
IN SEARCH OF THE MOST ADEQUATE FORUM: STATE COURT PERSONAL JURISDICTION

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ABSTRACT

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

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INTRODUCTION

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

Many of these costs are fixed, in that they will be incurred no matter where the litigation takes place. Others are not fixed. Litigation occurring in a court geographically far removed from the place where an accident occurred, for example, may be more costly for witnesses or parties than litigation near the accident; litigation before a judge who is unfamiliar with the law may carry a higher risk of erroneous rulings as compared with a adjudication by a better-informed court; litigation in a court plagued by delays may be more costly than litigation in courts with more expeditious dockets. Because costs vary across tribunals, it is possible—at least in principle—to identify the tribunal that can resolve the dispute at the least social cost. I refer to this tribunal as the “most adequate forum.”

All advanced legal systems contain rules for allocating disputes for resolution. Examples include principles of personal jurisdiction, venue, subject matter jurisdiction, and discretionary rationales for avoiding or deferring adjudication. Each of these rules can be evaluated against the benchmark of the most adequate forum. Other things equal, a forum-allocation rule is to be preferred if it directs litigation to the most adequate forum and disfavored if it directs litigation to less adequate forums.¹ I refer to the objective of directing

1. This Article is limited to the impact of forum selection rules on the direct costs of litigation. Analysis of other social costs, such as the costs of the forum choice leading to the selection of inefficient law, is outside the scope of the present study. For discussion of these

litigation to the most adequate forum as the goal of “forum adequacy.”

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

I. PERSONAL JURISDICTION OF STATE COURTS

Forum adequacy is realized when the forum state court exercises jurisdiction when it is the most adequate forum and refrains from exercising jurisdiction when it is not. State court personal jurisdiction rules achieve the goal of forum adequacy most of the time, but also display significant deviations from this objective.

A high level of alignment between jurisdiction rules and forum adequacy exists when the plaintiff and the defendant agree to litigate in state court, either by signing a contract containing a forum-selection clause or by the defendant not contesting the forum selected by the plaintiff *ex post*. In such cases, the defendant’s consent to the forum confers personal jurisdiction. The agreement of the parties also evidences the adequacy of the forum: if both the defendant and the plaintiff are content to litigate their dispute in a particular state court, it is probable that the court so selected is able to resolve the controversy at lowest social cost.² Because both the rules on personal jurisdiction and the analysis of forum adequacy dictate the same result—the plaintiff’s choice of forum should

other costs, see Dustin E. Buehler, *Jurisdictional Incentives*, 20 *GEO. MASON L. REV.* 105 (2012), and Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 *S. CAL. L. REV.* 1551 (2012).

2. Exceptions can be imagined: for example, commercial disputes involving parties from other states or countries are sometimes brought in New York State courts by agreement of the parties, even though the dispute has no contacts or connections with that state. See Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 *CARDOZO L. REV.* 2073 (2009) (discussing New York law authorizing such suits to be brought in New York courts under specified conditions). In such a case, it may be that a court of some other state or country would be the most adequate to resolve the controversy—although the wish of both parties to opt into a New York forum would suggest the contrary. Forum selection clauses contained in contracts of adhesion may also fail to specify the most adequate forum, because the element of bargaining is lacking. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991) (enforcing forum selection clause even though contained in a contract of adhesion).

be respected—these cases are ordinarily not problematic from the standpoint of the most adequate forum.

A good degree of alignment can also be achieved in cases where the defendant removes the action to federal court.³ In such cases, if the geographic location in the state of origin is not convenient, the defendant (or the plaintiff) can move to transfer the litigation to another federal district court.⁴ Because the transfer motion will be decided according to criteria that overlap substantially with the goal of forum adequacy,⁵ the process of removal and transfer will often work to distribute adjudication to the most adequate forum.

The alignment is less precise when the parties do not agree on the forum and removal is not possible. In such cases the court cannot look to the consent of the defendant as establishing its jurisdiction because the defendant has not consented. At the same time, if the parties disagree on the forum, the forum selected by the plaintiff is no longer presumptively the most adequate forum: the defendant's objection to the forum suggests that the plaintiff may have selected a less adequate tribunal.⁶ Whether in the absence of party consent the rules on personal jurisdiction align with the principle of forum adequacy depends, therefore, on whether the line drawn by the personal jurisdiction inquiry (adjudicate/dismiss) is the same as that delimited by the analysis of forum adequacy (the forum court is/is not the most adequate forum).

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

But the alignment is incomplete. Three principal reasons explain this lack of overlap: (a) The legal tool used in personal jurisdiction analysis (the Due Process Clause of the Fourteenth Amendment) over-weights certain costs of litigation and under-weights others; (b) Interests of federalism require deference to the forum's jurisdiction in cases when a different forum is more

3. See 28 U.S.C. § 1441 (removal of civil actions in federal courts).

4. See *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990); 28 U.S.C. § 1404 (procedure of transfer of litigation within the federal system).

5. See *id.* § 1404(a) (transfers “for the convenience of parties and witnesses, in the interest of justice”).

6. The plaintiff might opt for a less adequate forum for either of two reasons. Sometimes the chosen forum represents the lowest-cost option for the plaintiff, but these savings are outweighed by costs imposed on the defendant or others. Other times the chosen forum may not represent the lowest-cost option even for the plaintiff: the plaintiff selects the court, not to reduce her own burden of litigation, but rather to impose a larger burden on the defendant and therefore increase her settlement leverage. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (“A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.”). In either of these situations, allowing plaintiff control over forum choice would result in a socially inefficient outcome.

adequate; and (c) Institutional limitations allow state courts to manipulate the rules in order to preside over cases that would be more efficiently litigated elsewhere.

A. Due Process

Challenges to a state court's personal jurisdiction typically allege either or both of the following defects: the plaintiff failed comply with a state long-arm statute authorizing service of process on non-residents, or the exercise of jurisdiction, if permitted under the long-arm statute, would violate constitutional norms. In practice, these arguments often coalesce into a single inquiry. Most states have extended their long-arm statutes to the full constitutional limits;⁷ and most interpret the applicable requirements of their own constitutions to be co-extensive with the mandates of the federal Constitution.⁸ Ordinarily, therefore, the inquiry into state court personal jurisdiction morphs into an investigation under the Due Process Clause of the Fourteenth Amendment.

Although the constitutional limits on state court personal jurisdiction are sometimes treated as *sui generis*, the analysis is consonant with the approach taken in due process cases generally. A denial of due process occurs where (a) a person had a constitutionally protected interest in life, liberty, or property,⁹ (b) a state has deprived the person of that interest,¹⁰ and (c) the state did not have a sufficient justification under the Constitution for doing so.¹¹ Several of the elements are satisfied in every case where the defendant challenges the state's right to force her into court. The requirement of state action is met since the summons that commands the defendant to appear in court is issued by a state official. The Supreme Court has declared that being summoned into court

7. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496-97 (2004) (nearly two-thirds of states extend jurisdiction to the constitutional limits). Some states have not extended their long-arm statutes this far, however. See, e.g., *Kauffman Racing Equip., LLC v. Roberts*, 930 N.E.2d 784, 792 (Ohio 2010) ("Ohio's long-arm statute is not coterminous with due process.").

8. On convergence of state and federal constitutional standards, see, e.g., *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 715 (7th Cir. 2002) (applying Illinois state law); *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003); *Ex parte McInnis*, 820 So. 2d 795, 802 (Ala. 2001); *CSR, Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996).

9. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 716-17 (1987); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (asserted interest must be based on more than a "unilateral hope"); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (exploring the nature of a constitutionally-protected liberty interest); *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (asserted interest must be based on more than an "abstract need or desire").

10. See, e.g., *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (analyzing whether inmate's right to visitation is an interest protected by the Due Process Clause).

11. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

implicates a liberty interest protected under the Constitution.¹² The defendant's challenge to the state court's jurisdiction alleges an infringement of a constitutionally protected interest: her freedom is impaired when the government requires her to appear and defend against accusations of wrongful conduct (the archaic terminology of being "haled" into court emphasizes the compulsory quality of the government action).¹³

An important issue in these cases is whether the state's exercise of jurisdiction over the defendant is constitutionally permissible. Restrictions on liberty are not outlawed altogether; they may be permitted under the Due Process Clause if they further a sufficiently important governmental interest.¹⁴ Thus, in determining what process is "due" in any procedural due process case, a court must balance the defendant's interest in receiving the benefit of a procedural protection, on the one hand, against the state's interest in not providing that protection, on the other.¹⁵ This analysis applies in the context of state court personal jurisdiction, except that the issue for determination is not the *amount* of process the forum must afford to the defendant before depriving her of a protected interest, but rather whether the state, through its courts, may deprive the defendant of a protected interest *at all*.¹⁶ Although the context is different, the relevant analysis is the same: a court must balance the interest of the defendant in not having to answer in the forum against the interest of the forum state in forcing the defendant to answer in its courts.¹⁷

12. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471 (1985); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982). For skeptical commentary on whether a liberty interest is actually implicated, see, e.g., Jay Conison, *What Does Due Process Have to Do With Jurisdiction?*, 46 RUTGERS L. REV. 1196-97 (1994) (questioning whether a liberty interest is involved); and Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 535 (1991) ("[T]he Court has never explained why being subject to jurisdiction is a taking of liberty, at least where the defendant has had notice and a full opportunity to defend.").

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

14. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974) (limiting rights of prison inmates facing disciplinary charges to call witnesses and confront witnesses).

15. For example, due process generally requires notice and an opportunity to be heard before a state can deprive a person of a property interest; but notice can be dispensed with when the state's interest in summary seizure is sufficiently important. See *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972).

16. Partly for this reason, the issue in personal jurisdiction cases has elements both of procedural and substantive due process. See, e.g., Conison, *supra* note 12.

17. The balancing required looks principally to the interests of the person whose interest is infringed, on the one hand, and the interest of the government in imposing the restriction, on the other. A classic formulation is found in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected

I. Minimum Contacts

The test for due process limits on state court personal jurisdiction, announced in *International Shoe Co. v. Washington* and elaborated in subsequent cases, provides that a state court may exercise personal jurisdiction only if the party in question has “minimum contacts” with the forum state.¹⁸ This section first analyzes the minimum contacts test as a form of due process balancing and then considers whether the test satisfies the criterion of forum adequacy.

a. Minimum Contacts as Due Process Balancing

Although the Supreme Court has never fully explained exactly how the minimum contacts test implements the requirements of due process,¹⁹ the answer appears to be the following: the minimum contacts inquiry, which focuses on the relationship between “the defendant, the forum, and the litigation,”²⁰ balances between the interests of the defendant in avoiding answering in the forum state’s courts and the interest of the forum state in calling the defendant to account there.

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

by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

18. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The corpus of academic commentary on this case is by now enormous; leading treatments include Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995), Kevin C. McMunigal, *Essay, Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189 (1998), George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 363, and Symposium, *Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 513 (1995).

19. See Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 204-205 (2011).

20. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

correlates with a strong defendant interest in not being required to answer in the state's courts.

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

The minimum contacts requirement also serves as a proxy for the interest of the forum state.²¹ Where the defendant has only slight contacts with the forum state, it can be surmised that the policies of the state will not be significantly frustrated if litigation occurs elsewhere. Where, on the other hand, the defendant has substantial contacts with the forum state, it is more likely that the state's policies will be frustrated if the state's courts do not control the adjudication. Analogous considerations to the interest in protecting the defendant's justifiable expectations also play a role: when a party has only minor contacts with the forum state, the state has little reason to expect that its courts will adjudicate claims against that party; but if the defendant has significant contacts with the forum, then the state may more justifiably expect that the defendant will be subject to suit in that state's courts. Thus when significant contacts are present, the forum state is likely to have a substantial interest in adjudicating disputes in its own courts; but when substantial contacts are absent, the forum state's interest in adjudicating disputes involving the defendant is more attenuated.

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

Particular rules implementing the minimum contacts idea carry forward the approach of balancing the interests of the forum state and the defendant. Consider specific jurisdiction,—jurisdiction based on contacts between the

21. For judicial recognition of the importance of forum state interests in the due process calculus, see *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). See also *Shaffer*, 433 U.S. at 214-16.

forum state and the events that give rise to the controversy between the parties.²² When the defendant's contacts with the forum state are closely connected with the transaction or occurrence that gives rise to plaintiff's grievance, the defendant's interest in avoiding the forum state's courts is relatively slight. The defendant can rarely claim surprise at being sued in the forum state when the dispute involves the defendant's own conduct there. The forum state, meanwhile, has a substantial interest in adjudicating rights and duties that flow from harmful conduct that the defendant has performed in the forum. Hence, in specific jurisdiction situations, the level of contacts required to authorize the state to assume jurisdiction would appear to be lower than in other cases.

Consider general jurisdiction—jurisdiction over a party for any and all claims, including those that have no intrinsic connection with the forum state.²³ When the defendant's activities in the forum state are continuous, ongoing and systematic,²⁴ it is likely that the defendant could reasonably expect to be sued in that state, and also likely that if sued in a court of that state, the defendant will not experience the forum as inconvenient compared with other tribunals. The forum state, likewise, has a greater interest in subjecting the defendant to its courts when the defendant's activities are so extensive as to make her effectively “at home” there.²⁵ These considerations are so powerful that the law deems it unnecessary, when such contacts are present, to require that the plaintiff's grievance be connected with the defendant's activities in the forum state.

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

22. On the definition of specific jurisdiction and the contrast with general jurisdiction, see *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2855-56 (2011).

23. See *Goodyear*, 131 S. Ct. 2846; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Treatments include Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119; Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141; Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807 (2004); Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591 (2012); and Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527 (2012).

24. See *Helicopteros*, 466 U.S. at 415-16.

25. *Goodyear*, 131 S. Ct. 2846.

question of ownership of lands and buildings situated within its borders.²⁶ Even for chattels or intangible property, the state where the property is located has an interest in adjudicating disputes over ownership or control. Meanwhile the defendant's claim of right to the property indicates that litigating in the forum state is not overly inconvenient: as putative owner, the defendant has an interest in monitoring the condition of her property;²⁷ and can hardly claim surprise if litigation over property located in the forum state occurs in that state's courts. The existence of disputed property in the state is thus a proxy for the state's interest in adjudicating the dispute being sufficiently great as to outweigh the defendant's interest in avoiding the state's courts.

The balance between state and defendant is different when the in-state property enters the picture by way of attachment in an unrelated dispute. In such *quasi in rem* cases, it cannot be inferred that the presence of property in the state correlates strongly either with a reduced interest of the defendant in avoiding answering in the state's courts or with an enhanced interest of the state in calling the defendant to account there. These inferences are particularly weak when the property in question is an intangible or readily transportable item that is present in the state by happenstance. In such cases, the existence of property in the state provides only a weak justification for the state to exercise jurisdiction over an out-of-state defendant. Again the law tracks this analysis: a mere attachment of intangible property, unrelated to the underlying dispute, provides little greater justification for jurisdiction than would be derived from the baseline of minimum contacts.²⁸

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

26. See, e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (securing title to real property is an "essential state interest"); *Am. Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911) (suggesting that "the general welfare of society is involved in the security of the titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government").

27. See *Texaco, Inc. v. Short*, 454 U.S. 516, 518 (1982); *Huling v. Kaw Valley Ry. & Improvement Co.*, 130 U.S. 559, 562 (1889); *Pennoyer v. Neff*, 95 U.S. 714, 727 (1877) ("The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."). For a critique of this "caretaker" theory of notice, see Joshua Siebert, Note, *Here's Your Hat, What's Your Hurry?: Why "Caretaker Theory" Has Overstayed Its Welcome in Due Process Notice Jurisprudence*, 64 U. PITT. L. REV. 589 (2003).

28. See *Shaffer v. Heitner*, 433 U.S. 186 (1977); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1182-83 (2013) (documenting limited role of *quasi-in-rem* jurisdiction).

physically served with process while present in the state.²⁹ In such cases, the fact of in-state service usually indicates that the defendant has familiarity with that jurisdiction and some reason to be there. Especially after a dispute has arisen, the defendant may suspect that the plaintiff may seek to serve her with process in the forum state. If avoiding the forum is crucial to the defendant, she can seek to conduct whatever business she has in other locations. This strategy is not always possible; sometimes a defendant has a compelling need to visit the forum state.³⁰ But at least there is a correlation between the defendant's physical presence and a reduced cost to the defendant of having to litigate in the forum state. By like reasoning, if the defendant is physically present in the forum, it can be inferred that the forum state has an interest in subjecting the defendant to its courts—not always a compelling interest because perhaps the defendant was only passing through for a few minutes or hours—but an interest nonetheless. As in the other cases just discussed—the pure minimum contacts test and its glosses for specific jurisdiction, general jurisdiction and *in rem* jurisdiction—the rule on transient jurisdiction can be understood as reflecting a balancing between the interests of the defendant and those of the forum state.

b. Minimum Contacts and Forum Adequacy

To what extent does the balancing described above correlate with forum adequacy? It is apparent that these standards do have substantial overlap. Consider the defendant's interest in avoiding the forum, one of the principal concerns of due process analysis. This interest can be rephrased as the defendant's cost of answering in the forum. Because this is an important social cost of resolving a dispute in the forum, due process considerations overlap here with considerations of forum adequacy: the defendant's interest in not answering in the forum state is both a factor counting against jurisdiction in the due process analysis, and also a cost to be considered along with others in the cost-minimization analysis of forum adequacy. Similarly, the state's interest in adjudicating the dispute—an important factor in due process analysis—can be rephrased as the cost to the forum state of not doing so. This also is an important cost that affects the calculation of the most adequate forum. The factors, moreover, work the same way in the most adequate forum context as they do in the due process analysis. As the defendant's contacts with the forum state increase, the costs of dispute resolution in the forum state diminish (because the defendant's cost of having to litigate in the forum decreases),

29. *See* *Burnham v. Superior Court*, 495 U.S. 604 (1990).

30. For this reason, among others, so-called “tag” jurisdiction has been criticized as generating results in individual cases that are inconsistent with due process values. *See, e.g.*, *Sterk, supra* note 28, at 1196-97.

while the costs of litigation in alternative tribunals rises (because the cost to the forum state of another state adjudicating the defendant's rights increases).

Thus, to the extent that the interests of the defendant and the forum are the relevant concerns, the analysis of forum adequacy substantially overlaps the analysis under the minimum contacts test. However, the analysis of forum adequacy is not limited to the costs to the defendant and the forum state: it considers any and all relevant social costs. Thus a forum adequacy analysis would evaluate factors such as the plaintiff's cost of the litigation occurring elsewhere; the costs to other sovereigns of the litigation occurring in the forum; and the costs across the possible forums of witness appearances, presentation of evidence, inconvenience to third parties; and error in the determination of fact or law. These costs are not specifically considered under the minimum contacts test (although they are to some extent factored into the "fairness factors" analysis described below).³¹ When additional costs are taken into account, the correlation between minimum contacts and forum adequacy is less exact.³²

The degree of alignment between minimum contacts analysis and forum adequacy depends on the type of personal jurisdiction being asserted. Where the parties are disputing over real property located in the forum state—the case of *in rem* jurisdiction—it is likely that the forum will be found to be the most adequate to resolve the dispute even when the full range of social costs is taken into account. Evidence bearing on the nature, location, and condition of the property is likely to be located in the forum state; the plaintiff and other persons with an interest in the property are likely to be located or to conduct activities there; and the applicable law is likely to be that of the forum.

A reasonable degree of overlap between due process and adequate forum analysis can also be expected in cases involving disputed claims to moveable or

31. See *infra* notes 39-40 and accompanying text.

32. The failure of minimum contacts analysis to consider the full range of interests is a frequent theme in commentaries that criticize the Supreme Court for failing to give adequate weight to plaintiffs' interests in their choice of forum. See, e.g., Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1246 (2011) (arguing that the 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"); R. Lawrence Dessem, *Personal Jurisdiction After Asahi: The Other (International Shoe) Drops*, 55 TENN. L. REV. 41, 65 n.136 (1987); Walter W. Heiser, A "Minimum Interest" Approach to Personal Jurisdiction, 35 WAKE FOREST L. REV. 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"); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 547 (1991); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531-32 (1995) ("[D]eference to the convenience of nonresident defendants has frustrated the reasonable interests of plaintiffs and their home states.").

intangible property located in the forum. Although in such cases the balance of defendant and forum state interests would ordinarily counsel for litigation in the state where the property is located, a full analysis of social costs might lead to the conclusion that the courts of a different forum are more adequate to resolve the dispute.³³ Contemporary due process analysis set forth in *Shaffer v. Heitner* applies minimum contacts principles to such cases; accordingly the general alignment between due process and forum adequacy carries over to the case of intangible or moveable personal property.

When the dispute is factually connected with the defendant's contacts in the forum state—the case of specific jurisdiction—the forum state will often turn out to be the most adequate forum even when all costs of litigation are taken into account. In such cases it is probable that witnesses or evidence will be located in the forum state. Third parties who will participate in the litigation might also be located there. Because the law chosen—by the forum or other courts—may well be the law of the forum state, the courts of the forum state may be best qualified to interpret ambiguous rules. Other sovereigns, meanwhile, may have a reduced interest in resolving the dispute through their courts if when the controversy concerns the defendant's activities in the forum state. All of these factors counsel in favor of the plaintiff's choice of tribunal as the most adequate forum in specific jurisdiction cases.

However, the overlap between specific jurisdiction rules and forum adequacy is less pronounced than in the cases just discussed. Situations could arise where the interests of parties other than the defendant and the forum state tip the balance in favor of some other tribunal as the most adequate forum. Imagine a Pennsylvania company that sells most of its products in Pennsylvania but also conducts marketing activity in parts of Ohio near the Pennsylvania border. A Pennsylvania resident is injured while using the company's product during a visit to Ohio. Minimum contacts analysis would probably allow the injured party to bring a products liability suit against the manufacturer in Ohio because the defendant has purposefully availed itself of Ohio's market. Yet on these facts it appears most likely that Pennsylvania, not Ohio, is the state of the most adequate forum: both parties are located in Pennsylvania; key witnesses and evidence regarding the defendant's manufacturing processes will be in Pennsylvania; evidence bearing on the plaintiff's medical costs and physical harm will be centered in Pennsylvania; and Pennsylvania may have a stronger interest in adjudicating the controversy in its courts. In circumstances such as this, the rules on specific jurisdiction

33. For example, suppose a creditor serves process on a person who allegedly owes money to the creditor's debtor—the context of *Harris v. Balk*, 198 U.S. 215 (1905). In such a case there is no particular reason why the state in which the “debt” happens to be found is also the most adequate forum.

would allow a state court to exercise jurisdiction even though a court of some other state is the most adequate forum.

Conversely, specific jurisdiction rules may sometimes work to deny a state court the authority to adjudicate a controversy even when it is the most adequate forum. *J. McIntyre Machinery, Ltd. v. Nicastro* provides an example.³⁴ The plaintiff was injured while operating a metal shearing machine in New Jersey. The machine was manufactured by a British company that sold products in the United States through an independent distributor located in another state. There was no evidence that the manufacturer had conducted marketing activity in New Jersey or shipped product there. On these facts, a majority of the Justices concluded that the Due Process Clause prohibited New Jersey courts from taking jurisdiction over the foreign defendant. Yet it appears likely that the New Jersey state court was in fact the most adequate forum. The plaintiff, apparently an individual without substantial means, lived in New Jersey. Much of the evidence bearing on liability and damages was located in New Jersey: whether the machine in question was properly maintained; whether the plaintiff operated the equipment in an appropriate fashion; how the accident occurred; what expenses the plaintiff incurred as a result of the accident; and how permanent and how severe the plaintiff's injuries were. New Jersey had a substantial interest in protecting its citizens against the risk of being injured by dangerous products and in reducing the taxpayer expenses associated with workplace accidents. While there were also arguments in favor of litigation in the United Kingdom—the defendant's manufacturing facility and corporate headquarters were there, as was evidence on possible design defects or manufacturing failures—it was almost certainly easier for the defendant to answer for the alleged wrongdoing in the courts of New Jersey than it would have been for the plaintiff to pursue a recovery in the United Kingdom. In this case, the law divested the most adequate forum of authority and required that litigation (if any) take place in a less adequate forum.³⁵

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

34. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

35. See Sterk, *supra* note 28, at 1197 (critiquing the result in *Nicastro* on similar grounds).

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

A similar disjunction between minimum contacts and forum adequacy can be observed in the case of *Burnham*-style jurisdiction based on in-state service of process.³⁶ While the fact that the defendant is in a state long enough to receive service of process might have some bearing on the interests of the defendant and the forum state, it does not necessarily indicate that courts of the state where service is effected is the most adequate forum. Suppose that the defendant, a physician living and working in Texas, is served with process while attending a medical conference in Michigan in a case involving a Texas plaintiff who alleges that the defendant committed medical practice in Texas. In such a case due process analysis would suggest that the Michigan courts could take jurisdiction over the defendant even though the courts of Michigan appear to be more adequate forums.

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

2. *Fair Play/Substantial Justice*

The foregoing analysis demonstrates that the requirement of minimum contacts aligns with the goal of forum adequacy, but only to an extent. The existence of contacts between the defendant and the forum state is a good proxy for two relevant costs: the costs to the defendant of having to answer in the forum if the litigation is conducted there, and the costs to the forum state of not calling the defendant to account in its courts if the litigation is conducted elsewhere. But the existence of contacts between defendant and the forum state is not always a good proxy for other relevant social costs, such as the costs to plaintiffs, witnesses, third parties, and other states, or the costs of possibly erroneous determinations of fact or law. The requirement of minimum

36. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

contacts, in short, is a tool that is neither designed for, nor particularly well adapted to, the goal of forum adequacy.

A court wishing to allocate litigation to the most adequate tribunal might therefore seek other justifications which could authorize the court to override the dictates of minimum contacts analysis taken alone. This is where the second part of the *International Shoe* test plays a role: the requirement that the exercise of jurisdiction must be consistent with “traditional notions of fair play and substantial justice.”³⁷ This language, although vague, suggests that a court must look beyond the interests of the defendant and forum state that are the focus of the minimum contacts test. “Fair play” and “substantial justice” allude to the interests of the forum state and the defendant, but also to other factors such as the interests of the plaintiff and the value of achieving accurate results. Later decisions indicate that these broader considerations—the so-called “fairness factors”—involve a wide-ranging inquiry into the adequacy of the forum as compared with other tribunals.³⁸ These include, but probably are not limited to, the following: the burden on the defendant, the interests of the forum state, the plaintiff’s interest in obtaining relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.³⁹ Like many lists of factors found in judicial opinions, this iteration of factors is not a model of clarity; but it does seem that all the factors further the goal of directing litigation to the most adequate forum.

Consider first the case where minimum contacts exist but some other tribunal is the most adequate forum. A court applying the fairness factor could, in such a situation, conclude that the Due Process Clause requires that the case be dismissed. The Supreme Court has provided an example: *Asahi v. Superior Court*.⁴⁰ Justice O’Connor’s plurality opinion concluded that both minimum contacts and the fairness factors required dismissal of the litigation; four other

37. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

38. For critical commentary on the creation of this second stage of analysis, see, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 76-78 (1990); Heiser, *supra* note 32, at 925-26; and Linda J. Silberman, “Two Cheers” For *International Shoe* (and None For *Asahi*): An Essay On The Fiftieth Anniversary of *International Shoe*, 28 U.C. DAVIS L. REV. 755, 758 (1995).

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

40. *Asahi*, 480 U.S. 102 (1987).

Justices disagreed with her conclusion about minimum contacts but agreed that the fairness factors required dismissal. A majority of the Justices recognized that the fairness factors could, in appropriate cases, require dismissal of a case even when minimum contacts analysis standing by itself would not.

Because a broader array of cost factors are taken into account, application of the fairness factors improves the alignment between results under the Due Process Clause and the goal of forum adequacy. What is not so clear is how effective this correction will be. It is evident that the fairness factors do not always trump the first-order minimum contacts analysis in situations where an alternative forum is the least-cost tribunal. If the fairness factors always corrected inefficient outcomes, then the minimum contacts analysis would be superfluous: a court could jump directly to the fairness factors without considering minimum contacts at all.⁴¹ Since the Court's opinions demonstrate that minimum contacts are indeed important to the analysis, it is evident that the impact of the fairness factors must be more limited. These considerations suggest that the fairness factors will not often generate a different result from the one that would be obtained from minimum contacts analysis alone. In *Asahi*, four Justices agreed with this limited view of the role of the fairness factors, opining that they would divest a state court of jurisdiction only in "rare" cases.⁴² These Justices suggested that, even after applying the fairness factors, a significant number of cases would remain in the forum even though another tribunal was more adequate.⁴³

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

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

42. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring).

43. See Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 23 (2006) ("Although cases will purport to consider all the fairness factors, the lower court decisions often turn on the defendant's burden of litigating in the United States. Courts are likely to find the exercise of jurisdiction reasonable, unless the defendant and its witnesses have to travel extremely long distances."); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 623 (2006) ("The burden on defendants is typically given the most weight, with the plaintiffs' interests and state interests receiving a fair degree of consideration as well.").

forum of jurisdiction, but rather by allowing the forum to retain cases over which it would otherwise not be permitted to adjudicate. The Supreme Court has recognized that the fairness factors can, in appropriate circumstances, work to confer jurisdiction on a state court when minimum contacts alone would not do so.⁴⁴ However, such a use of the factors would be in tension with the “particular notion of defendant-focused fairness” which underlies the Due Process analysis.⁴⁵ Accordingly we can surmise that, if allowed at all, the fairness factors would confer jurisdiction on a court when minimum contacts are otherwise absent only in unusual cases.

The limited role of the fairness factors can be understood as reflecting their uncomfortable position within the framework of due process analysis. Unlike the interests implicated by minimum contacts (the convenience of the defendant and the interest of the forum state), which are the same as those analyzed in traditional due process cases, the fairness factors have a weaker grounding in due process values. It is true that modern due process doctrine includes a relatively freeform weighing of various policy concerns and is not limited to the interests of the defendant and the forum state.⁴⁶ Nevertheless some of the fairness factors fit uncomfortably within a due process framework. Why, for example, does due process require the court to evaluate the interests of other states in adjudicating the controversy? The interests of sister states does not seem relevant to an inquiry focusing on the infringement of individual rights. It is for this reason that the Court adds in the fairness factors as a sort of an afterthought: they correct the seasoning of a dish already composed under minimum contacts.⁴⁷

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

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

45. *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring).

46. See Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 71 (2012) (due process tests balance “cost, tradition, dignitary interests, liberty interests, federalism, and policy concerns”).

47. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (burden on a defendant is “always a primary concern” of the due process analysis).

B. Federalism

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

1. Vertical Federalism

Enshrined in American constitutionalism is the principle that the states retain sovereign authority even while participating in a national government whose law, where it applies, is the supreme law of the land.⁴⁸ This bedrock principle requires that, in general, the federal government should not interfere with the sovereign activities of state governments without good reason. Constitutional law, accordingly, does not authorize the federal government to micromanage state authority,⁴⁹ commandeer state officials to carry out federal programs,⁵⁰ or preempt state programs absent a clear expression of congressional intent.⁵¹ State actions are generally afforded a presumption of constitutionality and are upheld against constitutional challenge unless they intrude on fundamental rights, interfere with a compelling federal interest, or are so irrational as to be impossible to justify under any plausible set of facts.⁵²

Few activities of government are more fundamental to sovereignty than the power of a state to resolve disputes through its courts.⁵³ When another sovereign—in this case the federal government—declares that a state may not exercise judicial authority, the result is consequential for the relations between the states and federal government. Federal law, accordingly, is deferential to state court procedures. In federal habeas corpus review of state court criminal convictions, for example, the Supreme Court has long recognized that defendants must meet a high burden to overcome procedural defaults

48. See U.S. CONST. amend. X; see also *New York v. United States*, 505 U.S. 144, 157 (1992) (federalism is part of “the framework set forth in the Constitution”); H. Jefferson Powell & Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645 (2000).

49. *New York*, 505 U.S. at 162 (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).

50. *United States v. Printz*, 521 U.S. 898, 928 (1997).

51. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[T]he historic police powers of the States [are] not to be superseded ... unless that was the clear and manifest purpose of Congress.”).

52. *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935).

53. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

committed during the state litigation.⁵⁴ The Antiterrorism and Effective Death Penalty Act,⁵⁵ likewise, requires federal courts to defer to state court procedures in the course of habeas corpus challenges to criminal convictions.⁵⁶ Principles of deference also apply in settings where federal courts refrain from or defer rulings in cases involving state court proceedings: the supplemental jurisdiction statute, which allows federal district courts to turn away state law claims;⁵⁷ the *Rooker-Feldman* doctrine, which bars federal courts from exercising appellate review over state court judgments;⁵⁸ *Pullman* abstention, which requires federal courts to defer resolving unsettled questions of state law;⁵⁹ *Burford* abstention, under which federal courts may dismiss cases in which a federal adjudication could interfere with a complex regulatory scheme;⁶⁰ and *Younger* abstention, under which federal courts dismiss actions seeking to enjoin state criminal proceedings.⁶¹

Some commentators see the Supreme Court's decisions on personal jurisdiction as reversing this pattern of deference and discarding the presumption of constitutionality ordinarily attributed to exercises of state authority.⁶² But this is an error. As demonstrated above,⁶³ the minimum contacts analysis implicitly incorporates a concern for the interest of the forum state and balances that concern against the interest of the defendant in avoiding answering in the forum state's courts. The *International Shoe* standard does not demand a precise weighing of the interests of the forum state and the interests of the defendant; all that is required is that the state must not impose too great a burden.⁶⁴ This demand of federalism is coded in the *International*

54. *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

55. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2241 et seq. (2012)).

56. *See Bell v. Cone*, 543 U.S. 447, 455 (2005) (explaining that AEDPA dictates a highly deferential standard for evaluating state-court rulings which "demands the state court decisions be given the benefit of the doubt").

57. *See* 12 U.S.C. § 1367(c) (2012).

58. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *In re Am. Bridge Prods., Inc.*, 599 F.3d 1 (1st Cir. 2010).

59. *See* R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941).

60. *Martin v. Creasy*, 360 U.S. 219 (1959); *Burford v. Sun Oil*, 319 U.S. 315 (1943).

61. *Younger v. Harris*, 401 U.S. 37 (1971).

62. John Vail, *Six Questions in Light of J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 517, 519 (2012); *see also* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.2 (6th ed. 2010); *id.* § 4.8A(1)(D), at 191; *id.* § 4.8A(1)(E), at 195 ("It is a disgrace that we have made what should be a matter of interstate venue a constitutional issue and then have micromanaged state-court jurisdiction to adjudicate so that this threshold issue is one of the most litigated."); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism In American Procedural Law*, 44 STAN. J. INT'L L. 301, 322 n.113 (2008).

63. *See infra* notes 39-40 and accompanying text.

64. Some, such as Justice Brennan, would go even further in deferring to state

Shoe test itself, which insists only that there be “minimum” contacts between the defendant and the forum state. “Minimum” in this context means both that the required contacts need only exceed a certain threshold, and also that the threshold is not demanding.⁶⁵

The demands of deference to state procedural determinations—including the determination of who may be forced to answer before the state’s courts—create another source of tension between the minimum contacts/fair play and substantial justice test, on the one hand, and the value of forum adequacy, on the other. Unlike the due process approach, the inquiry into forum adequacy carries no deference to a state’s decisions; it looks impartially across states and asks which of the potentially available forums can adjudicate the dispute at lowest social cost. The requirement of deference to state procedures, on the other hand, creates a zone in which a forum may exercise jurisdiction over an out-of-state defendant even though the court of some other state is capable of resolving the dispute at lower social cost.⁶⁶

2. *Horizontal Federalism*

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

Despite occasional derision from commentators who find the whole notion antithetical to due process,⁶⁷ the idea of a sovereignty-based limitation on state

interests. *See* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299-300 (1980) (Brennan, J., dissenting) (“The Court’s opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State’s interest in the case and fail to explore whether there would be any actual inconvenience to the defendant.”).

65. Where the defendant purposefully directs activities at the forum, for example, only “compelling” evidence of unreasonableness defeats state court jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

66. *See* *Calder v. Jones*, 465 U.S. 783, 788 (1984) (personal jurisdiction is appropriate in “any State” with sufficient “minimum contacts” to the dispute).

67. *See, e.g.,* Borchers, *supra* note 32, at 1263 (criticizing the plurality opinion in *Nicastro* as a “a bull-headed attempt to ground personal jurisdiction in a sovereignty theory”); Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate*

court jurisdiction is consistent with constitutional norms. In enforcing legal rights, the Supreme Court inevitably and properly takes account of structural features of constitutional design.⁶⁸ One of these structural features is the federalism-based principle of deference to state legal processes just discussed. Another is what Alan Erbsen calls “horizontal federalism”⁶⁹: the notion that in performing their official responsibilities, federal agencies and federal courts can legitimately take account of the need for reasonable coordination and mutual respect among the states.⁷⁰ Sovereignty-based considerations in state court personal jurisdiction cases are simply special applications to a particular context of horizontal federalism principles familiar in many other settings.⁷¹

References to state sovereignty in the Supreme Court’s personal jurisdiction opinions throughout recent history can be understood in these terms.⁷² A principal justification of the “power theory” of *Pennoyer v. Neff* was that jurisdiction so limited would inherently control the propensity of state courts to expand their authority into domains properly reserved for the courts of other states.⁷³ Although Justice Stone’s opinion in *International Shoe* squelched the power notion of jurisdiction, it did not reject the more general

Mass Torts, 97 COLUM. L. REV. 2183, 2183-84 (1997) (“[T]he Supreme Court must with all deliberate speed disavow the doctrine that the Due Process Clause of the Fourteenth Amendment, or anything else in the United States Constitution, requires a territorial nexus between forum and defendant as a sine qua non for the exercise of in personam jurisdiction.”); Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 699 (1983) (criticizing the Court’s references to sovereignty as “vague, counterproductive and unworkable”).

68. For example, separation-of-powers concerns appropriately influence the exercise of statutory interpretation. Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1122 (2011); see also John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942 (2011).

69. Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008).

70. Indeed, there is no doubt that such considerations do inform due process analysis in a variety of contexts. *Id.* at 50 (“Some individual rights and liberties that constrain state power—often framed in terms of due process and equality . . . fit within horizontal federalism.”).

71. See Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801 (2012) (discussing cases where federalism concerns influence constitutional doctrine without being the object of constitutional doctrine).

72. For analyses of the sovereignty strand in personal jurisdiction analysis, see Sterk, *supra* note 28; Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicastro*, 16 LEWIS & CLARK L. REV. (2012); Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 105-06 (1991); and Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S.C. L. REV. 257, 262-63 (1990).

73. *Pennoyer v. Neff*, 95 U.S. 714 (1878).

idea of respecting horizontal federalism.⁷⁴ On the contrary, the result of the *International Shoe* case, bringing the administration of a state's unemployment insurance system more fully under the jurisdiction of the state's courts, was in furtherance rather than in derogation of interstate sovereignty. On the facts of the case, involving a Delaware-chartered company with its principal place of business in St. Louis, a contrary result would have left it to the courts of Missouri or Delaware to enforce Washington's statutory scheme.

Later cases make it clear that concerns about horizontal sovereignty continue to inform the analysis of due process limitations on state court jurisdiction. In *Hanson v. Denckla*, an early post-*International Shoe* case, the Court observed that restrictions on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States."⁷⁵ *World-Wide Volkswagen v. Woodson* echoed this view, stating that the notion of minimum contacts "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."⁷⁶ Likewise, in *J. McIntyre Machinery Ltd. v. Nicaastro*,⁷⁷ Justice Kennedy's plurality opinion warned that "if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."⁷⁸

In context, these statements do not imply that the Due Process Clause is *itself* a protection of interstate sovereignty; rather, they reference the fact that considerations of interstate federalism properly inform how the Court goes about protecting individual due process rights in the context of state court personal jurisdiction. Justice White, the author of *World-Wide Volkswagen*, clarified the distinction in the *Bauxites* case decided just a few years later: "It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States. . . . The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."⁷⁹ In enforcing constitutional protections of individual rights,

74. See Juenger, *supra* note 19, at 1031 ("[T]hrough *International Shoe* no longer required some magic act within the forum as a prerequisite for the sovereign's acquisition of jurisdiction, Chief Justice Stone's opinion did not eschew the notion of territorial sovereignty.").

75. 357 U.S. 235, 251 (1958).

76. 444 U.S. 286, 292 (1980).

77. *J. McIntyre Mach., Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2780 (2011).

78. *Id.* at 2789.

79. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982); see also *Crawford v. Glenss, Inc.*, 637 F. Supp. 107, 109 n.2 (N.D. Miss. 1986)

it is appropriate in the state court personal jurisdiction area, as elsewhere, for the Court to take account of fundamental values of the structural constitution.

Although the concerns of horizontal federalism principles embodied in the foregoing opinions are not based on considerations of forum adequacy, they have implications for that topic. We have seen that principles of vertical federalism—the deference federal courts pay to state sovereign interests when enforcing due process limits on state court jurisdiction—tend to generate inefficient forum allocation decisions because the plaintiff’s chosen forum may not be the tribunal that can adjudicate the dispute at the lowest social cost. The sovereignty strand of *World-Wide Volkswagen* and related cases partially corrects this misalignment. When a state court’s exercise of jurisdiction is so aggressive as to raise questions about horizontal federalism, it can be inferred that the forum state may not be the most adequate forum. The interests of other states are likely to be strong enough to tilt the balance of costs in favor of some other court being the tribunal that can resolve the controversy at the lowest social cost.

C. Institutional Factors

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

1. Limitations of Supreme Court Review

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

(sovereignty concerns are not independent of due process but influence whether jurisdiction may be asserted).

to enhance their power or prestige. And it is a natural response, in the event of conflict, to favor your own citizens over outsiders, even if the bias is unconscious.⁸⁰

The evidence suggests that state courts do sometimes adopt an expensive interpretation of their authority. For example, they tend to interpret conflict-of-laws principles to select the law of their own state to govern disputes that come before them.⁸¹ Similar parochial tendencies are evidenced in the personal jurisdiction area. State courts have long displayed a propensity to interpret their long-arm statutes generously, extending their jurisdiction to the fullest extent permitted by the federal constitution.⁸² The structure of pleading rules in such cases also favors the interests of the plaintiff who has selected the forum: typically, on motion to dismiss for lack of personal jurisdiction, the court is required to accept all uncontroverted allegations in the complaint,⁸³ and where the plaintiff's complaint and the defendant's affidavits conflict, the court construes all reasonable inferences in favor of the plaintiff.⁸⁴ It is, accordingly, not difficult to find instances in which state courts appear to have exercised jurisdiction over parties who have few relations with the forum state.⁸⁵

80. Consider in this regard the pretentious and overweening tone of the New Jersey Supreme Court's opinion reversed by the U.S. Supreme Court in *McIntyre*: "[W]e discard outmoded constructs of jurisdiction in product-liability cases, and embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State." *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 590-91 (N.J. 2010).

81. See, e.g., Clay H. Kaminsky, *The Rome II Regulation: A Comparative Perspective on Federalizing Choice of Law*, 85 TUL. L. REV. 55, 102 (2010) (many American conflict-of-laws doctrines exhibit parochial forum bias).

82. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491 (2004).

83. See, e.g., *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996); *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829 (11th Cir. 1990).

84. *Ex parte Alamo Title Co.*, No. CV-11-904034, 2013 WL 1032857 (Ala. 2013).

85. See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (North Carolina state court asserted jurisdiction over subsidiaries of a United States tire manufacturer, including subsidiaries based in Luxembourg, Turkey and France, in a case where North Carolina residents were killed in a bus accident that occurred in France); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (Texas courts took jurisdiction over a Columbian corporation which had engaged in few contacts with Texas, in a case arising out of an accident that occurred in Peru); *Rush v. Savchuk*, 444 U.S. 320 (1980) (Minnesota courts used the local presence of defendant's automobile insurer as a basis for asserting civil jurisdiction over a defendant who had no contacts with the state); *Hageseth v. Superior Court*, 59 Cal. Rptr. 3d 385, 388 (Cal. App. 2007) (California courts held to have jurisdiction to prosecute defendant even though he never directly communicated with anyone in California); *Mary Twitchell, Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 201 (highlighting risk of state abuse of general jurisdiction powers).

The only institution capable of policing against the tendency of state courts to exercise such “exorbitant jurisdiction”⁸⁶ is the United States Supreme Court. Lower federal courts cannot do the job. There is no federal habeas corpus procedure under which federal district courts can intervene to protect defendants in state court civil cases, and no route of appeal to federal circuit courts from state court rulings on jurisdictional matters. The Supreme Court of the United States, on the other hand, can take up any case in which a state allegedly infringes a person’s constitutional rights.⁸⁷ The problem is the Supreme Court can decide only a tiny fraction of the state court personal jurisdiction cases that might come before it.⁸⁸ The Court simply has no capacity to police the ordinary business of jurisdictional disputes that arise in state courts. In consequence, state courts as a practical matter have substantial discretion to ignore, nullify, or minimize the impact of Supreme Court rules.⁸⁹

The practical ability of state courts to evade the constitutional limits on their jurisdiction has consequences for forum efficiency. In rare cases, the effect could be to enhance efficiency. For example, the state court in *McIntyre v. Nicastro* was arguably the most adequate forum even though a majority of the Supreme Court found that it could not constitutionally exercise jurisdiction. In most cases, however, state court evasions of Supreme Court precedent would detract from forum efficiency because the court that would be asserting jurisdiction would not be the most efficient forum. Thus, while the exact implications of state court evasion of Supreme Court precedent are ambiguous, it is fairly clear that overall this phenomenon would reduce the efficiency of dispute resolution.

2. Mitigation Techniques

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

86. See Kevin M. Clermont & John R.B. Palmer I, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 482-503 (2006) (discussing tendency of courts to interpret the scope of their authority broadly in cases with international dimensions).

87. See 28 U.S.C. § 1257 (2012).

88. See Jay Timarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 557 n.187 (2006) (Supreme Court grants review in about one percent of the cases in its discretionary docket). The two recent state court jurisdiction cases—*Nicastro* and *Goodyear*—were the Court’s first venture into the area in twenty-one years.

89. On state power to ignore or circumvent binding federal law, see Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009); and Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 700 (2011).

a. Rule-based Requirements

International Shoe envisaged a discretionary approach to state court personal jurisdiction.⁹⁰ Later cases continue, from time to time, to emphasize the fact-specific nature of the inquiry.⁹¹ Yet, especially in more recent years, one detects in the cases an attraction for rule-based doctrines that rely on objective determinants of jurisdiction.⁹² Examples include the rule of general jurisdiction, which allows a state court to exercise jurisdiction over all matters involving a defendant who has behaved in such a way as to make her “at home” in the forum state, the rule on specific jurisdiction which subjects the defendant to the jurisdiction of courts in a state in which the defendant has engaged in some purposive act connected with the dispute; and the rule on transient jurisdiction, which recognizes a state’s power to adjudicate cases involving out-of-state defendants who have been personally served with process in the forum state. These rules function, in part, to provide notice to the parties about where jurisdiction will and will not be permitted, thus reducing the incidence of collateral disputes over jurisdiction and also equipping potential defendants with the ability to structure their primary conduct with knowledge as to its implications for litigation risk.⁹³

But objectively ascertainable rules also have the quality that they better control the judicial discretion of state court judges.⁹⁴ Even though a state court judge might still manipulate results through fact-finding, an objective standard reduces the ambit of discretion. If, for example, the rule on specific jurisdiction is that the defendant must have purposefully availed itself of the forum state, a

90. See Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe’s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 580 (1995) (“[T]he [*International Shoe*] Court’s ultimate test for jurisdiction was not so much the ‘minimum contacts’ concept that has dominated our analysis since, but, rather, the broader principle of ‘fair play and substantial justice.’”).

91. See Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 834 (1995) (explaining that the Supreme Court has “eschewed the opportunity to create definitive rules” and “mandated case-by-case, fact-specific inquiry”).

92. See Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. REV. 407, 407 (1980) (noting “the bright-line approach taken by the Court in these cases”).

93. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (jurisdiction rules provide “fair warning” to defendants as to where they are likely to be sued); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (purposeful availment test provides “clear notice” to defendants about where they will be subject to suit); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

94. For discussion of the use of rules to control lower court discretion, see Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509 (2012); and Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 333 (2007).

state court wishing to exercise personal jurisdiction will need to point to facts supporting an inference of such intentional behavior. In a purely discretionary regime, in contrast, a state court would not need to offer such specific support for its conclusion that jurisdiction is appropriate. Because rules impose greater constraints, they make it somewhat difficult, although not impossible, for a state court to manipulate its analysis in order to manufacture jurisdiction where none exists.

In addition to enhancing state court compliance with the Supreme Court's approach, rule-based doctrines can help improve the efficiency of forum allocation. By constraining state court discretion, rule-based doctrines reduce the tendency of state courts to exercise jurisdiction over cases that would more efficiently be litigated elsewhere. Thus the use of rule-based doctrine to police state court jurisdiction mitigates, to some extent, the inefficiency inherent in the institutional limitations on the Supreme Court's role.

Rule-based doctrines, however, can only manage these inefficiencies to some extent. Because of the inherently fact-specific nature of the due process analysis, the rules, even if expressed in objective terms, can reduce but cannot eliminate the risk of state court noncompliance. Even with objective rules in place, a state court intent on expanding its jurisdiction can often find ways to do so without triggering Supreme Court review. The problem of exorbitant jurisdiction is mitigated but not solved.

Rules, moreover, do not always work to reduce inefficient forum allocations even when faithfully observed. In some cases, in fact, rules exacerbate the problem. Consider the "purposeful availment" test of specific jurisdiction. As Justices Breyer and Alito observed in their *Nicastro* concurrence, a strict application of the purposeful availment test can generate errors on either side.⁹⁵ In some cases the test would subject a defendant to the jurisdiction of a less adequate court (for example, when the defendant knowingly introduces one and only one product in the stream of commerce hoping it would be sold in the forum state). In other cases, the defendant might not deliberately avail itself of the forum, but still might engage in activities that, although short of the level qualifying for general jurisdiction, nevertheless establish the state court as the most adequate tribunal (for example, worldwide product distribution through the Internet).⁹⁶ In each of these situations, the purposeful availment test results in inefficient forum allocation decisions.

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

95. *Nicastro*, 131 S. Ct. at 2793 (Breyer & Alito, JJ., concurring).

96. *Id.*

favorable law or to impose inconvenience on their adversary.⁹⁷ It was probably for these reasons that the Supreme Court's most recent foray into the topic of general jurisdiction endorsed a limited concept under which an out-of-state defendant could be sued for any reason in the forum state only if it was "essentially at home" there.⁹⁸ Even so, cases can be imagined in which the defendant is "at home" in the forum state but nevertheless the courts of some other jurisdiction can resolve the controversy at lower social cost. Suppose, for example, that a defendant with its principal place of business in Minnesota manufactures a product that causes harm in the United Kingdom to an English citizen. Most of the evidence is located in the UK and UK substantive law will apply to the litigation wherever it is filed. The plaintiff, however, sues in Minnesota because she hopes to take advantage of the benefits of broad discovery and jury trial which are available in Minnesota but not in the United Kingdom. In such a case, the courts of the United Kingdom may be the most adequate forums but the rule on general jurisdiction will allow the litigation to be conducted in Minnesota (although the Minnesota court might elect to reject the case on *forum non conveniens* grounds).⁹⁹

Consider also the rule of transient jurisdiction. Although in general, as we have seen, the defendant's physical presence in the forum state might be a proxy for the relevant balancing of costs and benefits, in specific cases the proxy might be grossly off base. The result could be severe harm to the defendant who makes the forum state a less-than-adequate tribunal in which to resolve the controversy.¹⁰⁰ If the rule is truly hard-and-fast—if state courts can take jurisdiction over transient defendants served with process in the state, without any other contact with the litigation—the result will be to increase

97. See Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1036-37 (2004) ("[G]eneral jurisdiction may permit a plaintiff to engage in unfettered forum shopping designed to capture the most favorable substantive law or statute of limitations, or both."); Rhodes, *supra* note 23, at 823 n.87 (criticizing the idea that individuals should be subject to general jurisdiction based on continuous and systematic business activities); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 671 (1988) ("If general jurisdiction is permitted to extend beyond the defendant's home base, plaintiffs may forum-shop among the various states where general jurisdiction is available, looking for the most favorable choice-of-law rule.").

98. See Stein, *supra* note 23.

99. See *infra* notes 114-21 and accompanying text.

100. Several commentators have objected to transient jurisdiction for similar reasons. See Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 755 (1988) ("On balance, transient jurisdiction has outlived its theoretical justifications."); Bruce Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 744 (1981) (criticizing transient jurisdiction cases for generating unfair results); Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 662 (1991) (criticizing transient jurisdiction as conferring excessive power on state courts).

rather than decrease the inefficiency of forum allocation.

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

b. Defendant Control

Another feature that mitigates the problem of limited Supreme Court capability is the fact that personal jurisdiction law purports to confer on the defendant the unilateral power to avoid being sued in a particular jurisdiction. Take the "purposeful availment" standard. In theory at least, this test allows the defendant to avoid being brought before a state's courts.¹⁰¹ All the defendant needs to do is to eschew intentional contact with the forum state.¹⁰² Or consider transient jurisdiction. To avoid being brought into state court on this theory, the defendant merely needs to avoid traveling to the forum state.¹⁰³ Again the defendant can control her susceptibility to suit by actions that are in her unilateral power to control. General jurisdiction provides another example: as long as the defendant stops short of acting "at home" in the forum state, she will not be subject to suit there on a general jurisdiction theory.

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

Defendant-empowering doctrines, however, are only partially successful at correcting the disjunction between law and forum adequacy. In some cases, a defendant simply cannot avoid traveling to the forum state and thereby

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

102. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-80 (1985) (purposeful availment requirement ensures that a defendant will not be subjected to state court jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts or of the "unilateral activity of another party or third person").

103. See Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 375 ("Because . . . a defendant is subject to state authority when she is within the state territory, she can control her amenability to jurisdiction by staying away.").

rendering herself subject to process there. *Burnham* provides an example.¹⁰⁴ The defendant, a divorcing father, visited California on business but also to visit his children who were under the custody of their mother. It could well have been harmful to the children, as well as inordinately painful for the father, if he avoided visiting his children in order to avoid being sued in an inconvenient forum. Thus defendant-empowering doctrines do not preclude all state attempts to exercise jurisdiction in cases where they are not the most adequate forum.

Beyond this, defendant-empowering doctrines can exacerbate the forum-allocation problem in some cases. The problem is that when the means of empowerment is objective, defendants can wind up with too much power. An objective mechanism for avoiding jurisdiction that is solely in the discretion of the defendant can create excessive opportunities for manipulative forum avoidance.¹⁰⁵ This was the issue that motivated the Court to decide *International Shoe*. Arguably the defendant in that case had deliberately structured its product distribution system so as to avoid having to respond in the courts of states where it sold its goods, with the consequence that, had the defendant succeeded in its strategy, litigation over Washington's unemployment insurance scheme would have been allocated to a less-than-adequate forum. The problem has not gone away.¹⁰⁶ Justice Ginsburg's dissenting opinion in *Nicastro* essentially took the defendant to task on this very point: although she did not directly accuse the defendant of structuring its distribution system to avoid state court jurisdiction, she did suggest, not too subtly, that this type of manipulation might have occurred.¹⁰⁷ Strategic behavior of this sort skews forum-allocation decisions by distributing cases to less adequate tribunals.¹⁰⁸

104. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

105. See Klerman, *supra* note 1, at 1551; Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995) (“[A] manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.”).

106. See Buehler, *supra* note 1, at 154.

107. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2797 (2011) (Ginsburg, J., dissenting) (“A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?”).

108. Manipulative forum avoidance strategies by defendants can also distort processes of product distribution in the marketplace, a potential cost that is outside the scope of this paper.

The upshot of analysis, again, is that the technique used to mitigate the disjunction between existing legal institutions and practices and forum adequacy is only partially effective, and may in some circumstances exacerbate rather than ameliorate the problem.

D. Cross-cutting Mitigation Factors

The discussion so far has dealt with three problems that interfere with the goal of forum adequacy in state court personal jurisdiction cases—incomplete coverage of social costs under the Due Process Clause, deference to state procedures resulting from federalism principles, and the institutional limitations on the Supreme Court’s ability to police state court exercises of inordinate jurisdiction. We have also considered mitigation factors applicable in these situations that partially correct for the disjunction between existing institutions and practices, on the one hand, and forum efficiency, on the other: the *International Shoe* fairness factors; principles of horizontal federalism; and the use of objective tests and defendant-empowering doctrines. Deferred until now is a discussion of cross-cutting mitigating factors: venue rules which govern the distribution of litigation within a jurisdiction; comity principles which counsel state courts to exercise restraint when their cases overlap substantially with cases pending in other tribunals; and the doctrine of *forum non conveniens*, under which state courts may decline to adjudicate cases otherwise within their jurisdiction. Although each of these doctrines and rules can serve the interests of forum adequacy to an extent, individually and in combination they fall far short of ensuring that litigation is allocated to the forum that can resolve the dispute at the lowest social cost.

State venue rules work to distribute litigation within the court system of a given state. Subject to this limitation, such rules can enhance forum adequacy. The general Texas venue statute, for example, provides that venue is proper in the county where all or a substantial part of the acts or omissions giving rise to the claim occurred; the county of the defendant’s residence at the time the cause of action accrued; the county of the defendant’s principal office in Texas; or if none of the foregoing apply, the county where the plaintiff resided at the time the cause of action accrued.¹⁰⁹

Venue provisions such as this weakly select for the most adequate forum. By requiring a nexus between the defendant, the plaintiff, or the transaction, these rules screen out cases where a given court is presumptively less than adequate. The screening is weak, however, because the statute does not require any sort of general weighing of costs and benefits: any connection will do as long as it satisfies one of the prongs of the rule. If the only basis of venue is

109. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a) (Vernon 2002).

that the plaintiff resided in the county at the time of the transaction, this would be a weak indicator, at best, that the county so selected is the most adequate forum. Even the site of the defendant's residence is not very good proxy for forum adequacy: it would confirm venue in El Paso if the defendant resided there at the time of the accident, for example, even if the accident occurred and the defendant currently resided in Brownsville, more than 800 miles away. The residual head of venue under the Texas statute—the county where the plaintiff resided at the time of the dispute-causing events—is even less accurate as a proxy for forum adequacy, both because the plaintiff may have moved and also because the plaintiff's residence is, in any event, only one of several considerations that play a role in the forum adequacy determination.

Texas's venue transfer rule, however, also allows defendants to obtain a transfer to a more convenient forum if a lawsuit in the original forum would "work an injustice" on the defendant, the transfer would not work an injustice on any party, and the "the balance of interests of all the parties predominates in favor of the action being brought in the other county."¹¹⁰ Although the language is not explicitly phrased in terms of the most adequate forum, the court clearly has discretion under this provision to consider the adequacy of respective possible forums when ruling on the transfer motion. These transfer rules enhance forum efficiency to some extent. Their effectiveness is limited, however, because they only work to distribute litigation within the borders of the state. For large states like Texas the benefit can be significant but less is achieved when litigation is distributed within courts in Delaware. More importantly, state venue transfer rules offer no assistance for out-of-state defendants who would prefer not to answer in any courts of the state.

Another technique for mitigating the disjunction between legal rules and forum adequacy is the doctrine of interstate comity. State courts will sometimes defer to parallel state court actions out of concern for honoring proceedings in the courts of another sovereign. The principle of interstate comity is strong enough, in some cases, to trump even strong social policies of the state in which the deferring court sits.¹¹¹ Interstate comity, however, is not a mandatory or compulsory rule of law, but rather a principle of best practice; while it may counsel for deference to parallel proceedings in some cases, it does not require such deference even when the other court is a more adequate forum. The doctrine "recognizes the fact that the primary duty of every court is

110. *Id.*

111. *See, e.g., In re AutoNation, Inc.*, 228 S.W.3d 663 (Tex. 2007) (deferring to Florida litigation to enforce a covenant not to compete, notwithstanding strong Texas policy disfavoring such clauses); *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231 (Cal. 2002) (refusing to restrain former employer from enforcing a covenant not to compete in Minnesota, notwithstanding strong California policy against such agreements).

to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them.”¹¹² Thus interstate comity offers only a small degree of assistance in aligning practice and law with the principle of forum adequacy.

A more significant mitigation technique available in state court is the doctrine of *forum non conveniens* which allows a court, in its discretion, to dismiss pending litigation otherwise within the court’s jurisdiction on the ground that the forum is less convenient than some other available tribunal. Most states employ some version of this doctrine,¹¹³ although there are substantial variations across states in how the doctrine is applied.¹¹⁴ The relevant factors considered in a *forum non conveniens* motion include the following: “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”¹¹⁵

A review of the *forum non conveniens* factors reveals that the doctrine can be useful at correcting some of the disjunction between legal rules and the principle of the most adequate forum. The factors listed above call on a court to assess the relative costs of litigation in alternative tribunals—an inquiry that overlaps the analysis required for forum adequacy. Thus cases in which a state court may exercise jurisdiction even though it is not the most adequate forum may be corrected through the use of *forum non conveniens*. The doctrine can be particularly useful, in this respect, when the forum’s authority is premised on a theory of general jurisdiction.¹¹⁶

On the other hand, *forum non conveniens* only achieves forum adequacy to a limited extent. The doctrine carries with it a presumption that the plaintiff’s choice of forum will be respected.¹¹⁷ Because its exercise is discretionary, the forum court may refuse to dismiss a case even when another tribunal is clearly

112. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900).

113. David W. Rivkin & Suzanne M. Grosso, *The Concept of Forum Non Conveniens in U.S. Lawsuits*, 2003-2 RMMLF-INST 5 (2003). Three states—Montana, Rhode Island and South Dakota—apparently do not recognize the doctrine. See Armin Rosencranz, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 188 & n.266 (1999).

114. See Sidney K. Smith, Note, *Forum Non Conveniens and Foreign Policy: Time For Congressional Intervention?*, 90 TEX. L. REV. 743 (2012) (discussing state-by-state variations).

115. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

116. See Silberman, *supra* note 23, at 614.

117. *Gulf Oil Corp.*, 330 U.S. at 508 (1947) (“[U]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”).

more adequate. Defendants may hesitate before moving to dismiss on *forum non conveniens* grounds out of concern that the forum court will both reject the motion and punish the litigant for making it. Courts, moreover, may resist dismissing cases on grounds of *forum non conveniens* when a party to the litigation is a resident of the state¹¹⁸ or where the plaintiff is an American citizen involved in litigation with a foreign defendant.¹¹⁹ These various limitations to the use of the doctrine materially reduce its utility as a device for correcting the results of inefficient forum allocation rules.¹²⁰

II. ASSESSMENT

So far we have examined how state court personal jurisdiction rules perform against the benchmark of forum adequacy.

One observation concerns the quality of jurisprudence in the two areas. Many commentators have criticized the Court's performance in the area of state court personal jurisdiction, and for apparently good reasons.¹²¹ Doctrines shift like quicksand; the Court seems to be unable to muster a majority opinion on fundamental questions; and sometimes the result of a much-anticipated opinion is only greater confusion. Academic commentators agree on the deficiencies in the Court's state court personal jurisdiction jurisprudence, but offer no consensus on the reason for the shortcomings. Some blame conservative Justices for sabotaging the framework of *International Shoe* in order to serve their personal political biases.¹²² Some suggest that the problem was more

118. Delaware courts, for example, will dismiss cases involving Delaware corporations only if the moving party shows "overwhelming hardship." See *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 135 (Del. 2006).

119. See Silberman, *supra* note 23, at 614.

120. See Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593, 603 n.76 (1990) (*forum non conveniens* "is an uncertain and unreliable corrective mechanism").

121. See, e.g., Borchers, *supra* note 38, at 78 ("tumbleweed"); Buehler, *supra* note 1, at 105 (unclear, impractical, and unjust); Frank Deale, *Jurisdiction, Transfer, and Pretrial: Using Fed. R. Civ. P. 16 to Resolve Forum Convenience Disputes*, 53 HOW. L.J. 1, 3 (2009) ("web of contradictions"); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 4-6 (2010) ("an evolving tapestry of modern insights and anachronistic assumptions stitched together without a guiding vision"); Juenger, *supra* note 18, at 1027 ("halfbaked"); McMunigal, *supra* note 18, at 189 (1998) (ambiguity and incoherence); Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 44 (2012) ("lack of clarity"); S. Wilson Quick, *Staying Afloat in the Stream of Commerce: Goodyear, McIntyre, and the Ship of Personal Jurisdiction*, 37 N.C. J. INT'L L. & COM. REG. 547, 549 (2011) ("incoherent"); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After Burnham v. Superior Court*, 22 RUTGERS L.J. 675, 686 (1991) ("out of step").

122. E.g., Redish, *supra* note 121, at 675 ("The version of due process that Justice Scalia envisions in *Burnham* all but trivializes the constitutional protection, as well as the

judicial incompetence than malfeasance.¹²³ Professor Juenger sees the problem as grounded in the inherent tension between concepts of jurisdiction based on territory and notions based on fairness.¹²⁴ Professor McMunigal points to the Court's propensity to add new factors into the mix of considerations that trial courts must address.¹²⁵ Professor Borchers argues that the root cause of the problem is that the Supreme Court lacks a clear rationale for imposing limits on state court jurisdiction.¹²⁶

While the Court could probably have done a better job in articulating its opinions and achieving consensus, the apparent inadequacies in its state court personal jurisdiction opinions are also, in part, a product of the intractable dilemmas it faces in devising workable rules. The key shortcomings noted in the Court's opinions are found, not in the basic doctrine, but in the mitigation factors: the fairness factors under *International Shoe*, the idea of horizontal federalism espoused in *World-Wide Volkswagen* and other cases; the use of rule-based doctrines for specific jurisdictional situations; and the apparent preference for rules that empower defendant to undertake unilateral actions to avoid the forum. When we see that the locus of difficulty lies in the mitigation factors, it becomes possible to identify a cause of the Court's difficulties in this area.

As a custodian for the nation's legal system, the Court has a responsibility to encourage efficiency in litigation, including the allocation of cases to the most adequate tribunal. Only the Supreme Court, among all bodies of government, has the necessary perspective and impartiality to perform this task. Yet the Court faces problems in achieving the goal of efficient forum allocation. Its tool for implementing forum-efficiency principles at the state court level is the Due Process Clause of the Fourteenth Amendment, a law designed for other purposes. The Due Process Clause focuses attention on only some of the factors that bear on forum adequacy, thus potentially distorting the process of forum allocation; and it operates within the framework of a federal system in which the national government necessarily and appropriately displays a degree of deference to state judicial processes. The Supreme Court, meanwhile, lacks the institutional capacity to monitor state court litigation to ensure that the goal of forum adequacy is being served or to intervene to correct

judiciary's role in enforcing that protection.”).

123. See Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Machinery, Ltd. v. Nicasro*, 45 LOY. L.A. L. REV. 341, 345 (2012) (“disappointing level of judicial competence”); Wendy Collins Perdue, *What's Sovereignty Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 729 (2012) (“foolish remarks and poor opinions”).

124. Juenger, *supra* note 18, at 1034.

125. McMunigal, *supra* note 18, at 189-90.

126. Borchers, *supra* note 32, at 1246.

things when that goal is not being met.

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

Because these measures are compromises, they go only part way to rectify the weaknesses in the Court's doctrinal and institutional capacities. They do not fully achieve the goal of forum adequacy, although without them the situation would be worse. And because they are compromises, they represent deviations from the form of due process jurisprudence that some commentators would desire. They are messy, incomplete, and confusing. In context, however, the Court's use of these mitigation factors is arguably justifiable because they serve a worthwhile goal: allocating litigation within the interstate and international system to the tribunals which, all things considered, can resolve the dispute at lowest overall social cost.

The same problems are not present to nearly the same degree in the case of federal court personal jurisdiction. It is true that the doctrine under *International Shoe* is imported wholesale into federal court jurisdictional law, and true also that the rules developed to manage state court jurisdiction are not necessarily appropriate in the federal context. These shortcomings, however, can be laid at the foot of the rule-makers who instructed federal courts to borrow personal jurisdiction law from their state court colleagues. The problems that follow from the rules so adopted do not represent a default by the Supreme Court (except indirectly, insofar as Justices of the Court have an influence on the rulemaking process). More importantly, the mitigation techniques available to federal courts are both more effective and more firmly

grounded in legal authority than the similar techniques operative in the case of state court jurisdiction. Statutes providing for transfer of litigation among federal district courts provide a reasonable degree of assurance that the dispute will be allocated to the tribunal that can resolve the controversy at the lowest social cost. It is therefore not surprising that the Court's performance in federal court personal jurisdiction cases appears superior to its work in the area of state court jurisdiction.

A second general observation flows from the first. A principal reason why federal court personal jurisdiction is less problematic than state court jurisdiction lies in the fact that transfers are possible to and from federal courts located anywhere in the United States. A similar transfer system operating at the state level, and between state and federal courts, would appear desirable as a means for increasing the efficiency and reducing the doctrinal problems that currently plague state court personal jurisdiction law. Proposals of this nature were bruited by law reform organizations during the 1980s but failed to generate traction, in part because they required approval by the several states.¹²⁷ Other related ideas have been explored recently.¹²⁸ Possible avenues for emulating the federal forum transfer system at the state court level are an active and valuable area of ongoing research.¹²⁹

CONCLUSION

This article has considered the legal regulation of personal jurisdiction from the perspective of the most adequate forum. In the case of state courts, it turns out that existing law assigns disputes to the most adequate forum only in some cases. Three problems interfere with the goal of distributing disputes in state court so as to minimize the costs of dispute resolution: analysis under the

127. See AM. LAW INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* § 3.08 (1983); UNIF. TRANSFER OF LITIG. ACT (1991).

128. See, e.g., Erbsen, *supra* note 121, at 78-88 (exploring the idea that problems of state court personal jurisdiction could be addressed by broad rights of removal to federal court coupled with nationwide service of process and transfer procedures to deal with cases where the federal forum is inconvenient); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245 (2008) (considering explores the idea of using the Judicial Panel on Multidistrict Litigation to achieve "maximalist" consolidation of similar cases in federal courts); Rodney K. Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 OKLA. L. REV. 269 (2012) (calling for relaxation of the complete diversity-of-citizenship rule for removal jurisdiction coupled with an increase in the amount-in-controversy requirement and other restrictions designed to ensure that federal courts are not flooded with garden-variety state law cases).

129. See Geoffrey P. Miller, *A New Procedure for State Court Personal Jurisdiction* (NYU Sch. of Law, Public Law and Legal Theory Paper Series, Research Paper No. 13-14, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2248719.

Due Process Clause does not account for the full social costs of litigation; federalism-based concerns allow state courts to adjudicate cases when they are not the most adequate forums; and institutional constraints interfere with the Supreme Court's ability to prevent excessive exercises of state court jurisdiction. These problems are partially corrected by mitigation strategies: the fairness factors of *International Shoe*, principles of horizontal federalism, and objective tests and defendant-empowering doctrines. Notwithstanding these mitigation techniques, however, the rules on state court personal jurisdiction align only imperfectly with the goal of forum adequacy. The dilemma of achieving forum efficiency in state court cases helps to explain the confusion that pervades the Supreme Court's opinions in this area.