Florida Law Review

Volume 66 | Issue 3 Article 5

February 2015

Constitutional Venue

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Abstract

A foundational concept of American jurisprudence is the principle that it is unfair to allow litigants to be haled into far away tribunals when the litigants and the litigation have little or nothing to do with the location of such courts. Historically, both personal jurisdiction and venue each served this purpose in related, but distinct ways. Personal jurisdiction is, at base, a limit on the authority of the sovereign. Venue, in contrast, aims to protect parties from being forced to litigate in a location where they would be unfairly disadvantaged. The constitutional boundaries of these early principles came to be tested in the first half of the twentieth century, as the rise of interstate commerce, transportation, and communication technologies prompted states to reach beyond their borders by expanding the jurisdictional limits of their courts through now familiar long-arm statutes. In *International Shoe Co. v. Washington*, the Court situated the due process inquiry related to a fair location for trial in the personal jurisdiction doctrine—and thus relegated venue to its current subconstitutional status. Forcing the square peg of venue interests into the round hole of personal jurisdiction was, on a theoretical level, an odd choice from the outset. This theoretical foible has plagued the Court's personal jurisdiction jurisprudence ever since. As a result, the Court's personal jurisdiction cases are marked by fractured decisions with dueling opinions that articulate conflicting visions of the nature of the due process inquiry in personal jurisdiction analysis. Some Justices minimize the fairness inquiry because they are unable to reconcile the dissonance of individual rights considerations with the origins and core of personal jurisdiction. Other Justices elevate the fairness inquiry to the fore, as they see individual rights protection as critical to the due process analysis. Reconceptualizing the due process fair location inquiry as venue acknowledges the validity of both positions. Fairness in location has little to do with jurisdiction and everything to do with due process and venue. Recognition of the constitutional aspects of venue brings

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clarity to the Supreme Court's muddled personal jurisdiction case law. In addition, constitutional venue would provide a basic measure of due process in a small but significant category of cases—most notably detained deportation proceedings—where defendants are prejudiced when they must defend themselves in gravely unfair locations because of the firmly established but deeply flawed conception of venue as lacking constitutional content.

INTRODUCTION

The most influential voices in the legal profession tell us that, in civil actions, venue has no constitutional dimension.[1] Indeed, it is a

1. *See, e.g.*, Burlington N.R.R. Co. v. Ford, 504 U.S. 648, 650–52 (1992) (rejecting unanimously a defendant's challenge to a Montana venue statute that permitted venue in any county of the state in some cases, and holding that "we have no doubt that a State would act within its constitutional prerogatives if it were to give so much weight to the interest of plaintiffs as to allow them to sue in the counties of their choice under all circumstances"); 77 AM. JUR. 2D *Venue* § 2 (2006) (noting that unlike issues of personal and subject matter jurisdiction, constitutional issues do not implicate venue); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 345 (2008 rev. 9th ed. 2008) ("Unlike personal jurisdiction and subject-matter jurisdiction, the venue of a civil action is a statutory, and not a constitutional, question,

basic tenet of black letter law taught in every first-year law school civil procedure class that venue, unlike personal jurisdiction, is a matter of mere statutory grace. Does this mean then that a resident of Portland, Maine, could be haled into court 8,000 miles away in Honolulu, Hawaii, to defend herself from suit no matter the hardship, impediments to a fair trial, or lack of connections that the defendant possesses with Hawaii? Surely not. A variety of legal doctrines would prevent this injustice. Venue statutes, in the first instance, generally require that proceedings be located where the controversy arose or where the defendant resides.[2] Service of process rules generally require that the person be in or near the location of the proceedings to be served.[3] And if these mechanisms fail, change of venue and forum non conveniens doctrines operate to remedy the injustice.[4] But the venue-protective elements of each of these doctrines are a matter of grace with no constitutional minimum, we are told. So what protections remain if these rules were to change to permit such wildly unfair venues to lie? Since the Supreme Court's famous pronouncements in *International Shoe Co. v. Washington*,[5] the answer has been the due process component of personal jurisdiction, as embodied in the minimum contacts test.[6] The defendant's lack of minimum contacts with the state of Hawaii would prevent the state's courts from exercising personal jurisdiction.

This constitutional backstop against unfair venues fails, however, in federal cases where the relevant sovereign is the United States rather

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relating primarily to the convenience of the parties and to concerns of judicial economy."); 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3801 (4th ed. 2013) ("Though personal jurisdiction implicates constitutional as well as statutory concerns, venue is wholly a statutory matter."); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 110.01[1] (3d ed. 2013) ("[N]o constitutional rights are implicated by the venue statutes."). On the other hand, venue in criminal cases *does* implicate constitutional concerns. *See infra* note 23.

2. *See infra* Subsection I.C.2.

3. *See infra* Subsection I.C.1.

4. *See infra* Subsection I.C.3.

5. 326 U.S. 310 (1945).

6. *See id.* at 316 ("[D]ue 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.'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))). Subsequent cases elaborated on the minimum contacts test and added that courts should consider "the relationship among the defendant, the forum, and the litigation," Shaffer v. Heitner, 433 U.S. 186, 204 (1977), whether the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (internal quotation marks omitted), as well as urge consideration of concepts, such as purposeful direction and foreseeability, *see* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion); *id.* at 118–21 (Brennan, J., concurring in part and concurring in the judgment). *See also infra* Section I.B.

than the state of Hawaii. The defendant, living in Maine, could hardly claim a lack of minimum contacts with the forum of the United States. Personal jurisdiction, in that circumstance, would not provide any venue protection—venue in Honolulu would, under current conceptions, be wholly constitutional. It seems absurd that the constitutional guarantee of due process could permit such an outcome, but because of venue's current subconstitutional status, it does.

Sadly, this absurd "hypothetical" is far from hypothetical. In the normal federal case, we rarely, if ever, confront the constitutional floor of venue because the subconstitutional mechanisms of venue statutes, service of process rules, and the due process component of personal jurisdiction all serve a venue-protective function. In a small but significant subset of federal cases, however, the venue-protective function of these subconstitutional mechanisms and the personal jurisdiction inquiry fail, thus exposing the constitutional floor of venue.

The most prevalent modern example—and a focus of this Article—occurs in the context of detained deportation cases. Federal immigration authorities routinely arrest immigrants, including legal residents, and transfer them to detention facilities in remote locations thousands of miles away from their homes and families to venues with which they have no connection whatsoever.[7] In fiscal year 2009, the last year with publicly available comprehensive data, federal immigration authorities detained over 350,000 immigrants—over half of those detainees were subject to at least one immigration detention transfer.[8] These detainees are not afforded traditional statutory venue protections.[9] Because of the federal nature of the proceedings, the minimum contacts due process inquiry also fails to provide any venue protection.[10] Thus, hundreds of thousands of immigrants must litigate their deportation cases in wildly unfair venues where they lack access to counsel, witnesses, and evidence necessary for their defense.[11] These proceedings demonstrate the real human toll of the misconception of venue as subconstitutional.

While scholars have not previously explored the immigration context, there is a small body of scholarship examining federal statutes that authorize service of process anywhere in the United States and thus remove the venue-protective function of the service of process rules.[12] A scholarly and legal debate has thus emerged regarding whether, in

7. Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1302 & n.10 (2011).

8. *Huge Increase in Transfers of ICE Detainees*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Dec. 2, 2009), http://trac.syr.edu/immigration/reports/220.

9. *See* Markowitz, *supra* note 7, at 1302.

10. *See infra* notes 248–250 and accompanying text.

11. *See infra* Section II.B.

12. *See infra* Section II.A.

such circumstances, the due process personal jurisdiction inquiry can provide the necessary venue-protective function. Those who argue that it cannot point out that the forum is the United States and thus the minimum contacts required by the due process clause for an exercise of personal jurisdiction must be the defendant's aggregate minimum contact with the United States.[13] In response, other courts and scholars focus on the due process requirements of "fairness" and "reasonableness"—as the Supreme Court's personal jurisdiction cases articulate—to maintain some personal jurisdiction limit on impermissibly unfair venues.[14]

The current debate, however, is largely unsatisfying because, although both sides persuasively defend their positions, neither discredits the contrary position. Indeed, both sides are correct. In the personal jurisdiction inquiry, the relevant inquiry is undoubtedly whether a defendant has sufficient contact with the sovereign seeking to assert judicial authority over the defendant. It is equally true, however, that due process could not permit a trial to occur in a location where a party faces profound or insurmountable obstacles to a fair trial. This deadlock, which arises in case law as well as scholarship, occurs because judges and scholars artificially cabin the debate to the personal jurisdiction inquiry. By expanding this discussion to explore the constitutional dimensions of venue, we can move beyond the deadlock and gain a richer understanding of the due process components of both personal jurisdiction and venue.[15]

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13. *See, e.g.*, Marilyn J. Berger, *Acquiring* In Personam *Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 UTAH L. REV. 285, 297–98; Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 117, 144 (1983); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1124–25 n.6 (1966); Ronald C. Finke, Recent Decision, Cryomedics, Inc. v. Spembly, Ltd., *397 F. Supp. 287 (D. Conn. 1975)*, 9 VAND. J. TRANSNAT'L L. 435, 444 (1976); Brian B. Frasch, Comment, *National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits*, 70 CALIF. L. REV. 686, 697–98 (1982); Elaine T. Ryan, Note, *Personal Jurisdiction over Alien Corporations in Antitrust Actions: Toward a More Uniform Approach*, 54 ST. JOHN'S L. REV. 330, 347–52 (1980); *see also infra* Section II.A.

14. *See, e.g.*, 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068.1 (3d ed. 2002); Gerald Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 533–36 (1963); Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 434–37 (1981); Stanley E. Cox, *Jurisdiction, Venue, and Aggregation of Contacts: The Real Minimum Contacts and Federalism Questions Raised by* Omni Capital, International v. Rudolf Wolff & Co., 42 ARK. L. REV. 211, 292 (1989); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 6 (1984); Thomas F. Green, Jr., *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 972 (1961); *see also infra* Section II.A.

15. A notable exception to this deadlock is the insightful article by Professor Clermont, wherein he argues that the reasonableness inquiry in personal jurisdiction jurisprudence overlaps

Lost in the current debate is an examination of the interrelated but distinct evolution of the venue and personal jurisdiction doctrines and, as a result, an appreciation of the way traditional venue concerns have been shoehorned into the personal jurisdiction doctrine. The due process minimum contacts inquiry of personal jurisdiction currently serves two distinct functions: It establishes the outer boundaries of sovereign authority[16] and it protects parties from being haled into court in unfair and unreasonable locations where they would face significant impediments to a fair trial.[17] The Supreme Court has been explicit about this dual function.[18] The former, sovereignty-rooted function goes to the very heart of notions of jurisdiction and is a natural extension of the historic conceptions of personal jurisdiction.[19] The latter function, however, has little to do with traditional concepts of jurisdiction and everything to do with the core of venue: protecting litigants against unfair locations for trial. *International Shoe*'s misconception of this aspect of the due process inquiry distorts personal jurisdiction jurisprudence and leaves the current doctrine confused and frequently maligned.[20]

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with concepts of venue. *See* Clermont, *supra* note 14, at 432, 437. Professor Clermont takes aim at the doctrinal confusion this overlap creates. He argues for a migration away from the traditional "power" inquiry of personal jurisdiction toward a new broad constitutional inquiry that focuses on the reasonableness of the forum district or state. *Id.* at 444–45. Clermont asserts this inquiry derives from both personal jurisdiction and venue. *Id*. at 437.

While his approach is notable and indeed critical in the recognition of the constitutional dimensions of venue, *id*. at 434, 435 n.116, his prescription that "forum-reasonableness becomes the sole constitutional test for territorial authority to adjudicate" calls for a wholesale revamping—indeed scrapping—of a sovereignty-focused concept of jurisdiction, *id*. at 455, and any notion of significance in venue, *id.* at 450. This Article, which identifies cases in which the consequences of this fairness in venue inquiry can be devastating, proposes a resolution that is more responsive to such urgent cases while it leaves undisturbed much of our longstanding doctrines of jurisdiction and venue.

16. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011) (citing Shaffer v. Heitner, 433 U.S. 186, 207 (1977)).

17. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

18. *See, e.g.*, *id.* at 291–92.

19. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2786–87 (2011) (plurality opinion).

20. *See* Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 872–75 (2012) (examining the "decision paralysis" in personal jurisdiction doctrine *International Shoe* and its progeny create); Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 554 (2012) (noting that "*International Shoe* put a variety of topics on the table for assessing the constitutionality of personal jurisdiction" without prescribing an order in which the myriad topics should be addressed); Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 729 (2012) (lamenting the jurisprudential confusion stemming from personal jurisdiction cases over the past quarter-

The constitutional floor of venue has remained hidden from view by the layers of subconstitutional venue-protective doctrines and by the venue-protective function of the minimum contacts test. However, as we demonstrate here, there are cases where those mechanisms fail and, when they do, the failures expose the constitutional floor of venue. This Article proceeds in three parts. Part I examines the interrelated origins of venue and personal jurisdiction, modern case law that incorporates venue considerations into the due process inquiry of personal jurisdiction, and subconstitutional venue-protective mechanisms that obscure venue's constitutional dimensions. Part II exposes the constitutional floor of venue by exploring two categories of litigation—national service of process and detained deportation cases—where traditional venue-protective mechanisms fail. Part III advances a constitutional theory of venue and discusses how the theory would both comport with traditional notions of due process and bring clarity to modern personal jurisdiction doctrine.

Recognition of the constitutional nature of venue would be a critical step forward. First, it would both clarify personal jurisdiction jurisprudence and harmonize the case law with the historic origins of both doctrines. Second, and more consequentially, it would ensure a basic measure of due process to the defendants whose cases are prejudiced when they must defend themselves in gravely unfair locations because of the flawed conception of venue as lacking constitutional content.

I. PERSONAL JURISDICTION AND VENUE: INTERRELATED ORIGINS AND EVOLUTION

A foundational concept of American jurisprudence is the principle that it is unfair to allow litigants to be haled into far away tribunals when the litigants and the litigation have little or nothing to do with the location of such courts.[21] Protecting litigants against such injustice is critical to both venue and personal jurisdiction jurisprudence. However, despite common concerns, venue and personal jurisdiction occupy distinct legal spaces and their unique characters protect fairness

century); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 398–400 (2012) (describing *International Shoe* as duplicitous, with one face looking to past personal jurisdiction doctrine, and the other expressing a new conceptual theory); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1164 (2013) (arguing that the Court "has struggled to explain why state lines should be relevant at all in personal-jurisdiction cases" since *International Shoe* and that, post-*Nicastro*, the Court's personal jurisdiction jurisprudence is "even more conceptually muddled and practically confused than it was before").

21. *See World-Wide Volkswagen*, 444 U.S. at 297.

concerns in specific ways.[22] Venue, on one hand, is litigant-protective because it inquires into the propriety of the site of proceedings based on the parties' connections to the place and obstacles to a fair proceeding.[23] Personal jurisdiction, on the other hand, is sovereign-constraining because it asks whether the sovereign has the authority over the parties.[24] Of course, personal jurisdiction also acts to protect litigants but, unlike venue, it does not purport to guard against an uneven playing field between parties. Rather, personal jurisdiction protects litigants against the unfairness of being subject to the authority of a sovereign with which they have insufficient connections.[25]

The sometimes fine distinction between the two and the common practical effect of both doctrines have resulted in profound confusion regarding the boundaries between venue and personal jurisdiction.[26]

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22. *See* 77 AM. JUR. 2D *Venue* § 2 (2006).

23. *See* Burlington N.R.R. Co. v. Ford, 504 U.S. 648, 651–52 (1992). Venue doctrine operates differently in criminal and civil cases. In criminal cases, venue protections provide defendants with the constitutional right to be tried in the district where the defendant committed the crime. The Constitution guarantees this right because it provides that federal criminal defendants be tried by "an impartial jury of the State and district wherein the crime shall have been committed," U.S. CONST. amend. VI, and that criminal defendants are entitled to trial "in the State where the said Crimes shall have been committed," U.S. CONST. art. III, § 2, cl. 3. The Supreme Court has agreed that a criminal defendant has a right to trial in the place where the crime was committed and has found that the Sixth Amendment guarantees this right. *See* Johnston v. United States, 351 U.S. 215, 220 (1956); Salinger v. Loisel, 265 U.S. 224, 232–33 (1924). Scholars affirm that this accords with the Framers' intention that the Sixth Amendment create a right to venue as well as a right to vicinage:

> [I]f the debates in the state conventions can be taken as typical, those who clamored for more specific and more narrowly defined criteria of vicinage were frequently speaking in terms of venue, or at least they failed to distinguish clearly between vicinage and venue, between origin of the jury and location of the trial.

See FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 93 (1951).

24. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011) (citing Shaffer v. Heitner, 433 U.S. 186, 207 (1977)).

25. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

26. *See, e.g.*, Pure Oil Co. v. Suarez, 384 U.S. 202, 203 (1966) ("[A]lthough [the relevant] provision [of the Jones Act] is framed in jurisdictional terms, the Court has held that it refers only to venue."); United States v. Anderson, 328 U.S. 699, 700, 704–06 (1946) (reversing the district court's erroneous determination that venue was improper and that the district court therefore did not have jurisdiction); Lafferty v. St. Riel, 495 F.3d 72, 82 n.13 (3d Cir. 2007) (noting that Wright and Miller's *Federal Practuce & Procedure* "criticize[s] judicial statements that 'venue is wrong' when referring to an absence of personal jurisdiction over the defendant, as that 'blurs the very different concepts of venue and personal jurisdiction,'" while Moore's *Federal Practice* says that "'the concepts of venue and personal jurisdiction [have become] essentially coextensive,' and therefore, venue can be 'technically proper' when 'it complies with

This confusion is largely responsible both for the erroneous conception of venue as subconstitutional and for the muddled state of personal jurisdiction jurisprudence. Accordingly, by examining the interrelated origins of both doctrines, tracing the modern constitutionalization of personal jurisdiction, and exploring the way that subconstitutional venue-protective mechanisms obscure the constitutional floor of venue, we begin to resolve the confusion.

A. *Origin and Early Evolution of Personal Jurisdiction and Venue Doctrines*

The origins of the personal jurisdiction and venue doctrines confirm the distinct roles played by each. Personal jurisdiction, from the inception of the concept, constrained the power of the sovereign and in so doing, protected litigants against unfair treatment at the hands of the state. Venue, on the other hand, served to make justice accessible to litigants and to protect litigants against unfair treatment, vis-à-vis an opposing party who sought to gain a tactical advantage by selecting an inconvenient location for trial. These early concepts, established in common law England, were carried forward in the American judicial system, which emphasized from its foundation the critical virtue in accessible justice. During the early history of the United States, the constitutional boundaries of venue, however, went largely unexplored, first because litigation remained local and largely confined to actions in state courts, and later, as litigation in federal courts became increasingly common, because federal service of process rules effectively limited the range of permissible venues.

Among the key achievements of the English common law system was the development of judicial mechanisms that allowed civil venue to be set and cases heard in locations that would avoid hardship to the

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the applicable venue statute' but 'wrong' when there is 'some other procedural obstacle in the original court, such as a lack of personal jurisdiction over the defendant'" (quoting 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3827 (3d ed. 2007); 17A MOORE ET AL., *supra* note 1, § 111.02); Rodriguez v. Bush, 367 F. Supp. 2d 765, 770 n.6 (E.D. Pa. 2005) ("Although Section 408(b)(3) of [the Air Transportation Safety and System Stabilization Act] refers to 'exclusive *jurisdiction*,' the provision is, at bottom, a directive that the [Southern District of New York] be the exclusive *venue* for the federal causes of action to which [the Act] applies."); Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 93–95 (D.D.C. 2003) (interpreting the same jurisdictional language from *Rodriguez* as not requiring exclusive venue in the Southern District of New York); *see also* George Neff Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 310, 316–23 (1951) (finding, in a survey of state venue and jurisdictional statutes, "inaccurate and misleading" conflations of jurisdiction and venue).

litigants and enhance the accessibility of the civil justice system.[27] In the early English system, actions against people—rather than actions based on property[28]—could be brought in any court so long as the court had personal jurisdiction over the defendant.[29] This broad authority to exercise personal jurisdiction meant that, initially, litigants were required to travel from the furthest reaches of England to defend themselves before the court, then centralized in Westminster, which was both inconvenient and prejudicial to the parties.[30]

In response to this problem, the concept of civil venue protections arose.[31] Through an act in 1285, Parliament brought civil adjudication close to litigants' homes by authorizing justices to conduct hearings of fact-finding, in cases of general jurisdiction, in the home counties of the litigants.[32] Allowing cases to be heard near litigants' homes was a

27. *See generally* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 289, 297–302 (1956).

28. *E.g.*, Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.) 1029; 1 Co. Rep. 161, 176 ("[W]here the proceeding is in rem, and where the effect of the judgment cannot be had, if it is laid in a wrong place.").

29. *See* Joseph Henry Beale, *The Jurisdiction of Courts over Foreigners* (pt. 2), 26 HARV. L. REV. 283, 284–85 (1913).

30. *See, e.g.*, *Mostyn*, 98 Eng. Rep. at 1029–30, 1 Co. Rep. at 176–77 (requiring the governor of Minorca, which was part of the British Empire at the time, *see* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 806 (9th Cir. 2013) (Kleinfeld, J., dissenting), to defend himself against suit in London); George Burton Adams, *The Origin of the English Courts of Common Law*, 30 YALE L.J. 798, 809 nn.38–39 (1921) (indicating the courts were centralized in Westminster).

31. *See* Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 199 n.17 (1989) ("Long ago, in England, there were no venue statutes, almost all actions were 'local' in nature, and the plaintiff typically had but one court to choose from. As courts began to recognize more and more transitory actions, legislatures began to enact statutes more like the modern venue statutes."); *see also* Livingston v. Jefferson, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411) ("[O]riginally all actions were local. That is, that according to the principles of the common law, every fact must be tried by a jury of the vicinage. . . . The jurisdiction of the courts therefore necessarily becomes local with respect to every species of action.").

32. Statutes of Westminster, 2d, 1285, 13 Edw. 1, c. 30; 3 WILLIAM BLACKSTONE, COMMENTARIES *58–60 (explaining that this act authorized justices to travel to sites throughout the country to conduct factual hearings in local venues closest to the litigants in cases within the jurisdictional authority of the Westminster court). Centuries later, as the function of the common law jury became more adjudicative and less testimonial, vicinage requirements were relaxed. 14D WRIGHT ET AL., *supra* note 1, § 3802. Even so, English venue doctrine retained the notion that the case must be tried in an area related to the dispute; while the rationale for rigid vicinage in laying "fact-venue" receded, "cause of action venue" became the practice—and finally the rule—which placed venue at the county specified by the plaintiff when initially pleading the cause of action. *See* The Civil Procedure Act, 1833, 3 & 4 Will. 4, c. 42, § 22 (granting the power to judges to have local actions tried in any county). Although "cause of action venue" meant, practically, that the plaintiff's notation on the complaint set the presumptive place of venue, "cause of action venue" nonetheless retained the notion that avoiding hardship to the

critical reform, motivated in part by the fact that jurors at that time decided cases based upon their own knowledge of the facts.[33] However, the reform was probably likewise intended to restrict plaintiffs' ability to purposefully bring suit where a defendant would be disadvantaged.[34] Trials were held locally, as opposed to centrally at the King's Westminster courts, to mitigate "hardship to the parties, witnesses, and jurors whose attendance was necessary."[35] Moving the site of adjudication to the counties to allow litigants to establish facts without hardship to key participants, was considered one of the key developments during the reign of Edward I, who, in the words of the father of American common law,[36] "perfect[ed]" the English system.[37] Accordingly, from its inception, the concept of venue was intended to protect parties from litigation in locations where they face an unfair disadvantage.

At that time, the premise behind courts' jurisdictional authority was a theory of territoriality and consent to the state's authority[38]: since the English sovereign's authority extended only as far as its territory and over its citizens, English courts could assert jurisdiction only over those either within the sovereign's territory or citizens of that sovereignty.[39] In England, as now in America, a court can assert jurisdiction only over

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defendant was key to proper venue placement and therefore change of venue was "*compulsory* . . . on a showing of the adverse party." ALEXANDER MARTIN, CIVIL PROCEDURE AT COMMON LAW § 30 (1905) (emphasis added).

33. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 120–21, 123–24, 127–28 (Little Brown & Co. 5th ed. 1956) (1929); Roger S. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 43 (1930).

34. Foster, *supra* note 33, at 43 (explaining that the "plaintiff's power of determining venue was abused" and the "successive attempts to restrict [plaintiffs' venue choice] indicate that then as now there was temptation to choose the most inconvenient place for the defendant whether or not it was convenient for the plaintiff").

35. MARTIN, *supra* note 32, § 362, at 307; *see* PLUCKNETT, *supra* note 33, at 29.36. William Searle Holdsworth, *Sir William Blackstone*, 7 OR. L. REV. 155, 157 (1928) ("If the Commentaries had not been written when they were written I think it would be very much more doubtful whether you here [in the United States], and other English speaking countries would have so universally adopted our [English] common law.").

36. William Searle Holdsworth, *Sir William Blackstone*, 7 OR. L. REV. 155, 157 (1928) ("If the Commentaries had not been written when they were written I think it would be very much more doubtful whether you here [in the United States], and other English speaking countries would have so universally adopted our [English] common law.").

37. 1 WILLIAM BLACKSTONE, COMMENTARIES *23. *Compare* Statutes of Westminster, 2nd, 1285, 13 Edw. 1, c. 30 (establishing the courts of *nisi prius*), *with* 3 BLACKSTONE, *supra*, at *425 (praising how courts like the courts of *nisi prius* did justice by resolving disputes in even the most remote provinces). *See generally* 3 BLACKSTONE, *supra*, at *58–60 (discussing the courts of *nisi prius*).

38. *See* Ehrenzweig, *supra* note 27, at 297–98.

39. Galpin v. Page, 85 U.S. (18 Wall.) 350, 367–68 (1874).

a person in a civil suit if that person receives service of process. In the early period of American law, since the state's jurisdiction extended only as far as its territory or over its residents, only those either within its territory or those who are residents of the state could be served with process.[40] In England, a court could assert jurisdiction so long as the defendant was served within England's borders.[41] Accordingly, from its inception, personal jurisdiction was an expression of the boundaries of sovereign authority over litigants.

The United States' judicial system was informed by, but not replicative of, the English system of jurisdiction, venue, and process; it is necessarily distinct, in part because two sovereign adjudicative systems function simultaneously within its national boundaries. While it retained its English forebears' basic relationship between courts, litigants, and causes of action, the American judicial system also reflected a deeper commitment to decentralized and accessible courts than its monarchical and comparatively centralized common law ancestor.[42] An exploration of the history of these doctrines as part of the development of the American common law reveals the due process values that underlie each doctrine, shows how the materialization of this protection within jurisdictional requirements operated to relieve venue doctrine of due process constraints, and explains the resultant characterization of venue as statutory and convenience-focused.

The connection between the geographic locale and the judicial authority of courts was fundamental to the American judicial system at its creation. In the pre-Independence era, each colony operated its own court system and, as a practical matter, functioned as an independent sovereign.[43] When the American colonies won independence, they united in a federation of American states and authorized the creation of a federal court system.[44] However, despite the creation of a coequal

40. *Id.*

41. Foster, *supra* note 33, at 46 n.20 (explaining that a defendant could receive service of process anywhere within England).

42. Jurisdictional authority was justified as founded upon various theories of sovereign power, which include consent to the authority of the sovereign and territorial sovereignty, which generally reflect the political structure of the sovereign. *See* Beale, *supra* note 29, at 283–84, 296–301. In feudal Europe, scholars thought a sovereign's juridical authority derived from reciprocal rights between rulers and subjects, while in England, where the King's authority superseded feudal authority, scholars saw jurisdiction as a matter of territorial principles. *See id.* at 283–84. Unsurprisingly, the distinct American political structure, comprised of coordinate sovereigns, produced an equally distinct approach to personal jurisdiction.

43. *See* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 401 (1968). *See generally id.* at 398–404 (discussing the early court systems of many of the American colonies).

44. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1 (6th ed. 2009) ("Article III, the judiciary article of the Constitution, emerged from the Convention that met in Philadelphia during the summer of 1787.").

national sovereignty, American courts continued to operate, as a practical matter, with little change.[45]

Contemporaneous accounts of the drafting of Article III, which authorized the creation of the federal courts, suggest that this may have been intentional. The Framers remembered the English monarchy's control of the national courts, and as such, the protection of fair access to the courts for those with limited means particularly concerned them.[46] At the constitutional conventions, there was considerable debate about whether the creation of a nationwide judicial system was necessary at all, and whether such creation could be used to upset the existing system of locally resolved disputes.[47] In these early discussions about the structure of the federal judiciary, state delegates opposed a federal court system in which litigation would "carry me a thousand miles from home—from my family and business—to where, perhaps, it will be impossible for me to prove [my case]."[48] The resultant law thus reflected the delegates' common view that there should be numerous courts arranged such that justice would be brought to every man's door.[49]

Pursuant to Article III's authority, Congress established a structure

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45. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 489–90 (1928) (stating that state courts retain much of their original jurisdictional hold).

46. *See, e.g.*, *id.* at 489 (noting that opponents of Article III feared the destruction of state judiciaries); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 638 (Max Farrand ed., rev. ed. 1966) (recording the statements of Virginia delegate George Mason).

> The Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.

Id.

47. *See* FALLON ET AL., *supra* note 44, at 8, 19–20; 1 JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 226 (Cambridge Univ. Press 2010) (1971) (describing concerns about a judicial structure that "offered a tempting means of extending [federal] jurisdiction" and noting that "[t]he delegates were too familiar with the British constitution not to know that it was at the level of original jurisdiction that the three central courts at Westminster had each extended its authority"); Fullerton, *supra* note 14, at 33 (describing the fear some delegates expressed to the Constitutional Convention of "the power that would accrue to a system of federal courts with authority to serve process throughout the country").

48. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 526 (Jonathan Elliot ed., William S. Hein & Co. 2d ed. 1996) (1891) (statement of Virginia delegate George Mason); *see also* 4 *id.* at 136 (statement of North Carolina delegate Judge Samuel Spencer) (discussing the oppression and interference that would be caused by parties having to travel to distant federal courts).

for the federal court system through the Judiciary Act of 1789.[50] In response to the Framers' concerns that plaintiffs could hale people in to court far from home, this Act created a federal judicial structure that retained the system of geographically localized courts: federal districts were established along state lines and those districts were grouped into circuits, which were granted appellate jurisdiction.[51] Thus, district courts were authorized to hear discrete categories of suits that arose within their geographical districts.[52] Moreover, the Act granted federal defendants the right to defend themselves in civil actions at the place of their residence or where they were physically present.[53] However, the

50. *See* FALLON ET AL., *supra* note 44, at 21; *cf.* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 500–01 (1928) (discussing the difficulties Congress faced in creating the federal judiciary).

51. *See* Judiciary Act of 1789, ch. 20, §§ 2–4, 1 Stat. 73, 73–75; FALLON ET AL., *supra* note 44, at 21–22 & n.6 (noting that this Act authorized additional circuit courts to sit in the remote districts of Kentucky and Maine, as opposed to requiring appellants in those faraway districts to travel to one of the three main circuits). The rationale for this structure was rooted in due process concerns:

> Members of the founding generation were concerned that a national court system would subject citizens to suit in distant locales at great inconvenience and in violation of a perceived entitlement to localized justice. Responding to this concern, the First Congress, via the Judiciary Act of 1789, limited effective service to that issued by the district in which the defendant resided or the district in which the defendant was actually present when served.

A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 326 (2010) (footnote omitted); *see also* Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1594 (1992); Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2903 & n.17 (2009).

52. *See* FALLON ET AL., *supra* note 44, at 21–22; 1 GOEBEL, *supra* note 47, at 462 & n.19; *see also* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 11–12 (1927).

53. Judiciary Act of 1789, ch. 20, § 11(b), 1 Stat. 73, 79 ("[N]o civil suit shall be brought before either [district or circuit] courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . . ."). This provision, the first relating to venue, remained essentially unchanged until 1875. Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 708–09 (1972). *Compare* Act of Mar. 3, 1875, ch. 137, §§ 1, 7–8, 18 Stat. 470, 470, 472–73 (granting federal courts concurrent jurisdiction over all matters arising under federal law, subject to a $500 amount-in-controversy requirement), *and* REV. STAT. § 739 (1878) (codifying § 11(b) of the Judiciary Act of 1789 and indicating two session laws before the Act of March 3, 1875 affecting the section), *with* Act of June 1, 1872, ch. 255, § 13, 17 Stat. 196, 198 (allowing juridiction in rem even if defendants fail to appear), *and* Act of May 4, 1858, ch. 27, §§ 1–2, 11 Stat. 272, 272 (allowing a plaintiff to sue multiple defendants in different districts if they were all in the same state, and clarifying venue for land that lies across a district boundary within a state).

Act authorized federal courts to hear only a limited category of cases, and so state courts remained the primary forum for the vast majority of disputes.[54] By and large, disputes were resolved locally, so litigants were not likely to be haled into courts far away from their homes.[55]

The basics of American common law actions resembled those in the English system. In order for a state court to have personal jurisdiction—authority to exert control over the person—the defendant had to be a resident of the state,[56] physically within the territory of the state,[57] or had to have voluntarily consented to submit to the jurisdiction of the state.[58] In the early years—and indeed the greater part of U.S. history—the American common law system mirrored that of its English ancestor

54. *See* FALLON ET AL., *supra* note 44, at 744 (explaining that, in the antebellum period, which was prior to the grant of "federal question" jurisdiction, parties had to turn to state courts even for adjudication of federal claims, except in the relatively limited number of diversity suits).

55. *See* Foster, *supra* note 33, at 46–47 (describing state venue rules and finding that"[i]n almost every state there is some check which would prevent the plaintiff from selecting a remote county merely to embarrass the defendant" or inconvenience parties or witnesses); *id*. at 47 n.21, 62 app. (finding that, as of 1930, almost every state set venue presumptively where the defendant resided or where the cause of action arose and, even in change of venue determinations, thirty-two of the state venue rules evinced a "tendency to give defendant rather than plaintiff the advantage of trial at his home").

56. *E.g.*, Milliken v. Meyer, 311 U.S. 457, 463–64 (1940).

57. Mason v. Connors, 129 F. 831, 833 (C.C.D. Vt. 1904) (holding that service during a defendant's physical presence in the state conferred personal jurisdiction); *see* McDonald v. Mabee, 243 U.S. 90, 91–92 (1917) (holding state court assertion of personal jurisdiction improper where service of process upon the defendant, after he had moved out of the state and was only attempted by publication). The physical presence basis for personal jurisdiction contemplates a voluntary physical presence; this basis does not apply where a person's physical presence is acquired through fraud or coercion. Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 256 (1909) ("It is undoubtedly true that if a person is induced by artifice or fraud to come within the jurisdiction of the court for the purpose of procuring service of process, such fraudulent abuse of the writ will be set aside upon proper showing." (citing Fitzgerald & Mallory Constr. Co. v. Fitzgerald, 137 U.S. 98 (1890))); Wyman v. Newhouse, 93 F.2d 313, 314–15 (2d Cir. 1937) (invalidating personal service where the plaintiff lied to the defendant to induce him to come to the state in order to be personally served); Blandin v. Ostrander, 239 F. 700, 703 (2d Cir. 1917) (reversing judgment in a case initiated by "fraudulent service"); Toof v. Foley, 54 N.W. 59, 60 (Iowa 1893) (holding that the case clearly fell within the rule that "if a person residing in one jurisdiction be induced, under false pretenses or representations, to come into another, for the purpose of there getting service upon him, the jurisdiction thus acquired will be held to have been fraudulently obtained, and the judgment is void"); Comment, *Jurisdiction over Persons Brought into a State by Force or Fraud*, 39 YALE L.J. 889, 894–96 (1930).

58. *See, e.g.*, *McDonald*, 243 U.S. at 91 ("[S]ubmission to the jurisdiction by appearance may take the place of service upon the person."). *Compare* FED. R. CIV. P. 12(h)(1) (providing for waiver of lack of personal jurisdiction), *with* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

in this respect: service of process could be effectuated only upon a person within the court's territorial domain.[59] The territorial bounds of federal district courts generally connected to the states from which they derived their authority;[60] this sphere of control encompasses territory as well as inhabitants.[61] Under this conception of territorial jurisdiction, residents of a state are subject to its judicial authority and, as such, may be served with process even when they are beyond its physical borders.[62] Because, as in early England, personal jurisdiction limits were strict and effectively acted to prohibit unfair venue, there was little need for litigants to rely on the venue doctrine—and thus few challenges to venue on constitutional grounds occurred during this early period.

In the late nineteenth century and early twentieth century, litigable disputes increasingly crossed state lines, and the federal court system expanded to respond to changes in social and political needs; as a consequence, traditional state-based jurisdiction no longer sufficed to ensure parties a fair forum for justiciable controversies.[63] Accordingly, principles of jurisdiction, venue, and process were modified to protect due process by ensuring that the defendant, cause of action, and

59. Pennoyer v. Neff, 95 U.S. 714, 733 (1878) (explaining that, for a court to hear a personal liability action, the defendant "must be brought within its jurisdiction by service of process within the State, or his voluntary appearance"), *abrogated by* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945), *and* Shaffer v. Heitner, 433 U.S. 186 (1977); 1 GOEBEL, *supra* note 47, at 226 (explaining that, within each state at the time of the adoption of the Constitution, service of process could be issued only within the state's borders); *see also* Comment, *supra* note 57, at 894–95.

60. The Judiciary Act of 1789 itself did not provide the specific *means* by which process was to be served but, pursuant to the Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94, and the Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276, federal courts initially utilized the modes of service employed by the states in which they sat. The Court in *Toland v. Sprague*, 37 U.S. (12 Pet.) 300 (1838), interpreted the Judiciary Act of 1789 to prohibit federal service of process under the Process Acts if it issued beyond the limits of the district in which the federal court sat, even if the state permitted its courts to issue extraterritorial service in certain cases. *Id.* at 328.

61. 1 BURR W. JONES & L. HORWITZ, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES § 33, at 185 & n.55 (1913). Initially, district courts were constrained by the territorial limits of the district in which it sat, but the adoption of the Federal Rules of Civil Procedure expanded these limits that go to the borders of the states in which the court sits, and provides that, in general, district courts may invoke jurisdiction based on the rules of the forum state. *See* FED. R. CIV. P. 4(k)(1)(A).

62. Milliken v. Meyer, 311 U.S. 457, 463–64 (1940); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 402–03 (1985).

63. *See* 5 ABRAHAM LINCOLN, *Annual Message to Congress*, *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 41–42 (Roy P. Basler ed., 1953) (warning that "the country generally has outgrown [its] present judicial system"); RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 12 (2d ed. 1994) (attributing this to increased commercial activity and post-Reconstruction legislation, among other causes).

adjudicating sovereign were connected.[64] Although the federal court system has existed almost as long as America itself, it was not until the late nineteenth century that federal courts became a forum for a significant amount of litigation.[65] After industrialization and the concomitant social and political developments, the American judicial system, once a collection of independent common law systems united by compact,[66] required adjustment to accommodate a more unified national character and cross-country litigation that arose from interstate commerce and disputes.[67] During this period, the subject matter jurisdiction of the federal courts expanded dramatically through, inter alia, the enactment of civil rights and removal statutes, expanded habeas jurisdiction, and most significantly, the creation of federal question jurisdiction.[68]

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64. *Cf.* WHEELER & HARRISON, *supra* note 63, at 12, 16 (describing the effects of the expansion in jurisdiction to include federal courts' new role as "protectors of constitutional and statutory rights and liberties").

65. *See* FALLON ET AL., *supra* note 44, at 744–45 (explaining that federal courts were "flooded with litigation" after Congress greatly expanded federal jurisdiction in the post-Civil War era, as it created civil rights causes of action, allowed for removal of state court cases, and authorized general jurisdiction over suits arising under federal law); *see also* Frankfurter, *supra* note 50, at 501–02 (describing both the legislation by which Congress allocated authority to federal courts during that time and the political context that prompted this shift). *See generally* WHEELER & HARRISON, *supra* note 63, at 6–9 (describing the initial compromises underlying the Judiciary Act of 1789 that restricted litigation in federal courts and the subsequent expansion of the federal case load in the mid-1800s).

66. Pre-industrialization, the majority of adjudication—and jurisdiction—was then, as it is now, found in state courts. FALLON ET AL., *supra* note 44, at 744. Estimates have shown that state courts handle over 98% of filed civil cases. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 6 (1986). More recent data on both civil and criminal cases show that the figure is more than 99%. The National Center for State Courts reported that about 39.4 million combined civil and criminal cases were filed in state courts in 2010. COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 3 (2012). In contrast, in 2010, U.S. district courts' combined filings of civil and criminal cases reached 361,323 and the combined U.S. courts of appeals reported 55,592 filings total. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 12 (2011).

67. As argued by Professor Philip Kurland:

> The rapid development of transportation and communication in this country demanded a revision of Johnson's "eternal principles" incorporated by Field in the Due Process Clause: "eternal principles" which were appropriate for the age of the "horse and buggy" or even for the age of the "iron horse" could not serve the era of the airplane, the radio, and the telephone.

Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 573 (1958) (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957); Hanson v. Denckla, 357 U.S. 235, 251, 260 (1958)); *see also* Friendly, *supra* note 45, at 510.

68. *See* Judith Resnik, *Trial as Error, Jurisdiction as Inquiry: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 970 (tracing the expansion of federal jurisdiction and

As a result of these changes, distinctions between jurisdiction and venue sharpened and assumed increasing importance. These statutory changes, along with the significant growth in American business, greatly increased the numbers of parties before and cases in federal courts.[69] The federal venue provision, however, remained "undisturbed," and maintained its defendant-protective requirement that venue be set either where a defendant resides or where "he shall be found."[70] Thus, as litigants increasingly utilized the sprawling federal court system for litigation of all types, statutory venue protections generally protected defendants from being sued in an inconvenient forum and therefore constitutional questions about venue did not arise.

Personal jurisdiction and service of process rules also played a key role in the restriction on the location of trial amid geographically expansive litigation. It was during this period that the Federal Rules of Civil Procedure (FRCP) were first established.[71] Those rules carried forward traditional protections that preserved the notions of proximity and fairness to defendants:[72] under the FRCP, personal jurisdiction was acquired in the same way as before, through proper service of process

differentiation of the federal court system during this era); FALLON ET AL., *supra* note 44, at 28–29. The Judiciary Act of 1875 established general jurisdiction over all civil cases that arose under federal law (subject to an amount in controversy requirement), which meant that the lower federal courts became the site of a significant amount of litigation. *Id.* at 28; Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 738 (1988) ("[T]he creation of a federal question jurisdiction in 1875 and the sweep of federal substantive policy created by Congress in the ensuing decades thrust the federal courts into the role of federal law enforcers . . . ." (footnote omitted)).

69. FALLON ET AL., *supra* note 44, at 745; WHEELER & HARRISON, *supra* note 63, at 12, 16; Friendly, *supra* note 45, at 510. Moreover, "[l]atitudinarian construction of this Act by the Supreme Court opened still wider the sluices of Federal litigation." Frankfurter, *supra* note 50, at 509 (referring to the Act of March 3, 1875 granting general federal question jurisdiction).

70. Judiciary Act of 1789, ch. 20, § 11(b), 1 Stat. 73, 779; Edward L. Barrett, Jr., *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 609–10 (1954) (noting that "the venue provision was left undisturbed" after Congress revised the Judiciary Act in 1875); *see also* Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 709 (1972) (citing *In re* Hohorst, 150 U.S. 653 (1893)) (noting that while Congress "greatly expanded the scope of federal jurisdiction" by "substantially revis[ing] the Judiciary Act" in 1875, the change to the original venue provisions "was stylistic and not substantive").

71. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)) (authorizing the Supreme Court to promulgate rules of procedure); FED. R. CIV. P. hist. n. (noting the original rules became effective September 16, 1938).

72. *See, e.g.*, FED. R. CIV. P. 12(b)(3) (providing defendants with the ground of "improper venue" as a basis for dismissal); *id.* 19(a)(3) (authorizing joinder generally but *requiring* dismissal of a joined party where the "joined party objects to venue and the joinder would make venue improper").

and an exercise of jurisdiction that comported with due process.[73] Thus, the FRCP authorized a district court to exercise federal jurisdiction over persons served within the district court's geographic area and, when litigants were haled into federal court, they remained entitled to be sued in a forum near their place of residence or in a place where they purposefully went.[74] In this way, the service of process rules, the exercise of personal jurisdiction, and venue operated together to ensure that due process protections remained robust within the changing and geographically expansive judicial system.

As the boundaries of federal personal jurisdiction expanded in the late nineteenth and early twentieth century, the geographic location of the trial—a question of venue—became increasingly important. However, until the 1930s, federal service of process rules constrained the geographic reach of federal courts[75] and made it largely unnecessary to explore the constitutional boundaries of venue in the federal system.[76] However, industrialization and technological advancements easing transportation and commerce continued to prompt increasing interstate litigation.[77] In response, states began to expand the jurisdictional reach of their courts through novel jurisdictional long-arm statutes.[78] It was the advent of these statutes that set the stage for the modern constitutionalization of personal jurisdiction.

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73. *See, e.g.*, Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104–06 (1987) (holding that the district court lacked jurisdiction because of ineffective service of process), *superseded by* FED. R. CIV. P. 4(k); Matthews v. U.S. Treasury Dep't, 60 F.R.D. 212, 217 (C.D. Cal. 1973) (finding no jurisdiction over the IRS Director of Utah without service in California because Rule 4(f) set the territorial limits of the court's jurisdiction to the boundaries of California).

74. The Supreme Court explained the relationship between jurisdiction and venue as follows:

> The court had jurisdiction over the parties if the petitioner was properly brought before the court by the service of process within the southern district. And it could rightly exercise its jurisdiction, notwithstanding petitioner's motion, unless there was want of venue. Venue in the present case is controlled by § 51 of the Judicial Code, 28 U.S.C. [§] 112, which provides, with exceptions not now material, that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant . . ."

Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 441 (1946) (ellipsis in original).

75. In addition to statutory protections, the doctrine of forum non conveniens protected defendants during the first half of the twentieth century. *See infra* Subsection I.C.3.

76. *See infra* Subsection I.C.1 (describing the venue-protective function of service of process rules); *see also* Ehrenzweig, *supra* note 27, at 292 (describing development of the "doctrine of the inconvenient forum" as a defendant-protective measure).

77. *See supra* notes 62–69 and accompanying text.

78. *See infra* note 84 and accompanying text.

B. *Modern Constitutionalization of Personal Jurisdiction: Competing Visions of Due Process*

Prior to the enactment of the Fourteenth Amendment, questions about the permissible reach of state courts over nonresident defendants arose most frequently where the courts of the defendants' home states were called upon to enforce a sister state's judgment.[79] The analyses in these decisions focused on international comity doctrines, which were deemed to be an exception to the Constitution's full faith and credit requirement.[80] However, within a decade of the ratification of the Fourteenth Amendment,[81] the Supreme Court famously declared in *Pennoyer v. Neff*[82] that "proceedings in a court . . . to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[83] With this pronouncement, the constitutionalization of personal jurisdiction jurisprudence began.

It was not until the middle of the twentieth century, however, that the full constitutional boundaries of personal jurisdiction would be tested. Technological advancements in communication and transportation and the concomitant rise of interstate commerce increased the volume and frequency of interstate disputes, and states responded by expanding the jurisdictional reach of their courts over nonresidents through a wave of now familiar long-arm statutes.[84] From *International Shoe* through the Court's most recent pronouncement in *J. McIntyre Machinery, Ltd. v. Nicastro*,[85] the Supreme Court has grappled time and again with the due process limits on personal jurisdiction. This history has been told and retold on many occasions,[86] and a general recounting herein would not

79. *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 175–76 (1851); Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 350 (1850); Evans *ex rel.* Bell v. Instine, 7 Ohio 273, 274–75 (1835); Steel v. Smith, 7 Watts & Serg. 447, 449–50 (Pa. 1844); *see also* Fullerton, *supra* note 14, at 8 n.22; Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1123–24 (1981).

80. U.S. CONST. art. IV, § 1; Redish, *supra* note 79, at 1123–24.

81. The Fourteenth Amendment was ratified in 1868.

82. 95 U.S. 714 (1878), *abrogated by* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945), *and* Shaffer v. Heitner, 433 U.S. 186 (1977).

83. *Id.* at 733.

84. *See* Burnham v. Superior Court, 495 U.S. 604, 617 (1990) (plurality opinion); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292–94 (1980); Shaffer v. Heitner, 433 U.S. 186, 202 (1977); Hanson v. Denckla, 357 U.S. 235, 250–51 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).

85. 131 S. Ct. 2780 (2011).

86. *See, e.g.*, Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 8–28 (2006); Redish, *supra* note 79, at 1115–20.

significantly advance the discourse. However, one aspect of this jurisprudence requires special attention: the treatment of traditional venue interests in the constitutionalization of personal jurisdiction.

Collectively, these cases show the Court struggling with two distinct, and sometimes competing, notions of the due process interest related to personal jurisdiction.[87] One notion, embodied most significantly in *International Shoe*, *Shaffer v. Heitner*,[88] and *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[89] is that the central due process limit on permissible personal jurisdiction is based on notions of fairness to the defendant—protection against being haled into court in a far-off forum, which may significantly burden the defendant and ultimately prejudice the defendant's ability to mount a defense.[90] A second set of decisions, notably the Court's decision in *Pennoyer*, Justice Antonin Scalia's opinion in *Burnham v. Superior Court*,[91] and Justice Anthony Kennedy's decision in *J. McIntyre Machinery*, describe the central due process inquiry as focused not on the rights of the defendants but on the permissible scope of sovereign authority.[92] Other cases, notably *World-Wide Volkswagen Corp. v. Woodson*,[93] *Burger King Corp. v. Rudzewicz*,[94] and *Asahi Metal Industry Co. v. Superior Court*,[95] credit both due process interests and conduct two distinct due process inquiries in assessing personal jurisdiction.[96] The due process interest that focuses on the fairness of the forum location to the defendant connects quite closely with the interests traditional venue doctrines serve. Accordingly, to understand the constitutional dimensions of venue, it is critical to tease out the role of this interest in Supreme Court personal jurisdiction jurisprudence.

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87. Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1119 (1989) (discussing the "two basic and often conflicting values underlying personal jurisdiction analysis: sovereignty and convenience"); Clermont, *supra* note 14, at 413–24 (discussing the Supreme Court's personal jurisdiction due process analysis since *Pennoyer*).

88. 433 U.S. 186 (1977).

89. 456 U.S. 694 (1982).

90. *See id.* at 702–03; *Shaffer*, 433 U.S. at 203 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

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

92. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2783 (2011); *Burnham*, 495 U.S. at 609–11; Pennoyer v. Neff, 95 U.S. 714, 722–23 (1878), *abrogated by Int'l Shoe*, 326 U.S. 310, *and Shaffer*, 433 U.S. 186.

93. 444 U.S. 286 (1980).

94. 471 U.S. 462 (1985).

95. 480 U.S. 102 (1987).

96. *See id.* at 108–09; *Burger King*, 471 U.S. at 471–77; *World-Wide Volkswagen*, 444 U.S. at 291–92.

The discourse around these competing notions of due process emerged in the seminal *International Shoe* decision. The decision pertained to an effort by the state of Washington to recover contributions from a Delaware corporation for Washington's unemployment compensation fund. The corporation had several salesmen who operated in the state and received commissions for sales there but the corporation did not maintain an office in Washington nor did it have any contracts for sale or purchase in the state.[97] Noting the move away from the traditional presence requirement for personal jurisdiction, the Court famously held that "due process requires . . . [that a defendant outside the forum] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[98] In its announcement of the "minimum contacts" due process requirement, the Court focused almost exclusively on the protection of defendants against any "unreasonable . . . burden" rather than on limitations of the power and reach of the sovereign forum.[99] The Court instructed that the inquiry should focus on whether the foreign defendants had

> such contacts . . . with the state of the forum as make it reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there. An "estimate of the inconveniences" which would result to the [defendant] from a trial away from its "home" or principal place of business is relevant in this connection.[100]

The decision of the Supreme Court to tether this due process interest in a fair location to the personal jurisdiction doctrine was a rather odd choice. Jurisdiction, at that time and for centuries before, was understood as a limitation on the power of the sovereign rather than as a right of the individual against government.[101] It is tempting to see the

97. *Int'l Shoe*, 326 U.S. at 311–15.

98. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

99. *See id.* at 317 ("To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.").

100. *Id.* (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)).

101. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 722 (1878), *abrogated by Int'l Shoe*, 326 U.S. 310, *and* Shaffer v. Heitner, 433 U.S. 186 (1977); Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 32 (1990); Parrish, *supra* note 86, at 8–10; A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006); *see also supra* Section I.A.

distinction as one of just taxonomy—every right inherent in the Constitution carries with it a corollary limitation on the power of the government. However, as discussed *infra* in Part II, the distinction between viewing the due process interest as a defendant-protective right or as a limitation on sovereign authority has real consequences. The odd squeeze of the square-peg rights framework in the round-hole jurisdiction concept, while a matter of mere taxonomy in most civil cases, has significant consequences in a select set of circumstances where jurisdiction is satisfied notwithstanding grave unfairness in the location of the tribunal.[102]

In the decades that followed *International Shoe*'s formulation of the due process interest in personal jurisdiction, the Court confronted and acknowledged the sharp break from previous notions of personal jurisdiction. In *Hanson v. Denckla*,[103] the Court sought to reassert a traditional conception of jurisdiction. The Court tried to recast the "minimum contacts" test in terms of those traditional concepts, asserting that:

> restrictions [on personal jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of *territorial limitations on the power of the respective States*. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.[104]

But the language and reasoning of *International Shoe* was too plain to ignore and, in *Shaffer v. Heitner*, the Court explicitly acknowledged this evolution of the Court's concept of the due process interest in personal jurisdiction and the break with precedent. Justice Thurgood Marshall, writing for the Court, explained that *Pennoyer*, wherein the Court originally found a due process interest in personal jurisdiction, was concerned with "exceed[ing] the inherent limits of the State's power" and thus "the Court focused on the territorial limits of the States' judicial powers."[105] But after *International Shoe*, Justice Marshall explained, the "central concern" in the due process inquiry was "notions of fair play and substantial justice" and whether it was "reasonable" to require a defendant to defend against suit in the forum

102. *See infra* Part II.
103. 357 U.S. 235 (1958).
104. *Id.* at 251 (emphasis added) (citing *Int'l Shoe*, 326 U.S. at 319).
105. *Shaffer*, 433 U.S. at 197.

jurisdiction.[106] "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the states on which the rules of *Pennoyer* rest[ed], became the central concern of the inquiry into personal jurisdiction."[107]

In *World-Wide Volkswagen*, the Court attempted to reconcile the two competing conceptions of due process. The Court laid bare the dichotomy and credited both conceptions of due process:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. [First, i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum. [Second,] it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[108]

The Court purported to give primacy to the former interest: "[T]he burden on the defendant [is] always a primary concern."[109] However, the Court's analysis focused primarily on the latter interest and on whether the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State"[110] such that the "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction" over the defendant.[111]

But the instability in the Court's conception of the due process interest in personal jurisdiction was on full display as, a mere two years later in *Insurance Corp. of Ireland*, the Court all but disavowed the idea that the Due Process Clause protects traditional notions of limitations on sovereign power. Justice White, writing for eight Justices, held that "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power

106. *Id.* at 203 (quoting *Int'l Shoe*, 326 U.S. at 316–17) (internal quotation marks omitted); *accord id.* ("Mr. Chief Justice Stone's [*International Shoe*] opinion . . . began its analysis of [the personal jurisdiction] question by noting that the historical basis of *in personam* jurisdiction was a court's power over the defendant's person. That power, however, was no longer the central concern . . . .").

107. *Id.* at 204.

108. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980).

109. *Id.* at 292.

110. *Id.* at 297 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (internal quotation marks omitted).

111. *Id.* at 297–98. *See generally id.* at 292–99 (discussing the historical shift in the Court's personal jurisdiction jurisprudence, and the Court's continued emphasis—despite this shift—on the limitations of state power).

not as a matter of sovereignty, but as a matter of individual liberty."[112] An incredulous Justice Powell, concurring in the judgment, explained that "[f]or the first time[, the Court] defines personal jurisdiction solely by reference to abstract notions of fair play."[113] It is notable how far the Court had moved at this point from a traditional conception of the power of the courts defined by jurisdiction toward a conception much more aligned with the interests at issue in traditional venue doctrine.

Insurance Corp. of Ireland represents the high-water mark in the Court's jurisprudence for this conception of the personal jurisdiction due process interest. But what can explain the apparent sharp break from *World-Wide Volkswagen*'s dual vision of the nature of the due process interest? The question becomes even more puzzling when we recognize that, in addition to the temporal proximity, Justice White authored both opinions, and both garnered votes by largely the same Justices.[114] The answer, it appears, can be found in the Court's emphasis on the fact that *Insurance Corp. of Ireland* arose in a federal, not state, court.[115] Justice White explicitly acknowledges the break with precedent: "It is true that we have stated that the requirement of personal jurisdiction, *as applied to state courts*, reflects an element of federalism and the character of state sovereignty vis-à-vis other states. For example, in *World-Wide Volkswagen* . . . ."[116] Thus, as applied to the federal courts, the Supreme Court appeared to view the sole due

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112. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (emphasis added). Attempting to reconcile its decision with the decision two years previous in *World-Wide Volkswagen*, the Court explained:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp*., however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.

Id. at 703 n.10. Thus, the Court cast any due process restriction on sovereign power not as a due process interest itself but rather as the flip side, a mere byproduct of the individual defendant-protective right.

113. *Id.* at 714 (Powell, J., concurring in the judgment).

114. Chief Justice Burger, Justices Rehnquist and Stevens joined Justice White's opinions in both cases. While Justice Powell fully joined Justice White's *World-Wide Volkswagen* opinion, he only concurred in the judgment of *Insurance Corp. of Ireland*. Justice Stewart fully joined Justice White's *World-Wide Volkwagen* opinion, while Justice O'Connor, his successor, fully joined the *Insurance Corp. of Ireland* opinion. Justices Brennan, Marshall, and Blackmun, who had dissented from *World-Wide Volkswagen*, fully joined Justice White's *Insurance Corp. of Ireland* opinion.

115. *See Ins. Corp. of Ir.*, 456 U.S. at 701.

116. *Id.* at 702 n.10 (emphasis added).

process interest personal jurisdiction inquiry as focused on venue-type fairness to the defendant.

In *Burger King* and *Asahi*, the Court reasserted the dual due process inquiry of *World-Wide Volkswagen*.[117] The *Asahi* decision is notable, however, for the conversation between the Justices regarding the nature of the due process interest at issue. The Court, with the exception of Justice Scalia, unanimously agreed with Justice Sandra Day O'Connor's conclusion that the California court's assertion of jurisdiction over the Japanese corporate defendant offended "traditional notions of fair play and substantial justice," and thus was unreasonable because of, inter alia, the great distance it must travel, its unfamiliarity with the legal system, and the availability of a less burdensome appropriate alternative forum.[118] However, notwithstanding this agreement, the case triggered two competing decisions—Justice O'Connor's and Justice William Brennan's decisions each garnered four votes in relevant part and presented dueling conceptions of the due process limits on sovereign authority.[119] As Justice Kennedy later described the two opinions, Justice Brennan "discarded the central concept of sovereign authority in favor of fairness and foreseeability" considerations[120] while Justice O'Connor focused on purposeful availment, which required that "minimum contacts must come about by an action of the defendant purposefully directed toward the forum State."[121] This crack foreshadowed the divergent conceptions of the due process interest in personal jurisdiction that different factions of the Court would hold and that would, from *Asahi* onward through the present, prevent the Court from delivering a majority opinion that articulates the nature of the relevant due process interest.[122]

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117. *See Burger King*, 471 U.S. at 471–73. However, in *Burger King*—which, like *Insurance Corp. of Ireland*, was a federal case, *id.* at 468—the Court continued to characterize the restriction on state power as a byproduct of the individual rights that flowed from due process. *See id.* at 472 n.13 ("Although this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'" (quoting *Ins. Corp. of Ir.*, 456 U.S. at 702 n.10)).

118. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–14 (1987) (internal quotation marks omitted).

119. *Compare id.* at 108–13 (O'Connor, J.), *with id.* at 116–21 (Brennan, J., concurring in part and concurring in the judgment). Justice Stevens was the only one not to join either position, as he preferred to dispose of the case on other grounds. *Id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment).

120. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (Kennedy, J.) (plurality opinion).

121. *Id.* (quoting *Asahi*, 480 U.S. at 112 (O'Connor, J.) (plurality)) (internal quotation marks omitted).

122. Justice Brennan's decision provides an example of how the different conceptions of the due process interest (as an individual right or as a limitation on sovereignty) could, in some

The crack, which was born in *Asahi*, grew into a fissure in *Burnham*. Again, the Court was unanimous as to the result and held that the transient jurisdiction rule as applied in this case did not violate due process. The decision permitted jurisdiction in a divorce proceeding over the nonresident defendant spouse based upon personal service upon him during his brief trip to the forum state of California.[123] Justice Scalia, writing for three members of the Court,[124] rejected the notion that any assessment of minimum contacts, reasonableness, fairness, or inconvenience to the defendant is relevant to the due process analysis where a defendant, even a transitory defendant, is personally served in the forum jurisdiction. For Justice Scalia, personal jurisdiction is all about the limits on a sovereign's authority.[125] In his view, since state court authority over transitory defendants was firmly established at the time of the adoption of the Fourteenth Amendment,[126] there is no need at all for a minimum contacts analysis in such situations.[127] *International Shoe*, according to Justice Scalia, developed the minimum contacts test only to define the limits of *novel* assertions of a state court's reach.[128] Justice Brennan, in contrast, viewed the due process inquiry as focused, in all instances, on the notions of "fair play and substantial justice" announced in *International Shoe*.[129] After *Burnham*, it would take two decades before the Court attempted to clarify the nature of the due process interest in personal jurisdiction.

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cases, be more than opposite sides of the same coin, but rather could determine the outcome of the analysis. As Justice Brennan explained, "This is one of those rare cases in which minimum requirements inherent in the concept of fair play and substantial justice . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." *Asahi*, 480 U.S. at 116 (Brennan, J., concurring) (alterations in original) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477–78 (1985)) (internal quotation marks omitted).

123. *Compare* Burnham v. Superior Court, 495 U.S. 604, 607–08 (1990) (discussing the facts of the case), *with id.* at 628 (Scalia, J.) (plurality) (affirming the judgment), *id.* at 628 (White, J., concurring in part and concurring in the judgment), *id.* at 604 (Brennan, J., concurring in the judgment), *and id.* at 640 (Stevens, J., concurring in the judgment).

124. *Id.* at 606–07. A fourth Justice, Justice White, joined a portion of Justice Scalia's opinion, but Justice White did not adhere to the critical portion of Justice Scalia's opinion that contained his due process analysis. *Id.* at 606–07, 619–22.

125. *Id.* at 609.

126. *See id.* at 610–16.

127. *See id.* at 616–19.

128. *Id.* at 619.

129. *Id.* at 629 (Brennan, J., concurring in the judgment) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Justice Brennan added that "[i]n *Shaffer*, we stated that '*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and it progeny.'" *Id.* at 629 (quoting Shaffer v. Heitner, 433 U.S. 186, 212 (1977)).

In 2011, the Court once again waded into these waters with two decisions on personal jurisdiction.[130] One of those decisions, *J. McIntyre Machinery, Ltd. v. Nicastro*, brought the Court's focus back to the nature of the due process personal jurisdiction inquiry. Again, the Court fractured and failed to issue a majority opinion. Justice Kennedy's plurality opinion, for four members of the Court, is the most full-throated defense since the birth of the minimum contacts test of the idea that personal jurisdiction is "a question of authority rather than fairness." He asserted that the due process inquiry should focus on whether the "sovereign has the power to subject the defendant to judgment," not on "a rule based on general notions of fairness and foreseeability, [which] is inconsistent with the premises of lawful judicial power."[131] Five members of the Court rejected this reasoning, though they did not agree on an alternative.[132] Justice Ginsburg's dissent, in response to this aspect of Justice Kennedy's opinion, explained that "constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty" and that the "modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness."[133]

Thus, more than sixty years after the Court began to explore the due process boundaries of personal jurisdiction in *International Shoe*, it has yet to settle on one coherent conception of the issue. One thing that is clear from the Court's jurisprudence is that there are two distinct potential problems that arise when a person is called into court in a faraway jurisdiction. One is that the forum court may exceed its authority beyond its sovereign powers. The other is that the defendant may be at an unfair disadvantage. The former concern pertains to what we traditionally conceive as jurisdiction, but it fits oddly into the

130. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

131. *J. McIntyre Mach.*, 131 S. Ct. at 2789. Justice Kennedy did pay lip service to the idea that "due process protects the individual's right to be subject only to lawful [judicial] power," but concluded that the scope of the individual right is wholly determined by "whether the sovereign has authority [to render a judicial judgment]." *Id.* Thus, Justice Kennedy read the individual fairness protection entirely out of, or, at minimum, entirely subservient to and encompassed in, the issue of the scope of sovereign power. It is notable that this is the exact opposite of the Court's position in *Insurance Corp. of Ireland*, where it read the limitation on sovereign power as the byproduct of the individual due process fairness protections. *See supra* notes 112–13 and accompanying text.

132. Justice Breyer's concurrence deems Kennedy's singular focus on the scope of sovereign authority as inconsistent with the "constitutional demand . . . of defendant-focused fairness." *J. McIntyre Mach.*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment).

133. *Id.* at 2798, 2800 (Ginsburg, J., dissenting).

individual rights due process framework. The latter, however, fits nicely into traditional conceptions of due process, but is awkward to conceive of as jurisdiction. The Court's discomfort with these two odd fits helps explain this incoherent line of cases and the inability of the Court to come to consensus (or even to a controlling holding) regarding the conception of the legal issues at play.

The "minimum contacts" test exacerbates the conceptual difficulty because the test is relevant to both inquiries. Whether one has sufficient "minimum contacts" for a court to deem one to have "purposely availed" oneself of the forum bears upon whether the individual submits to the authority of the sovereign and thus comes within the reach of its court's jurisdiction. Likewise, whether one has sufficient "minimum contacts" bears upon whether it is fair, reasonable, and substantially just for a defendant to expect to face suit and mount an adequate defense in the location. As discussed *infra* in Part III, this latter inquiry is more appropriately described as the due process aspect of venue rather than as personal jurisdiction. This reconceptualization begins to bring coherence to the Court's fractured jurisprudence in this realm.

C. *The Role of Subconstitutional Venue-Protective Mechanisms*

The Court's profound error—misplacing the constitutional inquiry regarding fair location in personal jurisdiction rather than in venue—has been largely obscured by a variety of subconstitutional mechanisms that operate, in the large majority of cases, to prevent us from ever reaching venue's constitutional floor. Service of process rules and statutory venue provisions place geographic constraints on the forum of litigation, and mechanisms like forum non conveniens and the transfer provision of the Judicial Code allow courts to correct unjust or unfair venue. To understand why courts have been slow to recognize the constitutional aspect of venue, it is critical to understand how these mechanisms operate to obscure the issue.

1. Service of Process Constraints

The federal service of process rules generally operate as a geographic constraint on where a party can be compelled to defend itself in court. Although it is well recognized that service of process rules are merely procedural and do not confer jurisdiction,[134] these rules

134. Personal jurisdiction concerns a court's authority to "proceed to a valid judgment" in a given case, while service of process "provide[s] a ritual that marks the court's assertion of jurisdiction over the lawsuit." 4 WRIGHT & MILLER, *supra* note 14, § 1063, at 326, 328. Service of process rules incorporate an unrelated due process element, which requires that a plaintiff afford fair notice to a defendant of the commencement of an action. *See infra* note 265 and accompanying text.

are critical because they set forth the means by which a court can assert jurisdiction over a party.[135] Without proper service of process, jurisdiction cannot be invoked.[136]

FRCP 4(k) is the default rule for district courts, regardless of whether they are sitting in diversity or adjudicating federal claims.[137] It provides that, in general, a district court may serve process in accordance with the rules of the state in which it sits; this means that it may issue process within the state in which it sits and only against parties located beyond the forum state's borders when the state's long-arm jurisdictional rules permit.[138] District courts may also serve process extraterritorially in a narrow category of other circumstances, for instance when the party to be served is located within 100 miles of the district courthouse,[139] or when another federal statute specifically authorizes extraterritorial process.[140] In this way, these rules serve, as a practical matter, to ensure that defendants have (or in some cases *had*) some contact with the forum of the litigation.

2. Statutory Venue Protection

The entitlement to geographically proximate court proceedings—that is, the right to defend oneself without prejudicial burden—is most directly embodied in the provisions set forth in venue statutes. The

135. *See, e.g.*, Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444–45 (1946) ("[S]ervice of summons is the procedure by which a court having venue and juridiction of the subject matter of the suit asserts jurisdiction over the person of the party served."), *quoted in* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987); Stafford v. Briggs, 444 U.S. 527, 553 n.5 (1980) (Stewart, J., dissenting) (explaining that "service of process is the means by which a court obtains personal jurisdiction over a defendant"); SEC v. Ross, 504 F.3d 1130, 1138 (9th Cir. 2007) (quoting United States v. 2,164 Watches, More or Less, Bearing a Registered Trademark of Guess?, Inc., 366 F.3d 767, 771 (9th Cir. 2004)); 62B AM. JUR. 2D *Process* § 1 (2005) ("Any means of acquiring jurisdiction is properly denominated 'process.'"); *see also* McDonald v. Mabee, 243 U.S. 90, 92 (1917).

136. *See Ex parte* Republic of Peru, 318 U.S. 578, 587 (1943) ("[J]urisdiction of the district court over the person of a defendant . . . . must be acquired either by the service of process or by the defendant's appearance or participation in the litigation."); 62B AM. JUR. 2D *Process* §§ 3–4 (2005).

137. *See, e.g.*, Vlasak v. Rapid Collection Sys., Inc., 962 F. Supp. 1096, 1099 (N.D. Ill. 1997) ("Service of process in both diversity and federal question cases [is] provided for in Federal Rule of Civil Procedure 4(k)."). For information on the territorial reach of state court process, see 62B AM. JUR. 2D *Process* §§ 266–68 (2005).

138. *See* FED. R. CIV. P. 4(k)(1)(A); *see, e.g.*, Noble Sec., Inc. v. MIZ Eng'g, Ltd., 611 F. Supp. 2d 513, 525 (E.D. Va. 2009) (noting that the first prong in a district court's determination of whether it has personal jurisdiction is "whether personal jurisdiction is authorized by the forum state's long-arm statute").

139. FED. R. CIV. P. 4(k)(1)(B) (the "bulge rule").

140. *Id.* 4(k)(1)(C); *see also infra* Section II.A (discussing the limited number of federal statutes that authorize service of process nationwide).

Supreme Court has explained that, unlike jurisdiction, the statutory venue entitlement is "not a qualification upon the power of the court to adjudicate, but a limitation designed for the convenience of litigants."[141] The ability to invoke the protection of venue statutes is a "personal privilege of the defendant,"[142] whereas a plaintiff cannot object to venue since the plaintiff had the initial choice of forum when the plaintiff filed suit.[143] In this way, venue statutes operate as a safeguard against a plaintiff's decision to forum shop or to use an inconvenient forum to prejudice a defendant.

Venue statutes are virtually unanimous in requiring that plaintiffs bring civil actions in the district where a defendant resides, is present, or in an area related to the underlying dispute.[144] The default venue for federal question cases is set forth in 28 U.S.C. § 1391, which allows for a plaintiff to bring a civil action either where any defendant resides or where there is a connection to the substance of the claim—that is, where the property at issue is located or the location where the events or omissions that gave rise to the claim occurred.[145] Some federal statutes provide separately for venue and, as with the federal general venue statute, the overwhelming majority locates litigation so as not to unfairly burden the defendant.[146]

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141. Olberding v. Ill. Cent. R.R., 346 U.S. 338, 340 (1953).

142. Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 272 (1922).

143. *Olberding*, 346 U.S. at 340 ("The plaintiff, by bringing the suit in a district other than that authorized by the statute, relinquished his right to object to the venue. But . . . the defendant . . . has a right to invoke the protection which Congress has afforded him.").

144. *See, e.g.*, 28 U.S.C. § 1391(b) (Supp. V 2011); ALA. CODE § 6-3-2 (Westlaw through the end of the 2013 Reg. Sess.); CAL. CIV. PROC. CODE § 395 (West, Westlaw through all 2013–14 1st Ex. Sess. laws and Res. c. 123); FLA. STAT. ANN. § 47.011 (West, Westlaw through ch. 272 of the 2013 1st Reg. Sess. of the 23rd Legis.); MICH. COMP. LAWS ANN. § 600.1621 (West, Westlaw through P.A. 2013, No. 277 of the 2013 Reg. Sess., 97th Legis.); TEX. CIV. PRAC. & REM. CODE ANN. § 15.002 (West, Westlaw through end of the 2013 3d Called Sess. of the 83rd Legis.). The small but significant exception to the Federal Rule is that the general venue statute does not protect any noncitizen defendant who lacks legal permanent resident status. *See* 28 U.S.C. § 1391(c)(3) (Supp. V. 2011) ("[A] defendant not resident in the United States may be sued in any judicial district . . . ."). Prior to 2011, even legal permanent residents could not avail themselves of a venue defense to suit. *See* 28 U.S.C. § 1391(d) (2006) ("An alien may be sued in any district."); Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763 (revising the general venue statute to provide a venue defense to legal permanent residents); *see also* Mark W. McInerney & Thaddeus E. Morgan, *The Federal Courts Jurisdiction and Venue Clarification Act of 2011*, MICH. B.J., May 2012, at 20, 22, *available at* http://www.michbar.org/journal/pdf/pdf4article2028.pdf; Jonathan Reich, *The Federal Courts Jurisdiction and Venue Clarification Act of 2011*, FED. LAW., July 2012, at 60, 61.

145. 28 U.S.C. § 1391(b) (Supp. V 2011).

146. Radzanower v. Touche Ross & Co., 426 U.S. 148, 156 (1976) ("The venue provision of the National Bank Act, § 94, was intended . . . 'for the convenience of those [banking]

On the whole, these statutes are relatively consistent in maintaining the common law protection for defendants who face "inconvenience and harassment of participating in trial far from home, . . . assuring an appropriate distribution of cases among different tribunals," and reducing "plaintiffs' control over the litigation they initiate by limiting the courts to which they have access."[147] Because most venue statutes require that a suit be filed in a forum with which the defendant has or has had some connection, they drastically reduce the number of instances in which a properly venued action will result in substantial inconvenience to the defendant.

3. Venue Corrective Mechanisms

If, notwithstanding service of process constraints and statutory venue protections, venue is unjust or unfairly burdensome, it can be remedied through common law and statutory mechanisms. These correctives—the common law doctrine of forum non conveniens and a federal statutory provision that allows courts to transfer a case to another venue—provide ways for courts to consider the convenience and the interest of justice that venue is meant to protect. In doing so, however, these mechanisms also obscure the constitutional floor of venue.

Forum non conveniens is a common law doctrine under which courts can, as a matter of discretion, dismiss a properly venued case when the chosen forum is unduly inconvenient for the defendant and an alternate forum exists.[148] This doctrine developed in response to the "very old" problem of "misuse of venue" wherein plaintiffs may adopt a "strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself," a tactic which "affect[s] the

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institutions, and to prevent interruption in their business that might result from their books being sent to distant counties . . . .'" (alterations in original) (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 561 n.12 (1963)) (internal quotation marks omitted)). For examples of state venue statutes that locate litigation in venues convenient to the defendant, see *supra* note 144.

147. *See* Adams v. Bell, 711 F.2d 161, 167 n.34 (D.C. Cir. 1983).

148. The Supreme Court defines the doctrine as follows:

> Under the federal doctrine of *forum non conveniens*, when an alternative forum has jurisdiction to hear a case, and when trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in the exercise of its sound discretion, dismiss the case even if jurisdiction and proper venue are established.

Am. Dredging Co. v. Miller, 510 U.S. 443, 447–48 (1994) (alterations omitted) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (internal quotation marks omitted).

administration of the courts as well as the rights of litigants."[149] Essentially, this doctrine requires a court to determine whether retaining jurisdiction in the plaintiff's chosen forum "best serve[s] the convenience of the parties and the ends of justice."[150] This doctrine allows—in fact *requires*—courts to consider multiple factors that would affect parties' ability to litigate the case;[151] the goal is to prevent plaintiffs from choosing inconvenient forums to "vex, harass, or oppress the defendant by inflicting upon him expense or trouble not necessary to [the plaintiff's] own right to pursue his remedy."[152] While forum non conveniens originated in state courts,[153] it became widely used in federal courts after the expansion of the reach of personal jurisdictional in the wake of *International Shoe*.[154]

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149. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947); *see also* Williams v. Green Bay & W.R.R., 326 U.S. 549, 554–55 (1946) ("[Forum non conveniens] was designed as an 'instrument of justice.' Maintenance of a suit away from the domicile of the defendant—whether he be a corporation or an individual—might be vexatious or oppressive. An adventitious circumstance might land a case in one court when in fairness it should be tried in another." (quoting Rogers v. Guar. Trust Co. of N.Y., 288 U.S. 123, 151 (1933) (Cardozo, J., dissenting))).

150. Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 613 (3d Cir. 1966); *see also Gulf Oil Corp.*, 330 U.S. at 507 (recognizing the use of "the convenience of witnesses and the ends of justice" as factors in applying the doctrine of forum non conveniens); Iragorri v. United Techs. Corp., 274 F.3d 65, 70–75 (2d Cir. 2001) (en banc) (discussing the appropriate "degree of deference" to be "accorded" to the "plaintiff's choice of forum" and the "assessment of conveniences"); Wheeler v. Societe Nationale des Chemins de Fer Francais, 108 F. Supp. 652, 653 (S.D.N.Y. 1952) ("Since this involves the exercise of the court's discretion, the court should necessarily weigh the relative advantages and obstacles to a fair trial . . . .").

151. *See Gulf Oil Corp.*, 330 U.S. at 508.

152. *Id.* (citing Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929)) (internal quotation marks omitted). The convenience of the defendant is critical to the analysis, as courts must consider:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive.

Id.

153. *Id.* at 505 n.4; *see also* Broderick v. Rosner, 294 U.S. 629, 643 (1935) (stating that the federal Constitution does not bar state courts' application of the doctrine of forum non conveniens).

154. *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 801–02 (1985). As one scholar explains, "[w]hile the absence of any meaningful venue limitations on a plaintiff's choice of forum may appear to have been conducive to forum shopping, thereby creating a need for further limits on choices of forum, the doctrine of forum non conveniens was virtually unheard of, outside of the admiralty context, prior to 1929. This apparent anomaly can be explained not only by a presumably smaller

In 1948, Congress codified this analysis by enacting § 1404(a) of the Judicial Code,[155] which, like the doctrine of forum non conveniens, requires "individualized, case-by-case consideration of convenience and fairness."[156] It differs, however, insofar as it allows courts to transfer a case to another district rather than dismissing it, in an effort "to protect litigants, witnesses and the public against unnecessary inconvenience and expense."[157] The Supreme Court has construed this difference to signify that Congress meant to provide greater protection against suit in an unfair forum, finding that since transfer is a less harsh remedy than dismissal, defendants can prevail upon a lesser showing of inconvenience.[158]

Since § 1404(a) governs in most federal cases as it usually preempts forum non conveniens,[159] protections for defendants who face suit in inconvenient forums have become more robust.[160] Even so,

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number of interstate and international transactions, but also by the existence of jurisdictional limits far more rigid than those that exist today." *Id*. (footnote omitted); *see also* Comment, *Forum Non Conveniens, A New Federal Doctrine*, 56 YALE L.J. 1234, 1234 (1947) (stating that expansion of personal jurisdiction, via state long-arm statutes, was countered by development of the forum non conveniens doctrine); *cf.* Am. Dredging Co. v. Miller, 510 U.S. 443, 449 (1994) (noting the "murky" origins of the doctrine in Anglo-American law and that forum non conveniens "within federal courts . . . may have been given its earliest and most frequent expression in admiralty cases").

155. Act of June 25, 1948, Pub. L. No. 80-773, sec. 1, § 1404(a), 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404(a) (Supp. V 2011)) (providing for transfer of venue to any district where the suit "might have been brought" "[f]or the convenience of parties and witnesses[and] in the interest of justice"); *see also* Wilshire Credit Corp. v. Barrett Capital Mgmt. Corp., 976 F. Supp. 174, 180 (W.D.N.Y. 1997) ("[Section 1404(a)] is a statutory recognition of the common law doctrine of *forum non conveniens* as a facet of venue in the federal courts.").

156. Van Dusen v. Barrack, 376 U.S. 612, 622 (1964); *see also id.* at 616 (explaining that this provision "reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice").

157. *Cf.* Cont'l Grain Co. v. Barge FBL–585, 364 U.S. 19, 27 (1960).

158. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) ("The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer."). In *Norwood*, the Court focused on that fact that Congress made transfer, rather than elimination, the remedy for inconvenient venue, and opined that "we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience" than was required under the doctrine of forum non conveniens. *Id.*

159. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996).

160. *See Norwood*, 349 U.S. at 32 (noting that a lesser showing of inconvenience will justify applying § 1404(a)'s transfer remedy); Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 613 (3d Cir. 1966) ("The court's discretion under the common law rule cannot be equated with its authority to transfer an action to another court of competent jurisdiction under [28 U.S.C.] § 1404(a) . . . . The court has a broader discretion in the application of the statute than in the application of the rule."); Amalgamated Ass'n of St., Elec. Ry. & Motor Coach

forum non conveniens remains available to protect defendants who face suit in circumstances that the statutory transfer provision does not cover.[161] Therefore, by operation of these safety-valve mechanisms, the fair play and justness concerns central to the Court's due process analyses are ameliorated in the vast majority of cases without courts having to reach the constitutional question.

II. EXPOSING THE CONSTITUTIONAL FLOOR OF VENUE

Given the layers of statutory and common law mechanisms that work to set venue in a fair location and to transfer venue when the defendant faces undue burden, it is unsurprising that the constitutional floor of venue is rarely visible. Yet in a small but significant subset of federal cases, these venue-protective mechanisms fail to varying degrees. Examination of such cases—specifically cases that arise under statutes that provide for national service of process and detained deportation cases—offers a rare glimpse of the full impact of venue's current subconstitutional status.

A. *National Service of Process*

In a discrete set of circumstances, Congress has supplanted general venue-protective service of process rules[162] with statutes that permit process to be served anywhere in the United States.[163] In cases brought under such statutes, the service of process rules do not provide any protection against an unfair location for trial.[164] Because these statutes can "free forum selection in federal question cases from any concern about a defendant's contacts with the state in which the federal court

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Emps. of Am. v. S. Bus Lines, Inc., 172 F.2d 946, 948 (5th Cir. 1949) ("Transfer is a less drastic matter than dismissal, for it involves no loss of time or pleading or costs; and no doubt a broader discretion may be exercised in ordering it.").

161. For example, a motion for dismissal under forum non conveniens is available to a defendant in a case brought in federal court if the case cannot be transferred to another federal court under § 1404(a) because the more convenient forum is a non-federal forum such as a *state court*, or the court of a *foreign country*. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994) (stating that forum non conveniens remains available when the alternative forum is located abroad); TUC Elecs., Inc. v Eagle Telephonics, Inc., 698 F. Supp. 35, 37–38 (D. Conn. 1988) ("[E]ven if venue is properly laid in a particular federal district court, where factors of convenience and justice suggest that the case should proceed in a state or foreign court (i.e., a non-federal forum), the action may be dismissed under the common-law doctrine of *forum non conveniens*.").

162. *See supra* Subsection I.C.1.

163. *See, e.g.*, *infra* notes 169–77 and accompanying text.

164. *Cf.* Fullerton, *supra* note 14, at 4–6 (discussing national service of process and personal jurisdiction).

sits,"[165] courts have had to consider anew the extent to which the Fifth Amendment's Due Process Clause limits the exercise of a court's jurisdiction. In such cases, however, the sovereignty-constraining component of the due process inquiry is clearly satisfied, at least in the case of a domestic defendant. But nevertheless, the burden of a distant location on the defendant can be great. The domestic defendant clearly has sufficient contact with the sovereign—the United States—but may be haled from, for example, Vermont to appear before a district court in Florida without having had the slightest contact with Florida. In this situation, the circuits are split on what due process requires.[166] In light of the fractured due process jurisprudence since *International Shoe* and the competing concerns that may dictate opposite outcomes, it is an open question whether, when jurisdiction is invoked under a national service of process statute, the Fifth Amendment requires courts to consider the fairness of the location to the defendant, rather than just whether the defendant has minimum contacts with the United States such that it does not raise concerns about the nation overreaching its sovereign authority.[167]

Congress has authorized nationwide service of process in some cases, as a "carefully guarded exception[]" to the otherwise localized service of process rules, to resolve intractable problems that prevent the federal judiciary from effectively remedying widespread concerns.[168] The first statute that allowed for nationwide service of process was enacted to allow the government to take action in a particular case—an interstate scandal involving public corruption.[169] Since then, Congress has authorized nationwide service of process in a limited category of other circumstances where it would otherwise be difficult for a court to grant complete relief. For example, when Congress enacted antitrust legislation to combat nationwide business monopolies, Congress provided for nationwide service of process so that a single district court could exercise jurisdiction over defendants anywhere in the country if "the ends of justice require,"[170] so that nationwide injunctions could be

165. Casad, *supra* note 51, at 1598 (making such a remark in reference to a proposal for federal question national service of process).

166. *See infra* note 203.

167. Casad, *supra* note 51, at 1599–600.

168. *Cf.* Robertson v. R.R. Labor Bd., 268 U.S. 619, 623–24 (1925).

169. *See infra* notes 187–92 and accompanying text.

170. Sherman Act, ch. 647, § 5, 26 Stat. 209, 210 (1890) (codified at 15 U.S.C. § 5 (2012)); *see also* Clayton Act, ch. 323, § 15, 38 Stat. 730, 737 (1914) (codified as amended at 15 U.S.C. § 25 (2006)) (similarly providing for jurisdiction if the "ends of justice require" and, in addition, explicitly authorizing federal courts to assert jurisdiction beyond the borders of the state in which it sat).

imposed.[171] Likewise, the Federal Interpleader Act of 1917[172] resolved the difficulties that resulted from a single court's inability to adjudicate insurance claims because it could not exert jurisdiction over the cases of multiple claimants against a single fund when some claimants lived beyond the borders of the forum state.[173] That act allowed courts adjudicating interpleader actions to assert extraterritorial jurisdiction over out-of-state claimants.[174] Similar concerns motivated the Securities Exchange Act of 1934[175] and the Mandamus and Venue Act of 1962.[176]

By authorizing service of process nationwide in certain instances, Congress removed one of the limitations that would ordinarily constrain the geographical reach of a district court in those cases.[177] Recall that

171. *See* 21 CONG. REC. 2,640–41 (1890) (statement of Sen. John Spooner) (explaining that, under the then-existing law, a writ of injunction could "only be served and punishment for its disobedience enforced within the district over which the court has jurisdiction" but, under the proposed law, it could "be served anywhere within the United States, and if it is disobeyed the attachment for contempt may be served anywhere within the United States").

172. Federal Impleader Act of 1917, ch. 113, 39 Stat. 929, *repealed and replaced by* Act of May 8, 1925, ch. 273, § 4, 44 Stat. 416, 417 (codified in current form at 28 U.S.C. §§ 1335, 1397, 2361 (2006) (allowing for national service of process to remedy problem in which insurance companies were faced with multiple claims on a policy in different jurisdictions and no single court could obtain jurisdiction over all of the parties necessary to fully resolve the claim).

173. The Federal Interpleader Act was enacted in response to the Supreme Court's decision in *New York Life Insurance Co. v. Dunlevy*, 241 U.S. 518 (1916), which affirmed a California federal court's order that an insurance company pay a California claimant even though a Pennsylvania state court had already ordered the company to pay out the proceeds of the policy to a Pennsylvania claimant. *Id.* at 522–23; *see* H.R. REP. NO. 64-677, at 1–2 (1916); *see also* Fullerton, *supra* note 14 ,at 65–66.

174. H.R. REP. NO. 64-677, at 1–2 (1916).

175. Securities Exchange Act of 1934, ch. 404, § 27, 48 Stat. 881, 903 (codified as amended at 15 U.S.C. § 78aa (2006)); *see* Fullerton, *supra* note 14, at 68–69 ("Although the legislative history of the securities laws is silent as to the government interests furthered by nationwide personal jurisdiction, one can easily assume that Congress believed that allowing investors to litigate securities fraud issues anywhere in the nation was a beneficial approach to policing the stock market, and an important step in furthering the public interest in a stable financial community.").

176. Pub. L. No. 87-748, 76 Stat. 744 (codified at 28 U.S.C. §§ 1361, 1391 (2006)); *see also* Stafford v. Briggs, 444 U.S. 527, 534 (1980); H.R. REP. NO. 87–1992, at 2–3 (1962) (noting that the bill is designed to broaden venue provisions to permit acts against government officials which were, prior to the enactment of the bill, limited to the District of Columbia). Other statutes providing national service of process include 9 U.S.C. § 9 (2012), regarding confirmation of an arbitration award, and 18 U.S.C. §§ 1964(c), 1965 (2006), regarding violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act. For additional federal statutes that permit nationwide service of process, see Fullerton, *supra* note 14, at 67–70, and Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 436 n.238 (1992).

177. *See supra* Subsection I.C.1. Although the FRCP authorize the extraterritorial assertion of jurisdiction in other cases, *see* FED. R. CIV. P. 4(k)(1)(A) (authorizing service of process

when the first nationwide service of process laws were enacted—and up through 1938—a district court's jurisdiction was generally limited to people found or residing in its territory.[178] Thus, a defendant in Vermont could not generally be forced to appear before a court in Florida unless the Vermonter either travelled to Florida or moved there. The 1938 adoption of the Federal Rules expanded district courts' territorial reach slightly; under the new rules, the Vermonter could be summoned to appear before a district court in Florida *if* the plaintiff could serve the defendant with process under Florida's long-arm statute because the federal service rule bootstrapped in the forum state's service of process rules.[179] Thereafter, in the ordinary federal question case, a Vermont defendant who did not meet Florida's long-arm jurisdictional rules would be protected from suit in Florida. But in cases that involved federal question claims where Congress had authorized national service of process, there would be no geographical constraints of Florida service of process rules;[180] accordingly, the Florida district court could serve process over the Vermont defendant in Vermont—or anywhere in the United States.

In the abstract, this could have proven disastrous: a tool to prejudice defendants and a license to forum-shop. It could have meant that a Kansas resident could hale a Wisconsin-based defendant to district court in Mississippi,[181] and coal operators could drag a District of Columbia-based federal administrator before a district court in Alabama to take advantage of favorable circuit law.[182] However, this parade of horribles did not occur because, as explained above, a variety of other mechanisms protect defendants from being forced to defend themselves in far-flung locales.[183] Thus, though the Florida court can assert

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through states' long-arm provisions); *id.* 4(k)(1)(B) (authorizing service of process within 100 miles of the court), these maintain a geographical tether to the forum state.

178. *See supra* notes 59–60 and accompanying text; *see also* Carrington, *supra* note 68, at 738 (footnote omitted) (explaining that "[t]he pattern of federal court dependence on state practice" included "conformity to state law in regard to service of process" and, even with "the creation of a federal question jurisdiction in 1875 and the sweep of federal substantive policy created by Congress in the ensuing decades[,] . . . no change was effected in the law governing the summons").

179. *See* FED. R. CIV. P. 4(k)(1)(A) (authorizing service of process based on a forum state's long-arm statute).

180. *See id.* 4(k)(1)(C) (permitting exercise of personal jurisdiction where service is "authorized by a federal statute").

181. Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079, 1081–85 (D. Kan. 1978).

182. A.J. Taft Coal Co. v. Barnhart, 291 F. Supp. 2d 1290, 1300, 1309 (N.D. Ala. 2003).

183. *See, e.g.*, Waeltz v. Delta Pilots Ret. Plan, 301 F.3d 804 (7th Cir. 2002) (affirming, despite proper invocation of jurisdiction through national service of process provision, that the Atlanta-based defendant was not required to defend itself in the Southern District of Illinois because venue was improper due to insufficient contact with Illinois); *A.J. Taft Coal Co.*, 291 F.

jurisdiction over the Vermont defendant, the statutory and doctrinal protections—including the statutory venue provision, a motion to transfer under 28 U.S.C. § 1404(a), or forum non conveniens—available to the Vermonter may make it unnecessary to consider whether due process requires the Vermonter to have minimum contacts with Florida.[184]

To be clear, Congress's power to authorize nationwide service of process, pursuant to its Article III authority to establish inferior courts, is not controversial. The contested question is whether, when Congress exercises such power, the Due Process Clause constrains a court from action where a domestic defendant would face significant hardship and disadvantage in the location the plaintiff selects for trial. In the first half of the nineteenth century, the Supreme Court indicated that Congress *could have* authorized service of process beyond state or district lines but it had not, at that time, done so.[185] However, after the enactment of the first nationwide jurisdiction statute,[186] the Court faced a direct challenge to that statute.[187] That case, *United States v. Union Pacific Railroad Co.*, involved a suit by the United States against corporations

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Supp. 2d at 1313 (transferring the case under § 1404(a) to Maryland); *Schreiber*, 448 F. Supp. at 1081–82, 1101 (dismissing plaintiff's case after it was transferred to a proper court after plaintiff brought the case in a favorable forum to avoid a statute of limitations). *See generally supra* Section I.C.

184. *See, e.g.*, *Waeltz*, 301 F.3d at 811; Ret. Plan of the Unite Here Nat'l Ret. Fund v. Vill. Resorts, Inc., No. 08 Civ. 4249 (RPP), 2009 WL 255860, at *2, *4–5 (S.D.N.Y. Feb. 3, 2009) (granting the defendant's motion to transfer venue from New York to Illinois in an ERISA enforcement action where the statute authorized nationwide service of process, because all of the parties and documents were in Illinois and the only connection to New York was convenience for the law firm that represented the plaintiff); Tyson v. Pitney Bowes Long-Term Disability Plan, No. 07-CV-3105 (DMC), 2007 WL 4365332, at *2–4 (D.N.J. Dec. 11, 2007) (granting defendant's motion to transfer venue from New Jersey to Connecticut despite ERISA nationwide service of process provision, because of the defendant's lack of business dealings in New Jersey and because the claim originated from events in Connecticut only); *see also* Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 34 n.158, 36–39 (1988) (noting that, "even in the absence of venue provisions," fairness to the defendant could be restored through transfer of venue or forum non conveniens); Barrett, *supra* note 70, at 629–33 (proposing to amend rules to authorize nationwide service of process in all federal cases but ensure venue protections as well in order to assure a convenient forum). *But see* Republic of Pan. v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 939 (11th Cir. 1997) (reaching the question of whether due process requires minimum contacts under national service of process provisions); Fullerton, *supra* note 14, at 35–38 (arguing that Congress's power to authorize national service of process should not withstand constitutional scrutiny because Congress could eliminate the statutory venue protections at its whim and because of the difficulty of getting reversal of trial courts' discretionary decisions regarding venue).

185. Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838).

186. *See* Act of Mar. 3, 1873, ch. 226, § 4, 17 Stat. 485, 509.

187. United States v. Union Pac. R.R., 98 U.S. 569, 579–80 (1879).

and others implicated in a scandalous, massive investment fraud perpetrated by financiers of the transcontinental railroad, which included U.S. congressmen.[188] The *Union Pacific* Court upheld the statute's service of process provision and reasoned that Article III, section 1 of the Constitution declares that the judicial "power shall be vested in one supreme court and in such inferior courts as the Congress may, from time to time, ordain" so "[t]he discretion, therefore, of Congress as to the number, the character, the territorial limits of the courts among which it shall distribute this judicial power, is unrestricted except as to the Supreme Court."[189] Although the defendants in that case asserted that the Fifth Amendment prevented Congress from enacting such a provision, the Supreme Court said only that it was aware of "no constitutional objection" to Congress's ability to enact such a provision and remained silent as to the Fifth Amendment limitations, if any, on courts seeking to invoke jurisdiction through nationwide service of process.[190]

This latter issue—whether the invocation of jurisdiction obtained under a nationwide service of process provision can violate due process—remains a contested question. In *Union Pacific*, the Supreme Court upheld Congress's power to authorize personal jurisdiction by summons service nationwide and found that the relevant geographic limitation for federal courts was the United States' borders, but noted that courts should consider matters of convenience and expense before they compel parties to answer a summons served nationwide.[191] Forty years later in *Robertson v. Railroad Labor Board*,[192] the Court made clear that nationwide service of process was to be authorized sparingly, describing it as one of the "few clearly expressed and carefully guarded exceptions" to the general rule that "a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district."[193] In so saying, the Court refused to interpret seemingly broad statutory language in the Transportation Act of 1920 so as to permit the Railroad Labor Board to compel an individual to come before a court in

188. *See id.* at 572–78 (describing at length the government's case against the defendants). *See generally* J.B. CRAWFORD, THE CREDIT MOBILIER OF AMERICA (1880), *available at* http://archive.org/details/creditmobilierof00craw; ROBERT WILLIAM FOGEL, THE UNION PACIFIC RAILROAD: A CASE IN PREMATURE ENTERPRISE 17, 53 (1960); HENRY KIRKE WHITE, HISTORY OF THE UNION PACIFIC RAILWAY 21–23, 73–76 (1895), *available at* https://archive.org/details/historyunionpac00whitgoog.

189. *Union Pac.*, 98 U.S. at 602 (quoting U.S. CONST. art. III, § 1) (internal quotation marks omitted).

190. *See id.* at 605.

191. *Id.* at 604.

192. 268 U.S. 619 (1925).

193. *See id.* at 622, 624.

any district in the country.[194] Twenty-one years later, following the FRCP's expansion of the territorial limits for service of process from district to state lines, the Supreme Court again stated that "Congress could provide for service of process anywhere in the United States."[195] In recent years, however, the Court has explicitly reserved opinion on whether due process constrains the scope of these national service of process statutes.[196]

It is perhaps telling that, despite the Court's sweeping statements that Article III permits Congress to authorize district courts to serve process nationwide, Congress has generally declined to do so. In the few circumstances where it does so, it has done so cautiously, evincing uncertainty as it expanded district courts' jurisdiction. At the same time as it enacted these statutes, largely in the face of events that illuminated public problems that could not otherwise be addressed, members of Congress expressed concerns.[197] Those concerns were assuaged in part by the inclusion of venue provisions designed to guard against forcing defendants to defend themselves in faraway forums and to prevent forum-shopping.[198] Moreover, Congress has repeatedly rejected proposals to make nationwide service of process the default rule in all cases that involve federal questions.[199]

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194. *Id.* at 626–27.

195. Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 442–43 (1946).

196. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.* (1987) (plurality opinion) (explicitly declining to answer "whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits"); *see also* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) (declining to consider the constitutional issues surrounding federal courts exercising personal jurisdiction based on an aggregation of the defendant's contacts with nation as a whole), *superseded on other grounds by* FED. R. CIV. P. 4(k).

197. *See, e.g.*, 53 CONG. REC. 12,150 (1916) (statement of Sen. Atlee Pomerene) (expressing concern about the "substantial denial of justice" that would result from forcing insurance beneficiaries affected by the Interpleader Act to travel hundreds of miles to litigate their claims and arguing that it would nullify any benefit afforded by the legislation); 51 CONG. REC. 9,414 (1914) (statements of Rep. Clement C. Dickinson) (arguing against provisions that would allow litigants to file suit in places wholly unrelated to where the cause of action arose).

198. *See, e.g.*, Securities Act of 1933, ch. 38, § 22(a), 48 Stat. 74, 86 (codified as amended at 15 U.S.C. § 77v(a) (2012)) (setting venue "in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein"); Act of Jan. 20, 1936, ch. 13, § 1, 49 Stat. 1096, 1096 (codified as amended at 28 U.S.C. § 1397 (2006)) (setting venue in interpleader cases where any one of the claimants resided); 15 U.S.C. § 22 (2006) (setting venue for antitrust actions "in the judicial district whereof [the defendant corporation] is an inhabitant [or] in any district wherein it may be found or transacts business").

199. *See* Casad, *supra* note 51, at 1597–99.

In light of the fractured jurisprudence on personal jurisdiction in recent years,[200] it remains unclear whether due process operates to protect a fair location for trial when nationwide service of process is authorized. In a federal question case in a federal court, the relevant sovereign is the United States government; therefore, under the sovereignty-focused inquiry espoused in *Pennoyer*, Justice Scalia's opinion in *Burnham*, and Justice Kennedy's decision in *J. McIntyre Machinery*, personal jurisdiction should be satisfied if the defendant has minimum contacts with the United States.[201] However, this ignores the defendant-focused concerns about fairness and burden that drive the analyses in *International Shoe*, *Shaffer v. Heitner*, and *Insurance Corp. of Ireland*.[202]

This doctrinal ambiguity, coupled with the difficult-to-harmonize concerns, has resulted in a circuit split. Courts disagree whether, when national service of process is authorized, a federal court may aggregate national contacts with the United States to determine if the due process minimum contacts test is satisfied or whether due process protects defendants from being haled into an inconvenient location even if that person has sufficient aggregate contacts with the United States.[203] Put

200. *See supra* Section I.B.

201. *See supra* Section I.B.

202. *See supra* Section I.B. This concern was also one of two critical elements in the personal jurisdiction analyses in *World-Wide Volkswagen*, *Burger King*, and *Asahi*. *See supra* Section I.B.

203. *See* Republic of Pan. v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 942 (11th Cir. 1997) ("There is considerable debate, however, over the scope of the limits imposed by the Fifth Amendment when jurisdiction is established over a domestic defendant via a nationwide service of process provision."). *Compare* Pinker v. Roche Holdings Ltd., 292 F.3d 361, 370 n.2 (3d Cir. 2002) (applying a "a fairness analysis consisting of more than an assessment of the defendant's national contacts," based on the Fourteenth Amendment "fair play and substantial justice" test, though without deciding whether "such an analysis is appropriate in this context"), Peay v. BellSouth Med. Assist. Plan, 205 F.3d 1206, 1212 (10th Cir. 2000) ("[W]e hold that in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant."), *and Republic of Pan.*, 119 F.3d at 947 (holding that the Fifth Amendment Due Process Clause requires courts to consider the burden on the defendant, even in the rare circumstances where a "defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum"), *with* Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979) ("[T]here can be no question but that the defendant, a resident of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court."), Driver v. Helms, 577 F.2d 147, 156 & n.25, 157 (1st Cir. 1978) (noting that the Constitution does not require federal courts to follow state boundaries), *rev'd on other grounds sub nom* Stafford v. Briggs, 444 U.S. 527 (1980), *and* Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) (holding that the primary question the Fifth Amendment Due Process Clause requires, aside from whether service was reasonably calculated to inform the defendant of the

another way, the question becomes whether the defendant must have sufficient contacts with the state of the forum court or need the defendant have only minimum contacts with the nation? If the latter, where do "fair play" and "substantial justice" fit in?[204]

The majority of the courts apply the "pure national contacts" or "aggregated contacts" approach, which requires only that the defendant have "minimum contacts" with the United States as a whole.[205] Even within this camp, there is no unified theory; some describe the minimum contacts test, in this context, as not "particularly relevant,"[206] while others explain that the national contacts test *is* the fairness test—they construe fairness to mean being fairly subject to the sovereign's authority and conclude that aggregated contacts with various points in the United States satisfy this test.[207]

However, at least three circuits have found that *International Shoe* requires something more. The Eleventh Circuit, most ardently, has concluded that the Fifth Amendment, like the Fourteenth Amendment, protects individual litigants against the burdens of litigation in an unduly inconvenient forum and therefore courts must also consider whether litigation in "a faraway and inconvenient forum" will burden

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suit, is whether the defendant has, in the aggregate, minimum contacts with the United States). *See also* DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 286 n.3 (3d Cir. 1981) ("[W]e are not sure that some geographic limit short of the entire United States might not be incorporated into the 'fairness' component of the fifth amendment.").

204. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted).

205. *See, e.g.*, *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 298 (3d Cir. 2004) (relying on "aggregate contacts with the United States as a whole"); United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 36 (1st Cir. 1999) (explaining that "the analytic exercises are performed with reference to the United States as a whole, rather than with reference to a particular state"); *Fitzsimmons*, 589 F.2d at 333 n.4 ("Service beyond the bounds of the territorial United States obviously raises questions as to the contact of the defendant with the United States, questions that are absent when a United States citizen is served within the country."); *Mariash*, 496 F.2d at 1143 ("[P]lainly, where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present." (footnote omitted) (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958))).

206. *Mariash*, 496 F.2d at 1143.

207. *See* Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255, 1258 (5th Cir. 1994) (holding that "sovereignty defines the scope of the due process test"); *Fitzsimmons*, 589 F.2d at 333 ("Here the sovereign is the United States, and there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court."); *see also* Diamond Mortgage Corp. of Ill. v. Sugar, 913 F.2d 1233, 1246 n.13 (7th Cir. 1990) (refusing to reconsider *Fitzsimmons*).

the defendant.[208] Similarly, the Tenth Circuit has adopted a "fairness test" that considers both the defendant's contacts with the site of the forum and the burden to the defendant, in addition to other location-focused concerns traditionally associated with venue determinations.[209] The Third Circuit also treats the due process inquiry as a two-prong test, asking first whether the defendant has contacts with the United States and, separately, whether it would comport with fair play and substantial justice to bring the defendant to the adjudicating forum.[210] And, finally, there appears to be another approach: "a 'flexible minimum contacts' analysis that evaluates a defendant's contacts with the forum, but in a less demanding fashion than the Fourteenth Amendment requires."[211]

In most of the cases thus far, distinct analyses adopted by different circuits have not produced markedly different results. This is because the majority of cases in which this question has arisen involve corporate defendants—domestic and international entities and officers.[212] Because these defendants have fairly obvious resources and the ability to transact beyond their area of residence, courts have not been persuaded that the defendants are being unfairly forced to litigate in a far-off forum.[213] Given the business-focused nature of many of the statutes that contain national service of process provisions, this is unsurprising and perhaps even serves as a rationale for permitting such geographically expansive service. But in the case of a less resourced defendant, these approaches will yield markedly different results: for defendants who cannot afford to travel or pay for witnesses and others to travel to the litigation forum, a fairness inquiry could mean the difference between a successful defense and a loss (or forced settlement).[214]

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208. *Republic of Pan.*, 119 F.3d at 945, 947; *see also* Handley v. Ind. & Mich. Elec. Co., 732 F.2d 1265, 1272 (6th Cir. 1984) ("In a case like the present one, where a federal court is sitting in a federal question case, the purpose of minimum contacts is to protect the defendant 'against the burdens of litigating in a distant or inconvenient forum.'" (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980))).

209. Peay v. Bellsouth Med. Assist. Plan, 205 F.3d 1206, 1212–13 (10th Cir. 2000).

210. Pinker v. Roche Holdings Ltd., 292 F.3d 361, 370 (3d Cir. 2002).

211. *Republic of Pan.*, 119 F.3d at 942 (recognizing this other approach).

212. *See, e.g.*, *Peay*, 205 F.3d at 1213 (10th Cir. 2000) (finding no showing of unfairness in requiring corporations based in the southeastern United States to defend themselves in Utah in light of the companies' ample resources and "modern methods of communication and transportation"); ESAB Grp., Inc. v. Centricut, Inc., 126 F.3d 617, 627 (4th Cir. 1997) (finding no demonstration of unfairness in requiring a New Hampshire-based corporate officer and company—with South Carolinian customers—to defend themselves in South Carolina).

213. *See* sources cited *supra* note 212.

214. While some of these defendants could avail themselves of statutory venue provisions or seek a change of venue, these mechanisms do not guarantee a fair forum, particularly for nonresident defendants, *see supra* note 144, and in any case would nonetheless require the defendant to conduct some litigation in a potentially unfair forum.

To be sure, even in national service of process cases, this constitutional question is infrequently reached. As commentators point out, modern technology and globalization can minimize much of the burden to a defendant and thereby alleviate the harms of haling her to court.[215] However, subconstitutional protections fail in some circumstances, most frequently in cases that involve foreign parties, and it is often the poorest and most vulnerable defendants who experience harm when they must defend personal or business interests far from home. In these situations, recognizing the constitutional floor of venue not only elucidates the doctrinal questions but also ensures protection of a fundamental principle that underpins our judicial system.

B. *Detained Deportation Proceedings*

There is, perhaps, no cleaner and more consequential example of the constitutional floor of venue than the current plight of detained immigrants facing deportation. Immigrants arrested and detained by federal immigration authorities are routinely transferred thousands of miles away from their place of arrest and residence[216] to remote detention facilities in rural areas of the South[217] with which they have no connections whatsoever. Such transfers regularly create insurmountable barriers to access to counsel and critical evidence necessary to mount a defense, as well as make it impossible for immigrants to produce key witnesses.[218] Current law and common practice allow the federal immigration agency, which prosecutes deportation cases,[219] unfettered discretion to venue deportation proceedings anywhere it desires.[220] There are no statutory or regulatory

215. Sterk, *supra* note 20, at 1204 (stating that "the Court has indicated that modern transportation and communication systems diminish the importance of personal inconvenience as a constraint on personal jurisdiction" but noting that "inconvenience is not dead").

216. Markowitz, *supra* note 7, at 1302; *see also Huge Increase in Transfers of ICE Detainees*, *supra* note 8.

217. DORA SCHRIRO, IMMIGR. & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 9 (2009) (providing a heatmap that shows where there is an excess of detention capacity over demand for detention space).

218. AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 30, 34 (2009), *available at* http://www.amnestyusa.org/sites/default/files/JailedWithoutJustice.pdf; *see also infra* notes 227–31 and accompanying text.

219. The agency responsible for the detention of immigrants and prosecution in deportation proceedings is the United States Immigration and Customs Enforcement agency (ICE), a division of the Department of Homeland Security. *Overview*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview (last visited Aug. 7, 2014). Deportation proceedings, which are technically known as "removal proceedings," are civil proceedings. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

220. *See infra* note 234 and accompanying text. Human Right Watch found that "ICE claims an almost unfettered power to transfer detainees at will, resulting in a disorderly system

limits on venue, regardless of any hardships that a respondent may face in a distant location.[221] Far from venue's historic origins as a defendant's shield against an unfair location for trial, the venue rules in deportation proceedings are a sword that the prosecuting agency can use to select the most disadvantageous location possible for the immigrant.

A firsthand account from a 2009 report on immigration transfers by Human Rights Watch contains an illustrative example of a common immigration transfer scenario and demonstrates how the venue rules and practices for detained deportation proceedings present significant obstacles to a fair hearing:

> I lived in upstate New York for 10 years with my four children and my wife . . . ICE said I was deportable because of an old marijuana possession conviction where I never served a day in jail, just paid a fine of $250 . . . They took me to Varick Street [detention center in New York City] for a few days and then sent me straight to [detention in] New Mexico. In New York when I was detained, I was about to get an attorney through one of the churches, but that went away once they sent me here to New Mexico . . . . All my evidence and stuff that I need is right there in New York. I've been trying to get all my case information from New York . . . writing to ICE to get my records. But they won't give me my records, they haven't given me nothing. I'm just representing myself with no evidence to present.[222]

There are structural factors at play in the immigration detention context that create obstacles to fair venue for detained immigrants' deportation proceedings, in particular the glut of relatively inexpensive immigration detention capacity in remote locations in the South and the relative dearth of detention capacity near many significant immigration population centers.[223] The numbers show the scope of the problem, with

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of detainee musical chairs that often violates non-citizens' rights." HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 19 (2009), *available at* http://www.hrw.org/sites/default/files/reports/us1209web wcover_0.pdf.

221. *See infra* notes 234–36 and accompanying text. While the governing law and regulations permit venue to lie in any Immigration Court in any location in the nation for any respondent, there is a provision in the regulations that permit a respondent to move for a change of venue. As discussed *infra* at notes 237–46 and accompanying text, this mechanism is, however, woefully inadequate to address the grave obstacles to a fair hearing imposed by the transfer phenomenon.

222. HUMAN RIGHTS WATCH, *supra* note 220, at 1 (alterations in original).

223. SCHRIRO, *supra* note 217, at 6–9 (2009) (noting "significant . . . shortages [of detention capacity] . . . in California and the Mid-Atlantic and Northeast states" and indicating

approximately 430,000 immigrants civilly detained last year for deportation proceedings,[224] and with hundreds of thousands of those immigrants transferred, as described above, each year.[225] The enormous scope of this problem has attracted significant attention from NGOs, international bodies, and governmental agencies alike in recent years, as a number of studies have been published documenting and analyzing the transfer phenomenon.[226]

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such with heatmaps), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf; HUMAN RIGHTS WATCH, *supra* note 220, at 20 ("ICE maintains the discretion to detain people wherever there is bed space."); *see also* Jennifer Ludden, *All Things Considered: Immigration Transfers Add to System's Problems* (NPR radio broadcast Feb. 11, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=100597565 (interviewing a detainee transferred Pennsylvania to Texas). In recent years, the federal immigration authorities made modest efforts to increase detention capacity near certain immigration population centers, *see, e.g.*, Kirk Semple, *Plan to Upgrade a New Jersey Jail into a Model for Immigration Detention Centers*, N.Y. TIMES (Jan. 28, 2011), http://www.nytimes.com/2011/01/28/nyregion/28detain.html, but to date those efforts fall far short of the action necessary to remedy the vast transfer problem.

224. JOHN SIMANSKI & LESLEY M. SAPP, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR. STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2011, at 1, 4 (2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (reporting 429,247 total admissions to ICE detention facilities in 2011).

225. In fiscal year 2007, the most recent year for which DHS reported transfer data, the agency transferred 261,910 detainees from one detention facility to another. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., IMMIGRATION AND CUSTOMS ENFORCEMENT'S TRACKING AND TRANSFERS OF DETAINEES 2 (2009), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_09-41_Mar09.pdf. Data the Transactional Records Access Clearinghouse reported demonstrate that the transfer phenomenon surged in recent years. *Huge Increase in Transfers of ICE Detainees*, *supra* note 8. In 2008, the most recent year with available data, federal immigration authorities transferred over one-half of ICE detainees and subjected to multiple transfers approximately one-quarter of ICE detainees. *Id*.

226. *See, e.g.*, ACLU OF N.J., BEHIND BARS: THE FAILURE OF THE DEPARTMENT OF HOMELAND SECURITY TO ENSURE ADEQUATE TREATMENT OF IMMIGRATION DETAINEES IN NEW JERSEY 11–12 (2007), *available at* http://www.aclu-nj.org/files/9613/1540/4573/051507DetentionReport.pdf; AMNESTY INT'L, *supra* note 218, at 7, 29, 34–35, 46; HUMAN RIGHTS WATCH, *supra* note 220, at 3–5; INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS ¶¶ 78–81 (2010), *available at* http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf; RUBEN LOYO & CAROLYN CORRADO, N.Y. UNIV. SCHOOL OF LAW IMMIGR. RIGHTS CLINIC, LOCKED UP BUT NOT FORGOTTEN: OPENING ACCESS TO FAMILY & COMMUNITY IN THE IMMIGRATION DETENTION SYSTEM 1–3 (2010), *available at* http://afsc.org/sites/afsc.civicactions.net/files/documents/LockedUpFINAL.pdf; NAT'L IMMIGRANT JUSTICE CTR., HEARTLAND ALLIANCE, ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 6–9 (2010), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf; LAURA RÓTOLO, ACLU OF MASS., DETENTION AND DEPORTATION IN THE AGE OF ICE 6–7 (2008), *available at* http://www.aclum.org/sites/all/files/education/aclu_ice_detention_report.pdf; SCHRIRO, *supra* note 217, at 22–24; KAREN TUMLIN ET AL., NAT'L IMMIGRATION LAW CTR. ET AL., A BROKEN

The hardships and injustice that result from immigration transfers are thus well documented. The obligation to defend themselves far from their families and homes creates significant obstacles to a detained immigrant's ability to mount a defense to deportation. First, transfers create significant barriers for immigrants who seek legal representation.[227] Since "[eighty] percent of detainees [are] held in facilities which were severely underserved by legal aid organizations" and over twenty-five percent are held in a facility with no access to legal aid organizations of any kind,[228] it is no surprise that approximately eighty-four percent of detained immigrants do not have legal representation.[229] Second, the distance from family and other support networks, which these transfers create, significantly impedes an immigrant's ability to gather and present relevant evidence.[230] Third, and perhaps most disturbingly, federal immigration authorities' unchecked control over venue allows them to manipulate the controlling law of a case because the case will be governed by the law of the federal circuit in the jurisdiction in which the immigration court sits.[231] These

SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS 65–66 (2009), *available at* http://www.nilc.org/document.html?id=9; U.S. DEP'T OF HOMELAND SEC., *supra* note 225, at 6–8; *Huge Increase in Transfers of ICE Detainees*, *supra* note 8.

227. *E.g.*, NAT'L IMMIGR. JUSTICE CTR., *supra* note 226, at 3.

228. *Id.* A recent study demonstrated that two-thirds of New Yorkers arrested by federal immigration authorities were transferred to far-off detention facilities and that detained immigrants who were not transferred were approximately twice as likely to obtain counsel as those who were transferred. Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings* (pt. 1), 33 CARDOZO L. REV. 357, 364 (2011).

229. NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM 1 (2008), *available at* http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf. Not surprisingly, the ability to obtain counsel has an enormous impact on the outcome of these cases. N.Y. IMMIGRANT REPRESENTATION STUDY, STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 1 (2012), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf (noting that immigrants with lawyers are approximately 500% more likely to avoid deportation than immigrants without lawyers); Steering Comm. of the N.Y. Immigrant Representation Study Report, *supra* note 228, at 383–86.

230. *See* HUMAN RIGHTS WATCH, *supra* note 220, at 3–5, 58–59; INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 226, ¶ 398.

231. *See, e.g.*, Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) (noting that the law of the circuit in which the case "aris[es]" governs immigration cases); HUMAN RIGHTS WATCH, *supra* note 220, at 36 (noting that transfers "can have the effect of altering the law applied to a detainee's case, which is determined by the federal circuit court of appeals with jurisdiction over the facility where the detainee is housed"). The practical result is that federal immigration authorities transfer a huge number of immigrants arrested in states in the Second and Ninth Circuits to detention facilites in southern states where the proceedings are governed by Fifth Circuit law, which is generally far less favorable to the immigrants. HUMAN RIGHTS WATCH,

are, of course, precisely the parade of horribles that venue doctrine was originally designed to protect against.

The operative question for our present inquiry is: how is it possible, with all the various layers of venue protection embedded in our legal system, that the law permits such widespread instances of gravely unfair venues, presenting such significant obstacles to fair adjudications, in proceedings where such liberty interests are at stake?

Unlike most other civil proceedings, venue statutes offer no protection in this case. The Immigration and Nationality Act (INA)[232] is silent as to the proper venue for removal proceedings,[233] but the regulations promulgated under the Act provide that venue is proper wherever federal immigration authorities choose to file the charging instrument.[234] Accordingly, the first line of venue defense—the venue rules themselves—impose no limit and give the initiating party, the government, complete control over the venue of the proceedings.

Nor do service of process rules limit the invocation of jurisdiction in this case, as they would in most other civil suits. As discussed *supra* in Subsection I.C.1, service of process rules often also function to ensure a fair venue. However, this subconstitutional venue protection likewise fails in the deportation context. The INA and the regulations provide that service may be in person or, if personal service is not practicable, by mail.[235] However, unlike the general rule FRCP 4 lays out, the immigration statute and regulations do not provide any geographic limit with regard to where federal immigration authorities may effect service.[236]

Finally, the change of venue mechanism is rarely a solution in this situation because it affords far less protection than the general civil transfer provision, 28 U.S.C. § 1404(a). The only potential protection against an unfair venue in deportation proceedings is the ability of the

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supra note 220, at 6, 36–37, 37 tbl.11; *see also* INTER-AM. COMM'N ON HUMAN RIGHTS, *supra* note 226, ¶ 399 ("[T]he Inter-American Commission observes that the immigration law in each U.S. federal circuit can vary significantly . . . . [T]he highest rates of immigrant transfers are into the federal court of appeals for the Fifth Circuit (Louisiana, Mississippi, and Texas), which reportedly has very low grant rates of immigration relief." (footnotes omitted)).

232. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–537 (2012)).

233. *See id.*

234. *See* 8 C.F.R. § 1003.20(a) (2012) ("Venue shall lie at the Immigration Court where jurisdiction vests pursuant to § 1003.14."); *id.* § 1003.14(a) ("Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service."); *cf.* La Franca v. INS, 413 F.2d 686, 689 (2d Cir. 1969) ("There is no clear mandate in either the statute or regulations as to where a hearing should be held.").

235. 8 U.S.C. § 1229(a)(1) (2006); 8 C.F.R. § 1003.13 (2012) (defining "service").

236. *Compare* 8 U.S.C. § 1229(a)(1), *with* FED. R. CIV. P. 4(k).

immigrant to move for a change of venue.[237] Unfortunately, the change of venue mechanism likewise fails to ensure a fair venue.[238] The regulations provide that venue may be changed at the discretion of the Immigration Judge upon a showing of "good cause."[239]

The Board of Immigration Appeals (BIA), the immigration courts' administrative appellate body, has interpreted the "good cause" standard as requiring a balancing of the factors generally relevant to venue, such as "administrative convenience, expeditious treatment of the case, location of witnesses, and cost of transporting witnesses or evidence to a new location."[240] However, change of venue motions are routinely

237. 8 C.F.R. § 1003.20(b); *see also* Ballesteros v. Ashcroft, 452 F.3d 1153, 1159 (10th Cir. 2006) (discussing the regulation for change of venue in removal proceedings). There is also a recently promulgated administrative policy which purports to "minimize, to the extent possible, detainee transfers outside [of] the area of responsibility" where they were apprehended. John Morton, Dir., U.S. Immigr. & Customs Enforcement, Policy 11022.1: Detainee Transfers 1 (Jan. 4, 2012), *available at* http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf. The new policy acknowledges the hardships of transfers as it purports to prohibit transfers when the detainee has immediate family members in the area, when an attorney enters an appearance, when removal proceedings are already pending or ongoing, or when a hearing is scheduled. *Id.* at 2–3. Unfortunately, the policy falls far short of delineating a list of permissible venues necessary to insure a fair hearing and does not take account of issues such as the ability to obtain counsel, gather and present evidence, and the prejudice the law of a far-off circuit might present. Moreover, the policy contains a number of exceptions, which include a rather large exception for when federal immigration authorities deem the transfer necessary to "relieve or prevent facility overcrowding." *Id*. at 3. Insofar as ICE detention capacity is still not aligned geographically with its enforcement operations, this exception ensures that the transfer phenomenon will continue to result in the routine deprivation of fair venues for tens or hundreds of thousands of immigration detainees each year.

238. *Ballesteros*, 452 F.3d at 1159–60.

239. 8 C.F.R. § 1003.20(b) (2012); *see also Ballesteros*, 452 F.3d at 1159 ("[Regulation 8 C.F.R. § 1003.20(b)] gives the immigration judge complete discretion, even to the extent that the immigration judge may still deny the . . . change of venue motion when good cause is present."); Kin Sang Chow v. INS, 12 F.3d 34, 39 (5th Cir. 1993) ("The decision of whether to grant a change of venue is committed to the [immigration judge's] sound discretion and will not be overturned except for an abuse of that discretion."). *But see* Campos v. Nail, 43 F.3d 1285, 1289 (9th Cir. 1994) ("Although motions to change venue are left to the sound discretion of the immigration judge, an arbitrary refusal to change venue can be a violation of the statutory right to a reasonable opportunity to attend and present evidence at the deportation hearing.").

240. Rahman, 20 I. & N. Dec. 480, 482–83 (B.I.A. 1992) (citing Velasquez, 19 I. & N. Dec. 377 (B.I.A. 1986)). In *Rahman*, a detained immigrant sought to change venue from Arizona to Los Angeles because his "counsel of choice, his witnesses, and an interpreter would be available" there. *Id.* at 481. The Immigration Court granted the change of venue motion, but the BIA reversed the immigration judge in part for the judge's improper focus on the defendant's "lack of connections to the place where he was detained." *Id.* at 482–83, 485. Additionally, the BIA held that a detainee did not establish good cause by residence alone and that "[t]he Government is not required to accommodate the applicant's choice of a distant attorney and his acquisition of an interpreter by changing venue at considerable expense." *Id.* at 484.

denied even if the location of proceedings is distant from the immigrant's place of residence;[241] deprives the immigrant of access to counsel[242] or evidence;[243] is far from the location of witnesses;[244] and changes the governing circuit law in ways prejudicial to the immigrant.[245] The case law demonstrates that "administrative

241. *See, e.g.*, Meng Fei Ye v. Holder, 491 F. App'x 479 (5th Cir. 2012) (upholding the immigration judge's denial of change of venue motion over the immigrant's argument that venue in San Antonio represented a burden because the immigrant lived in New York); Frech v. U.S. Att'y Gen., 491 F.3d 1277, 1281–82 (11th Cir. 2007) (upholding immigration judge's denial of change of venue motion over immigrant's argument that venue in Miami required prohibitively expensive travel from his home in Houston); Rivera, 19 I. & N. Dec. 688 (B.I.A. 1988) (upholding the immigration judge's denial of change of venue motion requesting change from Puerto Rico to New York City because that change would have prejudiced the government); *see also* Rahman, 20 I. & N. Dec. at 484 ("[W]hile the factors commonly associated with the applicant's place of residence may be relevant to the question of proper venue, the mere fact that an applicant allegedly resides or wishes to reside in another city, without a showing of other significant factors associated with such residence, is insufficient cause to outweigh the Service's opposition to a motion for change of venue . . . ." (citing Rivera, 19 I. & N. Dec. 688)).

242. *See, e.g.*, Mayers v. INS, 70 F.3d 1268, 1268 (5th Cir. 1995) (upholding the immigration judge's denial of change of venue motion from Louisiana to New York despite the fact that immigrant's attorney was in New York and immigrant subsequently appeared pro se); Benito Aguayo-Diaz, File: A91 750 478, 2007 WL 4182270 (B.I.A. Oct. 16, 2007) (upholding the immigration judge's denial of a change of venue motion because, "while it is unfortunate that [the immigrant] is detained at a location at some distance from his chosen counsel, that inconvenience is insufficient, without more, to compel a change of venue").

243. *See, e.g.*, Gandarillas-Zambrana v. Bd. of Immigration Appeals, 44 F.3d 1251, 1253, 1255–56 (4th Cir. 1995) (upholding the immigration judge's denial of a change of venue motion because, inter alia, immigrant's "right to present witnesses and evidence [was not] violated by the transfer to and hearing in Louisiana" because "[h]e had the same legal right to present witnesses and evidence in Louisiana that he would have had anywhere, and he has not demonstrated any practical prejudice to that right resulting from the hearing's location").

244. *See, e.g.*, *Meng Fei Ye*, 491 F. App'x at 479–80 (upholding the immigration judge's denial of a change of venue motion over the immigrant's argument that it would be "more convenient and cost effective for [him]" for venue not to be in San Antonio because his witnesses were in New York); *Frech*, 491 F.3d at 1281–82 (upholding denial of a change of venue where all witnesses lived in Houston and proceedings were held in Miami); Wenfei Chen, File: A200 657 453, 2011 WL 585623 (B.I.A. Jan. 31, 2011) (upholding denial of change of venue motion over immigrant's argument that "potential witnesses reside elsewhere"); Bader, 17 I. & N. Dec. 525, 526 (B.I.A. 1980) (upholding the immigration judge's denial of a change of venue motion over the defendant's argument that a change from Buffalo to Miami would have allowed him to present expert testimony).

245. *See, e.g.*, Robledo-Amaya v. Holder, 354 F. App'x 167, 170 (5th Cir. 2009) (upholding denial of a change of venue motion notwithstanding the claim that venue out of circuit of residence affected controlling law and rendered the petitioner ineligible for relief); Ballesteros v. Ashcroft, 452 F.3d 1153, 1157–58 (10th Cir. 2006) (same); Gosine, File: A075 231 637, 2010 WL 2601543 (B.I.A. June 11, 2010) (upholding denial of a change of venue motion notwithstanding the claim that venue out of circuit of residence affected controlling law

convenience"—which usually translates to the cost to the government to return a detained immigrant to his place of abode and apprehension—dominates all other factors.[246] Moreover, at a very practical level, it is extremely difficult for detained, sometimes undereducated immigrants, who have no legal counsel, and often are unfamiliar with the laws and language of the United States, to adequately prepare and document a motion to change venue.[247]

Thus, since the traditional venue-protective mechanisms fail to operate, all that remain are the due process protections against an unfair location. But since those due process protections are located in the personal jurisdiction doctrine,[248] it does not provide any protection in the federal deportation context.[249] The United States is the sovereign that seeks to assert jurisdiction over the immigrant. Therefore, an immigrant who is arrested at his residence in Seattle, Washington, and transferred to a detention facility in Florence, Arizona, cannot plausibly claim she lacks minimum contacts with the relevant sovereign, or that the federal forum is unreasonable, as she in fact lives in the United

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and rendered respondent ineligible for relief); Espinal, File: A38 676 095, 2006 WL 3252544 (B.I.A. Aug. 17, 2006) (same).

246. *See, e.g.*, Lovell v. INS, 52 F.3d 458, 460–61 (2d Cir. 1995) (affirming denial of a change of venue motion in part because of the cost to the government of transporting the petitioner); Santos-Sanchez v. INS, 12 F.3d 1098 (5th Cir. 1993) (affirming denial of a change of venue motion because of the cost to the government of transporting the respondent and the late stage of the proceedings); Rivera, 19 I. & N. Dec. at 690 (affirming denial of a change of venue motion based in part on the cost to the government of transporting witnesses if the court changed the venue).

247. *See* HUMAN RIGHTS WATCH, *supra* note 220, at 61–65 (noting that some detainees, especially those without representation, will not be able to successfully make a motion for change of venue).

248. *See supra* Section I.B.

249. As an initial matter, in our personal jurisdiction inquiry, we have the issue of presence. That is, at the time when an immigrant held in detention in Texas seeks to challenge the jurisdiction of the immigration court at the detention facility, she is of course present in Texas and presence is the traditional touchstone of personal jurisdiction. *See* McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power . . . ."); *supra* Section I.A. *But see* Burnham v. Superior Court, 495 U.S. 604, 637 n.11 (Brennan, J., concurring in the judgment) (arguing that "there may be cases in which a defendant's involuntary or unknowing presence in a State does not support the exercise of personal jurisdiction over him"). However, our courts long ago recognized that presence obtained by force was insufficient to confer personal jurisdiction. *See id.* at 613 (plurality opinion) ("Most States . . . [by the nineteenth and early twentieth centuries] had statutes or common-law rules that exempted from service of process individuals who were brought into the forum by force or fraud . . . ."); *id.* at 631 n.3 (Brennan, J., concurring in the judgment) ("[A]lthough, beginning with the Romans, judicial tribunals for over a millennium permitted jurisdiction to be acquired by force, by the 19th century . . . this method had largely disappeared." (citation omitted)).

States.[250] As a result of the failure of all subconstitutional venue-protective mechanisms and because of the misplacement of due process protections against unfair locations in the personal jurisdiction inquiry, detained deportation proceedings expose the usually hidden constitutional floor of venue. By revealing the way venue can be manipulated without a constitutional safety net, these examples—national service of process cases and detained deportation proceedings—demonstrate the need to recognize the constitutional underpinnings of venue.

III. A CONSTITUTIONAL THEORY OF VENUE

Our examination of the interrelated origins of venue and personal jurisdiction jurisprudence demonstrates the tangled history of these two doctrines and helps us understand how the core venue interest in a fair location for trial became miscognized as a part of the personal jurisdiction inquiry. The rise of interstate commerce, transportation, and communication technologies prompted states to reach beyond their borders and expand the jurisdictional limits of their courts through long-arm statutes.[251] Accordingly, throughout the latter half of the twentieth century, these changes forced the Supreme Court to define the due process limits that constrained when plaintiffs could hale defendants into courts in far-off states.[252] In *International Shoe*, the Court situated that due process inquiry in personal jurisdiction doctrine.[253] It was, on a theoretical level, an odd choice from the outset because, as the history demonstrates, fairness in location is the core of venue whereas personal jurisdiction focuses on the power of the sovereign entity, not the rights of individuals.[254] As a result, over the past quarter century the Court's personal jurisdiction cases have been marked by fractured decisions with dueling opinions that articulate conflicting visions of the nature of the due process inquiry in personal jurisdiction analysis.[255]

The theoretical conflict is, in most cases, just that: theoretical. However, when the federal nature of a case negates the venue-protective

250. *See, e.g.*, Sinclair v. Att'y Gen. of the U.S., 198 F. App'x 218, 221–23 (3d Cir. 2006) (rejecting New York resident immigrant's claim that the Immigration Court in York, Pennsylvania, lacked personal jurisdiction over him, because he had sufficient minimum contacts with the United States); Aquilar v. U.S. Immigr. & Customs Enforcement, 490 F. Supp. 2d 42, 48 (D. Mass.) ("[T]he court [is not] aware of[] any constitutional right to have a removal hearing held in a specific venue."), *aff'd*, 510 F.3d 1 (1st Cir. 2007).

251. *See* Hanson v. Denckla, 357 U.S. 235, 260 (1958) (Black, J., dissenting); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).

252. *E.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

253. *See supra* Section I.B.

254. *See supra* Section I.A.

255. *See supra* Section I.B.

function of personal jurisdiction and when all of the other subconstitutional safeguards fail—as is the case in detained deportation cases—we expose, in the starkest of circumstances, the constitutional floor of venue.[256] Altering the concept of the due process fair location inquiry as venue, however, reconciles the dissonance of the individual rights framework with the origins and core of personal jurisdiction and protects the individual rights element of due process.[257] Indeed, this reframing can bring coherence to the muddled case law because fairness in location has little to do with jurisdiction and everything to do with due process and venue.

The Supreme Court has, in various opinions, identified two separate due process interests it associates with personal jurisdiction, both of which *International Shoe*'s minimum contacts requirement purportedly protects. First, since *Pennoyer*, the Court recognizes that due process imposes a limit on the authority of the sovereign to assert personal

256. *See supra* Part II.

257. *Compare* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788–89 (2011) (plurality opinion) (explaining that "jurisdiction is in the first instance a question of authority rather than fairness" and identifying the "principal inquiry" in personal jurisdiction cases as the question "whether the defendant's activities manifest an intention to submit to the power of a sovereign"), Burnham v. Superior Court, 495 U.S. 604, 609 (1990) (plurality opinion) ("To determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority."), *and* Hanson v. Denckla, 357 U.S. 235, 251 (1958) (describing due process restrictions on state court assertions of personal jurisdiction as a "consequence of territorial limitations on the power of the respective States"), *with J. McIntyre Mach.*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (insisting that the constitutional elements of the personal jurisdiction inquiry rest upon "defendant-focused fairness"), *id*. at 2798 (Ginsburg, J., dissenting) ("[T]he constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."), *Burnham*, 495 U.S. at 629–30 (Brennan, J., concurring in the judgment) (focusing the personal jurisdiction inquiry on fairness to litigants rather than on notions of sovereignty and physical power), Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982) ("The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."), *id.* at 713–14 (Powell, J., concurring in the judgment) ("Whenever the Court's notions of fairness are not offended, jurisdiction apparently may be upheld."), *World-Wide Volkswagen*, 444 U.S. at 292 (internal quotation marks omitted) (characterizing the "reasonableness or fairness" of haling litigants into court as the "primary concern" in the personal jurisdiction due process inquiry), Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (describing "the relationship among the defendant, the forum, and the litigation" as the "central concern of the inquiry into personal jurisdiction," as opposed to the "mutually exclusive sovereignty of the States"), *and* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[I]n order to subject a defendant to a judgment . . . if he be not present within . . . the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

jurisdiction.[258] This limit on sovereign power is sometimes tied more to the federalist structure of our system, international law norms, and the division of power among the states than it is to any individual right inherent in due process.[259] This first due process interest is embodied in the Court's amenability-to-suit inquiry, which requires that a nonpresent defendant purposefully avail herself of the protections or benefits of the sovereign and thus triggers a reciprocal power of the sovereign to assert authority over the individual.[260] Second, and critically for our purposes, there is a due process interest in a fair location. As the Court explained, this inquiry requires an "estimate of the inconveniences which would result to the [defendant] from a trial away from its home"[261] and that the location cannot be "so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent."[262] This second inquiry is often referred to as the "reasonableness" or "fairness" requirement[263] and requires consideration of such factors as the hardship on the defendant to litigate in the forum, any obstacles to the presentation of relevant evidence in the forum, the substantive law applicable to the dispute, the availability of other more convenient forums, and any hardship the plaintiff would suffer in those locations.[264]

When we juxtapose the two due process interests—limited sovereign power and fairness in location[265]—with the central tenets of personal

258. *See, e.g.*, *Burnham*, 495 U.S. at 609 (plurality opinion) ("To determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority. That criterion was first announced in *Pennoyer v. Neff* . . . .").

259. *See J. McIntyre Mach.*, 131 S. Ct. at 2789 (plurality opinion); *World-Wide Volkswagen*, 444 U.S. at 291–92, 294; *Hanson*, 357 U.S. at 251; Fullerton, *supra* note 14, at 8–9; Redish, *supra* note 79, at 1115–20; *see also supra* notes 98, 133–34 and accompanying text.

260. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 110 (1987) (plurality opinion) (quoting *World-Wide Volkswagen*, 444 U.S. at 297); *World-Wide Volkswagen*, 444 U.S. at 295; *Int'l Shoe*, 326 U.S. at 319; *see also* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 423 (1984) (Brennan, J., dissenting) ("As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, . . . chief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation's commercial activities.").

261. *Int'l Shoe*, 326 U.S. at 317 (internal quotation marks omitted).

262. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985) (internal quotation marks omitted).

263. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 292; Kulko v. Superior Court, 436 U.S. 84, 92 (1978).

264. *E.g.*, *Asahi*, 480 U.S. at 113 (plurality opinion); *World-Wide Volkswagen*, 444 U.S. at 292; Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 100 (1983); *see, e.g.*, *Kulko*, 436 U.S. at 98; Shaffer v. Heitner, 433 U.S. 186, 214–15 (1977); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223–24 (1957).

265. There is also a third, related due process interest: "Due process requires that the defendant be given adequate notice of the suit." *World-Wide Volkswagen*, 444 U.S. at 291; *see also Kulko*, 436 U.S. at 91 ("The existence of personal jurisdiction . . . depends upon the

jurisdiction and venue, the parallels are inescapable. As the Supreme Court explained, venue rules "safeguard against the unfairness and hardship involved when [a party] is prosecuted in a remote place."[266] As Charles Wright and Arthur Miller further explained in their seminal treatise, the purpose of venue rules is "to insure that litigation is lodged in a convenient forum and to protect [the] defendant against the possibility that [the] plaintiff will select an arbitrary place in which to bring suit."[267] In contrast, as Justice Holmes explained, the "foundation of [personal] jurisdiction is physical power": the power of the forum to act against an individual.[268] Consider how these concepts compare to the two due process interests as articulated in *World-Wide Volkswagen*:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[269]

The latter function the Court describes is traditionally referred to as personal jurisdiction, while the former is, with one notable exception, merely venue refashioned as personal jurisdiction.

The notable exception is that the Court, in *World-Wide Volkswagen* and in many of its other personal jurisdiction cases, speaks of the "burdens of litigating in a distant or inconvenient *forum*"[270]—not a distant or inconvenient *location*. The focus on the forum is a natural byproduct of the personal jurisdiction framework but, as the examples in Part II illustrate, that focus is ill-suited in some cases to effectuate the stated purposes of the inquiry: the prevention of "litigation so gravely

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presence of reasonable notice to the defendant that an action has been brought . . . ."). Service of process requirements secure this due process interest because they have their own "due process component" which requires "notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." SEC v. Ross, 504 F.3d 1130, 1138 (9th Cir. 2007) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)) (internal quotation marks omitted). Service of process is distinct from, but closely related to, personal jurisdiction—service of process being the mechanism by which the court obtains personal jurisdiction over a defendant. *See supra* note 135.

266. United States v. Cores, 356 U.S. 405, 407 (1958).

267. 4 WRIGHT & MILLER, *supra* note 14, § 1063.

268. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

269. *World-Wide Volkswagen*, 444 U.S. at 291–92.

270. *World-Wide Volkswagen*, 444 U.S. at 292 (emphasis added); *accord* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) (plurality opinion); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent."[271] When the forum is the United States, a defendant who lives in Portland, Maine, who is sued in federal district court in the District of Hawaii, in Honolulu, cannot plausibly claim that the forum of the United States is inappropriate in any way, even if he never had any contact with Hawaii. But, of course, depending on the circumstances, the venue of Hawaii—over 8,000 miles away from his home—may indeed be "so gravely difficult and inconvenient" that he is at a "severe disadvantage" in comparison to his opponent.

Indeed, the tension that emerges from a focus on the fairness of the *forum* rather than the *location* cannot withstand logical scrutiny. Imagine a scenario where a Florida resident strikes an Alaska resident with her car while the Alaskan vacations in Miami. The Alaskan then returns home and files a lawsuit against the Floridian in Alaska state court. Imagine further that the Floridian has never been to Alaska nor had any contacts whatsoever with the forum, is indigent but has pro bono counsel who will represent her in Florida but not Alaska, and has no way to pay for the transportation of critical eye witnesses from Florida to Alaska. If the Alaska court asserted personal jurisdiction, the Supreme Court would undoubtedly find it unfair and unreasonable to require the Floridian to defend herself in Alaska, where she would be at a significant disadvantage, and that to do so would offend due process. But imagine now that the Alaskan is an employee at the Floridian's mom-and-pop grocery store while visiting for the summer in Miami and that the suit is a Federal Labor Standards Act action for unpaid wages brought in federal district court in Fairbanks, Alaska. If the analysis focuses on the fairness of the forum of the United States, the Floridian defendant could not plausibly contest a suit in the forum of his residence (the United States) and thus a court would uphold personal jurisdiction. But it is simply incoherent to hold that the first scenario offends due process because of the grave obstacles to a fair adjudication, but that the very same obstacles in the second scenario fail to raise any due process problems. It is the definition of inconsistency to hold that the very same obstacles to a fair hearing would be a due process violation in the state case but not in the federal case, but this is exactly the result our current jurisprudence dictates. There is, it seems, a

271. *Burger King*, 471 U.S. at 478 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972) and McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)) (internal quotation marks omitted).

flaw in the logic.[272] That flaw is the Court's target of the reasonableness inquiry toward the forum rather than toward the location.

The Supreme Court never directly grappled with this inconsistency and, as discussed *supra* at Section II.A, this logical tension triggered dramatically divergent approaches from various circuit courts. Some courts seem untroubled by the asymmetric operation of the due process requirement in state and federal cases:

> [T]he "fairness" standard imposed by [the Supreme Court] relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum. . . . Here the sovereign is the United States, and there can be no question but that the defendant, a resident citizen of the United States, has sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court.[273]

Other courts have bristled at the logical inconsistency and strained to apply due process standards in a universal manner:

> We discern no reason why these constitutional notions

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272. One could plausibly argue that the distinction lies between the Due Process Clause of the Fourteenth Amendment, which operates against states and thus controls in the first scenario, and the Due Process Clause of the Fifth Amendment, which operates against the federal government and thus controls in the second scenario. But the Supreme Court long ago considered and properly rejected this distinction. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (relying on Fourteenth Amendment cases to define limits of the Fifth Amendment's procedural due process protections). Professor Abraham eloquently noted the logical incoherence when he explained that in the state court context we protect a defendant against locations "considered so unfair to him as to offend the 'traditional notions of fair play and substantial justice' embodied in the due process clause of the Fourteenth Amendment. Might it not also be unfair to force him to litigate in the federal court across the street?" Abraham, *supra* note 14, at 533–34.

273. Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979); *see also* Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255, 1258 (5th Cir. 1994) ("Given that the relevant sovereign is the United States, it does not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over a defendant residing within the United States."); Haile v. Henderson Nat'l Bank, 657 F.2d 816, 825–26 (6th Cir. 1981) ("[N]ationwide service of process, when authorized by Congress, is not extra-territorial at all. Therefore, the due process limitation on such process should be precisely the limitations applicable on a state's process within its territorial limits . . . ."), *cert. denied*, 455 U.S. 949 (1982); Driver v. Helms, 577 F.2d 147, 156 (1st Cir. 1978) ("The United States, . . . whose court is here asserting jurisdiction, does not lose its sovereignty when a state's border is crossed. The Constitution does not require the federal districts to follow state boundaries."), *rev'd on other grounds sub nom.*, Stafford v. Briggs, 444 U.S. 527 (1980); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) ("[P]lainly, where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present." (footnote omitted)).

> of "fairness" and "reasonableness" . . . should be discarded completely when jurisdiction is asserted under a federal statute rather than a state long-arm statute. The language of the Fifth Amendment is virtually identical to that of the Fourteenth Amendment, and both amendments were designed to protect individual liberties from the same types of government infringement. . . . Although the fact that the United States is the sovereign asserting its power undoubtedly must affect the way the constitutional balance is struck, the assertion of federal power should not cause courts to abandon completely their role as protectors of individual liberty and fundamental fairness.[274]

So then what explains the Court's odd choice to tether the due process fairness inquiry to the forum rather than to the location of the proceedings in the first instance? Part of the answer surely lies in the fact that *International Shoe*, and the large majority of the Supreme Court's personal jurisdiction cases, arose in the context of state long-arm statutes where the issue was whether it was fair and reasonable to

274. Republic of Pan. v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 945 (11th Cir. 1997) (footnote omitted) (citation omitted) (quoting *World-Wide Volkswagen*, 444 U.S. at 292); *see also* Peay v. BellSouth Med. Assist. Plan, 205 F.3d 1206, 1212 (10th Cir. 2000) ("[W]e hold that in a federal question case where jurisdiction is invoked based on nationwide service of process, the Fifth Amendment requires the plaintiff's choice of forum to be fair and reasonable to the defendant."); Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sanborn Corp.), 835 F.2d 1341, 1344–45 (11th Cir. 1988) (footnote omitted) (observing that the "due process clause of the fifth amendment constrains a federal court's power to acquire personal jurisdiction via nationwide service of process" and indicating that the Fifth Amendment inquiry focuses on the "fairness and reasonableness" of requiring a defendant to litigate in particular forum), *rev'd on other grounds*, 492 U.S. 33 (1989); Handley v. Ind. & Mich. Elec. Co., 732 F.2d 1265, 1272 (6th Cir. 1984) ("In a case like the present one, where a federal court is sitting in a federal question case, the purpose of minimum contacts is to protect the defendant 'against the burdens of litigating in a distant or inconvenient forum.'" (quoting *World-Wide Volkswagen*, 444 U.S. at 292)); Horne v. Adolph Coors Co., 684 F.2d 255, 259 (3d Cir. 1982) ("The only constitutional limitation on Congressional power to provide a forum is whatever fairness is required by fifth amendment due process."); Chem Lab Prods., Inc. v. Stepanek, 554 F.2d 371, 372 (9th Cir. 1977) (holding that a defendant in a federal patent action must have minimum contacts with the state in which the federal court sits for the court's assertion of personal jurisdiction to comport with due process); Fraley v. Chesapeake & Ohio Ry. Co., 397 F.2d 1, 3–4 (3rd Cir. 1968) (holding that a defendant in a Federal Employers' Liability Act action must have minimum contacts with the state in which the federal court sits for the court's assertion of personal jurisdiction to meet the "basic principles of fairness" required by the Due Process Clause); Lone Star Package Car Co. v. Balt. & O.R. Co., 212 F.2d 147, 155 (5th Cir. 1954) (holding that, when "cases are governed by federal law, the question of whether they are to be tried in one locality or another is now to be tested . . . simply by basic principles of fairness"); Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 201 (E.D. Pa. 1974) ("We reject the notion that there are no limitations upon extraterritorial service of process under federal statutes such as the securities acts; the existence of the Fifth Amendment would indicate otherwise.").

require a defendant to travel from her home state to the forum state and defend herself from suit.[275] In this way, a "fair forum" was, in these critical cases, a proxy for a "fair location." Moreover, the focus on the fairness of the state, and the apparent lack of initial concern for the fairness of the location of federal proceedings, makes some sense from a democratic theory perspective. The due process reasonableness inquiry does not play the same role in federal and in state cases. The Court developed the reasonableness inquiry to impose some limits on states that may overreach in their attempts to assert jurisdiction over residents of other states[276] who lack a political voice in the forum jurisdiction. In the normal federal case, this is a non-issue. Congress represents all United States citizens and thus should have the proper incentives to establish fair venue statutes to prevent plaintiffs from haling people into court unnecessarily across the country. Thus in the normal cases, perhaps, there is no need for a constitutional floor to venue. But, as we demonstrate, in a discrete but significant category of cases with politically disempowered litigants (such as cases that involve immigrants or foreign defendants) or where the United States is itself a party (such as deportation proceedings), the same dynamics necessitate a constitutional backstop.[277] Moreover, there is nothing inconsistent with the recognition of the constitutional nature of venue and the simultaneous recognition of the political dynamics that often, but do not always, prevent us from falling below the constitutional floor.

Another likely factor is the Court's natural institutional incrementalism and adherence to stare decisis. Long before the Court recognized a due process interest in a fair and reasonable location, it held that there is "nothing in the Constitution which forbids Congress to . . . [authorize] process served anywhere in the United States" because the location of a federal suit "is merely a matter of legislative discretion."[278] To find that due process imposes a limit on permissible venues would have created tension with this entrenched holding. In contrast, *Pennoyer* had firmly established a due process limit on personal jurisdiction.[279] In addition, the history of *International Shoe* reveals that the litigants never raised a due process claim as a question

275. *See, e.g.*, *J. McIntyre Mach.*, 131 S. Ct. at 2789–90; Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105–06 (1987); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 696–700 (1982); *World-Wide Volkswagen*, 444 U.S. at 287; Kulko v. Superior Court, 436 U.S. 84, 92 (1978); Hanson v. Denckla, 357 U.S. 235, 243 (1958); *McGee*, 355 U.S. at 223; Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

276. *See supra* note 84 and accompanying text.

277. *See supra* Part II.

278. United States v. Union Pac. R.R., 98 U.S. 569, 604 (1879).

279. Pennoyer v. Neff, 95 U.S. 714, 733–36 (1878), *abrogated by Int'l Shoe*, 326 U.S. 310, *and* Shaffer v. Heitner, 433 U.S. 186 (1977).

of venue before the Supreme Court or the courts below.[280] Accordingly, the Courts treatment of the due process fair location inquiry through the lens of personal jurisdiction was a natural response to the questions presented and, in the context of the state cases through which the doctrine developed, sufficient to provide the required venue protection.

Whatever the cause, the decision to locate due process venue considerations in the personal jurisdiction inquiry is inconsistent with the history and functions of both doctrines. In the small but significant class of cases where other location-protective mechanisms fail to operate, this error can force litigants to proceed in gravely unfair locations.[281]

Understanding the due process inquiry in a fair location as venue would provide a host of benefits. First, it would better comport with the historic origins of both doctrines. Fairness of location is the historic

280. Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 781–817 (recounting, at length, the history of *International Shoe Co. v. Washington*). This is hardly surprising as International Shoe Co.'s primary claim was that Washington State lacked authority to levy taxes against it, a foreign corporation, by virtue of the dormant commerce clause. Thus, the assertion of lack of sovereign authority in the personal jurisdiction argument dovetailed with the company's merits position. In contrast, a win on the venue issue would only subject the company to the same claims in federal district court (with jurisdiction over the claim by virtue of diversity) in a more convenient location. *Int'l Shoe*, 326 U.S. at 315–16.

281. *See* Republic of Pan. v. BCCI Holdings (Lux.) S.A., 119 F.3d 935, 945 ("We discern no reason why these constitutional notions of 'fairness' and 'reasonableness' should be discarded completely when jurisdiction is asserted under a federal statute rather than a state long-arm statute. . . . [T]he assertion of federal power should not cause courts to abandon completely their role as protectors of individual liberty and fundamental fairness." (citation omitted) (quoting *World-Wide Volkswagen*, 444 U.S. at 292)); Chlomos v. U.S. Dep't of Justice, 516 F.2d 310, 314 & n.7 (3d Cir. 1975) (vacating a deportation order upon consideration of, inter alia, the due process implications of holding a hearing in Florida, far from the petitioner's place of residence in New Jersey); La Franca v. INS, 413 F.2d 686, 689 n.9 (2d Cir. 1969) ("Ordinarily the better procedure would be to hold the [deportation] hearing in the district of the alien's residence or place of arrest. Obviously it should not be held in a district so far removed from his residence or place of arrest as to deprive him of a fair hearing."); Lone Star Package Car Co. v. Balt. & O.R. Co., 212 F.2d 147, 155 (5th Cir. 1954) ("[When] cases are governed by federal law, the question of whether they are to be tried in one locality or another is now to be tested . . . by basic principles of fairness."); Seren, 15 I. & N. Dec. 590, 591 (B.I.A. 1976) ("Matters involving procedural due process in a hearing before an immigration judge, are under his jurisdiction. Venue is, of course, such a matter."); *see also* Brecheen v. Oklahoma, 485 U.S. 909, 910 (1988) (Marshall, J., dissenting) (noting that the Supreme Court "has established that a refusal to grant a motion for change of venue may constitute a violation of due process"). *But see, e.g.*, Lovell v. INS, 52 F.3d 458, 461 (2d Cir. 1995) (holding that the immigration "change-of-venue regulation does not reflect a fundamental right derived from the Constitution or Federal law"); Aquilar v. U.S. Immigr. & Customs Enforcement, 490 F. Supp. 2d 42, 48 (D. Mass.) ("[T]he court [is not] aware of[] any constitutional right to have a removal hearing held in a specific venue."), *aff'd*, 510 F.3d 1 (1st Cir. 2007).

core of venue. While this is closely related in effect, it is doctrinally distinct from the jurisdictional issues of the fairness of being subjected to the authority of the sovereign. Second, recognition of the constitutional dimension of venue would help harmonize the Supreme Court's confused personal jurisdiction jurisprudence and allow those Justices who see fairness in location as unrelated to jurisdiction to find peace with those Justices who see fairness in location as a central due process consideration. If they extracted fairness in location from the personal jurisdiction inquiry and placed it in a venue inquiry, this could satisfy both camps. Moreover, recognition of the due process floor of venue will eliminate the logical inconsistency that can now arise where the very same grave obstacles to a fair hearing can, under current doctrine, be recognized as a due process violation in state cases but not in certain federal cases. Finally, and most critically, recognition of the constitutional boundaries of venue will ensure a most basic measure of due process for thousands of poor litigants each year who must now defend themselves in the most consequential of proceedings, thousands of miles away from their homes, in locations where they have often face insurmountable obstacles to a fair hearing.[282]

CONCLUSION

Modern phenomena—advancements in communication technologies, innovative business relationships, and globalization—continue to facilitate long-distance interaction and bring us ever closer together, even as we remain geographically distant. In response, the Supreme Court's conception of personal jurisdiction appropriately adapts to the efforts of courts to exert jurisdiction over far-off defendants. In so doing, however, the Court conflates the distinct due process interests that historically underlie limits on personal jurisdictions with those that underlie venue. The Court's abandonment of the foundational understanding of venue and personal jurisdiction muddles Supreme Court jurisprudence and split circuits. Worse still, when the Court subsumes the due process interest in a fair location for trial within the personal jurisdiction inquiry, the Court leaves some defendants with no protections whatsoever. The time has come to recognize that venue indeed has a constitutional floor.

282. *See supra* Section II.A. Delineating the exact substance of the constitutional venue inquiry is beyond the scope of this project. However, insofar as we argue that the current "reasonableness" question in the personal jurisdiction context is, in fact, a venue inquiry miscognized, it is a natural starting point for an analysis of the constitutionality of venue choices.