Political Legitimacy and State Court Jurisdiction: A Critique of the Public Law Paradigm

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For more than a century, the United States Supreme Court has read the Due Process Clause of the Fourteenth Amendment\textsuperscript{1} as a limitation on the jurisdiction of state courts.\textsuperscript{2} The minimum contacts doctrine, inaugurated by the Court in 1945,\textsuperscript{3} remains the dominant doctrinal element of jurisdictional due process. Under the current formulation of the minimum contacts doctrine,\textsuperscript{4} a state court generally may exercise jurisdiction over a citizen of some other state

\textsuperscript{1}"No State shall... deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV, § 1.
\textsuperscript{2}It was in Pennoyer v. Neff, 95 U.S. 714 (1877), that the Court first declared that the clause limits state court jurisdiction.
\textsuperscript{3}International Shoe Co. v. Washington, 326 U.S. 310 (1945).
\textsuperscript{4}Justice Brennan’s opinion in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985),
or nation in a civil action only if the defendant purposefully has established the right sort of relationship with the forum state. If the extension of judicial power passes this threshold minimum contacts test, then there is a strong presumption in favor of its constitutionality, and the defendant can establish a violation of jurisdictional due process only by making a compelling showing that requiring the defendant to litigate in the forum imposes an unfair burden on the defendant.

Critics of the minimum contacts doctrine, preferring less stringent constitutional limits on state court jurisdiction, argue that the way is open for reform because the Court itself has failed to articulate any cogent theoretical justification for the proposition that purposeful contacts of the right sort should be a sine qua non for the extension of state judicial power against a noncitizen. A formidable theoretical defense of the minimum contacts doctrine can be constructed, however, from ideas published roughly during the past decade and a
half by Professor Lea Brilmayer and a few other jurisdictional


Recently, she offered a normative theory of conflict of laws that draws heavily on her account of jurisdictional due process. Lea Brilmayer, Rights, Fairness, and Choice Of Law, 98 YALE L.J. 1277 (1989) [hereinafter Brilmayer, Rights, Fairness, and Choice of Law].

In some of her most interesting writing, Professor Brilmayer has deployed the principles of political legitimacy that animate her account of jurisdictional due process to shed light in other areas, including the so-called Carolene Products approach to constitutional adjudication, Lea Brilmayer, Carolene, Conflicts, and the Fate of the “Inside-Outsider", 134 U. PA. L. REV. 1291 (1986), and the debate between liberal legal theorists and communitarians, Lea Brilmayer, Liberalism, Community, and State Borders, 41 DUKE L.J. 1 (1991).

This defense might be termed the legitimacy theory of state court jurisdiction. The theory asserts that the major elements of the minimum contacts doctrine protect defendants who are citizens of other states or nations against politically illegitimate exercises of state judicial power. According to the theory, the problem of state court authority over these noncitizens is an instance of the more general problem in political philosophy of the legitimacy of any government's extension of official coercion. A summons issued by a state court to a noncitizen is an order from a government that is not the noncitizen's government, backed generally by a threat to extend official coercion to seize and sell the reachable assets of the noncitizen. When a state court orders a citizen to appear and defend a lawsuit, the defendant ordinarily does not question the political legitimacy of the summons because the summons is an order issued by the defendant's own government.


12. Brilmayer et al., supra note 10, at 726 (arguing that political legitimacy is always an issue when court asserts adjudicatory jurisdiction); Stein, supra note 11, at 761 (asserting that theories of state court jurisdiction define when and how state may command obedience from individual); Stewart, supra note 11, at 19 (stating that an assertion of judicial authority against political outsider is illegitimate unless outsider has consented); Trangsrud, supra note 11, at 884-85 (arguing that the touchstone of jurisdiction should be consent of litigants or some other legitimating political principle); Weisburd, supra note 11, at 378 (stating that "the controversy over standards of personal jurisdiction... is a dispute about how to determine when particular state government may demand obedience from a particular person.")

13. E.g., Brilmayer, Jurisdictional Due Process, supra note 10, at 294-95 (noting that chief concern of political theory has been to analyze problem of legitimacy of official coercion and that jurisdictional due process presents this problem in interstate context).

14. Weisburd, supra note 11, at 402 ("The state does not simply invite defendants to participate in a civil suit; it orders them to do so.")

15. Brilmayer et al., supra note 10, at 726 ("Adjudicative jurisdiction is one way in which the state asserts coercive power over individuals."); Weisburd, supra note 11, at 385 ("Every time a summons issues, the state is ordering defendant to come to court and warn [defendant] that if he disobeys, he will suffer judgment.")

16. Professor Brilmayer characterizes as "a first principle," Brilmayer, How Contacts Count, supra note 10, at 85, the proposition that "there can be no sovereignty objections to a State requiring its own citizens to appear and defend a suit brought in its courts." Id. (footnote omitted). She also notes that "[t]he proper
demands obedience from an outsider, the political legitimacy of the demand is not self-evident and must rest on reasons other than the reasons that justify a government's orders to its own citizen. The minimum contacts doctrine, or so the argument goes, protects noncitizens against state court authority that is not backed by such reasons.

The legitimacy theory offers itself as a constructive account of the Court's jurisdictional due process precedents. That is to say, the theory claims to fit the Court's precedents well enough to count as an interpretation and not an invention, and it claims to justify what the Court has been doing. As a descriptive matter, the theory is especially impressive. While the Court itself never has defended all of the major elements of the minimum contacts doctrine explicitly as flowing from any overall theory of political legitimacy, a constructive account can be successful even if it has not been articulated in so many words in judicial opinions, so long as it fits what a court actually does. As Part I of this Article makes clear, the response of a citizen or resident who objects is to invoke the State's political processes, the classic remedy where the State imposes burdens on its own members. See also Stein, supra note 11, at 756-57 ("The very notion of citizenship connotes a universal allegiance to the authority of the state."); Weisburd, supra note 11, at 378 (noting that when the Court strikes down exercise of jurisdiction by state court as inconsistent with Due Process Clause, Court is saying in effect that state is not entitled to demand from particular defendant the deference that governments may expect from own citizens).

19. See Brussack, supra note 18, at 1133-34 (describing the elements of fit and value in Dworkin's notion of constructive interpretation).
20. Wendy C. Perdue, Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered, 62 WASH. L. REV. 479, 518 (1987); Redish, supra note 8, at 1125. The account, however, has penetrated the pages of the Federal Reporter. Judge Frank Easterbrook, writing for a Seventh Circuit panel in Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668 (7th Cir. 1987), described the minimum contacts doctrine in paradigmatically Brilmayerian terms:

The "minimum contacts" cases . . . require only sufficient contacts between the defendant (or the defendant's transactions) and the forum. The question is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant. A state court may lack such an entitlement to coerce, when the defendant has transacted no business within the state and has not otherwise taken advantage of that sovereign's protection.

Id. at 671 (citations omitted). Recently, Judge Easterbrook reiterated the point. United Rope Distributors, Inc. v. Seatruimph Marine Corp., 930 F.2d 532, 534 (7th Cir. 1991) (quoting Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 671 (7th Cir. 1987)).
legitimacy theory nicely fits the elements of the minimum contacts doctrine.

First, the theory elegantly explains why the minimum contacts doctrine applies only when the defendant is a citizen of some other state or nation, and not when the defendant is an absent citizen of the forum polity.22 If the defendant is a member of the political community of the forum state, then the political legitimacy of the summons is self-evident, even if the defendant happens to be located far from the forum when the lawsuit is brought. There is no reason, therefore, for any further inquiry under the minimum contacts doctrine. Second, the theory explains the distinction, familiar to students of minimum contacts jurisprudence, between specific jurisdiction and general jurisdiction.23 A state court may exercise specific jurisdiction, according to the theory, because a state is entitled to summon a noncitizen to answer for conduct that implicates a state regulatory interest. A state court may exercise general jurisdiction because the noncitizen's continuous and systematic contacts with the state entitle the state to treat the noncitizen as a de facto citizen. Third, the theory supplies a reason for the so-called purposeful availment requirement that became a gloss on the minimum contacts doctrine in 1958.24 The purposeful availment requirement can be seen as adding a contractarian element to the doctrine's formula for political legitimacy. A state is entitled to summon a noncitizen only if the noncitizen first has made a choice to establish an affiliation with the state. Finally, the theory fits the Court's insistence that the minimum contacts doctrine must be extended as a threshold test. If principles of political legitimacy animate the doctrine, and if the doctrine flows from the most attractive conception of political legitimacy, then a summons issued in violation of the doctrine is nothing more than a naked threat of violence that the defendant has no moral obligation to obey, no matter how eager the forum state might be to serve as the forum for resolution of the dispute and no matter how much more convenient or efficient it would be overall to allow the forum to serve as the place of trial.

Because the legitimacy theory succeeds so well as a descriptive matter, its normative claim deserves serious consideration. The normative claim is that the imperative of political legitimacy justifies the elements of the minimum contacts doctrine. Part II of this Article examines and rejects the theory's normative claim. The legitimacy theory operates within what might be called the reigning public law paradigm of state court jurisdiction, which is based on the premise that the antagonists in a jurisdictional dispute are the forum state and

22. See infra notes 36-39 and accompanying text.
23. See infra notes 40-48 and accompanying text.
24. See infra notes 49-70 and accompanying text.
the noncitizen defendant. The summons issued by the forum state is a projection of government power against a person. Jurisdictional due process, like other individual rights guarantees, protects persons against abuses of government power. A summons that violates the imperative of political legitimacy is an abuse of government power.

This Article presents a competing paradigm: In ordinary private litigation, the jurisdictional antagonists are not really the forum state and the noncitizen defendant, but the plaintiff and the noncitizen defendant. It is the plaintiff and not the forum state that decides to file a complaint against the defendant and to file it in one of the courts of a particular state. The summons issued by the forum state represents not the state's separate insistence on providing a forum for resolving the parties' dispute, but only its willingness to provide a forum at the instance of the plaintiff. The problem of state court jurisdiction, viewed from within this private law paradigm, is not so much a vertical problem of justifying a government's order to a person as it is a horizontal problem of doing place-of-trial justice between the parties.

In other words, the problem of state court jurisdiction in ordinary private litigation is more akin to the problem of working out the details of an arbitration than it is like the problem of justifying a government's extension of its criminal law or its taxing power. Any ordinary private dispute must be resolved according to some set of substantive rules and procedures. Moreover, an interpreter of these rules and procedures will be required, and someone will need to decide the facts. The jurisdictional problem arises because the parties themselves failed to agree in advance, and cannot agree now, on these matters. The plaintiff, by filing a complaint in the courts of a particular state, seeks to impose on the defendant a favorable package of rules, procedures, and decision makers for the

25. See infra note 74.
27. For example, in Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), a libel plaintiff from New York chose a New Hampshire forum for her action against a nationally distributed magazine because New Hampshire's rules governing choice of law dictated the application of the state's own statute of limitations for libel, and New Hampshire's unusually long six-year limitations period for the tort was the only one in the country that had not expired when the plaintiff filed her action. Id. at 773.
28. The plaintiffs in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), apparently joined the New York retailer and distributor of their automobile as defendants in the products liability action solely to prevent removal of the case from their chosen forum, an Oklahoma state court, to a federal court, because the state court was famous for being pro-plaintiff. Allen R. Kamp, Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory, 15 GA. L. REV. 19, 22
resolution of their dispute. Nothing about the character of plaintiffs or defendants as a class suggests that either side ought to have unfettered discretion to dictate these matters to the other. The package of rules, procedures, and decision makers for resolving a dispute ought to be determined according to neutral principles. Just as the primary objective of substantive private law should be to do justice between the parties, so too the primary objective of jurisdictional rules for ordinary private litigation ought to be to do place-of-trial justice between the parties.

In doing place-of-trial justice, state lines matter to the plaintiff as well as the defendant. Each side would prefer to have the dispute resolved within a favorable litigation setting. This often means a court close to home governed by familiar laws and procedures applied by neighbors rather than strangers. The vocabulary of political legitimacy, with its narrow concern for what states can do to persons, is simply not rich enough to yield principles of place-of-trial justice between the parties in ordinary private litigation. This Article, therefore, proposes an alternative to the legitimacy theory and its minimum contacts doctrine. The doctrinal centerpiece of the alternative is a significant relationship test for place-of-trial justice, developed in detail in Part II. The pivotal feature of the test is that it focuses symmetrically on the extent to which the parties to a lawsuit share a relationship with the forum state and with plausible alternative forums for the litigation.

The significant relationship test should be attractive to some of the critics of the minimum contacts doctrine. Overall, deployment of the test would broaden the scope of state court jurisdiction. Moreover, the test accommodates the idea that the extent of the parties' connections with plausible forums should be weighed along with other factors, including the relative litigational ability of the parties and the desirability of a single forum for resolving multiparty, multistate disputes, in an overall assessment of place-of-trial justice.

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29. See infra notes 78-92 and accompanying text (noting that the employment of the significant relationship test might have reversed results and permitted jurisdiction in the Shaffer and Helicopteros cases).

30. See infra notes 104-108 and accompanying text. The relative litigational ability of the parties is emphasized by Professors von Mehren and Weinberg, among others. See generally von Mehren, supra note 8 (observing that under the minimum contacts doctrine, the Court has failed to "explore and develop the principal of relative litigational ability"); Weinberg, supra note 8 (arguing that the excessive solicitude for interests of the defendant embodied in minimum contacts doctrine should be abandoned in favor of an approach that balances convenience interests of all the parties).

31. See infra note 109 and accompanying text. This factor is emphasized by Professor Hazard. See generally Hazard, supra note 8 (proposing that the restrictive
other hand, the test, like the minimum contacts doctrine, flows from the premise that state lines matter centrally in doing place-of-trial justice, and not just because litigation in one state rather than another can determine the substantive law that will apply. The test, therefore, is unlikely to satisfy those critics of the minimum contacts doctrine who claim or imply that the principal fulcrum on which jurisdictional rules should turn is convenience or efficiency.

Part III of the Article discusses alternatives for implementing the significant relationship test and other features of a private law regime for doing place-of-trial justice in state court litigation against citizens of other states or nations. The federal structure of our polity turns out to be a formidable obstacle to the implementation of such a regime. The Article concludes with a postscript that critiques the Court's most recent jurisdictional due process decision, *Burnham v. Superior Court*.

I. EXPLAINING THE MINIMUM CONTACTS DOCTRINE

A. The Distinction Between Citizens and Noncitizens

Years before it first enunciated the minimum contacts doctrine, the Supreme Court embraced a rule, which persists today, that when a government orders one of its own citizens to attend court, the order is

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features of minimum contacts doctrine should be discarded in favor of a regime in which state courts are permitted to exercise jurisdiction if the state is an appropriate forum according to criteria employed in typical venue provisions).

32. Thus, the test comports at least to an extent with Professor Weintraub's view that jurisdictional due process doctrine should not be preoccupied with the character of the relationship between the forum state and the noncitizen defendant. *See generally* Weintraub, *supra* note 8 (proposing that the requirement of a nexus between forum state and defendant should be rejected in favor of multi-factored inquiry that focuses on fairness to the defendant under all circumstances).


34. *See, e.g.*, Kamp, *supra* note 28, at 47 ("Under the Court's [current approach to jurisdictional due process], state lines can become barriers to jurisdiction in situations where jurisdiction could be obtained under an analysis based solely on questions of convenience"); Redish, *supra* note 8, at 1137 ("[T]he only concern of a principled due process jurisdictional analysis should be the avoidance of inconvenience to defendant"); Weinberg, *supra* note 8, at 916 (arguing that personal jurisdiction should turn on fair balancing of conveniences). *Cf.* Jay, *supra* note 9, at 446 (observing that state lines are largely irrelevant in modern commercial context, because companies as a practical matter hope for the widest distribution of their products and would not restrict distribution to avoid particular state forums).

immune from jurisdictional due process attack. In Blackmer v. United States, the Court upheld the jurisdiction of a federal court over an American citizen residing abroad. A court in the District of Columbia had issued two subpoenas requiring Blackmer, who was living in Paris, to appear as a witness for the government in a criminal trial. When Blackmer failed to comply with the subpoenas, which had been served on him in France, the court fined him. Blackmer argued in the Supreme Court that the lower court’s exercise of jurisdiction over him violated the Due Process Clause of the Fifth Amendment, but the Supreme Court rejected the contention:

While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. . . . It is . . . beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.

In Milliken v. Meyer, the Court made clear that the Blackmer principle permitted a state court within the United States to exercise jurisdiction over an absent citizen of the state in private civil litigation. A Wyoming court had entered a default judgment against Meyer, a Wyoming citizen who had been served with process in Colorado, in litigation involving oil profits. Meyer brought an action in a Colorado court to prevent the plaintiff in the Wyoming action from enforcing the Wyoming judgment in Colorado. The Supreme Court held that the Wyoming judgment was entitled to full faith and credit:

Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. . . . As in case of the authority of the United States over its absent citizens, the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. . . . One . . . incident of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him.

The persistence of the Blackmer-Milliken rule in the minimum contacts era, and the Court’s specific invocation in the two cases of the vocabulary of political legitimacy, are powerful confirmation of the proposition that the minimum contacts doctrine flows from principles

37. Id. at 421 (1932).
38. Id. at 436-38.
39. 311 U.S. 457 (1940).
40. Id. at 458-59.
41. Id. at 462-64.
of political legitimacy. When a state court summons a member of the political community that created the court, the summons is politically legitimate. When a state court summons an outsider, the political legitimacy of the summons must be established in some other way, and the minimum contacts doctrine is that other way.

B. Specific Jurisdiction and General Jurisdiction

Chief Justice Stone, writing for the *International Shoe* Court, inaugurated the minimum contacts era in 1945:

[D]ue process requires . . . that in order to subject a defendant to a [state court] judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[42]

The Chief Justice did not characterize the doctrine explicitly as flowing from principles of political legitimacy, but neither did he flesh out any other competing conception of the "traditional notions of fair play and substantial justice" that might animate the doctrine. Instead of deriving the minimum contacts doctrine from any particular abstract theory of jurisdictional justice, he relied on the familiar bottom-up method of common law reasoning, building the doctrine from the patterns of facts and results in the Court's pre-1945 jurisdictional due process cases.

He found in these precedents what might be described as a two-dimensional matrix. One dimension of the matrix gauges the relatedness of the noncitizen's contacts with the forum state to the claims asserted in the litigation; the other dimension gauges the extensiveness of the contacts on a scale from a single, isolated contact to continuous and systematic forum activity.[43] A single, isolated contact can justify an exercise of jurisdiction by a state court over a noncitizen if the lawsuit is sufficiently related to the contact.[44] Professors von Mehren and Trautman introduced the term "specific jurisdiction"[45] to refer to adjudicatory authority over disputes arising out of or sufficiently connected with a noncitizen's forum contacts. On the other hand, if a noncitizen's contacts with the forum state are sufficiently extensive, the state's courts may summon the noncitizen to defend lawsuits entirely unrelated to the contacts.[46] Professors von Mehren and Trautman coined the term "general jurisdiction" to refer to adjudicatory authority that extends to any sort of dispute.[47]

43. See id. at 317-18.
44. Id. at 318.
Specific jurisdiction and general jurisdiction can be described as flowing from principles of political legitimacy. What reasons, other than an individual's membership in a polity, might justify a summons to the individual from the polity's courts to answer a civil complaint? One plausible reason is that the individual allegedly has caused harm within the polity. A noncitizen who drives into a state and negligently injures a citizen of that state no longer can claim honestly to be free of any obligation to respond to a summons from the state's courts in an action brought by the injured citizen. Specific jurisdiction flows from this first reason. Another plausible reason is that the defendant, although not formally a member of the polity, has established such a close relationship with the polity that the defendant might be described as a de facto member. A noncitizen business, for example, that maintains substantial manufacturing facilities within a state and that participates in the state's political life arguably loses its status as an outsider. This second reason explains general jurisdiction.

C. The Purposeful Availment Requirement

One can imagine, and some commentators have defended, an apparently straightforward conception of political legitimacy in which the presence of a state regulatory interest is a sufficient condition for the extension of judicial power against a noncitizen. The minimum contacts doctrine, however, implies a more complex conception. In *World-Wide Volkswagen Corp. v. Woodson*, for example, the Court ruled that an Oklahoma court lacked the authority to entertain a products liability action against two noncitizens, despite the fact that the automobile collision and fire that precipitated the litigation occurred within Oklahoma's borders. The stumbling block to jurisdiction in *World-Wide Volkswagen* was the so-called purposeful availment requirement.

The purposeful availment requirement became a pivotal feature of

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49. Brilmayer, *How Contacts Count*, supra note 10, at 86 ("The most convincing justification [for the state court's exercise of authority over noncitizen] is [s]tate's right to regulate activities occurring within the [s]tate."). See also Stein, supra note 11, at 698 (observing that specific jurisdiction recognizes "state's legitimate regulatory stake" in litigation "to redress a legal wrong committed or suffered within the state").
50. Brilmayer, *How Contacts Count*, supra note 10, at 87 (observing that noncitizen's systematic unrelated activity in forum suggests that noncitizen is enough of an insider safely to be relegated to state's political processes). See also Stein, supra note 11, at 758 (asserting that noncitizens who establish pervasive and systematic contacts with forum legitimately can be treated as "constructive state citizens").
51. Stein, supra note 11; Weisburd, supra note 11.
52. 444 U.S. 286 (1980).
53. Id. at 295-99.
the Supreme Court's approach to jurisdictional due process in 1958. The Chief Justice Warren, writing for the majority in *Hanson v. Denckla*, stated that jurisdictional due process requires "in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The act must be the noncitizen defendant's act: "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." Moreover, the noncitizen defendant's immunity from the forum state's grasp persists even if the forum state is the center of gravity of the dispute, with a clear interest in resolving it, and the defendant easily could participate in litigation there, incurring no meaningful inconvenience costs.

Justice Brennan's 1985 opinion in *Burger King Corp. v. Rudzewicz*, the Court's most recent full-dress enunciation of the elements of jurisdictional due process, confirms that the purposeful availment requirement is an important gloss on the minimum contacts doctrine and must be treated as a threshold requirement. If the plaintiff has not demonstrated the noncitizen's purposeful minimum contacts with the forum state, then a state court's exercise of authority violates jurisdictional due process. Moreover, once a plaintiff estab-

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55. 357 U.S. 235 (1958). Professor Stein describes Hanson’s introduction of the purposeful availment requirement as a fundamental transformation of jurisdictional due process doctrine. Stein, supra note 11, at 717.
57. Id.
58. Id. at 254. See also Stein, supra note 11, at 718 (reading Hanson as “conceptual repudiation” of notion that regulatory need justifies jurisdiction and as foundation for reigning view that jurisdiction is justified by defendant’s voluntary submission to authority of forum state).
61. The opinion describes as “the constitutional touchstone” of modern jurisdictional due process doctrine the question of whether the defendant purposefully has established minimum contacts with the forum state. Id. at 474 (emphasis added).
62. Professor Stein sums up the Court’s most recent cases as based on the proposition that “[c]onvenience and forum interest apparently can divest a court of its presumptive authority, but they cannot establish jurisdiction absent the defendant’s purposeful availment.” Stein, supra note 11, at 732. See also Earl M. Maltz, Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction, 66 WASH U. L.Q. 671, 688 at n.83 (1988) (arguing that Supreme Court never has found exercise of state court jurisdiction constitutional in absence of purposeful availment, unless one counts Phillips Petroleum Co. v. Shuts, 472 U.S. 797 (1985), which involved plaintiff class members and not nonresident defendants); Rex R. Perschbacher, Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in Burger King v. Rudzewicz, 1986 ARIZ. ST. L.J. 585, 597 (Hanson decision now seen as first in series of restrictive jurisdictional due process decisions having as “[t]heir central feature . . . an insistence on
lishes a noncitizen defendant's purposeful minimum contacts with the forum state, the noncitizen can defeat jurisdiction only by marshaling what Justice Brennan characterized in *Burger King* as a "compelling" case against jurisdiction under a multi-factored balancing test weighing any burdens on the defendant against various countervailing considerations, including the plaintiff's interest in a convenient forum and the forum state's interest in resolving controversies flowing from in-state events.63

The dominance of the purposeful availment requirement in the modern jurisdictional due process regime does not defeat the project of explaining the main features of the regime in terms of political legitimacy. On the contrary, the central role played by the requirement reinforces the notion that principles of political legitimacy drive the doctrine. A famous idea in political philosophy, usually associated with John Locke,64 is that government derives its legitimacy from the consent of the governed.65 Analogously, a summons to a noncitizen derives its legitimacy at least in part from the noncitizen's consent,66 manifested perhaps by the noncitizen's execution of a forum selection clause in a contract67 or by a decision not to object to personal jurisdiction68 or through purposeful affiliation with the forum.69 No other

establishing purposeful and beneficial defendant-forum contacts before considering any other interests”).


64. *John Locke*, *Two Treatises of Government* 348 (P. Laslett 2d ed. 1967) (3d ed. 1968) (stating that a person cannot be subjected to political power of another without person's consent).

65. Stewart, *supra* note 11, at 19; Trangsrud, *supra* note 11, at 885. Professor Trangsrud emphasizes the importance of contractarian political legitimacy to American political leaders in the late eighteenth century. *Id.* He quotes John Adams for the proposition that "the only moral foundation of government is, the consent of the people." *Id.* (quoting letter from John Adams to James Sullivan (May 26, 1776), reprinted in 9 C. Adams, *The Works of John Adams* 375 (1854)).

66. Stewart, *supra* note 11, at 18; Trangsrud, *supra* note 11, at 889. *But see* Redish, *supra* note 8, at 1125 (observing that the Court itself has not embraced explicitly notion that contractarian conception of political legitimacy underlies minimum contacts doctrine).

67. Trangsrud, *supra* note 11, at 895. *See* Stein, *supra* note 11, at 756 (recognizing that individual is always free to subject himself or herself voluntarily to sovereign that otherwise would lack authority over individual).

68. Trangsrud, *supra* note 11, at 895.

69. Professor Stein describes the Court's modern jurisdictional due process cases as recognizing "a contract-like justification" for the deployment of state court authority against noncitizens. Stein, *supra* note 11, at 691. "[J]urisdiction satisfies due process scrutiny when the defendant voluntarily enters into a relationship with the sovereign and thereby confers upon the forum its jurisdictional authority." *Id.* (footnote omitted). He locates the genesis of this contract-like justification in *Hanson* and traces its development in the Court's modern round of jurisdictional due process decisions. *Id.* at 717-33.

Professor Brilmayer, defending her political rights model of choice of law, argues that a polity should not be permitted to apply its own substantive law against
person can obligate the noncitizen; the acts establishing the relationship must be the noncitizen's acts. And a forum's strong interest in issuing a summons to a noncitizen is no substitute for the noncitizen's prior consent.

It might be objected that the "consent" associated with a noncitizen's purposeful affiliation with a forum differs importantly from the actual consent manifested by a noncitizen's execution of a forum selection clause or calculated decision not to interpose an objection to jurisdiction. The purposeful availment requirement attaches consequences to a noncitizen's behavior whether or not the noncitizen wishes the consequences to attach. A noncitizen cannot escape the authority of a state court by announcing in advance that his or her purposeful affiliation with the forum should not be taken as a manifestation of consent. The minimum contacts doctrine therefore is contractarian only in the limited sense that the noncitizen has a choice whether to engage in the conduct that constitutes purposeful availment.70

This objection makes the mistake of equating contractarian principles of political legitimacy with the ordinary rules of contract law.71 In contract law, no contract generally is formed if one party makes clear that he or she objects to particular terms proposed by the other contracting party. In contractarian political theory, however, a polity may insist on a package deal. A person may choose to remain unconnected with a polity. The choice is a genuine choice.72 But if a person chooses to establish a relationship with a polity, then the polity legitimately may attach certain consequences to the choice, whether or not the person agrees term-by-term to the consequences. Contractarian principles hardly permit a citizen of a state to pick and choose among the obligations of citizenship, agreeing to fill out census question-
naires, but refusing to pay taxes. Similarly, a noncitizen who chooses to establish a relationship with a state must accept the jurisdictional consequences of the choice, so long as the state satisfies other applicable principles of political legitimacy in imposing the consequences.

II. THE PRIVATE LAW PARADIGM

The legitimacy theory gives a superficially satisfying coherence to the Court's jurisdictional due process project. The Due Process Clause protects persons from states. Defendants who are citizens of other states or nations need protection from politically illegitimate projections of state judicial power. The minimum contacts doctrine accords this protection. The coherence, however, is a false coherence. It is a coherence within the flawed public law paradigm of state court jurisdiction. In ordinary private litigation, the problem of state court jurisdiction is not a problem of public law in the conventional sense. The jurisdictional antagonists are not the forum state and the noncitizen defendant, but the plaintiff and the noncitizen defendant. The plaintiff, taking advantage of the litigation initiative that belongs to all plaintiffs, determines the initial forum for the lawsuit simply by filing a complaint in the courts of a particular state. The summons that the forum state issues to the defendant represents nothing more really than the state's willingness to supply a forum.

If, for example, the plaintiffs in the World-Wide Volkswagen case had decided to bring their products liability action in New York instead of Oklahoma because they thought they could secure a larger verdict in New York, no Oklahoma legal officer likely would have appeared in the New York action to seek to force the litigation into an Oklahoma court, despite the fact that Oklahoma, as the place where

73. Cf. Stein, supra note 11, at 708-09 (criticizing contractarian account of political legitimacy in general on ground that state authority does not depend on consent of each individual within state's borders and "individual can no more claim immunity from sovereign authority because of lack of consent than a driver can claim immunity from the speed limit because [driver] voted against the incumbent party").

74. Justice Frankfurter noted the "enormous 'discrimination' inherent in our system of litigation, whereby the sole choice of forum, from among those where service is possible and venue unobjectionable, is placed with the plaintiff." Hoffman v. Blaski, 363 U.S. 335, 365-66 (1960) (Frankfurter, J., dissenting). "The plaintiff," he continued, "may choose from among these forums at will." Id. at 366.

75. This practical indifference also undermines the theory that jurisdictional due process should protect against what might be called judicial aggrandizement—the deployment of judicial power by one state at the expense of a second state. Judicial aggrandizement is a theoretically available rationale in any federal republic for nationally imposed limits on state court jurisdiction. "To the extent that one state's judicial control over a legal controversy is increased, the control of all other states over that controversy is diminished." Philip B. Kurland, The
the plaintiffs suffered their injuries, theoretically could claim a regulatory interest in supplying the forum. If the plaintiffs, when they purchased their car in New York, had entered into a forum selection


An exercise of jurisdiction might be at the expense of a second state in either of two senses. First, the second state might be a polity with a strong cultural identity and distinct values, and therefore might regard an exercise of jurisdiction by the first state, even in private litigation, as an illegitimate intrusion into the affairs of the second state's political family. Such a state might insist, for example, that adoptions of the state's children be handled only through its courts according to its laws. In 1978, for example, Congress enacted legislation recognizing the exclusive jurisdiction of Indian tribal courts over adoption proceedings involving reservation-domiciled Indian children. Indian Child Welfare Act of 1978, 25 U.S.C. § 1911(a) (1988). The legislation reflects Congress's judgment that state courts lack appreciation for Indian cultural values. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989). Moreover, the legislation embraces the proposition that the tribe itself has an interest, separate from the parents' interest, in preserving the integrity of the tribe by preventing the wholesale adoption of Indian children by non-Indians. _Id._ at 49-53.

Second, even a state without any strong cultural identity or distinct values might view ordinary civil litigation as partly public in character, with the plaintiff serving as a private attorney-general, acting not only to protect his or her own interests, but to promote such state interests as the encouragement of promise-keeping and the deterrence of dangerous conduct. _See_ Louise Weinberg, _Against Comity_, 80 Geo. L.J. 53, 70-71 (1991). Such a state might insist that any lawsuit arising from events that occurred within the borders of the state should be tried in the state's courts and according to its laws in order to ensure that the public objectives of the state's system of civil litigation are promoted.

Despite the cultural convergence of the United States, the individual states, or at least some of them, might be described as having distinct cultures and values. Professor Brilmayer has called attention to the continuing significance of state lines:

_Maine has a different character than Texas, Nevada emphasizes different values than South Carolina, and San Franciscans complain bitterly about how their skyline comes more and more to resemble that of New York. Northern and Southern Californians joke about dividing the state in two precisely because it is thought that statehood appropriately reflects value choices, and two such different cultures are incongruously joined into a single state._

Brilmayer, _Shaping and Sharing, supra_ note 10, at 408. _See also_ Perdue, _supra_ note 20, at 517 (arguing that states even today retain importance beyond being political subunits and to some extent can be described as mechanisms for "recognition of social and cultural group differences") (quoting Howard C. Hunter, _Federalism and State Taxation of Multistate Enterprises_, 32 Emory L.J. 89 130 (1983)). The differences from state to state are not so pronounced or keenly felt that they generate any real state-based insistence on federal supervision of state court authority over noncitizens to keep certain matters within the political family. Moreover, there is little evidence that the states regard it as crucial that ordinary civil lawsuits arising from events within a particular state's borders be tried in the courts of that state according to its laws in order to ensure the promotion of such state interests as the encouragement of promise-keeping and the deterrence of dangerous conduct. As Professor Louise Weinberg has noted, "[a] defendant may not want to be sued in the forum of the plaintiff's choice, but to suppose that
agreement with the defendants, specifying that any disputes would be resolved in the courts of New York, the clause likely would have been enforceable, despite Oklahoma's theoretical interest. And if the plaintiffs and the defendants had settled their case, Oklahoma as a polity would not have insisted on scrutinizing the settlement to be sure that the state's separate interest was being served adequately. In fact, if the World-Wide Volkswagen plaintiffs had decided to sue in New York or to settle on terms agreeable to all the parties, or if the defendants had demanded adherence to a forum selection agreement, the only Oklahomans who likely would have cared at all would have been pleased to have the additional space on an Oklahoma docket.

It accords more with the reality of ordinary private litigation, therefore, to describe the place-of-trial problem in World-Wide Volkswagen not in vertical terms, as a state-defendant confrontation, but in horizontal terms, as a plaintiff-defendant confrontation, with the issue properly framed as whether the plaintiffs, consistent with the most
attractive principles of place-of-trial justice between the parties, were entitled to impose the Oklahoma forum on the defendants. The legitimacy theory and the minimum contacts doctrine, with their single-minded public law focus on the relationship between the forum state and the noncitizen defendant, lack an adequate normative vocabulary for doing place-of-trial justice between the parties.

This Article therefore proposes as an alternative to the minimum contacts doctrine a significant relationship test that takes as its starting point the horizontal symmetry of the problem of place-of-trial justice. Comparable in some ways to the approach to choice of law recommended by the Restatement (Second) of Conflict of Laws, the significant relationship test would permit a plaintiff initially to impose on the defendant any state forum with a significant relationship to the dispute and the parties to the dispute. The test also would permit the defendant to trump the plaintiff's choice in favor of a forum with a substantially closer relationship to the dispute and the parties to the dispute, but not if other factors such as the relative litigational abilities of the parties justified the plaintiff's original choice. Like the

78. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1)(1971) ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties. . . "). Because the significant relationship test tracks so closely a particular approach to conflict-of-laws, it should be attractive to those critics of the minimum contacts doctrine who argue that if a state would be entitled to apply its own substantive law to resolve a dispute, then a fortiori the state should be entitled to serve as the forum. Linda J. Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. REV. 33, 88 (1978) ("[i]f a court has the power to apply its own law, it should have the power to exercise jurisdiction over the action"); Stein, supra note 11, at 752-53 ("When the forum would be justified in applying its own law to the activity questioned by the lawsuit, it also should have the authority to adjudicate.") (footnote omitted). Cf. Weintraub, supra note 8, at 525 (arguing that when the law of forum is "so clearly the appropriate law to resolve the dispute that it would be the law chosen not only by the forum's conflicts rules, but also by the conflicts rules of all other states that have contacts with the parties or with the transaction," then "choice of forum law becomes a cogent reason for permitting litigation in the forum.").

In a number of its jurisdictional due process opinions, the Court has admonished that the question whether a state would be entitled to apply its own law in resolving a dispute and the question whether the state may serve as the forum are separate issues. A state that would be entitled to apply its own law nevertheless may lack the authority under the Due Process Clause to serve as the forum. Shaffer v. Heitner, 433 U.S. 186, 215 (1977) ([The Court has] rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute). Professor Silberman, for one, finds this "counterintuitive." Silberman, supra, at 82. "To believe that a defendant's contacts with the forum state should be stronger under the [D]ue [P]rocess [C]lause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Id. at 88.
"most significant relationship" test incorporated in the Restatement's choice of law rules, the significant relationship test for state court jurisdiction would look to such factors as the places where relevant events occurred; the citizenship, residence, and places of business of the parties; and the place or places where the relevant relationships between or among the parties were clustered.

A. The Symmetry of Place-of-Trial Justice

The minimum contacts doctrine is asymmetrical. It focuses only on the question of whether the defendant purposefully has established the right sort of relationship with the forum state. The plaintiff and the defendant, however, share the same place-of-trial concerns. If the plaintiff is not entitled to impose on the defendant a wholly alien forum for the resolution of their dispute, neither is the defendant entitled to impose such a forum on the plaintiff. If, for example, a lifelong South Carolina citizen is injured in South Carolina by a widget manufactured by a Massachusetts company, and if the South Carolinian cannot sue the company in a South Carolina court because the company has established no purposeful affiliation with South Carolina, then the South Carolinian is forced as a practical matter to seek justice in Massachusetts. But there is no more reason, focusing only on the relationships between parties and polities, to impose the Massachusetts litigation package on the plaintiff than there is to impose the South Carolina litigation package on the defendant. The significant relationship test recognizes this symmetry and allows consideration not only of the defendant's relationship with the forum chosen by the plaintiff, but also of the plaintiff's relationship with the forum where the defendant would have the dispute resolved.

If the Court had embraced the notion that borders matter as much and in the same ways to plaintiffs and defendants, a number of its modern jurisdictional due process decisions might have come out diff-

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79. E.g., Restatement (Second) of Conflict of Laws § 145 (1971).

80. Professor Brilmayer has discussed the idea of the symmetry of the imperative of political legitimacy:

If the defendant is sued in a distant forum, then he is faced with a choice between litigation and default. The plaintiff is faced with a similar choice if he cannot sue in his chosen forum. Thus, in some fact situations, the plaintiff would be able to argue that being forced to litigate in another forum violates his rights because he has no minimum contacts with the alternative forum. Denying jurisdiction puts him to the choice between litigation in a forum with which he has no contacts and defaulting in his claim. The harm which the defendant would suffer if jurisdiction were granted is no more serious than the harm that the plaintiff would suffer if it is denied.

Brilmayer, How Contacts Count, supra note 10, at 110. See also Perdue, supra note 20, at 517-18 (asserting that if argument from political morality works for defendants, it should work for plaintiffs as well).
ferently. An example is *Shaffer v. Heitner*. In *Shaffer*, a noncitizen of Delaware brought a shareholder's derivative action in Delaware's courts against present and former officers and directors of a Delaware-chartered corporation.\(^{81}\) The *Shaffer* majority concluded that the Due Process Clause prohibited the Delaware courts from exercising jurisdiction over the defendants.\(^{82}\) The plaintiff had argued that the litigation should occur in Delaware because of the state's strong interest in the affairs of corporations holding Delaware charters.\(^{83}\) The Court rejected the argument, concluding first that Delaware had not expressed such an interest clearly\(^{84}\) and second that the presence of a strong state interest is no substitute for a defendant's contacts with the state.\(^{85}\) Justice Marshall wrote for the majority that the defendants "have simply had nothing to do with the State of Delaware."

Within the mono-dimensional public law paradigm, it was enough for Justice Marshall to examine only the relationships between the defendants and Delaware. If what matters, however, is place-of-trial justice *between the parties*, then the Court also should have examined the relationships, if any, between the plaintiff and the forums identified as appropriate by the defendants. If the plaintiff could not sue in Delaware, and if the plaintiff therefore was compelled to follow some or all of the defendants to their home polities, then the plaintiff as a practical matter was required to seek justice under judicial regimes probably at least as alien to the plaintiff as Delaware's courts were to the defendants. Within the private law paradigm, therefore, Justice Marshall's point that the defendants "have simply had nothing to do with the State of Delaware" is hardly telling, even if accurate. In a particular case, if it really is true that there is no forum with which both parties have some significant relationship, then the answer should not be that the defendant's concerns about borders automatically count more than the plaintiff's, but instead that the place of trial should be determined according to other factors.

Another of the Court's modern jurisdictional due process decisions that might have come out differently if the Court had been operating within the private law paradigm is *Helicopteros Nacionales de Colombia, S.A. v. Hall*.\(^{87}\) The plaintiffs in the *Helicopteros* case were relatives of American construction workers who died in a helicopter crash in Peru.\(^{88}\) The relatives brought an action in a Texas court against a number of defendants, including the Colombian company that oper-

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81. 433 U.S. at 189-90.
82. *Id* at 216-17.
83. *Id* at 214.
84. *Id* at 214-15.
85. *Id* at 215.
86. *Id* at 216.
87. *Id* at 409-10.
ated the helicopter. Neither the plaintiffs nor their decedents were citizens of Texas, but the decedents had been hired in Texas by a consortium headquartered in Houston to work on a project in Peru. The consortium had contracted with the Colombian company to provide helicopter transportation for the project. Officials of the Colombian company had negotiated the contract in Texas, and then the parties had executed it in Peru. The Colombian company also had other contacts with Texas, having purchased helicopters there, and having sent its employees to Texas for flight training and related activities.

The Helicopteros majority treated the case as a general jurisdiction case and concluded that the Colombian company lacked the continuous and systematic contacts with Texas necessary to support general jurisdiction. If the Court, instead of focusing single-mindedly on the character of the relationship between the defendant company and Texas, had implemented instead the significant relationship test, the Court might have concluded that the Texas court was a permissible forum. Again, there is no reason inherently to prefer a defendant’s interest in avoiding alien forums over the plaintiff’s parallel interest. If it matters whether the Colombian company had sufficiently substantial contacts with Texas, then it should matter equally whether the plaintiffs had sufficiently substantial contacts with Peru and Colombia, because the Court’s decision as a practical matter relegated the plaintiffs to the courts of those nations.

B. Relative vs. Absolute Place-of-Trial Justice

The minimum contacts doctrine implies an absolutist conception of place-of-trial justice. An exercise of state court jurisdiction either is or is not politically legitimate, and if it is not, then it is unconstitutional, regardless of what else might be said in its favor. The significant relationship test, on the other hand, accommodates the rival notion that an exercise of state court jurisdiction can be just, or more nearly just, as between the parties not because it satisfies any absolute standard of purposeful minimum contacts, but because the relationship of all of the parties to the forum state is relatively closer than is the relationship of the parties to any other potential forum. In Shaffer, for example, the Delaware forum apparently did not meet the Court’s absolute standard of political legitimacy, but the plaintiff and the defendants shared a relationship with Delaware, the corporation’s

89. Id. at 412.
90. Id. at 411-12.
91. Id. at 412.
92. Id. at 410.
93. Id. at 411.
94. Id. at 415-16.
chartering state, that they did not share with any other state, except perhaps the state of the corporation's principal place of business.95 A shared relationship with a forum should count much more toward place-of-trial justice than should the unilateral relationship between any single party and any other potential forum.

The significant relationship test is sensitive in another way to the intensities of the shared connections between the parties and the forum state. The test permits the defendant to veto a state forum selected by the plaintiff, even if the forum can claim some connection to the parties and the dispute, if there is another available forum with a much closer connection to the parties and the dispute. If the Court's Helicopteros decision can be justified within the private law paradigm,96 the justification is that the Colombian company was entitled to veto the Texas forum, despite the parties' shared relationship with Texas, because the parties shared a much stronger relationship with Peru. There is no doubt that the parties held in common in a significant way a connection with Texas, because the Texas consortium was the hub of the relationships that connected the plaintiffs' fate to the competence of the defendant. On the other hand, the project was a project in Peru. Arguably, at least, Peru was the strong center of gravity of the events that led to the litigation.

A modern jurisdictional due process decision that probably can be justified using the notion of the defendant's veto is World-Wide Volkswagen. The World-Wide Volkswagen plaintiffs were citizens of New York, albeit on their way to a new home in Arizona, when they sustained the injuries that provoked their lawsuit,97 and the two defendants who challenged the jurisdiction of the Oklahoma forum also were citizens of New York.98 These parties, then, shared a close relationship with New York that they did not share with Oklahoma or with any other state. Moreover, the transaction that laid the groundwork for the plaintiffs' products liability lawsuit against the defendants—the purchase of the automobile that later burned on an Oklahoma highway—occurred in New York while the plaintiffs were New York citizens.99 It makes considerable sense, then, to require the plaintiffs to sue in the courts of the polity that, until just before the Oklahoma events, the plaintiffs and the defendants had held so closely in common,100 and to prohibit the plaintiffs from imposing on the defendants the courts of a political community that neither the plaintiffs nor the

95. See Weintraub, supra note 8, at 493 (arguing that it is fair to compel directors of corporation to respond to stockholder's derivative suit in state of incorporation).
96. My own view is that the decision cannot be justified. See infra notes 107-10 and accompanying text (discussing the importance of relative litigational ability).
98. Id. at 288-89.
99. Id. at 288.
100. Brilmayer, How Contacts Count, supra note 10, at 110.
defendants ever called home and with which the plaintiffs and the defendants had only the most attenuated and fortuitous connection.101

C. Weighing State Regulatory Interests in the Balance

There is the argument, of course, that Oklahoma, as the place where the automobile fire occurred, had a regulatory interest in serving as the forum for the products liability litigation, and some critics of the minimum contacts doctrine have insisted on the deceptively simple proposition that the existence of such a regulatory interest is a sufficient condition for the extension of state judicial power.102 Theoretically, the significant relationship test could accommodate the view of these critics and permit a plaintiff always to impose on the defendant the courts of a state with a regulatory interest in resolving the parties' dispute. This, however, would be to indulge the fiction that in ordinary private litigation the problem of state court jurisdiction is a three-cornered problem in which a regulatory interest of the forum state counts as much or more than the interests of the parties. The so-called "interest" of a state like Oklahoma in providing a forum is largely theoretical.103

A state where litigation-provoking events occurred often will emerge under the significant relationship test as the most attractive place of trial, but not because of the forum state's regulatory interest in resolving disputes involving in-state events. If, for example, a citizen of Iowa and a citizen of Alaska enter into a contract for the construction of a building in New York, and a dispute arises about performance of the contract, the plaintiff probably should be required to litigate the dispute in New York as opposed to the plaintiff's home polity. This is because New York is the only polity other than their shared national polity that these two parties have in common. There is no reason to permit the plaintiff to force the defendant into the courts of the plaintiff's own political community, and conversely there is no reason why the plaintiff automatically should be required to accept the litigation package offered by the defendant's home polity. Members of a society operating behind a Rawlsian104 veil of ignorance, unable to know whether they will wind up as plaintiffs or defendants in such cases, probably would choose New York as the right answer to the question of where the litigation should occur, not because New York has a separate and dominant interest that must be respected, but

101. But see, e.g., Weintraub, supra note 8, at 505 (footnote omitted) (arguing that if fairness to parties is criterion for jurisdictional justice then result in World-Wide Volkswagen was wrong because forum state chosen by plaintiff was not unfair to defendants).
102. Stein, supra note 11; Weisburd, supra note 11.
103. See supra notes 72-74 and accompanying text.
because New York is the center of gravity of the parties' relationship.  

D. Weighing Other Factors in the Balance

Implicit in the notion that an exercise of state court jurisdiction can be more or less just, given the character of the relationships between the parties and the forum state, is the further notion that the parties' relationships with the forum state can be weighed against other factors that contribute to or diminish the overall place-of-trial justice of an extension of state judicial power. Some critics of the minimum contacts doctrine have maintained that the Court's preoccupation with the question of contacts between the defendant and the forum state has eclipsed other factors that deserve serious consideration in the jurisdictional calculus.  

One factor emphasized in the literature is the relative litigational ability of the parties in particular classes of litigation. In products liability litigation, for example, it should matter that defendants tend to be companies represented by liability insurance carriers that operate nationally and that can call upon a national network of defense counsel, but that plaintiffs tend to be individuals who lack litigation resources of their own and must rely on the contingent fee system. It is this factor of relative litigational ability that persuades me, at least, that the Helicopteros plaintiffs should have been permitted to litigate in Texas, despite the

105. Cf. Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 8 (1984) (stating that a forum state interest should be irrelevant to jurisdictional analysis because if forum is fair, lack of strong state interest should not matter, and if forum is unfair, present of strong state interest should not make it fair).

106. See, e.g., von Mehren, supra note 8.

107. von Mehren, supra note 8, at 320.

108. See, e.g., Jay, supra note 9, at 446-47 (stating that defendants should not be able to hide within their state boundaries when they have used entire country as free trade zone and in process have visited injury on persons who do not enjoy economic fortunes derived from substantial interstate business operations).

109. Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 108 (1983) (lamenting Court's failure in modern jurisdictional due process cases to appreciate significance of fact that most tort defendants are covered by liability insurance and so are represented by insurance carriers that are multi-state actors); Weinberg, supra note 8, at 923 (footnote omitted)(noting that most tort litigation is conducted by insurers "doing business nationwide, for whom no state forum is inconvenient").

110. See Jay, supra note 9, at 446 (stating that given physical distance between modern manufacturers/distributors and their ultimate buyers, danger of uncompensated loss to consumers is very real unless plaintiffs can compel attendance of defendants in reasonable forum); von Mehren, supra note 8, at 311 (suggesting that traditional jurisdictional solicitude for defendants might be reversed in actions brought by consumers, who are generally less able than their corporate opponents to afford distant litigation).
argument that the connections between the parties and Peru were much stronger in some ways than the connections between the parties and Texas. Another factor is the desirability in complex multistate disputes of providing some single forum in which all claims against all parties can be resolved at once.\textsuperscript{111} In shareholder litigation like \textit{Shaffer}, for example, there is good reason to try to make available to the plaintiff a court in which all of the allegedly responsible officers and directors of the company can be sued.

The significant relationship test accommodates these other factors, so long as they are not treated as trumps. A forum is not automati-
cally just as between the parties merely because the defendant is bet-
ter able to afford litigating there, or because the plaintiff ought to have one place in which to sue every potential defendant. The factors should be considered as part of an overall inquiry into place-of-trial justice that focuses primarily on parties-polities relationships. Moreover, pro-plaintiff factors are not the only additional factors that deserve consideration. On the other side of the ledger, there is the argument that a plaintiff, all other factors being equal, should be re-
quired to litigate in the courts of the defendant's home polity not be-
cause of any principle of political legitimacy, but as a means of discouraging the plaintiff from bringing a very weak or flatly un-
founded claim in the hope of securing a nuisance settlement.\textsuperscript{112}

E. Between-the-Chairs Jurisdiction

Adoption of the significant relationship test would eliminate an ana-
ytical difficulty that has developed under the minimum contacts re-
gime in cases that seem to fall between the chairs of specific and
general jurisdiction.\textsuperscript{113} A recent example is \textit{Doe v. National Medical Services}.\textsuperscript{114} In \textit{National Medical Services}, the Tenth Circuit ruled

\begin{footnotes}
\item[111] Hazard, \textit{supra} note 8, at 714-15; Kamp, \textit{supra} note 28, at 46; von Mehren, \textit{supra} note 8, at 332.
\item[112] Cf. Kamp, \textit{supra} note 28, at 50 (speculating that a reason for the Court's tilt to-
toward defendants in such cases as \textit{World-Wide Volkswagen} is to protect defend-
ants against nuisance suits that take advantage of great distances and other such factors to up the odds for the hapless defendants).
\item[113] For an illuminating colloquy about this problem, see Brilmayer, \textit{Related Contacts}, \textit{supra} note 10; Mary Twitchell, \textit{A Rejoinder to Professor Brilmayer}, 101 HARV. L. REV. 1465 (1988); Twitchell, \textit{supra} note 94. \textit{See also} Lewis, \textit{supra} note 103, at 34-
38 (arguing that courts should be free to blend related and unrelated contacts in cases in which related contacts would not support specific jurisdiction and unre-
lated contacts would not support general jurisdiction); William M. Richman, \textit{Re-
view Essay, Part I—Casad’s Jurisdiction in Civil Actions; Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction}, 72 CAL. L. REV. 1328, 1341-43 (1984)(jurisdiction should be proper when facts amount to near miss on both general jurisdiction and specific jurisdiction paradigms).
\item[114] 974 F.2d 143 (10th Cir. 1992).
\end{footnotes}
that a Colorado state court would lack jurisdiction over a Pennsylvania drug-testing company in an action brought by a Colorado citizen alleging negligent testing and defamation. After testing positive for drug use, the plaintiff had been dismissed from his job as a hospital nurse. The hospital had obtained urine samples from the plaintiff and had sent the samples to a California company for testing. The California company in turn had engaged the Pennsylvania company to conduct the tests. The Pennsylvania company had reported the positive results to the California company, and the California company then had conveyed the information to the hospital.

The Tenth Circuit decided that a Colorado court would lack specific jurisdiction over the Pennsylvania company because the plaintiff's lawsuit did not arise out of and was not sufficiently related to any contacts between the company and the State of Colorado. The company had received the samples from California and had sent the results to California and no evidence in the record tended to establish even the company's awareness that the samples had originated in Colorado. The court also rejected the contention that a Colorado court could exercise general jurisdiction over the company. The record showed that the company had conducted almost 3,500 tests for four Colorado clients over a five-year period, but the court concluded that the company "could not reasonably anticipate being haled into court in Colorado for matters unrelated to its contacts with the Colorado clients."

Under the significant relationship test, a Colorado court would be permitted to entertain the plaintiff's action. Again, there is no reason to prefer the company's interest in avoiding alien forums over the plaintiff's parallel interest. Colorado was not a wholly alien polity from the company's point of view, given the substantial business the company conducted with Colorado customers. On the other hand, there is no reason to believe that Pennsylvania was anything other than an alien polity from the plaintiff's point of view. There were significant relationships between Colorado and the parties and between Colorado and the dispute, and neither Pennsylvania nor any other state apparently could claim any substantially closer relationships. Moreover, permitting the plaintiff to proceed against the Pennsylvania company in Colorado would help ensure that the plaintiff could sue in one forum not only the Pennsylvania company, but the

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115. Id. at 146.
116. Id. at 144.
117. Id. at 145-46.
118. Id. at 146.
119. Id. at 145.
120. Id. at 146.
hospital and the California company with which the hospital had contracted.

F. The Fairness Factors Analysis

While the minimum contacts doctrine is the dominant component of the Court's modern approach to jurisdictional due process, it is not the only component. As Justice Brennan made clear in his *Burger King* opinion, a state court summons that passes muster under the minimum contacts doctrine remains vulnerable if the defendant can make a compelling case against jurisdiction under a multi-factored balancing test. This test weighs any burdens on the defendant against various countervailing considerations, including the plaintiff's interest in a convenient forum and the forum state's interest in resolving controversies flowing from in-state events.

In *Asahi Metal Industry Co. v. Superior Court*, the Court invoked this fairness factors test to condemn an exercise of jurisdiction by a California court. The *Asahi* case began as a products liability action brought by a person injured in a motorcycle accident caused by an explosion in the motorcycle's rear tire. The plaintiff sued, among others, the Taiwanese manufacturer of the tire tube, and the tube manufacturer then impleaded the Japanese manufacturer of the tube's valve assembly. All of the claims in the case eventually were settled except for the indemnity claim asserted by the Taiwanese company against the Japanese company. The Court ruled in *Asahi* that the California court's retention of the indemnity claim was constitutionally unreasonable. Justice O'Connor noted in her opinion that the Japanese defendant would be forced to cope with a distant and foreign legal system in litigating an indemnity claim arising from a transaction that took place in Taiwan regarding a product shipped from Japan to Taiwan. She noted as well that California's interest in resolving the indemnity claim was slight.

*Asahi* almost surely would have come out the same way under the significant relationship test. Taiwan's relationship with the two Asian companies and with their indemnity dispute easily eclipsed California's very attenuated relationship, and the Japanese defendant therefore could have invoked the defendant's veto to defeat California's extension of judicial power. There might be cases, however, in which two forums receive relatively equal scores under the significant rela-

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122. *Id. at 477*.
124. *Id. at 106*.
125. *Id. at 113-14*.
126. *Id. at 114*.
127. *Id. at 114-15*. 
tionship test, but requiring the defendant to litigate in the forum chosen by the plaintiff would impose on the defendant litigation burdens so severe and disproportionate that they should be condemned as unreasonable. A comprehensive regime for doing place-of-trial justice therefore should include, as a complement to the significant relationship test, a fairness factors or forum non conveniens component to deal with such cases.

G. The Minimum Contacts Doctrine Revisited

The two central features of the minimum contacts doctrine are conspicuously missing from the significant relationship test. First, the test includes no purposeful availment requirement. Second, the test does not distinguish between specific and general jurisdiction. The reason for these omissions is quite simple. It is possible to fashion an attractive formula for place-of-trial justice without them. What matters most is not the purposefulness of the parties' actions or the relatedness or extensiveness of any single party's contacts with the forum state, but the extent to which the parties share a relationship with the forum state and with other potential forums for the resolution of their dispute. Moreover, the significant relationship test would not permit a plaintiff always to impose on a defendant, over the defendant's objection, the litigation package provided by the defendant's home state. The defendant would be entitled to defeat the plaintiff's choice, as in other cases, if the defendant could point to some other state with a much stronger connection to the parties and their dispute.128

Perhaps the most powerful rhetorical ally of the minimum contacts doctrine is the almost visceral conviction of many American lawyers and judges that there is a critical difference between being forced to litigate in a particular forum and choosing to litigate in the forum. The defendant is forced; the plaintiff chooses. The reality, however, is that the resolution of a jurisdictional dispute between a plaintiff and a defendant always entails coercion. If the plaintiff's forum choice is upheld, then the defendant is coerced. If the defendant's jurisdictional objection is sustained, then the plaintiff as a practical matter is forced either to give up the litigation altogether or to litigate in some forum more to the defendant's liking. The dichotomy is not between coercion and choice, but between brands of coercion. Moreover, this Article accepts fully the proposition that a summons from a forum state to a defendant is a serious matter that needs justification. Within the private law paradigm, the summons is justified if the plaintiff is justified in imposing the forum on the defendant.

128. Cf. Lewis, supra note 103, at 47-49 (drawing into question conventional notion that "technical" domicile alone should support jurisdiction and arguing for multi-factored inquiry designed to ensure fairness to the parties).
III. THE PROBLEM OF IMPLEMENTATION

One of the consequences of the federal structure of our government is the difficulty of implementing any private law regime governing the place of trial in state court litigation against citizens of other states or nations. Federal implementation of the regime theoretically might be the most attractive strategy. Federal officials can be expected to be even-handed in fashioning the limits of state court jurisdiction, at least in cases in which all of the litigants are citizens of the United States, and in cases involving defendants who are citizens of other nations, there is the alternative justification that we should have a single national answer to the question of when plaintiffs should be permitted to impose particular state forums on such persons. It is axiomatic, however, that the Court has no general common law authority in such matters. Moreover, it is far from clear that Congress ever would turn its attention to the problem or that our constitutional framework permits Congress to impose on the states a national private law of the place of trial. No provision of the Constitution unambiguously authorizes Congress to enact such legislation, and a constitutional amendment conferring the appropriate authority on Congress hardly would be likely to possess the political momentum necessary to propel it through the rigorous Article V process.

The Court might embrace the private law paradigm not as federal common law, but by abandoning the minimum contacts doctrine

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129. See, e.g., Trangsrud, supra note 11, at 905 (noting that if Congress is too distracted by other matters to legislate rules defining personal jurisdiction of federal courts, Congress is even less likely to turn its attention to matters of state court jurisdiction).

130. Professor Trangsrud has suggested that Congress has the power under the full faith and credit clause to enact legislation governing the jurisdiction of state courts over noncitizens. Trangsrud, supra note 11, at 903-05. Similarly, Professor Ehrenzweig thought that federal legislation governing “interstate venue” probably would be constitutional under the full faith and credit clause. Albert A. Ehrenzweig, The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens, 65 YALE L.J. 289, 313 (1956). Cf. Robert H. Abrams and Paul R. Dimond, Toward a Constitutional Framework for the Control of State Court Jurisdiction, 69 MICH. L. REV. 75, 87-89 (1984) (arguing that Congress has the power under the full faith and credit clause to enact jurisdictional legislation that would serve as an instrument of interstate federalism, removing the temptation for the Court to rely on the Due Process Clause to police federalism). What the clause actually says is that “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1. Even if this language could support some conceivable congressional regimes regulating the jurisdiction of state courts over noncitizens, it is at least problematic whether the words can be made to license the enactment of a comprehensive regime for doing place-of-trial justice between the parties.

131. In imaginable circumstances, a state court’s decision to exercise jurisdiction could threaten a defendant’s right to ordinary procedural due process. Howard M. Er-
and inviting the states themselves to fashion appropriate long-arm legislation, perhaps through the mechanism of the commissioners on uniform state laws. The political analog of the idea of externalities in microeconomic theory, however, argues against relying entirely on the states themselves to apply jurisdictional rules fairly in litigation involving noncitizen defendants. The states are not forced to take into account directly the interests of these defendants, because a noncitizen by definition has no vote in the forum state's elections and might have little practical political clout within the forum state.

Ichson, Note, Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule, 64 N.Y.U. L. Rev. 1117, 1151 (1989) (asserting that where inconvenience of forum is so extreme that defendant is effectively denied ability to litigate, defendant's due process right of an opportunity to be heard may be violated); Trangsrud, supra note 11, at 904 (noting that in unusual cases burden of litigating in distant forum could be great enough to threaten noncitizen's ability to present adequate defense). See Ralph U. Whitten, The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two), 14 Creighton L. Rev. 735, 846 (1981) (jurisdictional due process should protect only against actual or constructive denials of defendant's right to be heard). A defense might depend crucially, for example, on the live testimony of certain uncooperative witnesses, and the witnesses might reside beyond the territorial limits of the court's power to compel their attendance at a trial. Rhonda Wasserman, The Subpoena Power: Pennoyer's Last Vestige, 74 Minn. L. Rev. 37, 64 (1989) (stating that the inability to obtain testimony of necessary witnesses may deprive defendant of meaningful opportunity to be heard). See also Stewart, supra note 11, at 19 n.46 (noting that the ability to compel attendance at trial of reluctant witnesses may be necessary to fair resolution of dispute and witnesses may be located beyond subpoena power of forum). In Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), the Court acknowledged the potential that a noncitizen defendant's crucial witnesses could lie beyond the subpoena power of the forum, but the Court concluded that the defendants in Burger King had failed to establish that the problem was a real one for them. Id. at 483. If a defendant could establish that having to litigate in a particular forum would threaten the defendant's right to an adequate hearing, then the Court could intervene, deploying the uncontroversial procedural core of due process doctrine.

There is now a uniform act for state court jurisdiction over noncitizens, but the act reflects the reigning public law paradigm of state court jurisdiction. See Unif. INTERSTATE AND INT'L PROC. ACT OF 1962, 13 U.L.A. 357 (Supp. 1993).

Brilmayer & Paisley, supra note 10, at 34 (noting that domestic law is formulated after consideration of opposing interests but in formulating jurisdictional standards state is unlikely to be moved by interests of out-of-state defendants, who are not in position to influence legislature); Paul D. Carrington & James A. Martin, Substantive Interests and the Jurisdiction of State Courts, 66 Mich. L. Rev. 227, 237 (1967) (arguing that courts should be solicitous of interests of nonresidents in fashioning jurisdictional doctrine because nonresidents are unlikely to enjoy leverage in lawmaking processes of state); Transgrud, supra note 11, at 863 (stating that the risk of states asserting exorbitant theories of jurisdiction over noncitizens is substantial because citizens demand convenient forums for litigation against noncitizens and noncitizens have no right and little opportunity to encourage legislatures of other states to exercise restraint in conferring power on their courts over noncitizens).
state judges especially might be tempted to allow local plaintiffs to impose on noncitizen defendants unjustly the litigational consequences of the place of trial.\textsuperscript{134}

Perhaps, then, the Court could rely on the states to fashion the details of the private law regime through long-arm legislation, but could police the states' application of the regime under the banner of jurisdictional due process. Granted, the Due Process Clause is public law, and the basic point of this Article is that the problem of state court jurisdiction in ordinary private litigation is not a public law problem in the conventional sense, but is instead essentially a private law problem of enforcing place-of-trial justice between the parties. On the other hand, there is a weak sense in which a jurisdictional problem always is a problem of public law: The problem arises because of the forum state's issuance of a summons. Jurisdictional due process in general can be described at an abstract level as a means of ensuring the constitutional reasonableness of a summons. It is a form of substantive due process.\textsuperscript{135}

Under the Court's reigning approach to juris-

\textsuperscript{134} Justice Neely of West Virginia's highest court openly has conceded his preference for in-state plaintiffs over out-of-state defendants in products liability cases: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me." \textsc{Richard Neely, The Products Liability Mess: How Business Can Be Rescued From State Court Politics} 4 (1988). \textit{Cf.} Walter Hellerstein, \textit{Some Reflections on the State Taxation of a Nonresident's Personal Income}, 72 \textsc{Mich. L. Rev.} 1309, 1338-39 (1974) (footnote omitted) (stating that when forced to choose between fairness to outsiders and increased revenue for themselves, states have not unnaturally tended to give themselves benefit of the doubt).

\textsuperscript{135} Interpreters of the Due Process Clause generally agree that it is at least a guarantee of procedural regularity. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." \textit{Mullane v. Central Hanover Bank \\& Trust Co.}, 339 U.S. 306, 313 (1950). The controversial questions are whether the clause also protects other values besides procedural fairness, and if it does, how the Justices should go about the task of identifying these other, substantive values. John Hart Ely, in a well-known attack on the notion of substantive due process, declared that the only proper role of the Due Process Clause is to guarantee fair procedures. \textit{John Hart Ely, Democracy and Distrust} 80 (1980). \textit{See also} Robert H. Bork, \textit{The Tempting of America} 32 (1990) (citing Ely with approval and maintaining that the text of the Due Process Clause "simply will not support judicial efforts to pour substantive rather than procedural meaning into it"). The Court, however, has embraced substantive due process. In the late nineteenth and early twentieth centuries, the Court interpreted the Due Process Clause as a guarantee that individuals could make economic choices for themselves, free of constraints imposed by regulatory legislation. Herbert Hovenkamp, \textit{The Political Economy of Substantive Due Process}, 40 \textsc{Stan. L. Rev.} 379 (1988). In the late 1930's, the Court turned away from economic substantive due process. Michael J. Phillips, \textit{Another Look at Economic
dictional due process, the constitutional reasonableness of a summons is defined in terms of political legitimacy and of overall fairness to the defendant. Constitutional reasonableness could be redefined in terms of place-of-trial justice between the parties.

IV. CONCLUSION: A BURNHAM POSTSCRIPT

Even limited reliance on the Due Process Clause is an imperfect approach not only because it presses a mechanism of public law into service to achieve essentially private law objectives, but because the regime becomes hostage to more general concerns about the role of the Court in applying the Due Process Clause. This risk is illustrated nicely by the Court’s most recent jurisdictional due process decision, *Burnham v. Superior Court.* In *Burnham*, the Court unanimously, but without a majority opinion, rejected the argument that transient jurisdiction violates jurisdictional due process. “Transient” means

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*Substantive Due Process*, 1987 Wis. L. Rev. 265. The modern Court, however, has not abandoned the basic proposition that the Due Process Clause protects substantive values. Instead, the Court has interpreted the clause as a guarantee of certain non-economic rights, often but not always grouped under the heading of a right to privacy. Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 Rutgers L.J. 537 (1990). This modern, non-economic variety of substantive due process finds support not only among the Justices, but in the academy. *See*, e.g., Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 Ga. L. Rev. 201, 204 n.10 (1984).

The minimum contacts doctrine and the fairness factors analysis can be characterized as substantive due process doctrine. In fact, Professor Perdue makes the case that jurisdictional due process from the beginning has been a form of substantive due process. She argues that Justice Field’s opinion for the Court in *Pennoyer v. Neff* was of a piece with his overall commitment to substantive due process:

Field was the “pioneer and prophet” of the doctrine of substantive due process. His opinions during the 1870’s and 1880’s, largely dissents and concurrences, formed the foundation for the substantive due process approach later embraced in *Lochner v. New York*. Field’s view was that there were certain fundamental and inalienable rights. These rights were not created by the Fourteenth Amendment. Rather, the Fourteenth Amendment provided the mechanism for protecting these rights from intrusions by the states. . . . In the midst of Field’s as yet unsuccessful battle to use the Fourteenth Amendment as a weapon limiting state power, *Pennoyer v. Neff* must have been a real bright spot. . . . *Pennoyer* appears to be the first case in which a state action or statute was actually invalidated and the Fourteenth Amendment was cited as a basis for such invalidation. . . . [Field’s] approach in *Pennoyer* parallels in several respects his approach in other Fourteenth Amendment cases. First, and most basically, the focus is not on concerns about fairness to the particular defendant, but instead is on the inherent limitations on the power of governments.


137. The *Burnham* Court upheld a California court’s exercise of transient jurisdiction
“staying only a short time.” A state court exercises transient jurisdiction when it claims the authority to issue a binding judgment against a person simply because the person was served with a summons from the court while physically present, even briefly, within the territorial confines of the state.

No sensible architect of a regime for doing place-of-trial justice between the parties would include a provision allowing a plaintiff automatically to sue a defendant in the courts of a particular state on any matter whatever, so long as the plaintiff, with luck or permissible guile, was able to serve the defendant with a summons within the borders of the state. Over Dennis Burnham, a New Jersey citizen, in a divorce action brought by his spouse, Francie Burnham, after she and the Burnham children had moved to California from the couple's marital domicile in New Jersey. Under current jurisdictional due process doctrine, the California court could decide Ms. Burnham's marital status and the custody of the couple's children, because Ms. Burnham and the children had become California domiciliaries. Linda Silberman, Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law, 22 Rutgers L.J. 569, 590-91 (1991). On the other hand, the California court needed in personam jurisdiction over Mr. Burnham to litigate the economic details of the divorce. Id.

It is not clear whether Ms. Burnham should have been permitted to impose a California forum on Mr. Burnham under the significant relationship test. The forward-looking aspects of the family's relationship—the post-marital aspects—no doubt are centered in California, primarily because the children now live there. On the other hand, the move to California occurred only after the couple's ten years of married life in New Jersey, during which time the children were born. Petitioner's Brief on the Merits at 2, Burnham v. Superior Ct., 495 U.S. 604 (1990) (No. 89-44); Brief on the Merits for Real Party in Interest at 2, Burnham v. Superior Ct., 495 U.S. 604 (1990) (No. 89-44). Moreover, before Ms. Burnham and the children left for the West Coast, she executed in New Jersey a marital settlement agreement that purported to settle all of the issues that ordinarily arise at the end of a marriage: division of the marital property, child custody, child support, and alimony. Petitioner's Brief on the Merits at 2-3, Burnham v. Superior Ct., 495 U.S. 604 (1990) (No. 89-44); Brief on the Merits for Real Party in Interest at 3 Burnham v. Superior Ct., 495 U.S. 604 (1990). It is at least problematic whether Ms. Burnham should have been permitted to impose a California forum on her husband to resolve the validity of a separation agreement signed by the two of them in New Jersey as New Jersey citizens to wind up a decade-long marriage centered in New Jersey. The Burnhams shared a strong historical connection with New Jersey that they do not share with California. New Jersey was the center of gravity of their marital relationship. Arguably, therefore, Mr. Burnham should have been entitled under the second stage of the significant relationship test to veto Ms. Burnham's choice of a California forum in favor of a New Jersey forum. See supra notes 75-76 and accompanying text.


139. Burnham v. Superior Ct., 495 U.S. 604, 629 n.1 (1990), 110 S. Ct. at 2120 n.1 (Brennan, J., concurring). See also Ehrenzweig, supra note 125 at 289 (transient rule of personal jurisdiction has it that in personam jurisdiction of individual defendant can be acquired by mere physical service of process, even in forum where neither plaintiff nor defendant resides and which has no connection with cause of action).
violates the principles of political legitimacy underlying the minimum contacts doctrine. 140

At least some of the members of the *Burnham* Court, mindful of the counter-majoritarian character of their due process interventions, were unwilling to condemn transient jurisdiction, given its long history and broad continuing acceptance among the states, whether or not the practice, strictly speaking, violated the principles underlying the Court's jurisdictional due process jurisprudence. 141 Only Justice

140. Visitors to states, of course, presumptively must respect the laws and legal systems of the polities they visit. Brilmayer et al., *supra* note 10, at 739 (stating that surely may condition entry into state upon willingness to comply with state's laws). A visitor who injures a resident in an automobile accident has a theoretical obligation to answer for the injury in the host polity's courts. *Id.* (arguing that when an individual enters state and engages in tortious activities there, state has interest in adjudicating legality of conduct). But a visitor who changes planes within a polity during a trip elsewhere has no moral obligation, based merely on service of a summons in the airport lounge, to defend whatever lawsuit some plaintiff happens to have brought against the visitor in the polity's courts—a lawsuit that by definition need not be related at all to the noncitizen's presence or to the forum state. *Id.* at 754 (arguing that the state has clear governmental interest in having visitors obey state law, but interest justifies only specific jurisdiction to regulate local activities and not transient jurisdiction over unrelated claims). Transient jurisdiction effectively equates visitors with de facto insiders, making both subject to the general jurisdiction of the state's courts, and a visitor is hardly the functional equivalent in political terms of a citizen. *See id.* at 771 (arguing that a state may not reasonably require individual, as condition for mere entry or for occasional business, to consent to general jurisdiction over litigation arising outside of state). *Cf.* Redish, *supra* note 8, at 1125 (stating the fact that the due process analysis adopted by *Pennoyer* Court authorized state to assert jurisdiction over individual merely passing through and with no previous contact with state belies view that decision adopted theory of sovereignty premised on notions of consent of governed).

141. Justice Scalia announced the judgment of the Court. Writing for himself, Chief Justice Rehnquist, and Justice Kennedy, Justice Scalia refused even to test transient jurisdiction against the minimum contacts standard. He read *International Shoe* and the Court's minimum contacts precedents in general as limiting the application of the standard to cases in which the defendant is not present, *Burnham* v. Superior Ct., 495 U.S. 604, 621 (1990) and Justice Scalia added that "[w]e have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule, leaving that judgment to the legislatures that are free to amend it; for our purposes, its validation is its pedigree . . . ." *Id.* His opinion characterizes transient jurisdiction, as "tagging," as "one of the continuing traditions of our legal system," *id.* at 619, and concludes that the device's historical acceptance and its continuing popularity conclusively establish its constitutional-ity under the Due Process Clause: "The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system . . . ." *Id.*

Justice White, unwilling to concede that the Court necessarily is bound by history in determining whether a jurisdictional practice of the state courts satisfies the Due Process Clause, wrote a short concurring opinion in *Burnham* indicating that the wide acceptance and long roots of transient jurisdiction create a curious sort of presumption in its favor: A court should not entertain an argu-
Brennan explicitly denied any hesitation in applying the minimum contacts doctrine to transient jurisdiction.\textsuperscript{142} Further, the opinion's strikingly ineffectual defense of the practice\textsuperscript{143} suggests strongly that \textit{Burnham} would have been an easy case the other way if the Court had subjected transient jurisdiction to serious and honest scrutiny under the reigning \textit{Burger King} standard for jurisdictional due process.

In his opinion announcing the judgment of the \textit{Burnham} Court, Justice Scalia seems to appreciate that transient jurisdiction would fail the test of jurisdictional due process under the principles that animate the minimum contacts doctrine,\textsuperscript{144} but he declines to measure transient jurisdiction against these principles.\textsuperscript{145} He pronounces the minimum contacts doctrine irrelevant.\textsuperscript{146} The precedential fulcrum of his argument is the sentence from \textit{International Shoe} that launched the minimum contacts era. Chief Justice Stone wrote in \textit{International Shoe} that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that..."
the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "147 This sentence undeniably implies the constitutionality of transient jurisdiction and seems to treat jurisdiction based on minimum contacts almost as a backstop approach for those occasions when the defendant cannot be served with process within the forum's borders. Moreover, the sentence suggests that "traditional notions" should define jurisdictional due process, and Justice Scalia with some justification describes transient jurisdiction as "one of the continuing traditions of our legal system . . . ."148

Justice Scalia's opinion quotes all or part of Chief Justice Stone's sentence ten times149 and uses the term "traditional" or "traditionally" thirty times,150 not only to show that Burnham flows from International Shoe, but in service of a more general argument about how the Due Process Clause should be read. As at least one journalist observed when Burnham was handed down,151 this "obscure divorce case"152 was a skirmish in the battle between the increasingly powerful conservative wing of the Court and the dwindling liberal contingent about the extent to which history binds the Justices. It was a skirmish fought on the one side by Justice Scalia, who is emerging as the intellectual leader of the conservatives, and on the other side by the now-retired leader of the liberal wing, Justice Brennan.153 Justice

149. Id. at 609, 618, 619, 621, 621, 623 (twice).
150. Id. at 608, 609 (three times), 618, 619, 621 (twice), 622, 623 (three times), 626, 627 (twice).
152. Id.
153. The better known recent skirmish between the two Justices over the proper approach to interpretation of the Due Process Clause is Michael H. v. Gerald D., 491 U.S. 110 (1989). Justice Scalia has emerged as the modern Court's most outspoken proponent of the view that history dictates the content of substantive due process. An interest can qualify as a protected liberty interest under Justice Scalia's conception of substantive due process only if the interest is rooted in American tradition. Id. at 123 (Scalia, J., announcing the judgment of the Court). Moreover, it is not enough that an interest can be said to be consistent with American tradition at some high level of abstraction. In a recent footnote that has received much attention, see Gregory C. Cook, Note, Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process, 14 HARV. J.L. & PUB. POL'Y 853 (1991), Justice Scalia takes the position that the Court should focus on the most specific relevant American tradition. If this tradition cuts against the argued-for liberty interest, then the interest should not receive due process protection. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

Only Chief Justice Rehnquist joined Justice Scalia's footnote 6 in Michael H., but Justices O'Connor and Kennedy joined the rest of Justice Scalia's opinion, apparently endorsing his more general point that history binds the Justices in interpreting the Due Process Clause. Id. at 132. The remaining five Justices rejected explicitly or implicitly the proposition that a value can qualify for due pro-
Scalia prefers to treat as binding "a continuing American tradition that a particular procedure is fair," rather than to interpret the Due Process Clause according to "each Justice's subjective assessment of what is fair and just." Justice Brennan, on the other hand, argues in his Burnham concurrence that "all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process."

Chief Justice Stone's language in International Shoe was dictum. The International Shoe case did not involve transient jurisdiction. The Court, therefore, was not forced in International Shoe to confront the implications of its new minimum contacts doctrine either for transient jurisdiction or for the other time-honored jurisdictional mechanism approved in Pennoyer v. Neff—the attachment of a noncitizen's in-state property at the outset of litigation. When the Court later

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155. Id. at 623.
156. Id. at 630.
157. In International Shoe, the Court held that the State of Washington could exercise adjudicative jurisdiction over a noncitizen corporation to collect unpaid contributions to the state's unemployment compensation fund. The International Shoe Court based its holding on the nature of the corporation's activities in the state and not on the fact of in-state service of process on a corporate agent. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). It is far from clear that a corporation even is susceptible to transient jurisdiction through in-state service of process on corporate agents. See Brilmayer et al., supra note 10, at 748 and n.130 (noting judicial and academic skepticism about the applicability of transient jurisdiction to corporations). Professor Posnak has stated flatly that "[a] corporation is not subject to jurisdiction simply because an agent was served while in the forum, and this is true even though the agent was in the forum on corporate business." Bruce Posnak, A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory, 30 Emory L.J. 729, 731 n.9 (1981) (citation omitted).
158. In Pennoyer, Justice Field wrote that a state court may exercise authority over property located within the borders of the state if the property is brought within
considered, in Shaffer v. Heitner, whether attachment jurisdiction violated jurisdictional due process, the Court declared the practice unconstitutional. Justice Marshall wrote for the Shaffer Court that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." Justice Marshall specifically rejected the notion that attachment jurisdiction's "long history" in American practice saves it: "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant." Justice Scalia recognizes in his Burnham opinion that Shaffer poses problems for him. He deals with the precedent in two ways. First, he suggests that Justice Marshall's reasoning in Shaffer may not have given enough credit to tradition. Second, he distinguishes Shaffer factually from Burnham, employing what Justice Brennan's opinion aptly terms "nimble gymnastics." Justice Scalia reads all of the Court's jurisdictional due process cases, from Pennoyer to Asahi, as turning on the distinction between presence and absence. A noncitizen's presence within a state is, and always has been, a sufficient condition for the state's extension of judicial power against the noncitizen. The minimum contacts doctrine developed only as a means of determining when a state court may exercise authority over a noncitizen despite the noncitizen's physical absence from the state. Shaffer was an absence case and not a presence case, because only the property of the noncitizen defendants was present within forum state, and, therefore, the Shaffer Court properly invoked the minimum contacts doctrine.

What Justice Scalia fails to explain is why the distinction between presence and absence should be the axis on which all of the Courts jurisdictional due process precedents turn. The distinction, after all, is

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the control of the court through a device such as attachment at the outset of the litigation. Pennoyer v. Neff, 95 U.S. 714, 733 (1877).
160. Id. at 208-09.
161. Id. at 212 (footnote omitted).
162. Id.
164. Id. at 621-22.
165. Id. at 632 (Brennan, J., concurring).
166. Id. at 617-20.
167. Id. at 618.
168. Id.
169. Id. at 621.
not a principle, and Justice Scalia identifies no principle from which it flows. The conclusion is virtually irresistible that Justice Scalia merely found the distinction useful as a way of sidestepping, rather than overruling \textit{Shaffer}. Obeisance to precedent is not what animates Justice Scalia's approach in \textit{Burnham}. Instead, the approach grows from Justice Scalia's conviction that history should bind the Justices in fixing the dimensions of jurisdictional due process. History, then, can get in the way of place-of-trial justice if we must rely on jurisdictional due process to police the states' application of a private law regime.