
BEYOND BORDERS: DISASSEMBLING THE STATE-BASED MODEL OF FEDERAL FORUM FAIRNESS

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INTRODUCTION

The right of civil litigants to participate meaningfully in judicial proceedings has long been a defining characteristic of American procedural due process.¹ An equally longstanding notion, seen with particular historical acuity where litigation is conducted in the continent-spanning federal judicial system, is that the forum in which those judicial proceedings take place is a core determinant of whether litigants can enjoy that right of meaningful participation.² A forum is effectively unavailable if litigants can access it only through substantial cost or logistical complexity, and requiring litigation in such a forum could dramatically undermine their capacity to air and resolve their grievances satisfactorily.

Plaintiffs in civil lawsuits are certainly vulnerable to the harms that may result from litigating in a burdensome federal forum.³ Nevertheless, plaintiffs are “the masters of their complaints,”⁴ and have the first-mover advantage in choosing the forum in which their civil suits will be litigated. Defendants have therefore been made the primary beneficiaries of two core checks on this first-mover advantage in the federal judicial system⁵—Federal Rule of Civil Procedure 4(k)⁶

¹ See *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (“The core of due process is the right to notice and a meaningful opportunity to be heard.”) (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985)); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (observing that “the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process” are the “the two central concerns of procedural due process”); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (holding that due process requires any deprivation of life, liberty, or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case”); Lawrence B. Solum, *Procedural Justice*, 78 SO. CAL. L. REV. 181, 274 (2004) (“Procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate.”).

² See *infra* notes 14-22 and accompanying text.

³ The Supreme Court has recognized this vulnerability, if only incidentally, in its state personal jurisdiction balancing test. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (listing “the plaintiff’s interest in obtaining convenient and effective relief” as one of several “reasonableness” factors courts must weigh when determining the fairness of a court’s exercise of personal jurisdiction over an out-of-state defendant) (citing *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978)).

⁴ See, e.g., *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831-32 (2002) (observing, in the context of the well-pleaded complaint rule, that plaintiffs are free to choose any available forum in which to file their complaints); *Feltner v. Bluegreen Corp.*, No. IP 02-0873-C-M/S, 2002 WL 31399106, at *8 (S.D. Ind. Oct. 8, 2002) (explaining that the master-of-the-complaint doctrine is a “foundational principle in American jurisprudence” that allows plaintiffs to “choose where to file as long as jurisdiction and venue are proper”).

⁵ The notion that courts should be watchful of the negative effects that plaintiffs’ forum choices have on defendants is well established. See, e.g., *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

and the general federal venue statute.⁷ In providing these checks, Rule 4(k) and venue rely fundamentally on geographic touchstones to test whether a defendant's ability to participate meaningfully in the litigation initiated against it will be prohibitively undermined by a plaintiff's forum choice. States for Rule 4(k), and state-based judicial districts for venue, serve as the core geographical referent for determining the presence of logistical obstacles defendants may face in accessing a plaintiff's choice of courthouse. Whether a defendant will be required to defend itself in the court chosen by the plaintiff will depend largely on that defendant's connection to the state or state-based district in which the court is located. States serve as the geographic reference point even in federal question cases, where the states provide neither the substantive law governing the dispute, nor the procedural (judicial) apparatus by which that dispute is to be resolved. In sum, the aforementioned protections operate on the assumption that a defendant's connection either to a state or to a state-based judicial district is an all but determinative proxy for that defendant's ability to litigate in the forum chosen by the plaintiff.

This arrangement is curious to say the least. While employing the same forum availability constraints in state and federal courts has been defended as an important constraint on litigant forum shopping,⁸ it is

at a most inconvenient place for an adversary, even at some inconvenience to himself."); *World-Wide Volkswagen*, 444 U.S. at 292 (describing as "always a primary concern" the burden placed on defendants by extra-territorial assertions of personal jurisdiction).

At least one commentator has taken issue with the defendant-centric orientation of the Court's personal jurisdiction doctrine. See R.D. Rees, Note, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U. L. REV. 405 (2003) (arguing that personal jurisdiction jurisprudence denies plaintiffs' due process rights by ignoring the property interests they hold in their causes of action).

⁶ FED. R. CIV. P. 4(k).

⁷ 28 U.S.C. § 1391(b) (2006). The common law doctrine of *forum non conveniens* operates on concerns similar to those underlying Rule 4(k) and venue. However, I have declined to engage in an extended discussion of the doctrine for two reasons, both of which stem from this Article's focus on domestic federal question litigation. First, *forum non conveniens* is of little continuing importance to domestic litigation. See *infra* note 122 and accompanying text. Second, questions of whether a sovereign government has power over a litigant are logically antecedent to, and when they are unsettled tend to predominate, questions of how that power is used once its legitimacy is established. See discussion *infra* Section I.B.1. This Article is concerned not with exploring the attachment of sovereign federal power over litigants, but with the effect that the invocation of such power has on the ability of parties to participate in litigation. As the relevance of the *forum non conveniens* doctrine is confined almost entirely to situations involving foreign venues, its nuances fall largely beyond the scope of this Article. That being said, the doctrine does provide instructive insights into potential alternatives to the current domestic federal forum regime. Accordingly, the relevance of the doctrine is confined almost entirely to situations involving a foreign venue. Those insights are discussed in Section III.

⁸ Proponents of this position argue that creating federal forum selection rules that are not based in some fashion on state connections would provide litigants with additional opportunities to shop, unfairly, for more favorable substantive law. In federal question cases, a plaintiff would be free to file its lawsuit in a previously unavailable federal district court where the state's substantive law provides additional or more favorable causes of action. The federal district courts

somewhat doubtful that fears of forum shopping are sufficiently important to override meaningful participation concerns where the two may conflict.⁹ More importantly, whether a defendant (or a plaintiff, for that matter) is capable of meaningfully participating in litigation in a particular forum requires a robust assessment of its financial and logistical circumstances. The notion that gauging a defendant's connection to any particular geographic location adequately answers this question is dubious at best.

Surprisingly few attempts have been made to scrutinize the geographical assumptions on which federal service of process and venue operate, or to assess how effectively these federal forum selection provisions detect and address the instances in which a plaintiff's forum choice threatens a defendant's right of meaningful participation. While others have pointed out, for instance, the problems engendered by focusing the federal personal jurisdiction inquiry on whether a defendant is served with process inside or outside of a state,¹⁰ few have

could then exercise supplemental jurisdiction over these state claims. *See, e.g.*, Linda J. Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 587 (1991) ("Given the broad opportunities for forum shopping within the federal system, jurisdictional rules serve a dual purpose. First, they facilitate the selection of an appropriate forum in terms of convenience and other litigation values, and second, they function as the disguised regulator of choice-of-law power. . . . However, with regard to the impact on choice of law, a nationwide service rule would exacerbate forum shopping since a litigant would search for the forum with the most favorable choice-of-law rules.").

⁹ The Supreme Court has repeatedly asserted the central importance of meaningful participation (*see supra* note 1) whereas it has declined to treat forum shopping with anything approaching the same reverence. In *Keeton v. Hustler Magazine, Inc.*, the Court described the petitioner's opportunistic procession through several state court systems as follows:

Initially, petitioner brought suit for libel and invasion of privacy in Ohio, where the magazine was published. Her libel claim, however, was dismissed as barred by the Ohio statute of limitations, and her invasion of privacy claim was dismissed as barred by the New York statute of limitations, which the Ohio court considered to be "migratory." Petitioner then filed the present [New Hampshire] action in October, 1980.

465 U.S. 770, 772 n.1 (1984). Though the Court readily acknowledged the petitioner's obvious forum shopping—describing it as a "successful search for a State with a lengthy statute of limitations"—the Court refused to dismiss her case because of it. In the Court's words, the petitioner's litigation strategy was "no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations." *Id.* at 779. This is not to say that the Court has never expressed disapprobation for forum shopping. In *Ferens v. John Deere Co.*, it listed the prevention of "creat[ing] or multiply[ing] opportunities for forum shopping" as one of the reasons for its decision in *Van Dusen v. Barrack*. 494 U.S. 516, 523 (1990). The Court nevertheless approved the forum shopping in that case. *See* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1608 n.103 (1992).

¹⁰ *See, e.g.*, Lindy Burris Arwood, *Personal Jurisdiction: Are the Federal Rules Keeping Up with (Internet) Traffic?*, 39 VAL. U. L. REV. 967, 996-97 (2005) (arguing that technological advancements have made state borders an ineffective proxy for federal forum fairness); Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1121-22 (1993) ("The Reporters take the position that 'state boundaries cannot be used as a proxy for fairness in the Fifth Amendment

thoroughly interrogated that focus to uncover the precise reasons for its inadequacies.¹¹ As importantly, the general federal venue statute has not been scrutinized sufficiently to uncover the negative implications of its state-centered assumptions.

It is the assertion of this Article that such scrutiny reveals two fundamental problems. First, reliance on a defendant's connections to a state or state-based forum as the primary proxy for federal forum fairness fails to gauge adequately that defendant's actual capacity to litigate in that forum. By focusing on these connections, Rule 4(k) and venue call for information that provides a poor proxy for the inconvenience or burden a defendant may endure by litigating in a particular place, which leads to decisional inaccuracy. The Supreme Court has at least implicitly expressed its discomfort with this one-dimensional fairness approach in its attempts to modify the law of personal jurisdiction on which Rule 4(k) is based.¹² In addition to testing a defendant's "minimum contacts" with the forum, courts must now undertake a multi-pronged "reasonableness" calculation which purports to provide a more accurate fairness decision by balancing the interests of the defendant with those of the plaintiff and the forum state.¹³ However, the Court has not eschewed its fixation on defendant-state connections. The result is that the law of federal forum fairness has become increasingly complicated and more difficult for the courts to apply, while simultaneously failing to refocus on information that more accurately approximates a defendant's forum-related logistical burdens.

This leads to the second problem. The methods by which the courts implement federal forum fairness principles—Rule 4(k) and venue—have been under-theorized given the informational

context' and that 'crossing state boundaries does not accurately measure the practical degree of hardship or inconvenience to litigants.' If state boundaries are indeed irrelevant under Fifth Amendment analysis, 'the actual hardship imposed should guide the . . . Panel in deciding whether a particular litigant should be exempt from transfer for consolidation.'" (quoting Complex Litigation Project (Proposed Final Draft, ALI Apr. 5, 1993)); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068.1 (3d ed. 2008) ("As a practical matter, however, state lines could not have provided an accurate measure of the burdens that would be imposed on a defendant by requiring him to defend an action in a particular forum. There is nothing inherently burdensome about crossing a state line."); cf. Casad, *supra* note 9, at 1596 ("Tying the federal court's jurisdiction to the amenability standards of the state in which the court sits undermines a purpose for which Congress granted original federal question jurisdiction to the federal courts: to provide a forum for the protection of federally created rights that is free from irrelevant procedural restrictions operating in state courts.").

¹¹ See, e.g., Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 44-49 (1984) (setting out several of the difficulties involved in relying on state boundaries as proxies for personal jurisdiction fairness, but advocating their use nonetheless).

¹² See *infra* notes 54-66 and accompanying text.

¹³ See *infra* notes 54-59 and accompanying text.

requirements of accurately gauging a defendant's capacity to litigate in a particular forum. The current decisional mechanism is court-centric; parties submit information to the court regarding the defendant's connections to the state or state-based district in which the court is located. Increasing the informational intensity of the fairness inquiry would cause a reallocation of already scarce judicial resources, with the attendant negative effects on decisional accuracy. Accordingly, different decisional mechanisms as well as more granular information are needed to more accurately gauge a defendant's ability to participate meaningfully in litigation filed in a plaintiff-chosen forum.

This Article scrutinizes the information gathering and assessment challenges presented by Rule 4(k) and the general federal venue statute. While the common approach to these challenges has been simply to refine the rules to better assess a defendant's connections to the forum, this Article takes an analytically distinct approach by scrutinizing the assumptions upon which these rules are based and analyzing their impact on the process of answering the inconvenience and burden question. In so doing, it points to the somewhat counterintuitive possibility that the purpose underlying these rules may be better served by reserving a secondary decisional role for the courts, while either centralizing the information gathering and assessment function for all federal cases, or requiring parties to use their privately-held information to identify and agree upon the place of trial prior to judicial involvement.

Section I delineates the geographically oriented litigation model on which Rule 4(k) and venue are based. Section II utilizes a three-prong rule-precision framework to demonstrate how focusing federal service and venue rules on state connections leads to unreliable forum fairness determinations and creates perverse incentives for plaintiffs and defendants alike. Section III outlines the principles of two alternative approaches to the status quo, in which a centralized rule-making body identifies and assesses the information relating to the forum fairness inquiry or, alternatively, parties use their privately held information regarding their respective motivations and resources to agree on the place of trial. Both approaches de-emphasize the federal judiciary's traditional role of identifying, gathering, and evaluating the indicators of defendants' litigation capacity.

I. THE STATE-CENTRIC MEANINGFUL PARTICIPATION MODEL

A. *The State-Centric Federal Court System*

The notion that answering a lawsuit in a distant or inconvenient

location substantially undermines a defendant's ability to mount an adequate defense is as old as the country itself; it has influenced both the legal doctrines that define the territorial reach of the federal courts and the structure of the federal judiciary. Those members of the First Congress who set out to create the federal court system were keenly aware that their constituents were "accustomed to receive justice at their own doors in a simple form,"¹⁴ and repeatedly were warned of the dangers that could attend a geographically expansive national judiciary.¹⁵ Three provisions incorporated into the Judiciary Act attempted to calm these fears. First, the federal trial courts were organized into districts based exclusively on then-existing state boundaries.¹⁶ State lines have remained the basis for federal judicial districts since that time with three exceptions.¹⁷ Second, service of process on a defendant was effective only if that service issued from the district in which the defendant resided or, alternatively, if it issued from the district in which the defendant was actually present when served.¹⁸ Third, civil trials could be held only in the district from which service had issued.¹⁹ These provisions had the effect of substantially narrowing the number of available federal trial sites. Defendants could be sued only in two locations—their home district or the place in which they were physically present at the time of service—thus reducing the frequency with which they would have to defend suits away from home.

¹⁴ 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 28 (Maeva Marcus & James R. Perry eds., 1992) [hereinafter DOCUMENTARY HISTORY].

¹⁵ Critics of the bill setting out the plan for the national judiciary repeatedly intimated fears that it would allow a defendant to be taken "from his house, friends and connexions, to a distant spot, where he is deprived of every advantage of former character, of relations and acquaintance." *Id.*; see also 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS TO BEGINNINGS 460 (1974) (describing the view of Robert Treat Paine, attorney general of Massachusetts, who felt that "requir[ing] a defendant to answer 'at a distance' would be a greater oppression of the individual than any from which liberation had been expected by the Revolution").

¹⁶ Not everyone agreed with the state-based approach to organizing the federal judiciary. Alexander Hamilton, for example, proposed splitting the country into "four or five or half a dozen districts," with a federal court assigned to each one "in lieu of one in every state." THE FEDERALIST PAPERS 81 (Isaac Kramnick ed., Penguin Books 1987) (1788). Of course, this proposal ultimately was rejected. Section 2 of the Act provided for thirteen judicial districts, one for each of the eleven states, and one for each of the territories that would eventually become the States of Maine and Kentucky. See Judiciary Act of 1789, ch. 20, § 2 (1789).

¹⁷ First, the Judiciary Act of 1801, ch. 4, 2 Stat. 89 (1801), created a district of Potomac, which covered a portion of Virginia, a portion of Maryland, and all of the District of Columbia. This was quickly repealed by the Judicial Reform Act, ch. 8, 2 Stat. 132 (1802). Second, Yellowstone National Park currently straddles the borders between Wyoming, Montana, and Idaho, but the entirety of the park is included in the District of Wyoming. Third, the District of Hawaii includes islands that are not part of the state. See 13 WRIGHT & MILLER, *supra* note 10, § 3505 n.3; see also Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675, 678 (2005) (citing 28 U.S.C. § 131 (2000)).

¹⁸ Judiciary Act of 1789, ch. 20, § 11 (1789).

¹⁹ *Id.*

“In light of the limited mobility of 18th century society, the Judiciary Act ensured that most defendants were not required to respond to private civil litigation instituted in a faraway place.”²⁰ To further ensure localized federal adjudication, the Judiciary Act also required federal trial courts to convene in multiple cities within a given state,²¹ though this practice was eventually abandoned.²²

B. *Federal Service of Process*

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, the various Conformity Acts²³ passed by Congress required federal courts to follow the procedures of their state counterparts in most actions at law.²⁴ While state rules were not controlling on questions relating to the territorial reach of effective federal service,²⁵ federal practice regarding effective service of process hewed closely to the rigid territorialism of the Judiciary Act.²⁶

²⁰ Fullerton, *supra* note 11, at 34.

²¹ See GOEBEL, JR., *supra* note 15, at 471. Of course, concerns with distant litigation were not the only ones with which the First Congress contended when mapping out a federal judicial system. Tensions regarding the creation of the judiciary mirrored general tensions regarding the balance of power between the federal and state governments. Federalists and Anti-Federalists heatedly debated the potentially reductive impact that a powerful federal judiciary could have on state judicial authority. Moreover, many feared the cost of maintaining a federal court system. The already debt-ridden state governments could ill afford the maintenance of a redundant court system. One of the more prominent proposals (which was ultimately rejected) sought to address both concerns by recommending that the pre-existing state courts serve as federal trial courts. See DOCUMENTARY HISTORY, *supra* note 14, at 27. This would have allowed states to retain near-exclusive power over the judicial function of government, and would have dramatically reduced the expense of the federal plan. As a corrective measure for state error or abuse, appeal to the United States Supreme Court could be provided. *Id.*; see also Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1491.

²² See generally David Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007) (discussing history of “circuit riding” by Supreme Court justices).

²³ For a brief history of the Conformity Acts, the first of which was referred to as the Process Act of 1789, see 4 WRIGHT & MILLER, *supra* note 10, § 1002.

²⁴ The federal courts were under no obligation to follow state procedures in equity or admiralty cases. See *id.*

²⁵ See 20 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. DESKBOOK § 64 & n.11 (2007) (citing *Munter v. Weil Corset Co.*, 261 U.S. 276 (1922); *S. Pac. Co. v. Denton*, 146 U.S. 202 (1892)); see also George H. Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504, 507 n.8 (1935) (“State procedure regulating service of process does not control the Federal courts on the question of whether or not jurisdiction has been acquired.”).

²⁶ See, e.g., *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925) (“Under the general provisions of law, a United States District Court cannot issue process beyond the limits of the district . . . [a]nd a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district.”) (citation omitted); *Toland v. Sprague*, 37 U.S. 300, 327 (1838) (“Whatever may be the extent of their jurisdiction over the subject matter of suits, in respect to persons and property, it can only be exercised within the limits of the [federal judicial] district. Congress might have authorized civil process from any circuit court to have run into any state of

Despite the generally liberalizing effect that the Federal Rules had on federal practice, effective service in the federal trial courts continued to be governed by a rigid territoriality that made their reach “either narrower than or, at best, co-extensive with that of the courts of the state in which the federal court was sitting.”²⁷ Original Rule 4(f) limited effective service to “the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that State.”²⁸ After *International Shoe Co. v. Washington*²⁹—in which the Supreme Court relied on the Fourteenth Amendment’s Due Process Clause to dramatically expand the reach of state court jurisdiction to out-of-state defendants with certain “minimum contacts” with the forum state—many states enacted long-arm statutes extending the jurisdictional reach of their courts to the fullest extent permitted by the decision.³⁰ Federal courts quickly followed suit by relying on the minimum contacts test to determine the geographic limits of service under the Federal Rules, and thereby expanded those limits beyond the confines of their respective judicial

the Union. It has not done so.”); *Picquet v. Swan*, 19 Fed. Cas. 609, No. 1134 (C.C.D. Mass. 1828) (holding that the federal judiciary’s “very organization” prevented a writ of foreign attachment from conferring in personam jurisdiction on the Circuit Court of Massachusetts) (Story, J.); *Ex Parte Graham*, Fed. Cas. 911, No. 5657 (C.C.D. Pa. 1818) (“The absence of [the power to issue process outside of a federal judicial district] would seem necessarily to result from the organization of the courts of the United States.”) (Washington, C.J.); *id.* (“[D]ivision and appointment of particular courts, for each district, necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden.”) (Washington, C.J.). There were exceptions, of course, as several statutes allowed federal courts to issue process throughout the states in which they were located in specified circumstances. See Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure Under Rule 4(c)*, 73 VA. L. REV. 1183, 1245 n.352 (1987).

²⁷ 4 WRIGHT & MILLER, *supra* note 10, § 1068.1 (citing *Robertson*, 268 U.S. 619). This limitation did not come as a result of constitutional necessity. To the contrary, Congress has the discretion to define the territorial reach of federal service of process in all cases heard by the district courts, whether diversity or non-diversity. See *Robertson*, 268 U.S. at 623 (discussing congressional legislation that permitted service outside the federal district of the issuing court); *Toland*, 37 U.S. at 327 (“Congress might have authorized civil process from any circuit court, to have run into any state in the Union.”); *cf.* *Mariash v. Morrill*, 496 F.2d 1138, 1143 n.6 (2d Cir. 1974) (“Congressional power to authorize nationwide service of process in cases involving the enforcement of federal law is beyond question.”).

²⁸ TEXT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURT OF THE UNITED STATES, 1 F.R.D. LXIII, LXXIV-LXXXVI (1938).

²⁹ 326 U.S. 310 (1945).

³⁰ Many states passed nonresident motorist statutes to allow their courts to exercise personal jurisdiction over certain out-of-state defendants. “A standard type of state nonresident motorist statute permit[ed] initiation of an action against the nonresident defendant by serving process upon an official within the state (sometimes called the defendant’s ‘agent’ for receipt of process), corresponding notice being given to the defendant by mail or otherwise in his home state.” Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 620 (1964). Several states also passed general long-arm statutes “that based jurisdiction on certain acts or minimum contacts; these statutes usually required direct service on the out-of-state defendant.” Sinclair, *supra* note 26, at 1196 & n.65 (citing Illinois and Wisconsin long-arm statutes).

districts.³¹ This remains the case under current Rule 4(k), which replaced original Rule 4(f).³² While Rule 4(k) provides several exceptions, territorial effectiveness of federal process in the vast majority of cases, both diversity and non-diversity, is determined by “the jurisdiction of a court of general jurisdiction in the state where the district court is located.”³³ As a result, the territorial reach of federal service is determined by state long-arm statutes and the minimum contacts analysis, which gauges the reach of a state court’s personal jurisdiction.³⁴

1. The Structure of the Minimum Contacts Test

The Court often refers to an “individual liberty interest” when applying the minimum contacts test to determine a state court’s personal jurisdiction over a defendant. While some commentators argue (perhaps justifiably) that the Court has failed to provide the guidance needed to understand the precise nature and scope of this interest,³⁵ its

³¹ See, e.g., *Winkler-Koch Eng’g Co. v. Universal Oil Prods. Co.*, 70 F. Supp. 77, 84 (S.D.N.Y. 1946); *Smith v. Hall*, 79 F. Supp. 473, 475 (N.D. Tx. 1948).

³² Original Rule 4 has been revised multiple times since its adoption in 1938. See Sinclair, *supra* note 26, at 1194-97. The current version of Rule 4(k)(1), entitled “Territorial Limits of Effective Service,” states:

1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

FED. R. CIV. P. 4(k)(1). Apart from subsection 4(k)(1)(A), subsection 4(k)(1)(C), which addresses the territorial reach of federal district courts where Congress has provided for nationwide service of process, has been the subject of significant scholarly attention. See, e.g., Casad, *supra* note 9; Fullerton, *supra* note 11.

³³ FED. R. CIV. P. 4(k)(1)(A).

³⁴ A simple example will outline the pertinent mechanics of this analysis. Assume that A, a federal inmate, files a 42 U.S.C. § 1983 action against B, the warden of his prison, for inadequate medical treatment. See, e.g., *West v. Atkins*, 487 U.S. 42 (1988). B is an Arizona resident, but A files his lawsuit in the Federal District Court for the District of California. Process is sent to B in Arizona by first-class mail. In order to determine whether it has jurisdiction over B, the California district court must: (1) determine whether § 1983 permits nationwide service of process pursuant to Rule 4(k)(1)(C) and, if it does not; (2) apply the California long-arm statute to determine whether it reaches B, and; (3) apply the minimum contacts test to determine whether exercising personal jurisdiction over B would violate B’s due process rights. Here, § 1983 does not authorize nationwide service of process, see, e.g., *Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 385 (5th Cir. 2008), and the California long-arm statute is co-extensive with the minimum contacts inquiry. In other words, the California legislature has allowed its courts to extend their territorial reach to the limits of the Due Process Clause. CAL. CIV. PROC. CODE § 410.10 (West 2008).

³⁵ See Walter W. Heiser, A “Minimum Interest” Approach to Personal Jurisdiction, 35

decisions do inform us that it is grounded in the Due Process Clause, and that it protects the individual from “being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’”³⁶ The Court’s due process jurisprudence outside of the personal jurisdiction context also sheds some light on the matter, intimating that “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”³⁷ A necessary part of this “opportunity” is the ability to reach the forum in which the litigation is taking place. Taken together, these decisions place in fuller context the function of the minimum contacts test, as described by the Court in *World-Wide Volkswagen Corp. v. Woodson*:³⁸

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it 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.³⁹

Accordingly, two distinct conceptions of the liberty interest protected by the minimum contacts test emerge from the cases: an Obligation Interest and a Participation Interest.

WAKE FOREST L. REV. 915, 932 (2000) (“Neither *Insurance Corp. of Ireland* nor more recent Supreme Court [personal jurisdiction] decisions further define this [individual liberty] right, except to indicate it is one that may be waived by the defendant. Indeed, beyond the recognition that it is a personal right of the defendant, the term ‘individual liberty interest’ lacks normative content.”).

³⁶ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (“The Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’”) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (Brennan, J. concurring) (“‘The restriction on state sovereign power described in [*World-Wide Volkswagen*] must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.’”) (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982)).

³⁷ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quote and citation omitted); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

³⁸ 444 U.S. 286 (1980).

³⁹ *Id.* at 291-92; see also *Ins. Corp. of Ireland*, 456 U.S. at 702-03 n.10 (reiterating that the minimum contacts test protects defendants against litigating in inconvenient and burdensome forums, and clarifying that the test is based on the defendant’s “individual liberty interest,” not on concerns for state sovereignty or federalism); see also *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 944 (11th Cir. 1997) (recognizing the Supreme Court’s refinement of the basis of the minimum contacts test in *Insurance Corp. of Ireland*); Heiser, *supra* note 35, at 932 (“[P]resumably the Court views this liberty interest as protecting the defendant against the burdens of litigating in a distant or inconvenient forum—the function performed by minimum contacts as identified by the Court in *World-Wide Volkswagen* that was not rejected in *Insurance Corp. of Ireland*.”) (internal quote and citation omitted).

The Obligation Interest permits the defendant to choose those states with which it wishes to establish connections that may subject it to legal obligation. Whether the defendant has made such a choice is determined through application of the minimum contacts test, which scrutinizes its interactions with the persons or property within the state's territorial limits.⁴⁰ The Obligation Interest gives the defendant the right to argue that it lacks minimum contacts with—and hence owes no legal obligation to—the state that seeks to exercise jurisdiction over it. As a practical matter, the Obligation Interest provides the menu of territories from which the plaintiff must choose and, presumably, reduces the plaintiff's opportunity to select the forum that affords it the most favorable place of trial.⁴¹

In order to better scrutinize the intentionality of the out-of-state defendant's connections to the putative forum state, the Supreme Court has repeatedly attempted to refine (and in the process has significantly complicated) the minimum contacts analysis by adding several supplemental tests of both general and specific application. With respect to the test of general application, the Court has adopted the organizing concepts of general and specific jurisdiction.⁴² Under the former, substantive and pervasive contacts with the forum state can subject a defendant to litigation there, regardless of whether those contacts relate to the lawsuit brought against it.⁴³ Under the latter, continuous but limited contacts, or even a single act, can support personal jurisdiction so long as the plaintiff's cause of action against the defendant substantially relates to those contacts.⁴⁴ In this latter case, the

⁴⁰ It is not the goal of this Article to analyze or evaluate the relationship between a defendant's voluntary decision to interact with the persons or things in a foreign state and the power inherent in the state to call that defendant to account because of that decision. A rich literature has been developed on this subject. See, e.g., Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987).

⁴¹ See Heiser, *supra* note 35, at 934.

⁴² Development of the general specific jurisdiction framework is attributed to the seminal article written by Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); see also Symeon C. Symeonides, *Arthur Taylor von Mehren: A Gentle Giant*, 53 AM. J. COMP. L. 531, 534 (2005) ("The article helped reorient and rejuvenate American thinking about adjudicatory jurisdiction by . . . developing a distinction between general and specific jurisdiction, which has been adopted by the United States Supreme Court . . .").

⁴³ See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (concluding that Ohio state court could either accept or decline personal jurisdiction over foreign corporation, where all of corporation's activities were conducted in Ohio but all events giving rise to the underlying dispute took place outside of Ohio); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984) ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant.").

⁴⁴ See *McGee v. Int'l Ins. Co.*, 355 U.S. 220, 222-24 (1957) (sustaining personal jurisdiction where claim arose out of a single solicitation to renew an insurance policy sent by mail to the plaintiff in the forum state); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-97 (1985) (upholding jurisdiction over defendant in franchise agreement dispute where plaintiff and

defendant's minimum contacts must be purposeful; unintended contacts between a defendant and the forum state cannot constitute a sufficient basis on which to command that defendant's appearance.⁴⁵ Regardless of the method by which the Court gauges the defendant's purposeful availment (stream of commerce, effects of tortious conduct, Internet interactivity, etc.) for the purposes of the Obligation Interest, underneath it lies an implied but largely unelaborated notion of "just deserts," in which the defendant deserves to be called to answer in the forum state if its alleged actions harmed the persons, things, or interests protected by that state.⁴⁶ Predicated on the notion of intentional

defendant entered into a franchise agreement governed by Florida law, defendant had never visited Florida, co-defendant attended a training session in Florida, and both defendant and co-defendant communicated via mail and telephone with plaintiff's Florida headquarters).

⁴⁵ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) ("The 'substantial connection' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*." (quoting *Burger King*, 471 U.S. at 476)). The requirement of "purposeful availment" thus directs courts to infer from the defendant's interactions with the forum state that defendant intended to subject itself to the judicial power of that state. The courts have promulgated several context-specific tests in an attempt to better determine the defendant's intent in common, recurring factual circumstances. See, e.g., *World-Wide Volkswagen Corp.*, 444 U.S. at 298 (indicating that jurisdiction is justified over manufacturers or retailers who place their products into the "stream of commerce" with the expectation that those products will be purchased by consumers in the forum state); *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding that the effect of intentionally tortious conduct in the forum state could serve as a basis for personal jurisdiction); *Zippo Mfg. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (formulating a "sliding-scale" of interactivity between Internet websites and their visitors to adapt prior purposeful availment jurisprudence to information exchanged over the Internet). With respect to the so-called *Zippo* test, courts have expressed skepticism as to its necessity. See, e.g., *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154 (W.D. Wis. 2004) (concluding that "traditional" jurisdictional tests, not "interactivity," are sufficient to determine jurisdiction in Internet cases).

⁴⁶ The Court makes this point most explicitly in *World-Wide Volkswagen*, in which it explained the reason that a defendant must have purposely set out to "conduct[] activities within the forum State":

[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of the injury to its owner or to others.

444 U.S. at 297. Justice Scalia articulated a similar idea, couched in the language of personal responsibility, in *Burnham v. Superior Court*:

The only reason for charging Mr. Burnham with the reasonable expectation of being subject to suit [in California] is that the States of the Union assert adjudicatory jurisdiction over the person, and have always asserted adjudicatory jurisdiction over the person, by serving him with process during his temporary physical presence in their territory. That continuing tradition, which anyone entering California should have known about, renders it "fair" for Mr. Burnham, who voluntarily entered California, to be sued there for divorce—at least "fair" in the limited sense that he has no one but himself to blame.

495 U.S. 604, 624-25 (1990) (emphasis added). Judge Becker, in his influential opinion in *Oxford First Corp. v. PNC Liquidating Corp.*, made a similar observation when discussing Congress's justifications for permitting nationwide service of process in certain cases:

contacts, the more significant or contextually relevant the contact a defendant has with a state, the more just or fitting it is to bring it into court there.

Once a court concludes that a defendant's Obligation Interest will not be undermined by exercising jurisdiction over it, the second conception of the defendant's individual liberty interest, the Participation Interest, comes into play. The Participation Interest complements the Obligation Interest by basing its logistically oriented focus on the state to which the defendant, by virtue of its voluntary actions, has obliged itself to return in the event of a civil dispute. Thus, a defendant who has business dealings in Florida may be called to account there, unless the Florida litigation is so burdensome that the defendant has little opportunity to participate meaningfully in the suit. In this respect, the Participation Interest tempers the Obligation Interest; the defendant's capacity to appear, to be heard, and to affect the proceedings and the outcome are not subsumed by the existence of a voluntarily undertaken obligation to return to Florida.⁴⁷ As a practical matter, the Participation Interest checks the tactical advantages that may otherwise be available to the plaintiff as a result of the defendant's interactions with potential forum states.⁴⁸ Without some restraining mechanism, the plaintiff would have a broader choice of forums and, presumably, the opportunity to select a forum that could undermine the defendant's ability to participate meaningfully in the lawsuit.

[Congress] may well have made an implicit finding . . . that the subject matter of such types of litigation had such an impact upon the national economy that parties to such litigation would, by virtue of having involved themselves in the regulated area, have to suffer the consequences of being sued in a distant place . . .

372 F. Supp. 191, 202 (E.D. Pa. 1974). For a thoughtful meditation on the "just deserts" theory of personal jurisdiction and the minimum contacts test, see Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189 (1998).

⁴⁷ *Compare Burger King*, 471 U.S. at 476-77 (holding that Michigan-based franchisee's ability to defend civil suit would not be unconstitutionally compromised by litigating in Florida) with *Asahi Metal Indus.*, 480 U.S. at 114 (holding that litigation in California would impose unconstitutional burden on Japanese valve stem manufacturer).

⁴⁸ The Court has struggled to describe the precise balance to be struck between the Obligation Interest and the Participation Interest. To the extent that it has expressed its views on how the two interact, its explanations have been rather unsatisfactory. In *World-Wide Volkswagen* the Court asserted that a corporate defendants could, by recognizing that their actions affecting the persons or things within a state could result in an obligation to be sued in that state, could lessen its burden of returning to litigate there "by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297. Essentially, the Court concluded that defendants should either make provision for the expense ahead of time or forgo potentially lucrative activities in the forum state. Such a policy effectively nullifies the courts' role in protecting the Participation Interest by assuming that defendants can always provide that protection themselves. Additionally, such a stance also raises distributional concerns as it is far from clear whether businesses and individuals are similarly situated to procure insurance. Individuals are almost certainly not in any position to pass expected costs on to customers.

The Participation Interest therefore involves the defendant's right to be protected from some measure of the inconvenience and burden that may be caused by being haled to a distant state to answer legal claims. Its predominant concern is preventing logistical disadvantages imposed on the defendant by virtue of the plaintiff's choice of forum. Its underlying intuition is that the prototypical plaintiff, by filing suit in a state other than the one in which the defendant resides or can be found, may be seeking logistical advantages unrelated to its legal entitlements. By protecting the defendant from such overreaching, the Participation Interest also affirms one of the core values of the adversarial process, namely, to uncover the "truth" underlying disputes and to ensure that that truth is the basis for judicial decision-making.⁴⁹

The Court has never exhaustively enumerated the burdens and inconveniences that constitute this conception of the defendant's individual liberty interest.⁵⁰ It has nevertheless identified a handful of such burdens and inconveniences which, harkening back to the creation of the federal judiciary, mirror the concerns taken into account by the First Congress.⁵¹ They include the challenges of travel to the forum state, hiring an attorney, participating in discovery, and paying the various litigation costs and fees associated with litigating away from home.⁵²

While the minimum contacts test performs a state identification

⁴⁹ See *Matthews v. United States*, 485 U.S. 58, 72 (1988) (White, J. dissenting) ("[T]he very nature of a trial [i]s a search for truth.") (quoting *Nix v. Whiteside*, 475 U.S. 157, 166 (1986)); Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975) (arguing that the adversarial model of adjudication is, on the whole, truth-promoting). *But see* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (arguing that the adversarial process encourages a partisanship amongst lawyers that undermines the search for factual truth).

⁵⁰ See Heiser, *supra* note 35, at 932.

⁵¹ See *supra* notes 14-15 and accompanying text.

⁵² See Heiser, *supra* note 35, at 932 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985)). The Court also articulated this concern in *Asahi*, observing that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." 480 U.S. at 114. See also Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 250 (1991) ("[T]he fairness to the defendant of any particular choice of forum . . . depends only on the fairness of subjecting the defendant to the onerous and expensive process of litigation at that particular geographic location."); Fullerton, *supra* note 20, at 41 (burden of out-of-state litigation includes "(1) travel by parties, witnesses, attorneys, and staff to and from the forum for court appearances, discovery, and other trial preparations, (2) lodging and meals for these individual while they are away from home, (3) transportation of documents and exhibits, (4) time the defendant must spend away from work due to the time consumed by travel, (5) missed business opportunities at home, and (6) retention of local counsel.") (citing Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1325 (1983)). Other "non-financial factors might also make litigation in one federal court rather than another extremely burdensome to a defendant." *Id.* These include the willingness of witnesses for the defendant to travel to the trial site, limitations on compulsory process over witnesses or third-party defendants not subject to the court's jurisdiction. *Id.* at 41-42.

function for purposes of the Obligation Interest, it also serves a burden identification function for purposes of the Participation Interest. Measuring a defendant's contacts with a particular state determines the extent to which that defendant will be burdened by litigating there.⁵³ Utilizing the minimum contacts test in this way reveals a key assumption underlying the Court's conception of the Participation Interest; the potentially unconstitutional burdens placed on a defendant by a plaintiff's choice of forum (travel, lodging, transport or evidence, appearance of witnesses, etc.) emanate from largely geographic considerations. Stated differently, a plaintiff can secure an unconstitutional degree of tactical advantage over the defendant simply by choosing the place of trial. The defendant's contacts with a state thus serves as a crucial proxy for whether that defendant can meaningfully participate in the lawsuit brought against it.

This is not to say that the Court has limited itself to the Obligation Interest and the Participation Interest in analyzing the "individual liberty interest" at stake in questions of personal jurisdiction. The Court instead balances these interests against a competing set of plaintiff and state interests in the form of a "reasonableness" analysis.⁵⁴ Importantly, these additional reasonableness factors do nothing to improve the accuracy with which courts determine the litigation burden placed on defendants by the plaintiff's choice of trial location, nor are they intended to do so. They instead reflect the Supreme Court's recognition that simply considering the defendant's Participation Interest can have negative consequences on other constituencies—plaintiffs and the state court systems—who have a stake in how forum selection issues are resolved.⁵⁵ The Court therefore balances the "burden on the defendant,"

⁵³ See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (observing that "[a]n 'estimate of the inconveniences' which would result to [defendants] from a trial away from [his] 'home' or principle place of business" is relevant to the minimum contacts inquiry); *Ins. Corp. of Ireland*, 456 U.S. at 703 (noting that one of the functions of the minimum contacts test is to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum" (quoting *World-Wide Volkswagen*, 444 U.S. at 291-92)).

⁵⁴ See *World-Wide Volkswagen*, 444 U.S. at 292.

⁵⁵ Such broad, overall welfare calculations are a familiar feature of the Court's constitutional jurisprudence, whether in the criminal or civil context. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 591 (2004) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."); *Atwater v. City of Lago Vista*, 532 U.S. 318, 362-63 (O'Connor, Stevens, Ginsburg, and Breyer, JJ. dissenting) (arguing that a criminal defendant's individual liberty interest must be weighed against the reasonableness of a warrantless misdemeanor arrest); *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (observing that the Court has previously balanced an individual's liberty interest in refusing sustenance and medical treatment against interests like preventing disease); *Washington v. Harper*, 494 U.S. 210, 220 ("The substantive issue involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum

“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.”⁵⁶ Despite the outward appearances of this test, it does not replace the minimum contacts test as the means by which courts determine the inconvenience and burden that the plaintiff’s choice of forum places on the defendant. Rather, it perplexingly repeats the consideration of those inconveniences and burdens already imbedded in the minimum contacts analysis.⁵⁷ The Court therefore balances the defendant’s Obligation and Participation Interests via the minimum contacts test on the one hand, against myriad plaintiff and state interests on the other.

Unfortunately, the Court has never provided the schematic for the scale that balances the Obligation and Participation Interests on the one hand, and the sundry other “reasonableness” interests on the other. The fairest reading of the Court’s decisions indicates that establishing a defendant’s minimum contacts also establishes a rebuttable presumption that litigating in the putative forum state does not undermine the defendant’s Obligation or Participation Interests.⁵⁸ If offered specific evidence of countervailing considerations, however, the Court might be willing to conclude that maintaining the lawsuit in that forum is inappropriate.⁵⁹

procedures required by the Constitution for determining that the individual’s liberty interest actually is outweighed in a particular instance.”) (citation omitted).

⁵⁶ See *World-Wide Volkswagen*, 444 U.S. at 292.

⁵⁷ Professor Heiser points to the same problem:

Other [“reasonableness” factors], such as the “burden on the defendant,” appear at first blush to have independent meaning but do not withstand closer scrutiny. If the burden on the defendant refers to such concerns as the expense and inconvenience of staging a defense in another jurisdiction, this “reasonableness” factor simply repeats considerations already taken into account in the first level “minimum contacts” inquiry.

Heiser, *supra* note 35, at 926; see also Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1200 (1994) (“Requirements of both minimum contacts and reasonableness count reasonableness twice.”); 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, 709-10 (1983) (“Chief Justice Stone’s calculus [in *International Shoe*] did not measure fairness directly, according to the forum’s convenience to a given defendant, but only indirectly, through measures of defendant-forum contacts designed to ensure that a forum would be at least minimally ‘fair’ as between the parties, even if somewhat inconvenient to the defendant.”); Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 764 (2003) (arguing that the minimum contacts test is nothing more than a basic fairness test).

⁵⁸ See Heiser, *supra* note 35, at 928-29.

⁵⁹ Thus, the Court in *Burger King* suggested that if the defendant has purposely directed its activities at the forum state, jurisdiction is *presumptively* reasonable, and thus it will have to make a “compelling case” that the other reasonableness factors make the exercise of jurisdiction over it unfair. 471 U.S. at 476-77. In *Asahi*, which involved the somewhat different situation of a foreign defendant called to answer in a California court, a majority of the Court concluded that it

While this interpretation provides a vague sense of the relative weights of the interests, and hence a sense of how important the Court regards the Obligation and Participation Interests, it still leaves several important questions unanswered. Which of the several “reasonableness” factors are the most important? Is there even such a hierarchy amongst them? If there is no such hierarchy, by what method can courts predictably identify the relative importance of each factor from case to case? Is the outcome of the assessment translatable, such that it allows for consistent and sensible comparison with the Obligation and Participation Interests, or does it require courts to compare apples with oranges? Finally, and perhaps most importantly, is the institutional competence question—given the information needed to undertake these measurements, are courts even capable of making them in a manner that is not wholly arbitrary?

While the answers to these questions remain shrouded in mystery, one thing is clear: the Court’s movement toward an interest-balancing approach in its personal jurisdiction jurisprudence betrays a preoccupation with outcome accuracy and factual precision. The impetus for the Court’s revision of jurisdictional doctrine came from widespread dissatisfaction with the imprecision of extant personal jurisdiction tests. Judge Learned Hand made the point plain in *Hutchinson v. Chase & Gilbert*,⁶⁰ the jurisprudential progenitor of *International Shoe*. He maligned the crudeness of trying to divine a defendant corporation’s in-state “presence” to determine whether that state has jurisdictional power. “When we say, therefore, that a corporation may be sued only where it is ‘present,’ we understand that the word is used, not literally, but as a shorthand for something else.”⁶¹ The facts for which “presence” was merely a proxy (and a poor one, at that) were “some continuous dealings in the state of the forum; enough to demand a trial away from its home.”⁶² Thus “presence” was intended to serve two informational functions. First, it was meant to identify the forum-specific transactions giving rise to legal proceedings. Second, it was meant to provide some sense of proportion between those transactions and the burdens placed on the corporate defendant by

would be unreasonable to require it to appear in California. 480 U.S. at 112-13. In reaching this conclusion, the Court found not only that “the burden on the defendant in this case [was] severe,” but also that “California’s legitimate interests in the dispute have considerably diminished” because “the plaintiff is not a California resident,” and that “the interests of the plaintiff and the forum in California’s assertion of jurisdiction over Asahi are slight.” *Id.* at 114. Under such circumstances, the Court was “unwilling[] to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.” *Id.* at 115. Accordingly, in a case of slight contacts, severe defendant burden, and minimal forum interest, the Court found jurisdiction to be unreasonable.

⁶⁰ 45 F.2d 139 (2d Cir. 1930).

⁶¹ *Id.* at 141.

⁶² *Id.*

litigating in the state where those transactions took place; where the former outweighed the latter, jurisdiction would be found.⁶³ Accordingly, Hand concluded that the jurisdictional inquiry properly “involv[ed] an estimate of the inconveniences which would result from requiring [a corporation] to defend, where it has been sued.”⁶⁴ As the defendant in *Hutchinson* “ha[d] never done any continuous business in New York,” Hand concluded that its activities “[did] not make it reasonable to impose such a burden on it.”⁶⁵ It was this more factually intensive understanding of personal jurisdiction, which tried to provide a more precise sense of when a corporation is subject to the judicial jurisdiction of the states in which it conducts business, that the Court ultimately adopted in *International Shoe* and all of its subsequent personal jurisdiction cases.⁶⁶

2. The Relationship Between Minimum Contacts and Federal Service of Process

Given that the Court’s minimum contacts inquiry deals exclusively with extraterritorial assertions of judicial power, it is understandable that the twin purposes of the tests have become confused. Since American jurists initially understood state jurisdictional reach to be a function of state sovereignty,⁶⁷ the thrust of the inquiry was never

⁶³ Judge Hand provided no method for converting the values of burden and inconvenience into the values of transactions, or vice versa.

⁶⁴ *Id.*

⁶⁵ *Id.* at 142.

⁶⁶ *International Shoe* hinted at the Court’s movement toward a more fact-intensive, balancing-of-interests approach when it explicitly rejected the idea that determining whether a corporation has sufficient activities within a state to support jurisdiction in the courts of that state is “simply mechanical or quantitative.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Not only would the facts necessary to the jurisdictional inquiry vary somewhat from case to case, the relative values of those facts would differ as well. Put another way, the Court declined to announce a consistent threshold for proportionality amongst all of the factors that it would thereafter consider in the jurisdictional calculus.

⁶⁷ The view is exemplified by Justice Stephen J. Field’s historic opinion in *Pennoy v. Neff*, 95 U.S. 714 (1877). Although *Pennoy* famously (or perhaps infamously) introduced state personal jurisdiction to the Due Process Clause of the Fourteenth Amendment, much of Field’s opinion relied on Justice Joseph Story’s *Commentaries on the Conflict of Laws*, and on the concept of state sovereignty he derived from it, to describe the scope of the state courts’ territorial reach. *See, e.g.*, 95 U.S. at 722 (describing extraterritorial exertions of judicial power without the consent of the foreign sovereign as an “illegitimate assumption of power . . . to be resisted as mere abuse”); *id.* (stating that, except as limited by the Constitution, “every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory”); *id.* (asserting that “it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside the territory, except so far as is allowed by comity”); *see generally* KEVIN M. CLERMONT, *CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE* (1999) (discussing early American personal jurisdiction jurisprudence and its reliance on the law of nations); James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in*

directed toward the selection of trial sites *within* states. Although the Court abandoned state sovereignty as the theoretical foundation for personal jurisdiction in favor of individual liberty embodied in the Obligation and Participation Interests, the application of the inquiry has not materially changed; extraterritorial reach, not intra-territorial reach, has remained its focus. Accordingly, the minimum contacts test requires a geographic touchstone in order to identify the “foreign” sovereign to whom the defendant, by virtue of its conduct, has agreed to answer and to whose territory it must travel.

This is not the situation a federal court faces when it is asked to gauge the territorial reach of process in a domestic federal question case.⁶⁸ When a federal court is asked to determine its power over a domestic defendant in a federal question case, the minimum contacts test cannot be protecting that defendant’s Obligation Interest. The sovereign to which the defendant owes an obligation of appearance is clearly the United States. Put another way, unless a foreign sovereign has a competing jurisdictional claim over the defendant, there can be no legitimate claim that the United States lacks jurisdictional authority. Demonstrating the defendant’s connection to a particular state does nothing to address this question, and so analyzing the defendant’s connection to a particular state for jurisdictional purposes is pointless.

This is not the case, however, with the Participation Interest. Even if the defendant’s Obligation Interest can be protected without application of the state-based minimum contacts test, the question remains whether the plaintiff’s choice of trial site places the defendant at a constitutionally impermissible logistical disadvantage. Accordingly, the only logical purpose for application of the minimum contacts test in the domestic context is the protection of the Participation Interest.

C. *Venue*

Federal service of process rules are not the only means by which the domestic federal defendant’s Participation Interest is protected.

19th Century America, 38 AM. J. COMP. L. 73 (1990) (discussing the work of the Dutch international law scholar Ulric Huber and its influence on early American service of process jurisprudence).

⁶⁸ This point is expressed succinctly by the Second Circuit in *Mariash v. Morrill*:

Indeed, the “minimal contacts” principle does not, in our view, seem particularly relevant in evaluating the constitutionality of in personam jurisdiction based on nationwide, but not extraterritorial, service of process. It is only the latter, quite simply, which even raises a question of the forum’s power to assert control over the defendant.

496 F.2d 1138, 1143 (1974).

Federal venue provisions also address the concern that the plaintiff's forum selection can undermine the defendant's ability to mount an adequate defense. This concern is especially acute where Congress has provided federal courts with expansive territorial power, as is the case with statutes providing for nationwide service of process.⁶⁹ Venue statutes, particularly the general venue statute, purport to resolve this problem by "protect[ing] the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial."⁷⁰

In its original version passed in 1887, and in all of its amendments through 1966, the general venue statute relied on the residence of one or both of the parties, "allowing venue to be laid in, and only in, a district where the plaintiffs or defendants resided."⁷¹ So rigid a venue scheme caused significant difficulties. "The central difficulty with residence as a test for venue is that it bears no necessary relationship to the convenience and fairness of the place of trial in today's society. While in some cases residence may become the controlling factor, other factors, including judicial economy, also enter the determination."⁷²

In 1966 and again in 1990, Congress provided other means by which to identify a permissible venue. Venue can now lie in federal question cases⁷³ "in a judicial district where any defendant resides, if all defendants reside in the same State;"⁷⁴ in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the

⁶⁹ The history of the Federal Interpleader Act is instructive here. Clearly outraged by the prospect of unlimited national service of process under the Act, Representative Andrew John Volstead of Minnesota echoed the fears expressed by members of the First Congress well over one hundred years earlier:

We rebelled against England because she compelled us to go beyond the seas to try our cases, where we could not go without great loss. Why should we now change our policy and insist that a man has no right to try his case at home, no matter how poor or otherwise unable he may be to prosecute his claim at a great distance away from home?

53 CONG. REC. 9444 (1916). Other nationwide service of process statutes were met with similar disapprobation prior to their passage. See Fullerton, *supra* note 11, at 71 (describing debates prior to passage of statutes addressing antitrust, shareholder derivative suits, and securities litigation).

⁷⁰ See *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184 (1979) (emphasis omitted).

⁷¹ See 14D WRIGHT & MILLER, *supra* note 10, § 3805.

⁷² G.W. Foster, Jr., *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 77 (1968). Professors Wright and Kane are more biting in their criticism of the early general venue scheme:

At first glance this scheme might have seemed sensible enough, but on analysis it was difficult to avoid the conclusion that it was entirely irrational. It failed to promote the convenience of the parties, as venue statutes are intended to do, and it overlooked the distinctive functions and opportunities of a federal system of courts.

CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 260 (6th ed. 2002).

⁷³ Subsection 1391(b) applies to civil actions "wherein jurisdiction is not founded solely on diversity of citizenship." 28 U.S.C. § 1391(b) (2006).

⁷⁴ 28 U.S.C. § 1391(b)(1) (2006).

action is situated;⁷⁵ or in “a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.”⁷⁶

Congress has provided additional venue flexibility through several transfer of venue statutes. The most significant of these are sections 1404(a), 1406(a), and 1631 of title 28 of the United States Code. Section 1404(a) “allows transfer to either another district or any division of a district as long as the action ‘might have been brought’ there,” and “presupposes that the district court in which suit was filed is one of proper venue.”⁷⁷ Similarly, section 1406(a) allows transfer to an alternative judicial district or division within a district, but assumes that venue in the transferring court is improper.⁷⁸ Indeed, the Supreme Court has concluded that transfer under section 1406(a) is proper even when the transferring court lacks personal jurisdiction over the action.⁷⁹ Section 1631 also permits transfers “in the interest of justice” if the transferring court lacks jurisdiction, and if the suit could originally have been brought in the transferee court.⁸⁰

Though these revisions have liberalized the criteria for identifying a convenient and manageable federal forum, each continues to rely on connection to territory (in this instance, state-based judicial districts) as the proxy for the defendant’s ability to participate meaningfully in the litigation commenced against it. The statute views the defendant’s logistical disadvantages more or less as a function of geography, though not necessarily of distance. Unlike the minimum contacts test’s protection of the defendant’s Obligation Interest,⁸¹ there is no attempt here to glean the defendant’s intent to be called to account in a particular location through an analysis of its action. Rather, venue functions more like the minimum contacts test’s protection of the

⁷⁵ *Id.* § 1391(b)(2).

⁷⁶ *Id.* § 1391(b)(3). In addition to the general venue statute, there are at least 330 special venue provisions throughout the United States Code. See Am. Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft, app. F at 498-501 (1969). In its proposal to revise the venue scheme in the federal courts, the American Law Institute observed that “many special venue provisions are a needless duplication and could for that reason be repealed.” Additionally, the Institute considered other provisions to be “without any clear-cut pattern,” and thus advocated their repeal, while the remaining provisions involved “special factors that appear to remain valid and should hence be retained.” *Id.*

⁷⁷ 15 WRIGHT & MILLER, *supra* note 10, § 3842.

⁷⁸ *Id.*

⁷⁹ See *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962).

⁸⁰ See 15 WRIGHT & MILLER, *supra* note 10, § 3842. The vagueness with which Congress penned this provision has caused confusion amongst the circuits, with some holding that the section only permits transfer in an absence of subject matter jurisdiction, while others permit transfer in the absence of either personal or subject matter jurisdiction. “Although the federal courts are pretty evenly divided on the subject, the better view appears to be that Section 1631 is limited to subject matter jurisdiction defects and is unrelated to personal jurisdiction or venue.” *Id.*

⁸¹ See *supra* notes 40-46 and accompanying text.

defendant's Participation Interest by operating on two levels. First, whether a particular judicial district is an appropriate venue is determined by identifying the defendant's choice of residence or its "physical" location at the time the plaintiff commences suit. Second, the events or property at issue in the lawsuit can be used to answer the venue question. In this respect, events are reconceptualized into a res to be administered, giving them a localizing physical presence in a manner analogous to real property. The judicial district in which either the "events res" or property is located then determines whether venue is proper.

Though perhaps not apparent at first glance, the transfer-of-venue provisions are as dependent on state connection as the general venue statute. Section 1404(a), "easily the most important of the various federal statutes and rules providing for transfer of a case within the federal system,"⁸² permits a federal district court to transfer any civil action to any other district court, but only if the action "might have been brought" in that transferee court.⁸³ Following the Supreme Court's interpretation of this somewhat ambiguous phraseology in *Hoffman v. Blaski*,⁸⁴ "[t]he federal courts . . . have been almost uniform in accepting . . . that the Section 1404(a) transferee forum must be one in which service of process could have been made and jurisdiction over the person of the defendant acquired."⁸⁵ Moreover, the Court held that neither the defendant's subsequent consent to personal jurisdiction in the transferee court, nor its subsequent consent to accept service there, had any bearing on where the suit initially could have been commenced.⁸⁶ In other words, the transferee court must have had personal jurisdiction over the defendant, and must have been able to serve process on it, "at the time the suit was brought," not when the defendant files its transfer motion.⁸⁷ To hold otherwise would enable the defendant to select the forum giving it the greatest logistical advantage, or enable it to impose on the plaintiff the greatest logistical disadvantage. Thus, eliminating consent from the transfer calculus forestalled the reverse forum shopping that would have undermined one

⁸² 15 WRIGHT & MILLER, *supra* note 10, § 3842.

⁸³ *See id.*

⁸⁴ 363 U.S. 335 (1960).

⁸⁵ 15 WRIGHT & MILLER, *supra* note 10, § 3845.

⁸⁶ *Id.*

⁸⁷ *Id.* & n.14; *see also* Cali v. East Coast Aviation Svcs., Ltd., 178 F. Supp. 2d 276, 282-83 (E.D.N.Y. 2001) (observing that a "'district . . . where [an action] might have been brought' has been interpreted to mean a district where an action might have been brought as of right by the plaintiff as to both venue and jurisdiction at the time the action was filed by the plaintiff."); *Affymetrix, Inc. v. Synteni, Inc.*, 28 F. Supp. 2d 192, 194 n.1 (D. Del. 1998) ("In the District of Delaware, the district courts have traditionally followed the lead that the United States Supreme Court set in *Hoffman v. Blaski*, basing their transfer analysis on only those facts which existed at the time that the complaint was filed.").

of the core purposes for passing the transfer statute in the first instance.⁸⁸ Like section 1404(a), sections 1406(a) and 1631 direct that transfer only be made to a forum that could have entertained the suit at the time of its original filing,⁸⁹ and courts have held that there should be no difference in the way this language is to be interpreted or applied.

As a result of this restriction, the defendant wishing to transfer to a more convenient forum must show that the transferee court could effectively serve it with process which, in turn, requires a showing that the defendant had minimum contacts with the state in which the transferee court sits. Like service of process and venue, transfer of venue is intimately intertwined with state-based territorial referentiality.

II. RULE PRECISION AND THE STATE-CENTRIC MEANINGFUL PARTICIPATION MODEL

As shown in Section I, both federal service of process and venue protect the defendant's Participation Interest by analyzing that defendant's connection to a state or state-based district or the location of the events or property involved in the lawsuit. Accordingly, both service of process and venue assume that focusing on the defendant's connections to the forum in which the plaintiff filed its cases will sufficiently indicate the inconvenience and burden imposed on the defendant by virtue of the plaintiff's choice of trial site. Further, both limit the number of permissible trial sites to those with which the defendant has some relevant, pre-existing connection. In the case of federal service of process, the strength of this connection is then balanced against a variety of interests unrelated to the capacities or needs that should be protected by the defendant's Participation Interest. After setting forth a framework for evaluating the efficacy of each rule, this Section argues that Rule 4(k) and venue do not adequately protect that interest.

A. *A Three-Prong Precision Analysis*

To determine whether federal service of process and venue effectively protect the Participation Interest, we must have a sensible framework for determining whether they function in a way that advances the purpose they are intended to serve. In other words, we must test the precision of these protections. Precision in this sense can

⁸⁸ 15 WRIGHT & MILLER, *supra* note 10, § 3845.

⁸⁹ *See* 28 U.S.C. §§ 1406(a) & 1631 (2006).

be understood to involve three independent factors: uniformity, accessibility, and conformity.⁹⁰ Uniformity refers to whether the operative language of the protections are uniformly understood and accepted by its target audience, i.e., by those who must apply it and abide by it. Uniformity is reduced by significant potential disagreement over the meaning of this language amongst those who are affected by the protections.⁹¹ Accessibility speaks to the ease or difficulty with which these protections can be applied in specific situations.⁹² Put differently, accessibility gauges the costs associated with litigants interpreting and applying the protections in a manner consistent with how a court (the source of binding decisional authority) would do so.⁹³ Rules and standards that litigants can inexpensively apply in a manner that is consistent with judicial application under the circumstances are highly accessible.⁹⁴ Finally, and most importantly, conformity addresses whether these protections lead to the results desired by the rule-maker *ex ante*, whether they fit with underlying norms.⁹⁵ Here, conformity of the Participation Interest protections will turn on the degree to which they identify and reduce the instances in which a plaintiff's forum choice significantly undermines the defendant's ability to affect the outcome of the proceedings.

Problems of uniformity, accessibility, and conformity in both federal service of process rules and the general venue statute create distinct, negative incentive effects on plaintiffs' filing choices. The core purpose of these rules in the domestic federal question context is the protection of the defendant's Participation Interest. Assuming that aggressive forum choices are those that either provide plaintiffs with inordinate non-legal advantages or impose on defendants inordinate non-legal disadvantages, either of which would reduce a defendant's chance of meaningfully participating in a lawsuit, a set of rules calculated to protect the defendant would presumably aim to identify such choices and reduce their frequency. Plaintiffs, however, are more

⁹⁰ The academic literature addressing rule precision is quite extensive. See generally Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 596 (1992).

⁹¹ See Diver, *supra* note 90, at 67 (describing the related concept of "transparency" in the context of administrative regulations) (citing Jerry Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 901 (1981)).

⁹² See *id.* (describing the related concept in context of administrative regulations) (citing G. TULLOCK, *TRIALS ON TRIALS: A PURE THEORY OF LEGAL PROCEDURE* (1980); Broadly, *In Defense of Presumptive Rules: An Approach to Legal Rulemaking for Conglomerate Mergers*, in *THE CONGLOMERATE CORPORATION: AN ANTITRUST LAW AND ECONOMICS SYMPOSIUM* 249, 255-60 (1981)).

⁹³ See *id.*; Kaplow, *supra* note 90, at 596-99.

⁹⁴ Diver, *supra* note 90, at 74.

⁹⁵ Diver, *supra* note 90, at 67 (citing PAUL BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 478, 480 (1975)).

likely to gamble as uniformity, accessibility, and conformity decrease. Plaintiffs' probability-weighted benefits are more likely to outweigh the costs of dismissal; the chance of aggressive forum choices going undetected increases. Accordingly, the payoffs plaintiffs expect from filing in an inconvenient or burdensome location would be higher.

B. *Federal Rule of Civil Procedure 4(k)*

The minimum contacts analysis, and hence Federal Rule of Civil Procedure 4(k), affect the place of trial in the majority of cases so substantially that they must be considered the single most important factor in determining federal forum fairness. Depending on the court applying the test, and the situation to which it is applied, it is either the sole determinant,⁹⁶ or it imposes a powerful presumption of fairness that defendants can overcome only after producing substantial evidence of disadvantage.⁹⁷ In either case, a defendant's connection to a state is, in itself, almost conclusive proof of the fairness of litigating there.

1. Rule 4(k)(1)(A) and State Contacts

One quickly encounters the accessibility challenges of federal service of process rules upon reading Rule 4. Determining the territorial effectiveness of service in federal question cases requires reliance on several sets of separate rules. To apply Rule 4(k), one must know both the law that governs the underlying dispute and the parties that will be involved. Cases brought under federal law (non-diversity cases) may be governed by either Rule 4(k)(1)(A) or Rule 4(k)(1)(C); the latter applying to cases in which Congress has provided for nationwide service of process by statute, the former where it has not. Additionally, Rule 4(k)(1)(B) applies to specific classes of parties who are joined under Rules 14 or 19.

Rule 4(k)(1)(A) directs that federal courts exercise the same

⁹⁶ See *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 415 & n.9 (1984) (discussing "general jurisdiction"); *Jackson v. Cal. Newspapers P'ship*, 406 F. Supp. 893, 896-99 (N.D. Ill. 2005) (finding no jurisdiction based on absence of minimum contacts).

⁹⁷ See *Burnham*, 495 U.S. at 638-39 (Brennan, J. concurring) (finding jurisdiction over out-of-state defendant based on defendant's transient presence in the forum state, and concluding that that presence makes it unlikely the defendant would be inconvenienced by litigating there); Maier & McCoy, *supra* note 52, at 250 ("The notion of general jurisdiction embodies the presumption that it is fair to subject the defendant to the rigors of litigation in any place where the defendant is generally present, either physically or through a regular course of business or other contacts, even if the cause of action arose in another state and that other state alone possesses prescriptive jurisdiction over the issues in the case.").

personal jurisdiction as do the state courts of general jurisdiction in which they are located, but it provides no guidance on how to determine that jurisdiction. It thus requires resort to two external legal sources: state long-arm statutes and judicial opinions construing the parameters of state court personal jurisdiction and its Fourteenth Amendment due process limits. With respect to the long-arm statutes, a minority of states limit the power of their trial courts to serve process on out-of-state defendants to something less than the extent allowed by Fourteenth Amendment due process.⁹⁸ Accordingly, a court sitting in one of these states must determine the manner in which the state legislature has statutorily limited its reach. The majority of states, however, permit personal jurisdiction to the fullest extent permitted by due process, which collapses the jurisdiction inquiry into the minimum contacts test and its supporting analyses.⁹⁹

As has been pointed out time and again, the minimum contacts test itself lacks self-sustaining content.¹⁰⁰ The courts have been compelled to develop a cascade of supporting inquiries to determine the defendant's connection to the proposed place of trial (purposeful availment, effects of tortious conduct, Internet "interactivity," "stream of commerce," etc.).¹⁰¹ Each, in turn, has problems of uniformity; they involve fact-intensive analyses which vary in application from court to court, and from case to case. The result is wide-ranging interpretations and material system-wide variability.¹⁰² One would expect this lack of

⁹⁸ See generally Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491 (2004) (discussing in detail the various limits that state long-arm statutes place on the territorial reach of state courts).

⁹⁹ See *id.*

¹⁰⁰ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324-25 (Black, J. concurring); McFarland, *supra* note 57, at 767 ("The famous minimum contacts test is no more than an *ipse dixit* in each case."); Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 103 (1992) ("I call [the minimum contacts test] 'language' because it is too vacuous to be considered 'doctrine' or 'norm' or even 'general norm.'").

¹⁰¹ See *supra* note 45.

¹⁰² One commentator noted the following motley collection of federal appellate decisions, which illustrates a clear absence of uniformity as it relates to measuring the requisite minimum level of jurisdictional contacts for corporate defendants:

See *Lakin v. Prudential Secs., Inc.*, 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (holding that general jurisdiction may be present where the defendant maintains 1% of its loan portfolio with citizens of the forum state); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199-1200 (4th Cir. 1993) (rejecting general jurisdiction where 2% of total sales were in forum; rejecting specific jurisdiction because product liability suit did not "arise out of the defendant's activities in the forum"); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990) (rejecting general jurisdiction where 13% of total revenues occurred in the forum; specific jurisdiction not argued); *Mich. Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465-66 (6th Cir. 1989) (holding defendant subject to general jurisdiction in Michigan where 3% of its total sales were in Michigan); *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Assoc.*, 819 F.2d 434, 436-38 (3d Cir. 1987) (holding that loans to Pennsylvania citizens which amounted to .083 of its total

uniformity to encourage plaintiffs to make aggressive forum choices when filing lawsuits. Since these rules should protect defendants from litigating in unduly burdensome forums in the vast majority of cases, a lack of uniformity would likely increase the instances in which the burden imposed on defendants by the forum's location goes undetected. As a result, the probability of a plaintiff's aggressive forum choice being upheld increases, thus giving that plaintiff an incentive to be more aggressive. One would also expect, in turn, more defendant challenges to these initial forum choices, which would result in more disputes for the courts to resolve. As importantly, Rule 4(k)(1)(A) in many circumstances requires the expenditure of considerable effort to determine whether a defendant has minimum contacts with the state in

loan portfolio, plus other contacts, was sufficient to give rise to general jurisdiction in Pennsylvania; specific jurisdiction not argued); *Stairmaster Sports/Med. Prods., Inc. v. Pac. Fitness Corp.*, 916 F. Supp. 1049, 1052-53 (W.D. Wash. 1995), *aff'd*, 78 F.3d 602 (Fed. Cir. 1996) (unpublished table decision) (rejecting general jurisdiction where 3% of total sales occurred in forum; rejecting specific jurisdiction over patent infringement claim where the defendant sent letters into the forum threatening litigation for infringement in part because the letters had no substantive bearing on the infringement issue).

Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L.J. 343, 344 n.9 (2005). The problem extends to the frontier of jurisdictional jurisprudence, as evidenced by Internet-based contacts cases. Courts adopting the "sliding scale" approach to Internet minimum contacts pioneered by the *Zippo Manufacturing* decision have more or less agreed that a defendant does not subject itself to jurisdiction in the putative forum state by establishing a "passive" website, one which only provides information and through which the defendant conducts no commercial activity. *See, e.g.*, *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997); *GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *Remick v. Manfredy*, 238 F.3d 248, 259 (3d Cir. 2001). In all other cases, however, application of the test is far less clear.

Where the website in question is not passive, courts try to gauge the level of the website's "interactivity" to determine whether to assert personal jurisdiction. "Interactivity," it turns out, has provided little guidance as to which facts are relevant to this inquiry, or on how such facts should be weighed and compared. The result has been widespread disagreement and doctrinal confusion. As one commentator aptly described it, "[t]he current hodgepodge of case law is inconsistent, irrational, and irreconcilable." Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 939 (1998). A brief survey of the cases in this fretted area of jurisdictional law suffices to prove the point. *See, e.g.*, *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999) (concluding website that enabled email correspondence between users and defendant did not support jurisdiction); *Martitz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996) (concluding website that enabled users to join a mailing list and receive company information supported jurisdiction, even without evidence that any forum resident actually used website for that purpose); *Ecotecture, Inc. v. Wenz*, No. Civ. 99-387-P-C, 2000 WL 760961 (D. Me. May 16, 2000) (concluding website allowing users to subscribe to online journal and exchange email with defendant was interactive but did not support jurisdiction); *GTE New Media Servs. Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 38-39 (D.D.C. 1998) (concluding that website providing national "Yellow Pages" directory was "highly interactive" and supportive of jurisdiction, even though defendant did not engage in direct commercial transactions with users, did not exchange email with users, and did not collect users' personal information); *Energy Brands Inc. v. Spiritual Brands, Inc.*, 571 F. Supp. 2d 458, 470 (S.D.N.Y. 2008) (finding jurisdiction because defendant made twenty-nine sales of bottled water through its website).

which the federal district court sits. This effort ultimately produces only the rule's chosen proxy for forum fairness; it cannot, of course, denote forum fairness itself.

It is in this last respect that a rule centered on minimum contacts exhibits its gravest deficiency. The rule's effectiveness in carrying out its intended purpose depends on how closely related the chosen proxy is to the concept for which it substitutes. A rule that requires decision-making based on narrowly-circumscribed information must call for information that accurately reflects that rule's core concerns. The minimum contacts test assumes a direct correlation between the defendant's prior interactions with the state in which the federal district court sits and the logistical disadvantages to which a plaintiff's initial forum choices may subject that defendant. Where the defendant has a sufficient connection to the state, the rule dictates that requiring a defendant to litigate there imposes an acceptable level of inconvenience or burden. Where the defendant does not have such a connection, the rule dictates that litigating there is unduly inconvenient or burdensome. We see this where physical presence is used to measure such a connection. An out-of-state defendant may challenge the plaintiff's choice of forum because the rule does not assume the defendant has any connection to the state. An in-state defendant, on the other hand, is all but conclusively presumed to be treated fairly if it is properly served. In other words, it is effectively barred from claiming that it has been logistically disadvantaged by litigating in the state if it received personal service there. As the following examples show, the proof of state connection on which the minimum contacts test relies does not conform closely to the concerns underlying the Participation Interest. To wit, focusing on defendant-state connections causes problems of over-inclusiveness and under-inclusiveness, with concomitant inconsistencies in the protection of that interest.

To the extent that geography has any predictive value, logistical disadvantages vary by location, irrespective of state lines. Assume that Star Corp., a tire manufacturer with its principal place of business in Sacramento, is sued by one of its customers residing in San Diego for false advertising under the Lanham Act.¹⁰³ Since both parties are California residents, the minimum contacts test will presume that the plaintiff imposes, at most, an acceptable level of logistical disadvantage on the defendant by facilitating Star Corp.'s appearance in a court located in San Diego. This, despite the fact that the two cities are not within a commutable distance (500 miles), they have separate and

¹⁰³ 15 U.S.C. § 1125(a) (2006). The Lanham Act does not provide for nationwide service of process. *See, e.g.,* Sunward Electronics, Inc. v. McDonald, 362 F.3d 17, 22 (2d Cir. 2004) (applying New York state long-arm statute to determine personal jurisdiction of district court [because the Lanham Act does not provide for national service of process]).

distinct citizenries, and they are served by separate and distinct communities of legal professionals. Nevertheless, the minimum contacts test assumes that these material differences are problematic only when, all other things being equal, another state or its citizens are involved. Thus, crossing a state line while traveling a comparable distance would have the opposite result. Suppose a different Star Corp. customer files an identical suit in Las Vegas, 575 miles from Sacramento. Under these new facts the company would be given the opportunity to challenge the plaintiff's initial forum choice, despite the likelihood that its potential logistical and tactical challenges would be largely the same. In all, the minimum contacts doctrine does not protect the Participation Interest of all defendants, only those who have no connection with the forum state. In this regard, minimum contacts fails to protect defendants who may be in actual need of protection. Given the character of the litigation disadvantages to which defendants may be subjected, this is a puzzling policy choice.

Take another simple example, which further demonstrates this inclusiveness problem. Assume Baby Corp., an Internet-based manufacturer of baby products with its principal place of business in Philadelphia, Pennsylvania, has marketed and sold cribs in California, Illinois, and Louisiana. The United States Consumer Protection Safety Commission (the "CPSC")¹⁰⁴ is considering a suit against the company, alleging that the assembly instructions included with its cribs improperly describe how to attach the cribs' drop side. As a result of this error, the CPSC claims that dozens of children have been injured in falling accidents when the drop side has suddenly disengaged from Baby Corp.'s cribs. Baby Corp. would probably prefer to litigate the suit in Philadelphia or, alternatively, in the nearby district courts located in Wilmington, Delaware, or Camden, New Jersey.¹⁰⁵ Under the minimum contacts test, however, these alternative forums are off the table because Baby Corp. has no contacts with either Delaware or New Jersey. The CPSC is therefore free to sue in California, Illinois, or Louisiana, even though those states are much farther away and, presumably, more disadvantageous to Baby Corp.¹⁰⁶ While these

¹⁰⁴ The Consumer Product Safety Act, 15 U.S.C. §§ 2051-84 (2007), gives the CPSC the power to pursue recalls for products that present an unreasonable or substantial risk of injury or death to consumers, to promulgate product safety standards, and to sue manufacturers whose products violate those standards.

¹⁰⁵ Similarly, if a private plaintiff found litigation in Wilmington or Camden more convenient, she would be unable to maintain suit in either location without the Baby Corp.'s consent, even if those locations imposed no burden on the company whatsoever. See Fullerton, *supra* note 20, at 44-45 (pointing out the inclusiveness problems with a state personal jurisdiction fairness test based on state boundaries).

¹⁰⁶ In addition to the Camden-Philadelphia-Wilmington area, the Office of Management and Budget ("OMB") and the U.S. Census Bureau have identified fifty-nine multi-state communities in the United States. U.S. CENSUS BUREAU, CBSA-EST-2006-01, TABLE 1: ANNUAL

protection disparities do not rise to the level of equal protection violations, no sensible reason has been offered to justify defendants being treated differently when litigating federal questions.

2. Rule 4(k)(1)(C) and National Contacts

Congress has provided for nationwide service of process in a handful of statutory schemes.¹⁰⁷ These statutes eliminate the state-based limitations on service of process that constrain district courts in the majority of federal question cases, allowing them to summon defendants for trial anywhere in the country. Several commentators have suggested extending national service to all federal question cases.¹⁰⁸ Doing so, however, would not resolve the fundamental problems endemic to the dominant state contacts regime under Rule 4(k)(1)(A). While providing some benefits of uniformity and accessibility—mostly through avoiding state-based contacts altogether—pervasive nationwide service of process would ultimately fair worse in conformity terms than its state-based counterpart.

As a means of protecting the Participation Interest, the national contacts test would be, on balance, more uniform and accessible than its state-based analogue in purely domestic cases (i.e., cases in which no foreign defendants are involved). There would be little disagreement amongst courts and litigants as to what constitutes minimum contacts in

ESTIMATES OF THE POPULATION OF METROPOLITAN AND MICROPOLITAN STATISTICAL AREAS: APRIL 1, 2000 TO JULY 1, 2006 (2007), available at <http://www.census.gov/popest/metro/CBSA-est2006-annual.html>. OMB and the Census Bureau have established several designations for multi-county communities. The most significant of these are the “Metropolitan Statistical Areas” and the “Micropolitan Statistical Areas” (“MSAs”). “The general concept of a metropolitan or micropolitan statistical area is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.” U.S. Census Bureau, About Metropolitan and Micropolitan Statistical Areas, <http://www.census.gov/population/www/estimates/aboutmetro.html> (last visited June 20, 2007). Together, they are referred to as “core based statistical areas” (“CBSAs”). “[E]ach CBSA must contain at least one urban area of 10,000 or more population. Each metropolitan statistical area must have at least one urbanized area of 50,000 or more inhabitants. Each micropolitan statistical area must have at least one urban cluster of at least 10,000 but less than 50,000 population.” *Id.*

¹⁰⁷ See, e.g., The Clayton Act, 15 U.S.C. §§ 5, 22, 25 (2006); The Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(e)(2) (2006); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1965(b) (2006); Securities Act of 1933, 15 U.S.C. § 77v(a) (2006); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2006).

¹⁰⁸ See, e.g., Casad, *supra* note 9, at 1596; Marilyn J. Berger, *Acquiring In Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 UTAH L. REV. 285 (arguing that Congress should adopt a uniform standard for federal in personam jurisdiction which is coextensive with federal question subject matter jurisdiction). *But see* Lisa Rouchell, Comment, *Federal Question Jurisdiction: Must a Defendant Have Minimum Contacts with the State Whose Long-Arm Statute is Used to Serve Process?*, 54 LA. L. REV. 407 (1993) (arguing that federal in personam jurisdiction should not depend on the long-arm statutes of individual states).

these suits. As with suits brought in state courts or in the district courts under diversity of citizenship, a defendant's physical presence would almost universally be accepted as proof of its connection with the country. Stated differently, expanding national contacts to all federal question cases would have the effect of replacing the state-based minimum contacts test used in many cases with proof of physical presence. Defendants that would have otherwise been deemed out-of-state, and thus empowered to argue insufficient contacts, would be indisputably subject to personal jurisdiction if served personally with service within United State territory. This uniformity would correlate positively with the rule's accessibility. The outcomes in the vast majority of domestic cases (and thus the majority of cases filed in the district courts) would be clear, albeit drastically skewed to the advantage of plaintiffs. Equating presence with forum connection enables legal professionals and litigants accurately and quickly to estimate the success of jurisdictional decisions *ex ante*. The resultant reduction in "close cases" would effect a reduction in the volume of purely jurisdictional challenges filed by defendants, with a consequent drop in the decisional costs currently imposed on the courts by such challenges.

Only in the narrow subset of suits involving putatively foreign defendants would courts have to resort to the more complicated and indeterminate subordinate tests like "purposeful availment," which are currently applied to out-of-state defendants under the state contacts test. Here, national contacts would not improve upon the uniformity or accessibility of Rule 4(k), but neither would it fare any worse. Where reliance on physical presence is infeasible, national contacts offers no better a method of discovering the defendant-sovereign connection than does state contacts. Before a district court would entertain a suit against a foreign corporation for a violation of federal law, for instance, the plaintiff would have to prove that the company "purposely availed" itself of the privilege of doing business in the United States.¹⁰⁹ To make such a finding would require a fact-intensive inquiry into the defendant's intentions, with results varying considerably from case to case. As applied to foreign defendants, then, national contacts may discourage outcome consistency, as courts would find different facts legally cognizable or, alternatively, weigh similar facts differently in each case. These inconsistencies might likely increase the decisional costs of courts by increasing the number and complexity of jurisdictional challenges. In any event, federal question cases involving foreign defendants constitute a decidedly minor portion of federal dockets. Accordingly, this lack of uniformity would do little to

¹⁰⁹ See *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000).

compromise the overall, system-wide comparative uniformity of the national contacts test vis-à-vis the state contacts test.

It is in the area of conformity that the national contacts test compares least favorably to its state-based counterpart. Though the latter may permit jurisdictional challenges by out-of-state defendants for whom the plaintiff's initial forum choice is convenient and manageable, the former would have the effect of precluding the Participation Interest inquiry in all domestic cases. As already indicated, physical presence in the relevant forum (here, the United States) is all but universally accepted as sufficient proof of a connection between the defendant and that forum. In practice, the national contacts test would in all likelihood be reduced to a bright-line rule based on a defendant's physical presence in the country. As a result, the opportunities provided under the minimum contacts test to review potentially disadvantageous forum choices, though currently incoherently distributed amongst defendants, would be all but eliminated under a national contacts rule. Taken by itself, the national contacts test gives plaintiffs carte blanche to file in the forum which imposes the most litigation disadvantages on defendants,¹¹⁰ and thus does nothing to check plaintiffs' first mover advantage against domestic defendants. In this regard it treats all defendants equally, if not fairly. The work of protecting the Participation Interest would thus fall to venue and transfer of venue, but not without attendant problems.

C. Venue

As with any rule, the uniformity of the general venue statute depends largely on the susceptibility of its key terms to inconsistent interpretations.¹¹¹ One may reasonably question the uniformity of subsection 1391(b)(1), for example, because it requires courts and litigants to identify the defendant's "residence." This is a fact-dependent inquiry for which subsection 1391(b)(1) itself provides no guidance, making judicial interpretation indispensable to its proper

¹¹⁰ Strangely, the national contacts test provides foreign defendants with an opportunity to challenge federal jurisdiction, while stripping that opportunity from domestic defendants. *See Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 n.3 (1st Cir. 1984) ("If a person is served *within* the territory of the sovereign represented by the issuing court, there is no question that maintenance of the suit against him will not offend traditional notions of fairness."); *BankAtlantic v. Coast to Coast Contractors, Inc.*, 947 F. Supp. 480, 488 (S.D. Fla. 1996) ("A defendant who is a resident of the United States necessarily has sufficient contacts with the United States to satisfy the requirements of due process."); *Heft v. AAI Corp.*, 355 F. Supp. 2d 757, 766 n.10 ("As a practical matter, alien defendants would enjoy a much greater likelihood of success than domestic defendants in a constitutional challenge to the exercise of personal jurisdiction by a federal court.").

¹¹¹ *See supra* note 91 and accompanying text.

application. While determining a defendant's domicile in some cases will pose few difficulties,¹¹² 1391(b)(1) nevertheless provides only limited guidance to litigants *ex ante*, decreasing the accuracy with which they can identify "fair" venues on their own. Litigants must often make educated guesses as to which facts a court will deem dispositive of the inquiry. Moreover, the facts courts consider will differ depending on whether a defendant is a natural person or an incorporeal entity.¹¹³ Key terms in subsections (b)(2) and (b)(3)—"found" and "substantial part" specifically—also require judicial elucidation and therefore have similar effects on litigant and judicial decision-making. While the judicial discretion required by these terms may assist the courts in fulfilling the goals of the general venue provisions, they provide little guidance to plaintiffs *ex ante*. While narrower terms would reduce the number of permissible venues and thus force greater plaintiff self-regulation, one must conclude that, by virtue of its composition, the statute operates on a different assumption. It assumes that the most effective way to guard against potential abuse is through *ex post* judicial review of plaintiff forum choices.

While the ambiguity of the terms "residence," "found," and "substantial part" decrease the uniformity of the general venue statute, they may also increase its potential for conformity by providing courts with more interpretive license. Resolving venue challenges on a case-by-case basis may permit courts to take greater account of the defendant's individual circumstances.¹¹⁴ Of course, there are two substantial limitations to the value of this discretion, either of which may undermine the statute's ability to fulfill its stated purpose. First, the effectiveness of the statute relies heavily on the competence or predispositions of the individual judge making the fairness

¹¹² Identifying the appropriate venue for corporate defendants provides a useful example. 28 U.S.C. § 1391(c) provides that venue for suits against corporate defendants will lie where that corporation is also subject to personal jurisdiction at the time the lawsuit is filed. At a minimum, a corporation will always be subject to personal jurisdiction in its state of incorporation. See Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 895 (1989) (observing that "corporations should be and are amenable to suit in their state of incorporation, because by electing to be incorporated under the laws of a particular state a corporation has freely chosen to affiliate itself with that state"); EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 9.2, at 325 (2d ed. 1992) (observing that "[a] corporation which is organized and incorporated under the laws of a state has always been assumed to be subject to the jurisdiction of the courts of that state"). Moreover, one can determine the state of incorporation for a publicly traded company simply by referring to the filings it is required to make with the Securities and Exchange Commission, such as its Form 10-K or 10-Q.

¹¹³ Compare *Williams v. U.S.*, 704 F.2d 1222, 1226 (11th Cir. 1983) (residence of a natural person a fact-driven inquiry depending on all relevant facts and circumstances) with *Heyco, Inc. v. Heyman*, 636 F. Supp. 1545, 1550 (S.D.N.Y. 1986).

¹¹⁴ See *Jones v. United States*, 407 F. Supp. 873, 876 (D.C. Tex. 1976) (observing that "the federal courts are given great discretion in determining venue").

determination.¹¹⁵ Second, and perhaps more importantly, the discretion given to judges is limited by the facts that the statute allows them to consider. Since the statute relies exclusively on territorial connection, judges might exclude other factors (remoteness, indigence, sickness, sophistication, available communications infrastructure, etc.) from the calculation, consider them furtively, or consider them in some cases but not others. For instance, a judge who concludes that all of the venues permitted by the statute would impose a heavy financial burden on the defendant would be unable (explicitly, in any case) to direct the suit to another district on that basis. Judicial discretion is meaningless where territoriality ineffectively neutralizes the disadvantages imposed on defendants by plaintiffs' forum choices.

The venue statute also suffers from a separate, related conformity problem. To the extent one accepts distance to the place of trial as indicative of litigation burdens, it provides more protections to those in small states and in states with multiple districts. In large, sparsely populated states with only one judicial district (such as Colorado, Wyoming, and Montana), or in states with geographically expansive districts (such as Texas and California), defendants could be required to travel hundreds of miles to the trial site. As is the case with Rule 4(k)(1)(A) and state contacts,¹¹⁶ defendants would have no choice but to litigate in a distant forum, even if a district in which they do not reside, in which no legally relevant property is located, or in which none of the events underlying the dispute took place, would be less burdensome.

D. *Tradeoffs of Existing Forum-Fairness Rules*

The above analysis of federal service of process and venue reveals a harsh reality. The state or district-based territoriality on which each set of rules depends is a suboptimal proxy for the inconvenience and burden that undermines a defendant's Participation Interest. By determining whether a forum is convenient or manageable based on a defendant's presence in or connection to a state or state-based district, these rules provide protections to defendants who may not need them,

¹¹⁵ To the extent one is uncomfortable with broad judicial discretion in this regard, a rule that relies instead on self-regulation by the parties or a central rule-making body would be more desirable. See Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007) (arguing that judges may have more discretionary authority in managing cases than is warranted by their competence). Nevertheless, judges are frequently called upon to make such decisions. See Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) (arguing that judicial discretion is one of the most commendable features of the American legal system, and criticisms of recent increases in judicial discretion are unwarranted).

¹¹⁶ See *supra* notes 103-106 and accompanying text.

and may make potentially convenient forums inaccessible. The “minimum contacts” test assumes that a defendant’s presence outside of the forum state effectively flags potentially burdensome and inconvenient forum choices made by plaintiffs. However, there is little reason to believe that defendants who may be amenable to out-of-state service are exposed to any resultant logistical disadvantages. In fact, defendants in many instances may be better served by litigating in a nearby state, rather than in a state with which they have established connections. Similarly, the general venue statute excludes what may be convenient trial locations based solely on the questionable assumption that a connection with a judicial district (through residence, location of property, or situs of legally relevant transactions) substantially reduces the non-legal disadvantages to which plaintiffs’ forum choices may subject defendants. The multiple revisions to Rule 4, the spate of court-created jurisdiction tests developed in the state context that underlie it, and the added contribution of the general venue and transfer of venue statutes have done little to remedy these conformity problems. Ultimately, one is forced to question whether the effort expended on making state or district-based forum selection rules more precise has been well spent.

III. INFORMATION IDENTIFICATION AND USE

Any improvement on the current methods of protecting the Participation Interest of defendants must maximize and, where they conflict, balance between two separate criteria. First, it must identify the information that most closely reflects the defendant’s actual capacity to litigate in the forum chosen by the plaintiff. The methods employed by service of process and venue rules for protecting defendants’ Participation Interest operate on a dearth of relevant information, requiring courts and litigants to determine the appropriate place of trial based almost exclusively on the territorial connections of persons, property, or events. Allowing the consideration of more complete information about defendants would increase the accuracy of identifying logistical litigation disadvantages. In other words, choosing better indicators of litigation disadvantages could improve conformity by more accurately identifying genuinely burdened defendants, and by identifying those forums in which the defendants are less likely to be unduly burdened. It would not be sufficient, however, to replace the current emphasis on state or district connections with one indicator alone; determining a defendant’s capacity to litigate in a particular place would require consideration of more than one variable. Several indicators, considered in combination, would improve conformity by

providing a much better sense of a defendant's actual capacities than simply knowing whether it would have to cross a state or district line to get to court.

This information must be employed by a decision-making process that effectively applies it to its intended purpose, namely, to appropriately protect the participation rights of defendants. This is a greater challenge than identifying better litigation capacity proxies. The current process is based on court-centric decision-making. If one accepts the primacy of courts in making the ultimate litigation capacity determination, the questions become whether they should be invested with the added responsibility of initially identifying the capacity indicators, and how much latitude they should be given in weighing them in each individual case. Of course, in a decentralized process, where courts are left to work out these issues on their own, problems of uniformity and accessibility are more of a concern. However, the court-centric model is only one alternative. A second approach would encourage the parties to use their privately held information to negotiate the place of trial, reserving judicial adjudication only for those circumstances in which the parties fail to reach an agreement. Of course, either of these alternatives might ultimately fail if they trade substantive fairness to defendants for procedural legitimacy; the manner in which the place of trial is determined must itself be viewed as fair by those who participate in it and are affected by it.

A. *Identifying Litigation Capacity Indicators*

Several courts have attempted to develop approaches that rely on more diverse and granular information when trying to identify an appropriate federal forum. For instance, Judge Becker in *Oxford First Corp.* developed such an approach after concluding that *International Shoe* does not control federal *in personam* jurisdiction where Congress has provided for nationwide service of process.¹¹⁷ Expanding the traditional inquiry to include more than just the defendant's "contacts with the place where the action was brought,"¹¹⁸ he explicitly pointed to "the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business."¹¹⁹ Under this relatively broad umbrella, he considered "the nature and extent and interstate character of the defendant's business, the defendant's access to counsel, and the distance from the defendant of the place where the

¹¹⁷ *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203 (E.D. Pa. 1974).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

action was brought.”¹²⁰ While this test still relies quite heavily on state connections and on vague terminology—“nature,” “extent,” “character,” etc.—it acknowledges the shortcomings of state contacts in determining forum fairness and attempts to account for them.¹²¹

One could imagine, without great difficulty, several indicators of inconvenience and burden aside from territorial connections. A defendant’s financial resources are one example, including its disposable income, personal savings, and liquidity of investments and other assets. These resources could serve as proxies for the defendant’s ability both to marshal the resources initially required to mount its defense and to endure the sustained hardship of litigating in the plaintiff’s chosen location. In the particular case of individual defendants (as opposed to businesses or organizations), these indicators could be expanded to include the amount of time her employer will allow her to take off from work, the distance of her primary residence or place of employment to the trial site, the frequency with which she travels to the area in which the court is located, the availability and expense of transportation and lodging, her physical and mental health as well as that of her dependents, or the expense of legal representation and related services in that location as compared to other potential trial sites. These indicators alone would not be sufficient, however, as the defendant’s financial capacity would only have meaning if it was applied to the available methods of interacting with local counsel, opposing counsel, and the court. The availability and expense of transportation, lodging, or telecommunications facilities are relevant in this regard.

B. *Identifying an Optimal Indicator Utilization Mechanism*

While these situational details would almost certainly provide a clearer picture of whether the place of trial should be changed and, if so, to which location, their consideration necessarily raises implementation concerns. By what mechanism should they be assessed? Two alternatives are discussed below. First, courts could be charged with reaching the definitive conclusion. Second, the parties themselves could be given primary decisional control; that control would default to the courts in the event that the parties failed to resolve the issue themselves.

¹²⁰ *Id.*

¹²¹ See also *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000); *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 946-47 (11th Cir. 1997).

1. Lessons from the Common Law: Forum Non Conveniens

Like federal service of process and venue rules, the common law doctrine of forum non conveniens purports to protect defendants from litigating in unnecessarily inconvenient forums. While its application to domestic federal lawsuits is negligible,¹²² the doctrine's mechanical operation points to a court-centric decision-making approach that is different from both Rule 4(k) and the general venue statute. Broadly speaking, the doctrine assesses whether a foreign forum would be a more appropriate venue for litigation by determining the degree of deference to accord the plaintiff's choice of trial location, whether an alternative foreign forum is available, and whether the case should go forward in the plaintiff's chosen forum or the foreign forum based on the balancing of numerous public and private interest factors.¹²³

Forum non conveniens thus approaches protection of the Participation Interest from a very different perspective than either Rule 4(k) or the general federal venue statute. In addition to allowing courts to consider more than the litigants' connection to the putative place of

¹²² See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (“[T]he federal doctrine of forum non conveniens has continuing application only in cases where the alternative forum is abroad.”).

¹²³ The doctrine is divided into two broad inquiries. Courts first ask whether an adequate alternative forum is available in which the plaintiff could bring its dispute if the court were to dismiss it. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). As one commentator noted, “[i]t generally would be unfair [to the plaintiff] for a court to dismiss a case over which it has jurisdiction if the plaintiff were barred by limitations or some other procedural barrier from bringing it elsewhere.” William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Court-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1666 (1992). The answer to this question turns largely on whether the defendant would be amenable to service in the alternative forum, though courts on rare occasion may consider other factors. See Helen E. Mardirosian, Note, *VII. Forum Non Conveniens*, 37 LOY. L.A. L. REV. 1643, 1650-51 (2004).

If the defendant carries this threshold burden, it must then prove that the weight of public and private interests lie heavily in favor of litigating in that alternative forum. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247-52 (1981). This second prong consists of a multi-factor test consisting of the “private interest factors” and “public interest factors.” Broadly speaking, “private interests” are intended to indicate when the “oppressiveness and vexation” that the place of trial may cause a defendant is “out of all proportion to plaintiff’s convenience.” *Id.* at 241. To determine the litigant’s private interests in the plaintiff’s chosen forum, courts look to 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.” *Id.* at 258 n.6. “Public interests” point toward the “administrative and legal problems” the court may encounter when adjudicating the dispute. *Id.* These include “the administrative difficulties flowing from court congestion; the ‘local interest in having localized controversies decided at home’; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.” *Id.*

trial, it interestingly begins with an assumption about what is convenient to the plaintiff, and not with assumptions about what is convenient to the defendant. According to the Court, when a plaintiff chooses its home forum (as most often determined by its citizenship or place of residence) the reasonable assumption is that it does so because that is the most convenient place of trial, and not primarily because the plaintiff intends to “‘vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting . . . expense or trouble not necessary to [its] own right to pursue its remedy.”¹²⁴ Based on this assumption, the court is required to grant the plaintiff a presumption in favor of its forum choice if it has filed its lawsuit in its “home” forum.¹²⁵ That presumption is even greater if the plaintiff is a United States citizen and has chosen to file its case in a United States court.¹²⁶

The doctrine thus incorporates a simple incentive structure into its constitutive rules, one that is calculated to decrease the likelihood that a plaintiff will choose a forum that compromises a defendant’s Participation Interest. It assumes that the presumption in favor of a plaintiff’s initial forum choice effectively tends to separate unavoidable or necessary litigation burdens that are placed on defendants from unnecessary or avoidable burdens. The doctrine hinges on the intent of the plaintiff; if it files suit in its place of citizenship or residence, the courts must presume that it does so out of concern for its own ability to litigate effectively, but not out of an intention to abuse the defendant. Stated differently, the doctrine assumes that forums other than the plaintiff’s place of citizenship or residence are comparatively less convenient to the plaintiff and, *ceteris paribus*, a plaintiff would not inconvenience itself by filing a lawsuit in a “foreign” forum unless it has an ulterior motive.

Implicit in the doctrine is the notion that there is a sufficiently high correlation between the plaintiff’s abusive intent and the defendant’s actual inconvenience to warrant its focus on plaintiff self-regulation; if a plaintiff chooses a forum because that forum places a defendant at a disadvantage, it is likely that those disadvantages could have been avoided by filing the suit in another location. To dissuade such choices, the doctrine provides an incentive—in the form of a reduced risk of dismissal—for the plaintiff to orient its trial strategy toward a narrow conception of its self-interest. If the plaintiff refrains from choosing a forum for the purpose of imposing litigation disadvantages on the

¹²⁴ *Gulf Oil Corp.*, 330 U.S. at 508.

¹²⁵ *See Piper*, 454 U.S. at 255-56 (“[A] plaintiff’s choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient.”) (internal citations omitted).

¹²⁶ *See id.* at 255 n.23 (“Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum.”).

defendant, it receives the benefit of a presumption that increases the likelihood that it will be permitted to litigate close to home. Unlike Rule 4(k) and the general venue statute, *forum non conveniens* explicitly tries to align the plaintiff's interests with those of the defendant.

Unfortunately, the doctrine of *forum non conveniens* is not as clever as it first appears. While it may be sound to assume that a plaintiff will choose to litigate at "home" because doing so will reduce its litigation costs, it strains credulity to assert that this would be the only (or perhaps even the primary) reason it would do so. Without more, it seems equally likely that a plaintiff would choose to litigate in its home country because doing so would place the defendant at a disadvantage. In fact, the law of personal jurisdiction, the transfer of venue statutes, and the removal statute are all based at least in part on the expectation that plaintiffs will use their first mover forum selection advantage to undermine the ability of defendants to get a fair hearing in court.

Despite the dubiousness of its "plaintiff's home" presumption, the doctrine points to the potential reward that plaintiffs may view the possibility of reduced court involvement in the ultimate forum decision—by gaining the benefit of a presumption in favor of their forum choices—as attractive enough to pursue. While shifting a measure of decisional control from the court to the plaintiff may reduce the plaintiff's incentive to make abusive forum choices, some additional mechanism would be needed to assure the defendant that it would be likely to receive some benefit from the bargain.

2. The Court-Centric Approach

Under a court-centric decision-making model, operationalizing an informationally granular approach to protecting defendants' Participation Interest would pose many of the uniformity, accessibility, and conformity challenges already explored in the federal service of process and venue contexts. A rule that permits consideration of multiform proofs could be penned as a standard, providing general guidance to courts and litigants but placing the burden on them to identify the appropriate information to satisfy the inquiry. Alternatively, it could be drafted as a series of bright-line rules or exhaustive lists that attempt to provide detailed guidance in every case, and thus predetermine the appropriate information for deciding whether a forum is fair.

Understanding the efficacy of a standard that merely expresses the aspirations of a Participation Interest protection regime—i.e., that only

directs the court to protect that interest without any guidance on how to do so—requires an assessment of the behaviors it is most likely to induce. Courts would be left to balance the relative costs of accessibility and conformity, almost certainly resulting in a reduction in uniformity as each district, and eventually each circuit, reaches different conclusions as to the optimal mix of precision factors. In the process of reaching these conclusions, the costs of rule precision would increase due to an increase in information costs.

The courts would determine the optimal accessibility and conformity mix on a case-by-case basis,¹²⁷ and such an open-ended standard would invite the parties to devote substantial resources to obtain information pertinent to the inquiry. Defendants moving to dismiss or to transfer would readily provide information that supports the difficulty of litigating in any forum chosen by the plaintiff. Indeed defendants, constrained only by their ability to pay lawyers' fees, page limits, and the judge's patience could be expected to provide a deluge of such information, varying portions of which would bear only a questionable relationship to the defendant's actual burden or inconvenience.¹²⁸ By the same token, defendants will almost certainly be less forthcoming with information that supports the convenience of plaintiffs' chosen forums, and thus any information they provide would have to be scrupulously vetted and supplemented.¹²⁹ Plaintiffs in opposition might respond in kind, presenting an avalanche of contradictory "proof." In the end, the burden would be placed squarely on the shoulders of the courts to distinguish relevant from irrelevant information through briefings, hearings, and hours of solitary contemplation.¹³⁰ In short, obtaining and evaluating the parties' filings

¹²⁷ The delineation of this standard would require a case-by-case inquiry at least early in its existence, before the courts are able to develop binding precedent. Once the courts have sufficient experience with the standard (i.e., we should not assume that the standards would develop into a rule), and their decisions were disseminated to the public, the scope of information deemed relevant to the inquiry would certainly narrow. While litigants would not necessarily know with certainty the types of proof the courts would consider in satisfying the standard, they would have some guidance and orient their arguments accordingly.

¹²⁸ For instance, it would come as no surprise if defendants offered testimonial proofs, such as affidavits from employers or family, attesting to the defendant's conflicting obligations and the attendant burdens that litigating in a particular place would impose on them. Obviously, this evidence would have to be taken with a grain of salt, as either an employer or a family member would have self-interested reasons for distortion in the defendant's favor.

¹²⁹ I am not suggesting that defendants would be motivated to perpetrate a fraud on the courts, but rather that the nature of adversarial adjudication, and of the attorney's responsibilities to her client, would tend to stylize or otherwise de-emphasize potentially exculpatory evidence even if it is dutifully submitted for the court's review.

¹³⁰ In any event, scrupulously scrutinizing all of this information would not guarantee the proper judgment. A judge could certainly be swayed in the odd case by biases that have little or nothing to do with the defendant's ability to litigate before her, such as the comparative wealth or perceived sophistication of the parties, the size of the judge's caseload, her familiarity with the law to be applied in the suit, prior experiences with the parties or their attorneys, or her intuitions

and other statements would be time-consuming and costly for both the court and the parties.¹³¹ Promulgation of detailed guidance on how to operationalize the standard's aspirations would come only through a decentralized, episodic, and potentially lengthy process.

A Participation Interest protection standard that evolves through judicial discretion and case-by-case adjudication might also undermine the litigant self-regulation commended by the *forum non conveniens* doctrine that would otherwise reduce the expenditure of court resources. Such an approach provides little *ex ante* guidance as to what evidence the courts will find satisfactory, and thus imposes less of a disincentive for aggressive filings by plaintiffs who are looking to gain as much advantage as possible.¹³² The standard's potentially low accessibility results in under-inclusiveness by lowering the likelihood that courts will properly apply it to void plaintiffs' aggressive forum choices.¹³³ Plaintiffs thus have an incentive to file their lawsuits in locations that

with respect to the likelihood of a quick settlement. These problems of decisional distortion inhere in any system which relies on the judgments of party who must gather the information needed to make decisions. *See, e.g.,* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1870 (discussing decision-making fallibility of real estate developers screening for desirable residents). Accordingly, this criticism applies with equal force to the minimum contacts test and the general venue statute, both of which depend on courts to come to sound decisions. Additionally, determining whether and to what extent courts are overstepping their authority as constrained by the rule would be difficult (if not impossible).

¹³¹ These increased litigation information costs may have a disproportionate effect on defendants, who may bear a heavier burden of proof under a broad rule than under the current forum fairness rules. Defendants would have to factor in the costs associated with challenging the plaintiff's choice of forum as measured against the potential costs of litigating in that forum. Plaintiffs would also have to factor the increased cost of potential challenges against the perceived benefits of litigating in a particular forum.

¹³² Judge Posner succinctly describes a similar problem with respect to unclear criminal laws:

If a law is unclear, prospective violators will discount the punishment cost of the violation not only by the probability that they will be caught . . . but also by the additional probability, significantly less than one, that the law will be held applicable to the conduct in which they are engaged. Thus the deterrent effect of the law will be reduced.

RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 556 (6th ed. 2003). In the forum fairness context, the deterrence effect would not be felt on the filing of the suit, but rather where the suit is filed and whether defendants challenge that choice. It is reasonable to assume that, unlike in the criminal context where a person may refrain from engaging in an activity altogether for fear of sanction, the fear of an adverse forum ruling would not deter the filing of a lawsuit. Certain defendants would also have an incentive to act aggressively, since their worst case scenario would be to litigate in the place chosen by the plaintiff. In other words, defendants may be induced to challenge plaintiff forum choices even when litigating in those forums imposes little or no burden on them. Rather, the defendant would be looking to change from a neutral location to an advantageous one, or from a moderately to a very advantageous one. As a general matter, it is unlikely that this defendant-initiated abuse would pose as great a concern as plaintiff-initiated abuse, as the default works against defendants. The defendant must pay for the opportunity to reverse forum-shop, because it can do so only through a challenge to the plaintiff's initial forum choice. Additionally, the defendant would bear the burden of demonstrating its inconvenience. Taken together, these factors indicate that defendants would have fewer opportunities to take advantage of a low-accessibility forum fairness standard than would plaintiffs.

¹³³ *See id.*; Diver, *supra* note 90, at 73.

cause greater disadvantages to the defendant. It is also possible, though less likely because defendants bear the burden of proof, that low accessibility may increase the probability that some courts will misapply the standard to the plaintiff's detriment, such that plaintiffs who seek no advantages or who file in locations that are actually advantageous to defendants may nevertheless have their suits dismissed or transferred. This over-inclusiveness further increases the incentive for plaintiffs to try to abuse defendants by lowering the rule's deterrence effect. Filings of dismissal motions would likely increase,¹³⁴ either because plaintiffs would actually be more aggressive, or because defendants anticipate aggressive forum choices and thus overcompensate. In either case, the courts would have their work cut out for them.

Crafting a bright-line rule could do much to reduce the costs associated with the information-gathering and evaluation endemic to a standards approach, but at the cost of conformity and possibly accessibility. Such a rule would specify beforehand all of the evidence that courts could consider to satisfy it and, for instance, limit courts to evidence that is either publicly available or easily obtainable. By way of example, the rule could call for the defendant's tax records for the purpose of determining her financial capacity, or the distance between her current residence and the courthouse or the availability of public transportation for the purpose of gauging its traveling expenses. These proxies for burden and inconvenience would be less susceptible to argumentative manipulation by the parties than, say, testimonial evidence, and would require less subjective and costly evaluation than other forms of evidence, such as the defendant's physical or mental health. Accordingly, the courts would have to spend substantially less time and effort in gathering them and in determining their accuracy.

This does not necessarily mean that using this information to make decisions in particular cases would be free from complication. Courts would still be left to draw sound inferences from the evidence presented to determine the relative weight of each individual piece of information, and to balance amongst them in order to achieve conformity. The parties would presumably request the opportunity to have their thoughts heard on the matter through briefings and hearings, further increasing the evaluation costs imposed on the courts. Without more, the self-

¹³⁴ One would expect defendants to challenge plaintiffs' forum choices if the expected cost of defendant's disadvantages is less than those costs discounted by the probability that the challenge will be successful, plus the cost of filing the dismissal motion. Assuming that an unclear forum fairness rule reduces the probability of success, defendants are more likely to challenge plaintiffs' forum choices as motion costs decrease, and/or undiscounted disadvantage costs increase. While aggressive plaintiffs would probably have no effect on motion costs, their behavior would almost certainly increase undiscounted defendant disadvantage costs by actually increasing such costs, or by leading defendants to overestimate such costs. The result would be more dismissal motions.

regulation through *ex ante* guidance that otherwise commends a rule that calls for specifically enumerated evidence would be undermined by the absence of instructions on how to actually use the evidence for which the rule calls.

To address these shortcomings, the rule could set a combination of cut-offs and benchmarks that reduce the courts' application burden by reducing the courts' interpretive discretion. For instance, a defendant whose after-tax income is below \$20,000, and who resides more than 100 miles from the courthouse, could be deemed *per se* burdened by litigating there.¹³⁵ The conformity of such a rule would improve with each additional piece of information that is added to the decision matrix.¹³⁶ This solution would essentially shift much of the information evaluation costs from individual courts and individual cases to the entity responsible for promulgating the matrix, avoiding duplication of effort by courts in the federal system. In theory, promulgating a decision matrix of this kind would also reduce instances of conformity deviance committed by courts, since they would have little if any explicit discretion when applying or interpreting the rule. To the extent that such deviance occurs, it would be committed by the central rule-making body, which would be responsible for determining whether, for example, the defendant's health should be more heavily weighted than her ability to get time-off from her employer.¹³⁷

While the tradeoffs of uniformity, accessibility, and conformity are an unavoidable aspect of any rule-based or standard-based system, there

¹³⁵ This is essentially the operating architecture employed by the Federal Sentencing Guidelines. The guidelines suggest sentence ranges based primarily on the conduct associated with the criminal offense (termed the "offense level"), and the defendant's criminal history (termed the "criminal history category"). The guidelines Sentencing Table dictates the relationship between these two factors by specifying the number of months of incarceration to which the court may sentence the defendant. For example, under the 2006 Sentencing Table an offense level of 13 with a criminal history category of I suggests a sentence of 12-18 months. The same offense level with a more severe criminal history category of IV suggests a sentence of 33-41 months. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 5, pt. A (2006).

¹³⁶ Trying to achieve greater conformity would have direct negative consequences for accessibility, because an increase in the amount of information the courts are required to consider would also increase the unwieldiness of the rule, thereby making it more difficult to apply. See Diver, *supra* note 90, at 74.

¹³⁷ So detailed a scheme certainly harbors hidden costs. Circumstances that generally affect defendants' capacities would result in pressure to amend the rules by addition, deletion, or exception. For instance, inflation could make nominal measures of income less representative of financial wherewithal. Improved transportation infrastructure in the form of more highways or faster public transportation could reduce the time and expense of travel. In fact, more pervasive household use of telecommunications technologies, such as video teleconferencing, could obviate the need for travel altogether. Additionally, a rule constituted by specific factors would not necessarily eliminate judicial error in their application. If courts believe that the rule system still suffers from a lack of conformity, despite its detail, they could be tempted to expand them by invoking the premises that underlie the rule. If this expansion is repeated over time, the rule can slide from objectivity to subjectivity, and erode the self-regulatory benefits it gained from specificity. See POSNER, *supra* note 132, at 557.

are challenges and costs that arise directly from the court being tasked with the responsibility of gathering and assessing the information relevant to the Participation Interest inquiry. As the courts are not in possession of the information needed to determine the defendant's burden or inconvenience, provision must be made for them to obtain that information. Once obtained, they must bridge the inherent divide between that information and its efficacy in indicating defendants' actual burden and inconvenience. While rules can be devised to overcome these information asymmetries, promulgating them necessarily involves tradeoffs between administrative ease (i.e., uniformity and accessibility) and conformity.

3. The Litigant-Centric Approach

Here is where the doctrine of *forum non conveniens* can be most instructive. Though it might seem counterintuitive, it is possible that defendants might be better at protecting their Participation Interest themselves than the courts. Specifically, placing the decision-making burden for avoiding burdensome or inconvenient forums on the litigants, who are in possession of the information necessary to make those decisions, may provide defendants with more consistent and reliable protection.¹³⁸ Additionally, the information costs associated with judicial decision-making could be reduced by minimizing overall court involvement in the forum selection process. Such an approach could also eliminate a substantial portion of the cost associated with courts identifying, gathering, and evaluating capacity indicators, or with a central rule-maker doing so for them. Providing incentives for the parties to reach an agreement on the appropriate place of trial in most cases would reserve judicial resources for intervention only in those situations in which the parties fail to reach an agreement. The focus of such a process would be structuring litigant incentives, as opposed to determining the defendant's litigation capacity.

The core challenges in crafting such an incentives-based system would be identifying effective incentives and ensuring their symmetrical application to both plaintiffs and defendants. Put another

¹³⁸ This strikes a middle path between court-centric decisional control on the one hand, and the almost complete abdication of protective responsibility at which the Court hints in *World-Wide Volkswagen*. See *supra* note 48. The precautions suggested by the Court in *World-Wide Volkswagen*—that defendants can protect themselves from the burden of litigation “by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State”—seems both impractical and undesirable. It raises distributional concerns, as it ignores the possibility that many individuals and small businesses (particularly those that are looking to expand their operations) may be ill-situated to procure insurance. Individuals are almost certainly not in any position to “pass[] expected costs on to customers.”

way, an incentives-based system must have a significant carrot (or stick), and equally motivate each party to act in furtherance of the process's goals.¹³⁹ Imposing a sufficiently material penalty on parties who refuse to agree to a mutually convenient forum would make judicial adjudication of the issue more costly (and therefore less desirable) than settling it amongst themselves. This would have the effect of discouraging aggressive forum choices by plaintiffs, and of discouraging stubbornness by defendants who would otherwise be inclined to challenge reasonable forum choices in order to delay litigation or harass plaintiffs. The effectiveness of this option in increasing conformity would depend on the magnitude of the penalty to substantially reduce the instances in which it is economically sensible for either party to rely on judicial intervention.

While this approach would induce the parties to come to an agreement in many cases, it would not produce agreement in every case. It must therefore be supported by a residual judicial component by which the courts resolve forum disagreements.¹⁴⁰ The parties would measure the costs of failing to reach an agreement in part by the likelihood of obtaining a favorable judgment from the court.¹⁴¹

¹³⁹ The purpose behind, and failures of, Federal Rule of Civil Procedure 68 are instructive in this regard. The Rule permits one party to make an offer of judgment with a settlement amount to the other. If the plaintiff accepts, the court enters judgment against the defendant and the controversy is ended. If the plaintiff declines, the court proceedings continue. In the event that the plaintiff wins at trial, and the amount it is awarded is less than the amount the defendant previously offered, the court imposes a penalty on it by requiring it to pay all of the defendant's post-offer costs. By increasing the plaintiff's expected costs of seeking a verdict, the Rule attempts to force the plaintiff to "'think hard' about accepting a reasonable settlement offer," so as to avoid the unnecessary expenditure of judicial resources on a dispute that can be resolved privately. See Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 867 (2007). The Rule has fallen short of its intended purpose, and is considered inconsequential in large measure because of its incentive and symmetry problems.

Many lawyers and judges believe that rule 68 has failed to encourage settlement. Two principal defects account for this apparent failure. First, Rule 68 is a "one-way street"—only defendants can invoke the rule. Second, the sanction of post-offer "costs" is usually too small to motivate parties to settle (except when costs are held to include attorneys' fees). These shortcomings have crippled the rule.

Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 7-8 (1985).

¹⁴⁰ As pointed out by Baird, Gertner, and Picker, legal rules do not affect the bargaining process *per se*. Rather, they affect the options available to the parties while bargaining, and thus the desirability of the outcomes available to the parties. See DOUGLAS G. BAIRD, ET AL., *GAME THEORY AND THE LAW* 246-47. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

¹⁴¹ This calculation would change depending on how the penalty is assessed. For example, if the penalty is automatically assessed *ex ante* to each party upon any party seeking judicial intervention, that penalty will be greater at every probability of losing that is less than 100% than if the penalty is assessed *ex post* to any single party by virtue of a judicial determination on the merits. In other words, the *ex ante* and *ex post* penalties will be the same where the party is absolutely certain it will lose; the *ex ante* penalty is greater in all other cases. A rulemaker with concerns about the court's ability to adjudicate these disputes accurately, or with the parties'

Accordingly, the rules by which the court determines the merits of the parties' respective positions would influence the private negotiations between the parties. Nevertheless, judicial involvement would be less than under the status quo.

As with any method of protecting defendant's Participation Interest, an incentives-based approach would not be free from tradeoffs. For one, there are distributional concerns. A cost-insensitive plaintiff for whom neither the cost of a forum fight nor a court-imposed penalty serve as a meaningful strategic limitation could exert pressure on a more cost-sensitive defendant to capitulate to a burdensome or inconvenient forum. Similarly, in litigation between cost-insensitive plaintiffs and defendants, the costs of a forum fight and the threat of a court-imposed penalty would likely serve as no deterrent at all. Without more, this proposal would likely alter strategic decision-making in litigation between similarly-resourced, cost-sensitive plaintiffs and defendants.

Additionally, this approach would not provide uniform guidance on how future litigants conduct their negotiations, or on when they should resort to judicial intervention. A private-solution model would likely not provide the benefits of a court-centric model that produces instructive precedents; it is unlikely that the course of negotiations between parties and the reasons for their successes or failures would become a matter of public record. In a small legal community, with stable membership and frequent interaction amongst attorneys and judges, the reputation and experience of repeat players may minimize this limitation, but the benefits of recorded collective experience garnered from published opinions would largely be lost. Despite these shortcomings, an incentives-based model may be preferable in terms of administrative ease (uniformity and accessibility) and accuracy (conformity) than the current system of service and venue rules.

CONCLUSION

This Article has shown in domestic federal question cases that reliance on proof of state and state-based district connections in the law of federal service of process and venue has led to increasingly complicated tests that, in the end, do not optimally protect defendants from litigating in inconvenient and burdensome forums. Conventional accounts, both in the courts and in the academy, have trusted too much

ability to assess the merits of their positions accurately, would therefore prefer the *ex ante* option. However, this option is overbroad; it would sweep in more plaintiffs or defendants who have the better argument than would the *ex post* option. Whether the *ex ante* option provides greater conformity would depend on the magnitude of the penalty, i.e., how frequently parties are induced privately to reach an agreement.

in the power of territorial connections to approximate (or at least to signal) non-entitlement disadvantages that may be foisted on a defendant by a plaintiff's initial choice of the place of trial.

A more effective approach would identify the information best calculated to indicate the defendant's actual ability to litigate in a particular place, and utilize that information accurately and efficiently. An incentives-based approach, which requires the litigants to negotiate a trial location with only limited court involvement, could ensure greater forum fairness and better protection of defendants' interest in meaningfully participating in the civil suits initiated against them.