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A New Procedure for State Court Personal Jurisdiction

Geoffrey P. Miller

Abstract: This article explores a simple but fundamental reform of the rules governing state court personal jurisdiction: Congress could grant federal district courts the full judicial power authorized by the Constitution coupled with discretion to dismiss, transfer or remand cases when it appears that some other forum is more adequate for resolving the controversy. If implemented, this reform could improve the fairness and efficiency of civil justice in the United States.

Introduction

This article analyzes an idea for improving the law of personal jurisdiction in state courts: the most adequate forum procedure. The essence of the concept is that Congress would grant federal courts the full range of authority permitted under the Constitution but also would instruct federal courts to dismiss, remand or transfer cases when it appears that some other forum is more adequate for resolving the dispute.

As will be seen in the pages that follow, this approach offers an interesting alternative to the existing complex of rules and standards governing state court personal jurisdiction.

Although the idea would entail substantial changes in practice, and for that reason is unlikely to be adopted any time soon, I suggest it as a sort of gedanken experiment: an investigation into what might be done if we were crafting a set of forum-allocation rules tabula rasa, performed for the purpose of illuminating and possibly improving aspects of contemporary practice and procedure.

1 Stuyvesant Comfort Professor of Law, New York University. I thank Oscar Chase, Sam Issacharoff, Helen Hershkoff, Arthur Miller and participants at a Notre Dame Law School Faculty Workshop for helpful comments and Gabriel R. Geada for excellent research assistance.
This article is structured as follows. Part I outlines problematic features of current law governing state court personal jurisdiction. Part II sets forth the most adequate forum idea. Part III explores strengths and weaknesses of this idea. Part IV compares the most adequate forum idea with other proposals for reform. I end with a brief summary and conclusion.

I. The Tangled Web of State Court Personal Jurisdiction

Under what circumstances may a state summon a party before its courts to answer accusations of wrongful conduct? The issue is important. For the parties, the selection of a forum may determine fundamental matters such as the substantive law that will govern the dispute, the rules of procedure that dictate how facts are proved and law applied, the relationship between judge and jury, the speed with which the case is adjudicated, the extent and scope of discovery, the admissibility of evidence, the availability of counsel, and the convenience and costs of the parties and their attorneys. Forum selection also has importance for governments: states have an obvious interest in providing the forums in which disputes involving state interests are adjudicated. Third party interests may also be involved; witnesses may need to travel to testify and parties with related claims may be impacted. The significance of forum selection, moreover, has increased over time. As disputes cross state and national boundaries, the courts of two or more sovereigns can frequently be considered logical candidates for resolving disputes. Given the significance of forum selection, there is a palpable need for rules of personal jurisdiction that take account of all affected interests and that provide clear, consistent, reasonable and easily-administered guidance about outcomes.

The need has not been met. State venue rules typically take little account of the interests of other states or out-of-state defendants; if the defendant is not to be found in the
state, venue is typically determined by factors that allow the litigation to proceed in the forum state regardless of the defendant’s location.\(^2\) State long-arm statutes, which authorize jurisdiction over out-of-state defendants, once purported to define limits on state court personal jurisdiction; but most such statutes are now interpreted to confer jurisdiction to the furthest extent permitted by the Due Process Clause of the federal Constitution.\(^3\) State courts and legislatures, accordingly, have largely opted out of responsibility for defining clear limits on state court personal jurisdiction.

In default of more specific guidance from the states, the task of defining state court personal jurisdiction falls to the Supreme Court of the United States. But the Supreme Court has encountered grave difficulties in articulating a clear and coherent approach. Commentators have not stinted in deriding the Court’s opinions as obscure,\(^4\) artificial,\(^5\) incoherent,\(^6\) haphazard,\(^7\) questionable,\(^8\) obtuse,\(^9\) muddled,\(^10\) unhelpful,\(^11\) contradictory,\(^12\) ambiguous,\(^13\)

\(^2\) See, e.g., California Code of Civil Procedure § 395 (“If none of the defendants reside in the state . . . , the action may be tried in the superior court in any county that the plaintiff may designate in his or her complaint”); Texas Civil Practice & Remedies Code § 15.002(a) (in default of other connections with the state, venue is proper the county where the plaintiff resided at the time the cause of action accrued).

\(^3\) Most states have extended their long-arm statutes to the full constitutional limits, see Douglas D. McFarland, Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process, 84 Boston University Law Review 491, 496-97 (2004), and most interpret the applicable requirements of their own constitutions to be co-extensive with the mandates of the federal constitution. See, e.g., Hyatt Int’l Corp. v. Coco, 302 F.3d 707, 715 (7th Cir. 2002) (Illinois); Ex parte McInnis, 820 So.2d 795, 802 (Ala. 2001) (Alabama); CSR, Ltd. v. Link, 925 S.W.2d 591, 594 (Tex.1996) (Texas); Gallagher v. Elam, 104 S.W.3d 455, 463 (Tenn. 2003) (Tennessee). Some state continue to interpret their long-arm statutes as not extending to the full constitutional limits. See, e.g., Kauffman Racing Equip., LLC v. Roberts, 126 Ohio St.3d 81, 930 N.E.2d 784 (2010) (“Ohio’s long-arm statute is not co-terminus with due process.”).


impractical,\textsuperscript{14} unjust,\textsuperscript{15} capricious,\textsuperscript{16} unpredictable,\textsuperscript{17} unwieldy,\textsuperscript{18} careless,\textsuperscript{19} anachronistic,\textsuperscript{20} frivolous,\textsuperscript{21} foolish,\textsuperscript{22} incompetent,\textsuperscript{23} disappointing,\textsuperscript{24} deplorable,\textsuperscript{25} troubling,\textsuperscript{26} frustrating,\textsuperscript{27}

\textsuperscript{8} Jay Conison, What Does Due Process Have to Do With Jurisdiction?, 46 Rutgers Law Review 1071, 1200 (1994).
\textsuperscript{16} See Patrick J. Borchers, The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again, 24 University of California at Davis Law Review 19, 78 (1990) (“tumbleweed”); Wendy Collins Perdue, Personal Jurisdiction and the Beetle in the Box, 32 Boston College Law Review 529, 530 (1991) (“every few years, the Court’s description of personal jurisdiction is inconsistent with its recent prior precedent.”).
\textsuperscript{17} See A. Benjamin Spencer, Jurisdiction to Adjudicate: A Revised Analysis, 73 University of Chicago Law Review 617, 619 (2006).
\textsuperscript{22} Wendy Collins Perdue, What’s Sovereignty Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court, 63 South Carolina Law Review 729, 729 (2012).
\textsuperscript{26} Wendy Collins Perdue, Personal Jurisdiction and the Beetle in the Box, 32 Boston College Law Review 529, 531 (1991).
\textsuperscript{27} Adam N. Steinman, The Meaning of McIntyre, 18 Southwestern Journal of International Law 417, 417 (2012).
deficient\textsuperscript{28} – and probably much else besides. While not every commentator would voice these epithets, there is a remarkable degree of consensus – especially among such a factious lot – that the Supreme Court’ performance been unsatisfactory in many respects.

It is useful to catalog these criticisms, without necessarily endorsing them, in order to develop a compendium of criteria by which rules on state court jurisdiction can be judged. Objections to the Court’s decisions reduce to six themes:

1. The cases provide inadequate guidance to lower courts and parties regarding what the law requires.

There is an obvious interest in clear rules to guide decisions in this area. Lack of clarity can generate costly satellite disputes on the threshold issue of jurisdiction.\textsuperscript{29} Uncertainty over jurisdictional requirements imposes other costs as well: costs to plaintiffs, who may find their expenses of filing suit in a particular state to be wasted when complaints are rejected on jurisdictional grounds, and costs to defendants who may structure their primary conduct based on erroneous notions of its consequences.\textsuperscript{30}

\textsuperscript{28} Friedrich K. Juenger, A Shoe Unfit for Globetrotting, 28 University of California at Davis Law Review 1027, 1037 (1995).
\textsuperscript{30} The Supreme Court itself acknowledges the importance of providing clear standards for decision in this area in order to inform potential defendants about litigation exposure. See World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980) (citation omitted) (Due Process Clause gives “a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”).
One problem concerns the vagueness of terminology. Justice Stone’s *International Shoe* opinion setting forth the basic due process limits on state court personal jurisdiction announced that maintenance of a lawsuit must be consistent with “traditional notions of fair play and substantial justice.” What did he mean by “fair play”? What is “substantial justice”? Later opinions added to the uncertainty. What does it mean to say that a person “purposefully avails” himself of a state? When is a defendant “essentially at home” somewhere? What is the line between specific and general jurisdiction? When is the exercise of jurisdiction “reasonable”? What are the “shared interests of the several states in furthering fundamental substantive social policies”? When does a controversy “arise out of” or “relate to” a defendant’s contacts with the forum state?

The structure of doctrine can also perplex the unwary. What is the relationship between “minimum contacts,” on the one hand, and “fair play and substantial justice,” on the other?

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34 See Robin J. Effron, Letting the Perfect Become the Enemy of The Good: The Relatedness Problem in Personal Jurisdiction, 16 Lewis & Clark Law Review 867, 889 (2012) (“Going forward, one can expect further debate and development in the lower courts as to what it means for a defendant to be “at home” in a forum state.”); Patrick J. Borchers, *J. McIntyre Machinery, Goodyear*, and the Incoherence of the Minimum Contacts Test, 44 Creighton Law Review 1245, 1266 (2011) (“what does it mean to be essentially at home in a state, particularly for a corporation?”).
36 Patrick J. Borchers, *J. McIntyre Machinery, Goodyear*, and the Incoherence of the Minimum Contacts Test, 44 Creighton L. Rev. 1245, 1249 (2011) (“Asahi’s independent reasonableness check on jurisdiction proved difficult to apply at the margins”); *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (quoting *Hanson v. Denckla*, 357 U.S. 235, 246 (1958) (“Like any standard that requires a determination of ‘reasonableness,’ the ‘minimum contacts’ test of International Shoe is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite ‘affiliating circumstances’ are present. We recognize that this determination is one in which few answers will be written ‘in black and white. The greys are dominant and even among them the shades are innumerable.’”)
other? Is purposeful availment required for all exercises of state court personal jurisdiction? If so, why is the requirement not always mentioned?\(^{39}\) What role do history and tradition play in the analysis?\(^{40}\) What is the significance of interstate federalism and how is it to be assessed?\(^{41}\) How are the “fairness factors” to be appraised and weighed against one another?\(^{42}\) When do they trump analysis based on minimum contacts alone?

The confusion could potentially be rectified if the Court were to return frequently to the area of personal jurisdiction and clarify areas of uncertainty. However, given that it reviews only a few dozen cases out of state courts each year,\(^{43}\) the Court cannot act as a traffic cop over state court personal jurisdiction. The most recent opinions in \textit{Nicastro}\(^{44}\) and \textit{Goodyear Dunlop}\(^{45}\) were the Court’s first state court personal jurisdiction decisions in more than two decades. In the interim between Supreme Court interventions, commentators, judges, litigants and commentators must struggle to make sense of prior cases.\(^{46}\)

When the Court does take on a new personal jurisdiction case, moreover, the results can disappoint. Many commentators bemoan the fact that split decisions make it difficult –

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\item \textit{McIntyre Machinery, Ltd. v. Nicastro}, 131 S. Ct. 2780 (2011).
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sometimes nearly impossible – to tease useful law out of the welter of conflicting views.\textsuperscript{47} The Court splintered 4-2-3 in \textit{Nicastro}, 4-1-4 in \textit{Asahi}, and in an even more convoluted fashion in \textit{Burnham}, leaving commentators and courts sifting the tea leaves to discern guidance for future cases. In some cases no amount of effort will help. In \textit{Nicastro} the concurring opinion of Justices Breyer and Alito, which was necessary to the result, refused to articulate general standards beyond the facts of the case. If the concurrence fails to endorse general principles or rules, it may be impossible to draw firm conclusions of any sort.\textsuperscript{48}

Even when the Court does not splinter, its decisions sometimes fail to illuminate murky corners.\textsuperscript{49} \textit{Goodyear Dunlop}, the Courts recent general jurisdiction decision, may be criticized on this score. The Court did not splinter in this case; Justice Ginsburg’s opinion was unanimous. But one senses that the price of consensus may have a loss of content: the case seemed rather easy on its facts and the Court’s statement that the defendant must be “essentially at home” in the forum state did not offer much instruction on when that criterion is met.

2. The cases generate unfair results.

A second group of complaints has to do with the fairness of results to plaintiffs, defendants, and the forum state.


\textsuperscript{48} See Robin J. Effron, Letting the Perfect Become the Enemy of The Good: The Relatedness Problem in Personal Jurisdiction, 16 Lewis & Clark Law Review 867, 868 (2012) (Court in \textit{Nicastro} “solved little beyond holding that the New Jersey courts could not exercise personal jurisdiction over the defendant in the instant case.”).

\textsuperscript{49} See Todd David Peterson, The Timing of Minimum Contacts after \textit{Goodyear} and \textit{McIntyre}, 80 George Washington Law Review 202, 217-18 (2011) (“the Supreme Court has once again squandered an opportunity to define the purpose of a contacts-requirement and to clarify the still-murky contours of general jurisdiction.”).
Many have noted that the Court’s decisions take explicit account of the inconvenience imposed on the defendant from having to litigate in the forum state, but not of the inconvenience to the plaintiff of having to litigate elsewhere.\(^{50}\) A natural inference of the fact that plaintiff interests are not explicitly considered is that the deck is stacked in favor of defendants (a poster child may be Mr. Nicastro, a worker in New Jersey who lost part of his hand to a metal shearing machine but whose interest in litigating in New Jersey was insufficient to overcome the English manufacturer’s interest in avoiding the forum).\(^{51}\)

Excessively pro-defendant rules on state court personal jurisdiction may also unfairly prejudice the forum state. One rationale for state court jurisdiction, found in many opinions, is the “quid pro quo” theory: because the defendant has accepted the benefits of being in the forum state and enjoyed the protection of its laws, it is only fair and right that the defendant should be required to answer in the forum state’s courts for activities performed there.\(^{52}\) The concern is that pro-defendant rules on state court personal jurisdiction may upset the deal by enabling companies to “take advantage of the benefits but shirk the obligations.”\(^{53}\)

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\(^{50}\) 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]efence 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).


\(^{52}\) See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (“some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”); *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 109 (1987) (O’Connor, J.); id. at 121 (Brennan, J).

At other times the Court’s decisions may unfairly favor plaintiffs. In the case of transient jurisdiction, for example, the fact that a defendant happened to be in a state long enough to be served with process is hardly an indication that she will not suffer inconvenience from being forced to litigate in the state where she was tagged. The doctrine of general jurisdiction can also impose apparently unfair results on defendants, at least if the Supreme Court’s most recent test of being “essentially at home” is construed broadly enough to allow plaintiffs a choice of multiple forums in which to bring suit.

3. The cases generate unjust results.

State court personal jurisdiction doctrine may generate unjust results, in that persons with putatively valid claims may be unable to obtain redress for injuries allegedly caused by the defendant in the forum state. A special area of concern is the insulation which personal jurisdiction doctrine provides to foreign defendants who target the United States generally but do not purposefully avail themselves of any particular state. Federal Rule 4(k)(2) allows access to federal courts in such cases when a claim is based on federal law; but no similar rules confers federal jurisdiction over foreign defendants for claims based only on state law. In

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54 See, e.g., Mary Twitchell, Burnham and Constitutionally Permissible Levels of Harm, 22 Rutgers Law Journal 659, 662 (1991) ("While a state must certainly have some adjudicative power over a defendant within its territory, such plenary power over travelers seems excessive."); Bruce Posnak, A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the “Gotcha” Theory, 30 Emory Law Journal 729, 744 (1981) (noting the “unfairness to the defendant” that tag jurisdiction may entail).


consequence, injured plaintiffs, including victims of human rights violations or terrorist attacks, may be unable to obtain redress against foreign defendants under any state law theory.  

4. The cases employ confused or erroneous legal analysis.

Another criticism is that the Supreme Court’s personal jurisdiction jurisprudence is not grounded in any “coherent theory about the relationship of traditional theories of jurisdiction to contemporary notions of due process.”  

Often the Justices seem to be articulating theories valid for themselves and a few colleagues but without much purchase in the Court as a whole. The recent Nicastro case is an example: it is difficult to tease a discernible shared theory of jurisdiction out of that morass.  

When the Justices do articulate the legal basis for their decisions, moreover, many argue that the theories are flawed. An example is the reliance on concepts of state sovereignty as limits on personal jurisdiction. This idea, which is a persistent if sporadic theme in the cases, has drawn unfriendly fire from many commentators. The principal criticism is that the Due

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Process Clause, which is a protection for individual rights, is an inappropriate vehicle for enforcing limits on state sovereignty.61

Some commentators go further by questioning the use of due process concepts to restrict state court jurisdiction in the first place. Professor Conison questions the due process basis for personal jurisdiction law on the ground that the concepts are used in an anachronistic and spurious way.62 In Professor Borchers’ view, the Due Process Clause places almost no limitations on personal jurisdiction:63 the proper inquiry is not focused on due process but rather on a utilitarian assessment of internal and external costs and benefits.64 Such an assessment, Borcher argues, would allow state courts to exercise jurisdiction as long as doing so is not irrationally or fundamentally unfair.65

5. The cases encourage opportunistic party behavior.

Some complain that the Supreme Court’s state court personal jurisdiction cases encourage opportunistic party behavior. For plaintiffs, this behavior takes the form of forum

61 See, e.g., Robert H. Abrams & Paul R. Dimond, Toward a Constitutional Framework for the Control of State Court Jurisdiction, 69 Minnesota Law Review 75, 84 (1984) (“[F]ederalism does not justify allowing an individual to assert the state’s supposed interest as a personal due process right when the state could, if it wished, intervene in the suit or otherwise indicate that it perceives extraterritorial jurisdiction as an affront to its state sovereignty.”); Harold S. Lewis, Jr., The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction, 58 Notre Dame Law Review 699, 700 (1983) (taking issue with the premise that “state sovereign interests, as opposed to the rights of individual civil litigants, are of distinct jurisdictional concern after International Shoe”); Martin H. Redish, Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation, 75 Northwestern University Law Review 1112, 1132-33 (1981).

62 Jay Conison, What Does Due Process Have to Do with Jurisdiction?, 46 Rutgers Law Review 1071, 1076 (1994) (personal jurisdiction doctrine is a “body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined.”).

63 E.g., Patrick J. Borchers, Jurisdictional Pragmatism: International Shoe’s Half-Buried Legacy, 28 University of California at Davis Law Review 561, 564 (1995); Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 Creighton L. Rev. 1245, 1247 (2011) (Supreme Court “should abandon the idea that the Constitution limits state-court jurisdiction, except in the most extreme of circumstances”).


shopping – bringing suit in a court, not because it is the tribunal best suited to resolving the controversy, but rather because offers strategic litigation advantages such as access to favorable law or the ability to impose costs on the defendant. Although not without potential benefits,\textsuperscript{66} forum shopping is generally considered undesirable if it becomes too extreme or too pervasive.

Forum shopping is of particular concern in the case of general jurisdiction, where in plaintiff may file a lawsuit in any state where a corporate defendant is “at home” – even if far removed from the facts and circumstances giving rise to the dispute – in order to take advantage of favorable substantive law.\textsuperscript{67} Forum shopping may also be possible in the specific jurisdiction setting. In \textit{Nicastro}, the Justices holding that the state court not exercise jurisdiction over the foreign defendant may have voted out of concern that plaintiffs would drag manufacturers into far-off courts (the manufacturer in that case was located in the United Kingdom), not because the chosen forum was the most adequate to resolve the controversy, but rather as a litigation tactic designed to extract a settlement offer. Justice Kennedy hinted as much when he posited a case where the “owner of a small Florida farm” finds himself sued in Alaska even though he never left his hometown;\textsuperscript{68} Justice Breyer pointed to a “small Egyptian

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\item[\textsuperscript{67}] See, e.g., Lea Brilmayer, Jennifer Haverkamp & Buck Logan, A General Look at General Jurisdiction, 66 Texas Law Review 721, 725 (1988) (“forum shopping is a persistent problem in general jurisdiction cases”).
\item[\textsuperscript{68}] See \textit{J. McIntyre Machinery, Ltd. v. Nicastro}, 131 S. Ct. 2780, 2790 (2011) (Kennedy, J.). One wonders if Justice Kennedy would have felt the same sympathy for the defendant if the case involved an Alaska potato farmer called to answer in the courts of Florida!
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shirt maker” sued in the courts of some arbitrary American state.⁶⁹ Although the official focus of these opinions was on the burden of having to defend in an inconvenient forum, the strategic litigation advantage to the plaintiff is hard to ignore.

The Supreme Court’s cases may also encourage the functional equivalent of forum shopping by defendants: purposefully structuring conduct in order to avoid exposure to litigation. The facts of International Shoe suggested that behavior of this sort may have occurred; it was somewhat suspicious that the rather convoluted procedures adopted by the defendant for managing and organizing its sales force happened to be ones which, under then-prevailing law, could be used to support an argument that the state lacked jurisdiction over the defendant. Justice Ginsburg’s dissent in Nicastro suggested, by way of a series of rhetorical questions, that the same thing may have happened there.⁷⁰

6. The cases generate socially inefficient outcomes.

Some commentators claim that the Supreme Court’s personal jurisdiction cases generate socially inefficient outcomes. Consider first the ex post costs of jurisdictional rules.⁷¹ While application of the Court’s doctrine often results in the selection of the tribunal which can resolve the controversy at lowest social cost, there is also a range of cases where a less adequate forum is selected. Three reasons are salient. First, because the Due Process Clause

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⁷⁰ J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2794 (2011) (Ginsberg, 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?”).
does not take full account of all relevant social costs, it is not well-adapted to the task of
allocating disputes to the most efficient courts.\textsuperscript{72} The “fairness factors” of \textit{World-Wide Volkswagen} and later cases mitigate this problem, but only to an extent; a considerable amount of inefficiency remains even after these factors are applied. Second, the Court implicitly accords deference to state court assertions of jurisdiction due to federalism-based concerns for not intruding unduly into state sovereignty.\textsuperscript{73} In consequence, state courts are permitted to exercise jurisdiction over a range of cases even though they are not the most efficient forums. This problem is mitigated by considerations of horizontal federalism – the adjustment of constitutional rules to protect the sovereignty of states vis-à-vis one another – but again the mitigation is only partial.\textsuperscript{74} Third, institutional limitations on the Supreme Court’s role impair its ability to police against exorbitant exercises of jurisdiction by state courts.\textsuperscript{75} The Supreme Court addresses this problem by employing objective tests and defendant-empowering doctrines, but this form of mitigation is also only partially effective and in some cases can exacerbate the problem.\textsuperscript{76} The upshot is that existing doctrine allows substantial deviations from the goal of distributing disputes to the tribunals which can resolve the controversies at lowest social cost.

A different line of analysis looks at \textit{ex ante} consequences. Examining product liability cases, Professor Klerman considers the effects of possible jurisdictional rules on the manufacturer’s design of the product, its choice of distribution strategies, and the incentives on

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\bibitem{72} Id. at \underline{___}.
\bibitem{73} Id. at \underline{___}.
\bibitem{74} Id. at \underline{___}.
\bibitem{75} Id. at \underline{___}.
\bibitem{76} Id. at \underline{___}.
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state legislatures or courts to adopt efficient rules of substantive law. Klerman concludes that the optimal jurisdictional rule is that suit should be brought in the state where the consumer purchased the defective object. He argues that such a rule would prevent manufacturers from distorting their distribution systems to avoid litigation, and also that such a rule would not incentivize states to adopt pro-plaintiff rules of substantive law because manufacturers could adjust prices state-by-state to compensate for their expected liability. Professor Buehler also examines the ex ante effects of the Supreme Court’s personal jurisdiction rules. He argues that unclear or restrictive rules on personal jurisdiction deter plaintiffs from filing meritorious law suits and increase the likelihood that injurers will escape liability. Buehler argues that state courts should be allowed to exercise jurisdiction over an out-of-state party so long as a rational basis supports the state action.

II. The Most Adequate Forum Procedure

A. The Concept of the Most Adequate Forum

Litigation provides social benefits: it resolves disputes, deters misconduct, clarifies obligations, inculcates respect for law, and provides a forum for developing shared values and norms. But litigation is also costly. The parties pay for attorneys, investigators, consultants, discovery, presentation of evidence, travel, and other items; they also incur opportunity costs of having to devote their time to the matter as well as the discomfort associated with contested proceedings and uncertain outcomes. Society bears other expenses of litigation: the costs to witnesses of testifying; the costs to the court and the forum state of hosting the litigation; the

costs of error in finding fact or applying law; and the costs to other states whose policies could be frustrated if the litigation does not occur in their courts.

While many of these costs are invariant across tribunals, others change from court to court. Some courts may lack expertise in the subject matter in dispute. Some may be located at a geographically inconvenient place. Some may be plagued by docket delays. Some may be biased; others may lack interest in the controversy. Some may be chosen by the parties in a pre-dispute forum-selection agreement. Some may fall short on the dimension of procedural fairness, or may lack authority to adjudicate the matter in question.

The selection of the tribunal to resolve disputes, accordingly, is an important factor in the welfare calculus. Social wealth is maximized when disputes are distributed to the most adequate forum – the tribunal which can achieve the desired social benefits of litigation at the lowest total cost. The concept of the most adequate forum is the defining feature of the procedure outlined in this paper.

**B. The Procedure**

The most adequate forum procedure would have the following elements. First, Congress would grant federal district courts the full authority permitted under the Constitution of the United States. Subject to unusual situations where Congress might deem an express exception necessary to serve an important public interest, the authority so conferred would include the powers:

1. To authorize service of process to the extent permitted under the Due Process Clause of the Fifth Amendment;
2. To exercise diversity-of-citizenship jurisdiction over all cases in which at least one plaintiff and one defendant are citizens of different states;

3. To exercise jurisdiction without regard to venue;

4. To exercise removal jurisdiction over all cases filed in state court which could originally have been filed in federal court under the foregoing rules.

The second part of the idea requires federal courts, to the extent possible, to distribute cases to the most adequate forum. The idea would work as follows. The plaintiff files a lawsuit against an out-of-state defendant in state court and defendant removes to federal district court in the state where the action was filed. Thereafter any party would be permitted to file a suggestion of a more adequate forum, together with supporting affidavits or other materials (the court would also have authority to raise the issue on its own). The filing would set forth reasons why the court where the action is pending is not the most adequate tribunal and would identify a more adequate alternative forum or forums. Along with the suggestion of a more adequate forum the party would attach a motion to remand, transfer, or dismiss (individually or in the alternative). Any other party could oppose the motion and supply reasons and evidence for why the court should not grant the requested relief.

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79 Recall that the most adequate forum idea contemplates expanding federal diversity jurisdiction up to the limit permitted by the Constitution. In virtually every case of interest, therefore, the defendant would be able to remove the case to federal court. See Allan Erbsen, Impersonal Jurisdiction, 60 Emory Law Journal 1, 78 (2010) (nearly every case where personal jurisdiction is an issue in state courts would be cognizable in federal court under the minimal diversity). The only exception would be cases where both the plaintiff and the defendant are citizens of the same state. If both are citizens of the forum state and no issues of federal law are involved, it is difficult to imagine that the forum state’s courts would be inadequate to resolve the controversy, so removal would not be needed to perform the forum allocation task. If both plaintiff and defendant are citizens of the same state other than the forum state. In such a situation it is possible that the defendant could claim prejudice from having to litigate in the forum; but this case would be exceptionally uncommon and in any event could be handled by the forum state dismissing the action on forum non conveniens grounds.
Thereafter the court would determine whether some other forum is more adequate, using the same informational resources that a court would use in any challenge to personal jurisdiction. The court could rule on the pleadings alone, on the pleadings supplemented by affidavits or other information supplied by the parties, or on the basis of targeted discovery. After receiving information sufficient to make an informed judgment, the court would make a determination as to forum adequacy. A forum would be deemed more adequate if it is probable that it can resolve the controversy at lower social cost than the alternative forum or forums.

Having made its decision, the court would grant (or deny) relief as follows:

1. If the court concludes that no other forum is more adequate, the court would deny the motion and the case would proceed in the ordinary course.

2. If the court concludes that the state court where the action originated is more adequate, the court would remand.

3. If the court concludes that another federal district court is more adequate, the court would transfer to that court under the federal transfer statute.\(^\text{80}\)

4. If the court concludes that a court of some other state or foreign government is more adequate, the court would dismiss. However, in the interest of justice, the court could condition the dismissal on the moving party’s waiving the statute of limitations or other impediments to the adjudication in the alternative forum.

To discourage abuse, the court would have discretion to administer sanctions analogous to those contemplated under Rule 11 of the Federal Rules of Civil Procedure. If the court finds

\(^{80}\) 28 U.S.C. § 1404(a).
that a plaintiff has filed the action in a tribunal which is clearly less adequate than some alternative forum, and that the filing is not excused for reasonable mistake or error of judgment, the court could impose a sanction on the plaintiff or plaintiff’s counsel, which could in an appropriate case be set equal the attorneys’ fees and expenses incurred by the defendant in litigating the matter in the less adequate forum. If a defendant moves to remand, transfer or dismiss a case where the suggested alternative forum is clearly not more adequate, and the motion is not otherwise excused, the court could impose similar sanctions on the defendant or defendant’s counsel.

Because rulings under the most adequate forum procedure would be fundamental to the future course of the litigation, they could be appealed on an interlocutory basis. The standard of review on appeal would be abuse-of-discretion. Given the deferential standard of review, the district court’s rulings under the most adequate forum procedure would be reversed only in unusual cases.

The following hypothetical cases illustrate how the procedure could work under different factual scenarios.

1. Consider a case where an in-state plaintiff files a lawsuit in state court, joining an out-of-state manufacturer and an in-state retailer of a product which allegedly caused damage to the plaintiff in the forum state due to a negligent failure of design. Only state law issues are involved. Upon being served with process, the manufacturer removes the case to federal court, in spite of the absence of complete diversity between the parties, since one plaintiff and one defendant are citizens of different states.
The plaintiff files a suggestion of a more adequate forum, arguing that the state court where the action originated is more adequate than the federal court to which it was removed. The plaintiff accompanies the suggestion with a motion to remand. The defendant also files a suggestion of a more adequate forum, arguing that the state courts of the defendant’s domicile are more adequate. The defendant accompanies its suggestion with a motion to dismiss.

Thereafter the federal district court inquires into the issue of forum adequacy. It would have substantial discretion as to how to conduct this inquiry. If the pertinent facts are simple and essentially uncontested, the court might rule on the papers alone; otherwise it could order a hearing or, in problematic cases, allow the parties to engage in targeted discovery on the most adequate forum issue.

Suppose that after investigation the court concludes that witnesses and evidence pertinent to the lawsuit are concentrated in the forum state and that the defendant would not incur significantly increased costs from having to litigate there. On these facts, the district court might conclude that the courts of the manufacturer’s domicile are not more adequate and the courts of the state where the plaintiff initially filed the complaint are more adequate. In such a case the court would remand the matter back to the state court of origin. Further, because the defendant’s position on the most adequate forum issue was arguably not well grounded in fact or law, the court could entertain a motion by the plaintiff for an order requiring the defendant to pay a sanction possibly equal to the reasonable fees and costs that the plaintiff incurred in contesting the action in federal court.

2. Suppose now that the accident which forms the basis for the lawsuit occurred in another state where the manufacturer and the plaintiff both reside, and the only connection
between the controversy and the forum state is the fact that the plaintiff purchased the item from a retailer located in the forum state who is also joined in the action as a defendant. The plaintiff selects the forum in order to take advantage of favorable law of punitive damages. The manufacturer removes to federal court as a matter of right since minimal diversity exists between the plaintiff and the in-state retailer. Once again both the plaintiff and the defendant file suggestions of a more adequate forum, the plaintiff seeking a remand and the defendant seeking dismissal.

In this case the court might conclude, after conducting an appropriate inquiry, that a court of the home state of the manufacturer and the plaintiff is the most adequate forum. The court would accordingly dismiss the complaint. If the court concluded that there was no valid basis in fact or law to support the plaintiff’s argument that the state court where the action was filed is the most adequate forum, it could impose a sanction on the plaintiff, perhaps equal to the defendant’s fees and costs associated with the removal petition.

3. Suppose the manufacturer is a citizen of a foreign country. The accident occurs in the forum state where the plaintiff resides. The allegedly defective product reached the forum state, not through the manufacturer’s efforts to serve that market, but rather through some indirect route involving a chain of independent wholesalers or distributors. The manufacturer, however, does a substantial volume of business in the United States as a whole. The manufacturer removes the matter to federal court as of right, since diversity of citizenship exists between the parties.

After removal, the federal court conducts an investigation and concludes that the state court where the accident occurred is not a more adequate forum, given limited contacts
between the manufacturer and the state. On the other hand, the court also concludes that the courts of the manufacturer’s home country are also not more adequate given the problems that the injured plaintiff would experience in attempting to sue there. Having so concluded, the federal court could then decide to retain jurisdiction over the case, basing personal jurisdiction on the defendant’s contacts with the United States as a whole.

4. Suppose that the facts are the same as in the preceding hypothetical, except that the accident occurred in some state other than the one where the action is first filed. In this situation, the federal court, after removal, might determine that the federal court located in the state where the accident occurred is a more adequate forum. In such a case, the court could transfer the action to the more adequate federal court under the federal transfer statute.

Obviously many permutations on these fact patterns are possible. The most adequate forum procedure should, in theory, be able to deal with all possible situations in which a defendant removes a case to federal court and either party thereafter complains that the court to which the action is removed is not able to resolve the controversy at lowest social cost.

**III. Analysis**

I now turn to a discussion of the pros and cons of the most adequate forum procedure as compared with current law.

*The concept of the most adequate forum is normatively appealing.*

The most adequate forum procedure embodies a widely held belief – one which is fundamental to American civil procedure generally\(^{81}\) – that litigation should be conducted in the most efficient way consistent with the needs of substantive justice. The value of efficiency

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\(^{81}\) Cf. Federal Rule of Civil Procedure 1 (federal rules should be construed to achieve the “just, speedy, and inexpensive determination of every action and proceeding.”).
of litigation is nearly self-evident, and is reflected already in numerous federal rules. To the
degree the most adequate forum concept advances this value, it is in line with fundamental
conceptions about the role of procedure in the American legal system.

*The most adequate forum procedure is grounded in existing law.*

A leading objection to the Supreme Court’s state court personal jurisdiction cases is that they are poorly grounded in legal authority. No such objection could be lodged against the most adequate forum procedure.

*Jurisdiction based on minimal diversity of citizenship:* Congress has authority to confer jurisdiction on federal district courts based on minimal diversity of citizenship. It has already exercised this authority in particular situations: examples include the Class Action Fairness Act (governing certain types of class actions) and the Multidistrict, Multiparty, Multiforum Jurisdiction Act (applicable to litigation arising out of catastrophic accidents). The most adequate forum procedure would merely expand this already well-established jurisdictional authority.

*Expanded removal jurisdiction:* Having extended diversity of citizenship jurisdiction to the constitutional limit, Congress may provide for removal to federal court of all cases falling

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83 E.g. Rule 13 (counter-claims and cross-claims); Rule 14 (third party practice); Rules 18-20, (joinder of claims); Rule 22 (interpleader); and Rule 23 (class actions).
85 Although the diversity-of-citizenship jurisdictional statute is interpreted to require complete diversity between plaintiffs and defendants, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), the Constitution permits Congress to confer jurisdiction on the basis of minimal diversity – one plaintiff and one defendant being on opposite sides. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 & nn.6-7 (1967).
86 28 U.S.C. §§ 1332(d), 1453.
within this head of jurisdiction. Congress has already experimented with broad removal authority of this sort: the Class Action Fairness Act provides that class cases satisfying certain criteria may be removed to federal court in situations of minimal diversity of citizenship, even if the defendant exercising the removal right is a citizen of the forum state. Removal under the most adequate forum procedure would follow a similar pattern.

**Expanded service of process:** It is clear that legislation or federal rule can authorize service of process to the extent permitted by the Constitution (the applicable provision, in this case, being the Due Process Clause of the Fifth Amendment rather than the Fourteenth Amendment applicable to state court jurisdiction). The personal jurisdiction of federal courts already reflects a related practice. Many state long-arm statutes confer the full authority permitted by the state and federal constitutions. Because by rule the jurisdiction of federal district courts tracks that of courts in the courts where they sit, the expansion of state long-arm statutes also applies to federal courts. Beyond this, several statutes or rules authorize nationwide service of process for particular sorts of federal lawsuits. In each of these settings

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90 See Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97 (1987); Robertson v. Railway Labor Board, 268 U.S. 619 (1925); A. Benjamin Spencer, Nationwide Personal Jurisdiction for our Federal Courts, 87 Denver University Law Review 325 (2010). If in a given case service of process was constitutionally defective when performed for purposes of state court jurisdiction, it might be accepted *nunc pro tunc* in federal court. If doubt remained on this score, the federal court could reauthorize new service of process. See Allan Erbsen, Impersonal Jurisdiction, 60 Emory Law Journal 1, 79-80 (2010) (“If there is any lingering taint from the state’s summons (which may have had some coercive effect because it forced the defendant to seek refuge in a federal court), the federal court can expunge the taint by requiring the plaintiff to serve a new summons that invokes federal rather than state authority.”).
92 Federal Rule of Civil Procedure 4(k).
existing law confers personal jurisdiction on federal courts extending near or to the outer limits of the Constitution.  

Transfers to more adequate federal courts: There is no doubt that federal courts may transfer cases within the federal system. Federal law already authorizes district courts to send cases to more adequate tribunals in cases where the court of origin lacks venue, personal jurisdiction, or subject matter jurisdiction; where the convenience of the parties and the interests of justice so require; or where factually-related civil actions are pending in different federal courts. Nor is there doubt that Congress can authorize federal courts to remand cases back to state court, even if properly removed in the first instance, on the ground that the court of origin is the most adequate forum. Congress is not required to authorize removal to federal court; if it does so it can place limits on the scope of the jurisdiction so granted.

Prudential dismissals: A federal court has power to dismiss cases which it deems inappropriate for resolution, especially if authorized to do so by Congress. Several rules and doctrines already recognize that federal courts may refuse to proceed when some other tribunal is more adequate: the principle of forum non conveniens, applicable when an alternative forum is found to be more convenient than the court where the action is filed; federal law when the defendant is not subject to the jurisdiction of any state court and the exercise of jurisdiction by the federal court is consistent with the Constitution and laws of the United States.

94 In unusual cases where the federal court’s personal jurisdiction might be questioned, notwithstanding the provision for service of process to the maximum extent permitted under the Constitution, a court might still have jurisdiction to determine whether it had jurisdiction, and to take appropriate action if it concludes that it does not have jurisdiction. Cf. Goldlawr v. Heiman, 369 U.S. 463 (1962) (interpreting 28 U.S.C. § 1406(a) to authorize federal courts to transfer cases even when they do not have personal jurisdiction over the defendant).

the comity of nations doctrine, under which the “spirit of cooperation” encourages deference to foreign courts;101 the supplemental jurisdiction statute, which allows federal courts to turn away state law claims;102 the Rooker-Feldman doctrine, which bars federal courts from exercising appellate review over state court judgments;103 Pullman abstention, which requires federal courts to defer resolving unsettled questions of state law;104 Burford abstention, under which federal courts may dismiss cases in which a federal adjudication could interfere with a state’s regulatory scheme;105 and Younger abstention, under which federal courts dismiss actions seeking to enjoin state criminal proceedings.106

Sanctions: Imposition of sanctions for motions made in bad faith or not well grounded in law or fact is well within the federal court’s inherent authority; the power conferred by the most adequate forum procedure would be no different than that which already undergirds Rule 11 of the federal rules.107

Conditional dismissals: Because the most adequate forum dismissal would represent an exercise of discretion, a district court implementing the most adequate forum procedure should be able to impose conditions on dismissal such as requirements that the defendant accept service of process or waive time-bar defenses in the alternative jurisdiction.108 The authority to impose conditions on dismissals is already well established under forum non conveniens

107 See Federal Rule of Civil Procedure 11 (authorizing federal district courts to impose sanctions for certain abuses of motion and pleading practice).
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doctrine;\textsuperscript{109} no reason appears why a similar authority could not generally be exercised under
the most adequate forum procedure.\textsuperscript{110}

\textit{The most adequate forum procedure would perform better than existing law at allocating disputes to efficient forums.}

As discussed above, current Supreme Court doctrine takes inconsistent account of the various direct costs of litigation, and thus does not reliably allocate litigation to the most adequate forum.\textsuperscript{111} The most adequate forum idea involves no such confusion of goals. The inquiry under this procedure is nothing other than an attempt to identify which tribunal can resolve the controversy at lowest social cost. No thumb is placed on the scale requiring the court to give extra weight to the interests of the defendant or the forum state; all relevant interests are considered to the degree they are affected.

The most adequate forum procedure would also address the vexed issue of the interaction between federalism values and the due process limits on state court personal jurisdiction – a problem which, as discussed above, can also generate inefficient forum allocation decisions.\textsuperscript{112} These concerns are absent under the most adequate forum procedure. Because the case will have been removed to federal court, the question of deference to the


\textsuperscript{110} In unusual cases, a defendant might refuse to accept such conditions and demand that the district court dismiss for lack of personal jurisdiction. If this happened, the federal district court might conclude that it had authority over the case under the expanded provision for effective service of process, and thus could retain the case rather than dismiss with conditions. If, however, the court concluded that it lacked personal jurisdiction even under the expanded jurisdictional authority, it probably would have to dismiss the action without conditions. This latter situation would be rare, and when it occurred, it is likely that jurisdiction is so questionable that the plaintiff would have been on notice not to file in the forum state in the first place.

\textsuperscript{111} See text accompanying notes xx-xx, supra.

\textsuperscript{112} See text accompanying notes xx-xx, supra.
state’s sovereign processes does not arise: after removal, no state sovereign processes exist to which a federal court could defer. Facing no pressure to defer to state sovereign processes, the federal court can inquire into the most adequate forum without dealing with the distorting influence of federalism considerations.

The most adequate forum procedure also addresses the inefficiencies in forum allocation that flow from the Supreme Court’s limited ability to police state court compliance. Unlike the Supreme Court, which can intervene only sporadically, the most adequate forum procedure would involve federal district courts in all cases in which the adequacy of a state tribunal was a *bona fide* question. Thus the procedure would eliminate the slack that flows from the limitations on the Supreme Court’s institutional capacities. Further, federal district courts applying the most adequate forum procedure would not need to employ objective rules or defendant-empowering doctrines; these strategies would not be needed as mechanisms for controlling state court overreaching because the federal court would have much more powerful tools ready to hand in the form of dismissal, retention of jurisdiction, or transfer. Thus the federal courts applying the most adequate forum procedure would be able to assess forum adequacy without being constrained by the rigidities that characterize current Supreme Court doctrine.

As compared with existing law, therefore, the most adequate forum idea could improve the efficiency of forum allocation. Two situations are relevant. Sometimes existing law would allow jurisdiction to proceed in state court even though some other forum is more adequate to resolve the dispute. Here, the most adequate forum approach would perform better than

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113 See text accompanying notes xx-xx, supra
existing law. If no other court is shown to be more adequate, the federal court can retain jurisdiction; if another federal district court is more adequate, the court can pass the action on. In both these situations the disposition directly achieves forum adequacy.

In cases where the courts of another state or a foreign country are more adequate, however, the most adequate forum procedure calls for the court to dismiss the action, a disposition which terminates the litigation rather than distributing it to the most adequate forum. Even so, the procedure would often result in efficient forum allocation. Assuming the case has merit, a plaintiff is likely to re-file elsewhere after dismissal.\textsuperscript{114} If the plaintiff does re-file, she is likely to select the most adequate forum, either because it is her second choice or because she realizes that filing in any other forum would probably lead to the same outcome – dismissal – as she experienced in the first forum. Because the dismissal in the initial action occurs at the threshold of the litigation, the plaintiff ordinarily would not ordinarily face a statute of limitations defense when she re-files in the most adequate forum, especially if she exercised reasonable promptness in the first action. If an expired statute of limitations is a problem, the district court would have discretion to require the defendant to waive the time-bar.

Different questions are presented in cases where the original forum is the most adequate tribunal but the defendant’s contacts with the forum are insufficient to satisfy the requirements of due process as currently construed. It would seem that notwithstanding the importance of forum adequacy, a court implementing the most adequate forum procedure would have no authority to confirm the jurisdiction of the state court by remanding the action:

\textsuperscript{114} A dismissal on a threshold objection has no bearing on the merits and does not prejudice the prosecution of the case elsewhere.
pragmatic considerations of efficiency cannot override constitutional rights. In such a case the most adequate forum procedure allows a fallback: the federal district court could retain jurisdiction on the ground that the defendant’s contacts with the United States as a whole are sufficient to satisfy the requirements of the Fifth Amendment’s Due Process Clause.\footnote{The theory of federal jurisdiction based on national contacts has never been endorsed by the Supreme Court, although Justice Kennedy’s plurality opinion in Nicastro made it clear that he consider this to be a valid exercise of judicial power. However, most lower courts and academic commentators seem to agree that national contacts-based jurisdiction would be permissible for federal courts under the Fifth Amendment’s Due Process Clause.} A substantial degree of forum adequacy could be achieved even though the most adequate forum is a state court. Nevertheless, in this situation the most adequate forum procedure might not fully succeed at achieving forum adequacy.

This view may be shortsighted, however. Existing Supreme Court doctrine has evolved in an institutional context where the most adequate forum procedure is absent. In such a setting the Court must devise rules that constrain state courts in the absence of pervasive federal control. With the most adequate forum procedure in place, the need for those constraining doctrines is eliminated because a federal court would be ruling on the issue of forum allocation in every case. For example, current law apparently requires that the defendant must purposefully avail itself of the forum before it can be compelled to defend there. The purposeful availment test delegates to defendants part of the task of controlling state court overreaching; they can avoid exorbitant exercises of jurisdiction by refraining from contacts with the forum state. With the most adequate forum procedure in place, the due process limitations on state court personal jurisdiction may be differently defined by looking directly at the interests involved. In such a situation a court might conclude that even if a defendant has not purposefully availed itself of the forum state, due process is satisfied when it appears that
the forum chosen by the plaintiff is the most adequate tribunal. Thus if the most adequate forum procedure were in effect, cases such as Nicastro might be decided differently: if the courts of New Jersey are most adequate for resolving the dispute, a court might conclude that a foreign defendant’s due process rights are not prejudiced by having the litigate there.

The most adequate forum idea would also perform well at aligning ex ante incentives with the criterion of economic efficiency. Unlike current doctrine which looks primarily to the interests of the defendant and the forum state, the most adequate forum procedure would give significant weight to the interests of plaintiffs avoiding the costs of litigating in an inconvenient forum. The procedure would not unduly limit the ability of plaintiffs to obtain access to courts for redress of injuries. Accordingly, the procedure would not frustrate the deterrence goal of legal rules. Because the procedure would not utilize defendant-empowering doctrines such as purposeful availment, it would not countenance effects by manufacturers to manipulate distribution systems in order to avoid state courts. The procedure would also respond to the concern that jurisdictional doctrines should not promote substantive liability rules that favor plaintiffs at the expense of economic efficiency. Although no prescription for distributing litigation will eliminate this problem altogether, the most adequate forum process would minimize the risk that particular state would come to specialize in plaintiff-favoring rules as a way of attracting litigation business into their borders.116 Such efforts would fail because a state court that aggressively reached out to take jurisdiction over an out-of-state defendant would not be deemed the most adequate forum and would not be allowed to adjudicate the case.

116 This concern preoccupies business interests who worry that liberal rules on personal jurisdiction will foster “hellholes” where biased judges, friendly juries, and populist laws combine to turn consumer litigation into a nightmare. See American Tort Reform Foundation, Judicial Hellholes 2012-13, available at http://www.judicialhellholes.org/wp-content/uploads/2012/12/ATRA_JH12_04.pdf,
Federal district courts have the capacity to determine forum adequacy.

Federal district courts could perform well in carrying the task of identifying the most adequate forum. Because the most adequate forum inquiry does not depend on formalistic rules, such as whether the defendant “purposefully availed” itself of the forum state or whether the defendant was physically served with process there, the inquiry into the most adequate forum can be more realistic, and therefore more accurate. The courts should be able to examine the actual as opposed to the hypothesized costs of litigation. Under the most adequate forum procedure it might not be enough, as Justice O’Connor did in Asahi, to conclude without evidence that the burden on a defendant of litigating in the forum is “severe.” A court could require the complaining party to provide evidence on why the burden is severe, and why it would be cheaper to litigate in some alternative forum. The focus on actual as opposed to hypothesized costs would increase the accuracy (as well as the fairness) of the most adequate forum procedure as compared with the situation under current law.

It is true that the forum adequacy inquiry cannot be reduced to quantitative form. Factors such as the cost to a state of the dispute being resolved in the courts of a different state require the exercise of judgment. But judgment is what judges do. Courts are probably not particularly skilled at quantitative analysis of the sort engaged in by engineers or finance economists; they are good at assessing a situation as a whole and making an evaluation based on experience, intuition and common sense. Federal courts have few problems carrying out

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117 For suggestions that these burdens may be lower than the courts often suppose, see Allan Erbsen, Impersonal Jurisdiction, 60 Emory Law Journal 1, 22-23 (2010).
their responsibilities for other types of litigation management,119 including transfers of cases to other courts;120 there is no reason to suppose they would have greater difficulty under the most adequate forum procedure.

Federal courts also have generally good incentives to carry out this task. State courts who must rule on their own jurisdictions face an inherent conflict of interest. If they turn away litigation the cases will probably be filed in the courts of a different state whose interests do not necessarily align with the interests of the forum state. Power will flow out into some other court system. Lawyers with whom the state judges are friendly may lose business. In contrast, federal court judges have no special interest in seeing the laws of a particular state apply. Nor do they have any particular reason for wanting to control the development of state law; their opinions on state law issues are at most persuasive authority. If they turn away cases by transferring to another federal district, the adjudicatory function will remain within the federal system. Their connection with the local bar and local interests is likely to be looser than in the case of state judges. Unlike many state judges, they are not elected to office; and the attorneys who appear before them are more often based in other jurisdictions. For all these reasons federal courts have good incentives to perform the most adequate forum inquiry in a faithful and unbiased fashion.121

The most adequate forum procedure would not unduly protract litigation.

119 See Richard L. Marcus, Slouching Toward Discretion, 78 Notre Dame Law Review 1561, 1587 (2003) (describing discretionary case management under Rule 16 as “surely the most successful ‘bottom up’ effort at procedural innovation in the United States in the last 30 years.”).

120 See, e.g., Yvette Ostolaza & Michelle Hartmann, Overview of Multidistrict Litigation Rules at the State and Federal Level, 26 Review of Litigation 47, 75 (2007) (the multidistrict litigation statute “has proven to be a useful procedural tool for...consolidating thousands of related cases pending in federal courts and has led to substantial judicial and party savings.”)

121 Although their personal interest in managing their dockets might play a role in encouraging them to avoid the option of retaining jurisdiction.
A natural objection to the most adequate forum idea is that these additional proceedings would create unacceptable delays in an already protracted process. However, the most adequate forum procedure probably would not cause excessive delays.

Many cases are already removed to federal court, so the time involved in the most adequate forum removal process would be incurred in any event. Because the most adequate forum procedure contemplates expansive removal jurisdiction, moreover, disagreements over the propriety of removal, which often delay litigation under current law, would be uncommon under the most adequate forum procedure. The district court’s inquiry into the most adequate forum would of course take time to complete. However, disputes over forum adequacy – in the form of motions to dismiss for lack of personal jurisdiction – are already common in state courts. The most adequate forum procedure would involve essentially the same sorts of considerations; the salient difference would be in the nature of the decision-maker, not in the amount of time need to reach a decision.

Considerations of expedition favor the most adequate forum procedure when it comes to appeals. In general an immediate appeal is permitted from state court rulings on motions to dismiss for lack of personal jurisdiction, either because the disposition is a final order (if the motion is granted) or because the defendant is able to obtain interlocutory review (if the motion is denied). The same would be true under the most adequate forum procedure: the party who is disappointed by the federal court’s ruling would enjoy a right of immediate appeal.

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The difference lies in the standard of review. Appellate review of rulings on motions to dismiss for lack of personal jurisdiction is *de novo*;\(^{123}\) appellate review of rulings under the most adequate forum procedure would be for abuse of discretion. The applicable standard of review has an impact on timing in three respects. First, a court facing the prospect of *de novo* review is likely to expend more time and effort in investigating the facts and in writing up a decision detailed enough to withstand exacting appellate scrutiny. A judge whose decision will be reviewed on an abuse-of-discretion standard, in contrast, is able to act in a more summary fashion. Second, an appeal under a *de novo* standard of review has reasonably good prospects of success, whereas an appeal under an abuse-of-discretion standard will succeed only in unusual cases. Because the chance of success would be lower under the most adequate forum procedure, there would be correspondingly less incentive to take an appeal in the first place; and if appeal is not taken the delay incident to the appeal would never occur. Third, an appellate court tasked with reviewing a trial court decision under a *de novo* standard of review needs to undertake a comprehensive analysis of the record and, in theory, must rethink the decision from square one – a potentially time-consuming task. An appellate court tasked with reviewing a trial court decision under an abuse-of-discretion standard, on the other hand, only needs to look generally at the record and the trial court’s decision in order to confirm that the disposition under review falls in a range of reason.

*The most adequate forum idea would be practical to implement.*

Because the most adequate forum procedure involves a new procedure operating under different ground rules, some might object that it could prove to be unworkable in practice.

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\(^{123}\) See, e.g., *Adams v. Unione Mediterranea Di Sicurta*, 220 F.3d 659, 667 (5th Cir.2000) (review of a district court’s determination of personal jurisdiction over a non-resident defendant is *de novo*).
The most adequate forum idea is probably unworkable in the sense that it is unlikely to be adopted. Even though the Supreme Court appears to have reached a doctrinal dead end, the courts will muddle through with the existing rules. There is no particular crisis in state court jurisdiction and no strong impetus for Congress to act. Moreover, since the most adequate forum procedure is not skewed to benefit either plaintiffs or defendants, it is unlikely that any particular interest group would find it worthy of promotion. However, I do not put this idea forward as a proposal for reform but rather a thought experiment which can challenge entrenched assumptions, stimulate thinking, and possibly inform more modest proposals which have actual prospects for success.

Aside from probably insuperable difficulties in being enacted in the first place, nothing in the most adequate procedure seems unworkable. The procedure would not require the courts or the litigants to undertake unfamiliar tasks. It fits within the established framework of pleading, argumentation and motion practice. The remedies available to the federal court – retain jurisdiction, dismiss, transfer and remand – are straightforward and easy to implement. Overall, the procedure arguably represents an example of the “sensible legal pragmatism” which has characterized the best in federal jurisdictional law over the past decades.124

The most adequate forum procedure would provide guidance to lower courts and parties.

We have seen that one of the principal objections to the Supreme Court’s state court personal jurisdiction cases is that they fail to provide guidance to the courts or the parties. The most adequate forum procedure might be criticized on the ground that it performs even worse

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on this score. At least in the case of existing doctrine the Supreme Court does provide tests –
however vague and malleable – for assessing whether jurisdiction does or does not exist in a
given case. The most adequate forum procedure doesn’t even offer this much guidance. There
are no tests at all for determining which court will wind up adjudicating the controversy, other
than an inquiry into the adequacy of the forum – one which, moreover, rests in the discretion
of the district court with only limited possibility for correction on appeal. Some might argue,
therefore, that the enhanced risk and uncertainty could make both parties worse off under the
most adequate forum procedure than under existing law.125

But the fact that a decision is discretionary does not mean that it is arbitrary or
capricious.126 The district court would be required to inquire into a defined question using
analytic techniques familiar in other contexts. While results of the proposed inquiry cannot be
forecast with complete confidence, it is far from clear that outcomes would be any less
predictable than results under current law.127 Given a straightforward task – decide whether
any other forum is more adequate to resolve the dispute – the federal district court can
probably make a fairly predictable decision. To the extent that the proposed procedure fails to

125 See Robert G. Bone, Revisiting the Policy Case for Supplemental Jurisdiction, 74 Indiana Law Journal 139, 150
(1998) (uncertainty associated with discretion may increase risk-bearing and litigation costs).
126 Decisions of the Judicial Panel on Multidistrict Litigation, although discretionary and nontransparent,
evertheless exhibit a degree of regularity and predictability. See Daniel A. Richards, An Analysis of The Judicial
Panel on Multidistrict Litigation’s Selection of Transferee District and Judge, 78 Fordham Law Review 311(2009).
Somewhat further afield, although the courts have discretion to determine awards of attorneys’ fees in class action
cases, the actual practice has been constrained, generating a remarkable degree of predictability in individual
cases. See Theodore Eisenberg & Geoffrey Miller, Attorney Fees and Expenses in Class Action Settlements: 1993-
Settlements and Their Fee Awards, 7 Journal of Empirical Legal Studies 811 (2010); Theodore Eisenberg & Geoffrey
(2004).
127 See Harvey I. Saferstein and Nathan R. Hamler, Location, Location, Location: A Proposal for Centralized Review
(change of venue decisions are unpredictable); Richard D. Freer, Erie’s Mid-Life Crisis, 63 Tulane Law Review 1087,
1124 & n.185 (1989) (“transfer motions require assessment of such a variety of amorphous issues that their
outcomes are notoriously difficult to predict”).
deliver predictability in forum selection, moreover, the costs of this uncertainty would be mitigated by the assurance that the forum ultimately chosen – whatever it might be – would be considered adequate to resolve the controversy; thus potential prejudice to the parties would be kept under control.

*The most adequate forum procedure would generate fair results.*

Recall that a leading objection to the Supreme Court’s personal jurisdiction opinions is that they generate results which unfairly burden plaintiffs, defendants, or the forum state. The most adequate forum procedure does not appear vulnerable on this score. The objective of the procedure – to distribute litigation to the tribunal which is able to resolve the controversy at lowest social cost – is impartial as between the parties and also as between the forum state and other states. It looks only to minimizing social costs and takes no special account of the interests of any party or interest.

In addition to being impartial in its objectives, the most adequate forum procedure would not systematically prefer any party or interest in terms of outcomes. It would re-allocate the benefits and burdens of forum selection as between the parties but would not benefit either at the other’s expense.

Consider the impact on plaintiffs. It is true that in some cases the procedure would deny plaintiffs the benefit of a forum choice to which they are entitled under current law. For example, even when the plaintiff could establish constitutionally sufficient contacts between the defendant and the forum state, a federal court might dismiss a removed case on the ground that in light of the inconvenience to the defendant, the plaintiff’s chosen court is not a more

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128 See text accompanying notes xx-xx, supra.
adequate forum. In this respect, plaintiffs would be worse off under the most adequate forum procedure than they are under current law.\textsuperscript{129}

But these considerations tell only part of the story. Although the most adequate forum procedure could impose a detriment on plaintiffs in some cases, it would not automatically reject the plaintiff’s forum choice. In fact it would favor the plaintiff’s forum choice in significant respects. The plaintiff’s revealed forum preference would weigh heavily in the court’s assessment of the most adequate forum both because by selecting the forum the plaintiff signals that he or she probably considers it to be convenient, and also because the preliminary proceedings represent an investment of resources that might have to be duplicated in the alternative forum – a cost which would be taken into account in the evaluation of forum adequacy. The most adequate forum procedure would also favor the plaintiff’s choice of forum by requiring the defendant to demonstrate that some other forum is more adequate. Doubtful cases go to the plaintiff. Thus the most adequate forum procedure embodies an implicit norm of respect for the plaintiff’s forum choice.

Even when the most adequate forum procedure would deprive a plaintiff of a forum to which the plaintiff would be entitled under current law, moreover, the plaintiff at least has assurance that the forum ultimately selected will be deemed to be a more adequate forum. Thus whatever forum is selected is unlikely to be excessively inconvenient for the plaintiff. As a condition to dismissing the case, moreover, the district court would have discretion to require

\textsuperscript{129} Even when the case is not dismissed outright, plaintiffs might sometimes experience a detriment. Empirical work by Clermont and Eisenberg suggests that plaintiffs experience a reduced probability of success in cases which are removed to federal court or transferred to another federal district. See Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 Cornell Law Review 581, 599 (1998); Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evil of Forum-Shopping, 80 Cornell Law Review 1507, 1512 (1995).
the defendant to waive objections to the forum that the defendant alleges is more adequate. Thus the plaintiff could be assured of an alternative tribunal in which to litigate her rights.

Although the most adequate forum procedure would impose a detriment on plaintiffs in some cases as compared with existing law, in other cases plaintiffs would benefit. Because the procedure expands the scope of federal jurisdiction, it would give plaintiffs a chance for federal adjudication in some cases in which, under present law, a federal forum would be foreclosed. Similarly, the most adequate forum procedure would protect the plaintiff’s preferred state forum in some cases where that forum choice would not be protected under current law; this consequence could happen when a federal court remanded a case, validly removed under current law, on the ground that the state court where it was originally filed was more adequate. We have also seen that if the most adequate forum procedure were in place, federal courts might develop new approaches to due process analysis which would allow plaintiffs to retain their chosen forum in some cases where, under current law, the defendant’s contacts with the forum would be deemed constitutionally insufficient.130

Consider now the procedure’s fairness for defendants. In some respects the procedure would make defendants worse off than under current law. In cases where diversity-of-citizenship jurisdiction would exist under current law, for example, a federal court applying the most adequate forum procedure would sometimes remand on the ground that the state court is more adequate. Thus the defendant would lose the benefit of the forum choice associated with removal. In other cases, however, the procedure would be more solicitous to defendants than the existing system. It would distribute many cases to forums which are more convenient

130 See text accompanying notes xx-xx, supra.
for the defendant even when, under current law, the case would remain in plaintiff’s chosen forum.

_The most adequate forum procedure would generate just results._

Another objection to existing law is that it can lead in some cases to unjust results, for example when the only forum in which a plaintiff can realistically afford to bring suit is foreclosed because the defendant has not purposefully availed itself of the forum state’s laws. This objection cannot be made with the same force to the most adequate forum procedure. Unlike under current law, the costs to the plaintiff of having to litigate in another forum would receive explicit consideration under the most adequate forum procedure. If those costs were excessively high, they would weigh heavily in the court’s determination of the most adequate forum.

The most adequate forum procedure could enhance substantive justice in other respects as well. An important factor under the procedure is whether a particular tribunal will make accurate findings of fact and conclusions of law. A court which is unable to achieve a high level of accuracy in this regard is unlikely to be deemed a more adequate forum. Thus the procedure would help ensure the accuracy, and therefore the substantive justice, of trial outcomes.

_The most adequate forum procedure would police against unfair conduct by both parties._

The most adequate forum procedure provides a mechanism for policing against unfair conduct by the parties.
The procedure would deter forum shopping by plaintiffs. If, for example, the court concludes, after conducting an inquiry into the most adequate forum, that the plaintiff is engaging in law-shopping – filing suit in an inconvenient but constitutionally permissible forum for the purpose of borrowing a favorable legal rule applicable in that jurisdiction – the court could take that consideration into account by dismissing the action and requiring the plaintiff to re-file in some other forum. If the plaintiff’s only reason for selecting the forum is to obtain a favorable law, this would not weigh heavily in the court’s calculus. Similarly, the proposed procedure would deter plaintiffs from suing in a forum chosen so as to impose inconvenience on the defendant; such a strategy would ordinarily fail because the defendant could demonstrate that some other tribunal was more adequate.

The procedure would also discourage strategic behavior by defendants. If, for example, a defendant employed the procedure to remove a case to federal court for the purpose of delaying the litigation or increasing plaintiff’s costs, the court would have discretion to impose sanctions along with an order remanding to state court. The forum would also police against efforts by defendants to structure their primary conduct so as to avoid having to answer in a particular forum; the federal court inquiring into the most adequate forum would look at the actual efficiencies involved and would not be bound by defendant-empowering rules such as the purposeful availment test.

*The most adequate forum idea would not impose unacceptable burdens on federal courts.*

The most adequate forum procedure could be criticized on the ground that it imposes a massive and unsustainable increase in the workload of federal courts. Whereas under current
law federal courts see only a fraction of cases which are initially filed in state courts – cases
removed under existing law – the most adequate forum procedure, by greatly expanding
removal jurisdiction, would attract many new cases into federal court. Having received these
cases, the federal courts would be required to engage into a potentially far-ranging inquiry into
the most adequate forum. Much more of their time would be expended on the seemingly
unproductive threshold issue of court allocation, leaving less opportunity to deal with the more
important task of disposing of cases on the merits.

This critique ignores a number of considerations. Two types of burdens are involved:
work associated with the most adequate forum procedure itself, and work associated with
resolving cases on the substantive merits. As to the first type of burden, we may note that the
procedure would not automatically provoke a flood of new removals. Most cases are already
filed in the most adequate forum. If the forum is adequate to begin with, the procedure would
not often be invoked because it would not result in any change. A defendant might attempt to
delay matters or impose additional costs on the plaintiff by removing such a case to federal
court, but such a tactic would be unavailing and dangerous because the defendant would risk
costly and embarrassing sanctions once the district court recognized that the removal was
unwarranted.

When legitimately invoked, the most adequate forum procedure might not represent an
increase in federal court workload. Federal courts already spend considerable time on issues
related to forum selection. Litigation on motions to transfer occurs more frequently than trials
in the federal system.\textsuperscript{131} Removals are commonly observed, together with ensuing motions to remand.\textsuperscript{132} Disputes over jurisdiction are common. In each of these contexts, federal courts must engage in an analysis similar to what would be required under the most adequate forum procedure. In many cases, therefore, the invocation of the procedure would result in a court performing essentially the same tasks as it would be required to perform under existing law in any event; no substantial increase of workload would be involved. In some situations, in fact, the procedure would eliminate controversies which arise under current law; to this extent, the most adequate forum idea would reduce the amount of work the federal court must undertake at the threshold of litigation. For example, under the most adequate forum approach many disputes over diversity of citizenship would disappear because the party seeking federal jurisdiction need only allege minimal diversity to gain access to federal court.\textsuperscript{133}

Even when the procedure would impose additional duties on federal courts on the threshold issue of forum adequacy, the task would probably be manageable. Federal courts are already familiar with the type of inquiry contemplated by the proposed procedure, since it resembles inquiries in which they already engage (for example, on motions to transfer a case to another federal court). The procedure would not require federal judges to learn new analytical skills or develop new methods of inquiry. The procedure, moreover, would afford federal courts substantial discretion in how they perform the inquiry, including the option of resolving

\textsuperscript{131} See Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evil of Forum-Shopping, 80 Cornell Law Review 1507, 1508 n.3 (1995) (comparing incidence of transfer motions and trials).


the matter on the papers without oral hearing or discovery. Appellate review would be on an
abuse-of-discretion standard; thus the district court need not worry about elaborately
documenting the basis for its decision in order to avoid reversal on appeal. The abuse-of-
discretion standard of appellate review also serves to reduce the burden on appellate courts of
resolving appeals and the burden on district courts of potential proceedings on remand after
appeal.

The second judicial task that could be affected by the procedure is work on the
subjective merits. Given the jurisdictional expansion contemplated by the most adequate
forum idea, it is true that some cases that would otherwise be resolved in the courts of a state
or a foreign country (or not litigated at all) would find their way into federal court. To this
extent the burden on federal courts of work on the substantive merits would increase. The
requirement of the most adequate forum, however, implies that cases that do wind up in
federal court can be litigated there efficiently. If the federal court is the most adequate forum
to resolve the dispute, it is probably also a forum that can adjudicate the matter without
excessive effort. More importantly, the most adequate forum procedure would authorize
federal district courts to dismiss or remand many cases which would be otherwise be litigated
in federal court under existing law. While it is impossible to predict the balance between the
increased workload due to expanded jurisdiction and reduced workload due to discretionary
refusals to adjudicate, it is possible that the effects would largely cancel each other, resulting in
no net increase in federal court workload on merits issues.

Even if in the final analysis the most adequate forum procedure would increase federal
court workload, this is hardly a conclusive argument against the idea. The social policy
objective is not to minimize or reduce the burdens on federal courts, but rather to reduce the social costs of litigation. One social benefit of the most adequate forum procedure is that while it imposes a new responsibility on federal courts, it also relieves state courts of a substantially similar task. A state court applying the Supreme Court’s existing jurisprudence must examine whether minimum contacts exist between the defendant and the forum state and whether fairness factors change the result of the minimum contacts analysis. These considerations are similar to those which would occupy the federal district court under the most adequate forum procedure. In consequences, when a federal court conducts the most adequate forum inquiry it implicitly relieves the state court of the need to perform a similar investigation. If the federal court, after inquiring into the most adequate forum, concludes that the state court of origin is not the most adequate forum, the case would be adjudicated elsewhere and the state court of origin would never have to perform the personal jurisdiction analysis at all. Even if the case were remanded on the ground that the state court of origin is a more adequate forum, the state court would not have to revisit the personal jurisdiction issue because a conclusion that it is the most adequate forum would necessarily entail the conclusion that it can constitutionally exercise jurisdiction over the person of the defendant.

In addition to potentially reducing the workload of state courts, the most adequate forum procedure would hold promise to reduce costs for the parties and others involved in the dispute. All relevant costs would be taken into account under the procedure, and decisions under the procedure would seek to minimize their sum. If it is true that, overall, the most adequate forum procedure reduces rather than increases the social costs of litigation, any
increased burden on federal courts should not matter in a fundamental way. The appropriate policy response is not to dispense with the procedure but rather to hire more federal judges.

*The most adequate forum idea would not vest excessive discretion in federal district courts.*

The most adequate forum determination would be made by a federal district court in the exercise of discretion. The discretionary nature of the inquiry could give rise to several objections. Vesting extensive discretion in the district court has potentially negative implications for the separation of powers, since courts would be authorized to exercise a mandate to determine the most adequate forum free of more specific congressional guidance. Extensive discretion reduces the ability of appeals courts to monitor and supervise the decisions of district courts, since appellate review in such cases is necessarily limited in scope. District courts might make unreviewable errors in identifying the most adequate forum; worse still, they might use discretion as cover for bias or prejudice against either side. These are serious concerns – if grounded in fact. The testimony of experience suggests, however, that discretionary judgments about court allocation are unlikely to raise any of these problems.

In the first place it is clear, as a practical matter, that most rulings on court allocation necessarily involve the exercise of discretion. Such rulings depend on an assessment of many

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134 The concept of "discretion" has multiple possible meanings in legal discourse, and perhaps sometimes no discernible meaning at all. See Edward L. Rubin, Discretion and its Discontents, 72 Chicago-Kent Law Review 1299, 1303-04 (1997) (discussing usages of the term in the administrative law context). Here I simply mean that the federal district court is entitled to draw on multiple factors in making its decision, subject only to weak appellate review).

135 See Kevin M. Clermont, Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion, 63 Florida Law Review 301, 304 (2011) (judges are given broad discretion as to the order in which matters are adjudicated in their courtrooms – a license largely premised on the efficiencies that case-by-case judgment can achieve). In the case of litigation management, there is also the impact of the adversary system, which vests discretion in the litigants or their attorneys to manipulate the course of proceedings to serve their own interests. Enhanced judicial discretion may be needed to police against an undesirable level of
different factors and require the exercise of judgment by the responsible court. Reflecting this judgment, the framers of the existing laws on court allocation often confer extensive discretion on the district court to determine the appropriate tribunal. Rulings on motions to transfer,\textsuperscript{136} motions to dismiss on grounds of \textit{forum non conveniens},\textsuperscript{137} and motions under the multidistrict litigation process\textsuperscript{138} all rest in the sound discretion of the district court. Decisions by courts under these various contexts are appealable only on an abuse-of-discretion standard, if at all.\textsuperscript{139} Federal district court discretion, in fact, extends more broadly than decisions on forum allocation: nearly every judicial decision about management of cases is discretionary in nature;\textsuperscript{140} and the extent of discretion has increased over the past few decades.\textsuperscript{141} The most adequate forum procedure would align with existing law insofar as it, too, authorizes district court to exercise sound discretion when making court allocation decisions.

\textsuperscript{136} See, \textit{e.g.}, \textit{Van Oosen v. Barrack}, 376 U.S. 612, 622 (1964) (28 U.S.C. § 1404(a) confers discretion to adjudicate transfer motions based on an “individualized, case-by-case consideration of convenience and fairness”); \textit{Lafferty v. St. Riel}, 495 F.3d 72, 76 (3d Cir. 2007) (“Section 1404(a) transfers are discretionary determinations made for the convenience of the parties and presuppose that the court has jurisdiction and that the case has been brought in the correct forum”). In the case of transfers under § 1406(a), the district court is constrained to take on of two actions – dismiss or transfer – but the choice between these is discretionary.


\textsuperscript{139} See 28 U.S.C. § 1447(d) (decisions on motions to remand are not typically appealable); 28 U.S.C. §1407(e) (2000) (decisions by the Judicial Panel on Multidistrict Litigation to transfer cases for pretrial litigation cannot be appealed except in unusual circumstances).


Concerns about excessive discretion resulting in biased decisions, moreover, are probably overstated. While the most adequate forum idea does contemplate that district courts will make determinations in the exercise of discretion, this does not mean that they would be cut loose from all constraints. The decisions involved would be purely procedural in nature; the court would not, for example, be invited to reform institutions, effect social change through adjudication, or otherwise engage in “managerial” judging. The most adequate forum idea, moreover, does not involve any ad hoc crafting of procedural rules: the court would face a clear set of options specified in advance (retain jurisdiction, transfer, remand or dismiss). Nor would the court’s discretion to choose among these options be unconstrained: the explicit objective of the procedure is to identify whether any other forum is more adequate than the court where the litigation resides. Certain factors should be taken into account; for example, the burden on the parties and the court would always be relevant considerations. Other factors should not be considered: for example, whether the court where the action is transferred will adopt substantive rules with which the court agrees; or whether the court making the most adequate forum determination wishes to advance social policies by favoring the interests of one litigant or another. Accordingly, while the decision is indeed discretionary, the discretion involved is constrained rather than free-floating in nature.

The fact that discretion is constrained, of course, does not prevent a judge from abusing her authority by deciding the most adequate forum issue based on impermissible factors.

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142 See Kent Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges, 75 Columbia Law Review 359, 362 (1975) ("it is not at all obvious that judges who think they have discretion will give freer rein to their personal preferences than those who do not").

There is, however, no reason to suppose that federal judges would often deliberately distort their rulings on order to achieve covert objectives – particularly when the effect of a decision is not to generate a result on the merits but merely to determine the tribunal in which the merits will be addressed. Even if judges were inclined to engage in such inappropriate behavior, it is not clear that judges have significantly greater ability to do so under discretion than under more definite rules.  

The most adequate forum procedure would not interfere with the ability of federal courts to develop legal rules.

Another possible objection to the most adequate forum idea is that it would detract from the process by which federal courts make and clarify the law. Because the decisions on the most adequate forum would be discretionary and based on a nuanced analysis of factors, the outcome of cases would not generate clear precedents for future litigation. Since precedent is valuable as a means to clarify the law and reduce legal risk, the most adequate forum concept might be considered objectionable on this score. On balance, however, the most adequate forum procedure would not significantly interfere with the law-making process.

It is true that the procedure would ordinarily remove federal courts from the business of providing authoritative interpretations of laws pertaining to the selection of the forum. Because the procedure contemplates that Congress would expand federal personal jurisdiction to the outer reaches permitted by the Constitution, there would be a lesser need for the court to interpret jurisdiction-selection rules because those rules would only rarely come into play.

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144 See Charles M. Yablon, Justifying the Judge's Hunch: An Essay on Discretion, 41 Hastings Law Journal 231, 236 (1990) (discretion exists in virtually every case, even when the judge is applying legal standards which are not formally discretionary).
Even when the rules did come into play, the determination of the most adequate forum would ordinarily not provide a clear articulation of the legal standard, because such decisions would be discretionary and based on many potential factors.

Although the most adequate forum idea would reduce the frequency of authoritative interpretations of jurisdiction-selection law, this result should not be of great concern. The constitutional requirements would remain, and would occasionally be the explicit topic for adjudication if a federal court concluded that an exercise of jurisdiction by a putatively more adequate forum would exceed those limits. Even in the usual case where a court rules on non-constitutional grounds, a finding that a particular tribunal is the most adequate forum would necessarily imply a judgment that adjudication in that forum is constitutionally permissible. Thus all determinations on the most adequate forum would provide some information about constitutional norms. The failure to go further and offer explicit interpretations is not in itself problematic; rather it would represent an example of a well-accepted principle that courts should avoid constitutional issues when a matter can be resolved on non-constitutional grounds alone.\(^\text{145}\)

Even if the most adequate forum procedure can be criticized for interfering with the development and articulation of due process norms, the same criticism cannot be directed with respect to the procedure’s impact on substantive law. To the contrary, if implemented, the most adequate forum procedure would likely enhance the clarity and predictability of substantive law. It would accomplish this objective by directing litigation to the forum which,

other things equal, is most capable of developing the law to accord with underlying social policies. The most adequate forum idea, in other words, does not sacrifice the value of judicial redundancy but rather takes maximum advantage of that value by directing the task of legal interpretation to the tribunal best situated to perform the function. \(146\)

\textit{The most adequate forum idea would not interfere with legislative policies.}

A related objection to the most adequate forum procedure is that, if implemented, it would frustrate congressional efforts to make or influence policy.\(147\) The procedure would not, however, frustrate such efforts. Congress has many means for implementing policy; it needn’t use the indirect means of controlling jurisdiction when more direct means are at hand. If Congress did wish to use court-allocation rules as a device for signaling its concerns or for controlling policy implementation in particular cases, it would have ample authority to do so under the most adequate forum procedure; it would merely have to enact a special rule governing the area of special concern, as it has done already in several contacts (for example, the Class Action Fairness Act provides special access to federal court for large-scale class actions, on the theory that federal courts could be more even-handed than some state courts in

\begin{itemize}
    \item See Tobias Barrington Wolff, Ruth Bader Ginsburg and Sensible Pragmatism in Federal Jurisdictional Policy, 70 Ohio State Law Journal 839, 864 (2009) (calling on federal courts to “recapture the understanding, largely atrophied in recent years, that statutory grants of jurisdiction are tools by which Congress authorizes the federal courts to enforce federal policies and safeguard federal interests”); Tobias Barrington Wolff, Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action, 156 University of Pennsylvania Law Review 2035, 2054 (2008) (emphasizing the need to recognize the specific legislative policies that embodied in targeted grants of federal jurisdiction).
\end{itemize}
their management of such litigation).\textsuperscript{148} Nothing in the most adequate forum procedure would (or could) prevent Congress from enacting such specialized court-access rules.

\textit{The most adequate forum idea would not upset the federal-state balance of power.}

A different class of objections to the most adequate forum idea concerns its impact on the federal-state balance of power. Some might argue that idea would work an inappropriate expansion of federal judicial power by granting federal courts a scope of jurisdiction unprecedented since the founding of the Republic. It is true that the idea contemplates that federal judicial power will be increased to the degree permissible under the Constitution (subject to specific congressional override). That expanded power, however, is constrained by the countervailing requirement that federal courts not exercise the authority so granted to adjudicate the merits if they conclude that some non-federal forum (a state court or foreign tribunal) is more adequate for resolving the controversy. The most adequate forum procedure would rebalance the portfolio of federal courts – leading them to take on more cases implicating federal interests and to divest themselves of other cases not implicating federal interests – but probably would not expand federal judicial power overall, other than in the sense that federal district courts would be assigned primary responsibility for allocating jurisdiction among tribunals within the interstate and international legal system.

Another objection based on concern for the federal-state balance of power is that the most adequate forum procedure would represent an inappropriate intrusion into state sovereignty. However, the proposal merely vests in federal courts authority which they are entitled under the Constitution. This is not an intrusion on state sovereignty. Nor would the

procedure interfere with state sovereignty in other respects. To the contrary: the federal
court’s inquiry into the most adequate forum would take state sovereign interests into explicit
consideration. A strong state interest in adjudicating a matter would be a reason for the federal
court to allocate the dispute to a state rather than a federal court. Conversely, if the state does
not have a strong sovereign interest in a matter, this would, other things equal, be a reason for
a federal court to conclude that the tribunal of some other sovereign is most adequate to
resolve the controversy. When the procedure would divest a state court of jurisdiction,
moreover, the state-federal conflict would be less severe than under current law. When the
Supreme Court declares that a state court’s purported exercise of jurisdiction violates
constitutional norms, the result is a direct clash of sovereign interests. The most adequate
forum idea, in contrast, would never accuse state courts of violating constitutional rights.
Decisions to take cases away from state courts would be based only on the conclusion that
some other court is a more adequate forum.

IV. Comparison with Other Reform Ideas

The most adequate forum idea has elements in common with a number of important
prior reform initiatives and recommendations. A leading example is the 1991 proposal of the
National Conference of Commissioners on Uniform State Law recommending the adoption of
the Uniform Transfer of Litigation Act (UTLA).¹⁴⁹ This reform would authorize courts to transfer
litigation from one state or federal court to another state or federal court if doing so would
serve the interests of justice and the convenience of the parties. Like the most adequate forum

idea, the UTLA proposal seeks to improve the process for forum allocation by facilitating transfers of cases within the federal and state systems. However, the UTLA proposal suffers from the problem that it relies on state courts to act reasonably and in good faith in transferring jurisdiction to other forums. No state court could be deprived of jurisdiction under this statute, a result which made the proposal ineffective at dealing with exorbitant exercises of state court authority.

In 1993 the American Law Institute approved a study of complex litigation which recommended that Congress should authorize removal to federal court of mass-tort cases even when complete diversity of citizenship was lacking, and authorize the transfer of such cases within the federal system and to consenting state courts. This project was motivated by the same considerations underlying the most adequate forum idea: the need to allocate litigation within the federal system to the tribunal which is most adequate to resolve the controversy. Like the most adequate forum idea, the ALI proposal uses the concept of removal based on minimal diversity, with personal jurisdiction extending to constitutional limits. The proposal, however, is limited to mass tort cases and does not incorporate the concept of the most adequate forum or the specific procedures contemplated by the most adequate forum idea.

The Supreme Court’s recent Nicastro decision sparked a proposed reform styled the Federal Manufacturers Legal Accountability Act, which would require foreign manufacturers to submit to personal jurisdiction in at least one state as the price of importing substantial

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150 See American Law Institute, Complex Litigation: Statutory Recommendations and Analysis § 3.08
volumes of goods into the United States. This statute, if enacted, would respond to the problem that under current law there may sometimes be no American court which can exercise jurisdiction over lawsuits based on state law brought against foreign manufactures which do not purposefully avail themselves of the laws of any state. To this extent the proposal would a problem of inefficiency in forum allocation rules. This statute, however, deals only with litigation against foreign manufacturers; it also would not always result in the selection of the most adequate forum because in some cases a lawsuit against a foreign manufacturer might be most efficiently litigated outside the United States.

Several scholars have proposed reforms designed to serve the same general objectives as the most adequate forum idea. Richard Marcus documents and applauds how the Judicial Panel on Multidistrict Litigation has expanded the scope of its activities to achieve “maximalist” consolidation of similar cases in federal courts. His approval of the Panel’s activities is based, in part, on its success in directing litigation for resolution in efficient forums. Marcus does not, however, address the issue of state court personal jurisdiction which forms the subject of this article. Rodney K. Miller calls for elimination of the complete diversity-of-citizenship rule for removal jurisdiction coupled with an increase in the amount-in-controversy requirement and a mandatory abstention rule designed to ensure that federal courts are not flooded with local cases. This proposal employs an expanded removal procedure similar to the one contained

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in the most adequate forum idea, but does not address problems of personal jurisdiction and does not seek to allocate disputes to the most adequate forums. Allan Erbsen’s 2010 Emory Law Journal article explores the idea that problems of state court overreaching could be addressed by broad rights of removal to federal court coupled with nationwide service of process. Erbsen’s article, however, does not endorse the idea of broad removal rights and does not address a procedure under which after removal a federal court could retain, remand, dismiss or transfer cases based on an investigation into the most adequate forum. These and other reform ideas all seek a similar objective of revising existing procedures in order to improve the efficiency of litigation. None, however, recommends the combination of expanded federal court jurisdiction and discretionary forum selection orders which forms the basis of the most adequate forum procedure.

Conclusion

This article has investigated an idea for reforming the law of state court jurisdiction. Under the most adequate forum procedure, Congress would expand federal court diversity-of-citizenship, removal, and personal jurisdiction to the full extent permitted by the Constitution, but would couple this broad grant of power with discretion to retain, transfer, remand or dismiss cases with the goal of distributing litigation to the tribunal which can resolve the dispute at lowest social cost. The procedure offers interesting possibilities for improving the administration of civil justice in the United States.

156 Allan Erbsen, Impersonal Jurisdiction, 60 Emory Law Journal 1, 83 (2010) (“there are many sound reasons not to expand the scope of diversity and removal jurisdiction and not to authorize nationwide service of process in diversity cases”).