PERSONAL JURISDICTION AND FEDERALISM

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ABSTRACT

Personal jurisdiction has long professed to safeguard interstate federalism through the principle that good fences make good neighbors. Although this goal sits uncomfortably with the idea of personal jurisdiction as an individual right under the Due Process Clause, recent decisions from the Supreme Court have reinvigorated the federalism aspect of personal jurisdiction, offering a new opportunity to appraise its value and efficacy. This Article does so and concludes that personal jurisdiction fails to protect interstate federalism. States and private parties, it turns out, have too much authorization to expand state-court personal jurisdiction beyond state borders using the doctrine of consent and to constrict state-court personal jurisdiction within state borders using state law. The resulting distortion of interstate federalism has implications for vertical federalism, too, by creating anomalies in the parallelism between federal-court and state-court personal jurisdiction. I therefore urge the elimination of interstate federalism from personal-jurisdiction doctrine. Doing so not only will refocus personal jurisdiction on its core attention to the relationship between the defendant and the forum but also will shift the responsibility of policing interstate federalism to more apt doctrines of horizontal federalism and court access, such as the Dormant Commerce Clause and the First Amendment's Petition Clause. These recalibrations would produce a simpler, more workable personal-jurisdiction doctrine, for the benefit of courts and parties alike.

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INTRODUCTION

Because personal jurisdiction has, since *Pennoyer v. Neff*,[1] been tethered to the Fourteenth Amendment's Due Process Clause, the doctrine often

1. 95 U.S. 714 (1878).

takes the form of an individual right.[2] Yet the historical development of personal jurisdiction in American courts has also featured an important yet underappreciated ground: interstate federalism. The Court has long recognized that personal jurisdiction serves, at least in part, to keep harmony among sovereign states by fixing limits on their authority to encroach upon the adjudicative prerogatives of each other. By purporting to use state borders to partition case allocation among states, personal jurisdiction follows the mantra that good fences make good neighbors.[3]

This structural aim of personal jurisdiction fits uncomfortably with the conceptualization of personal jurisdiction as an agent of the individual right protected by the Constitution's Due Process Clause.[4] Due process, after all, is concerned with a state's relationship to a defendant, not with the state's relationship to another state. Only rarely have commentators tried valiantly to reconcile interstate federalism with the individual-right component of personal jurisdiction.[5]

Two recent cases from the Supreme Court signal a new opportunity for assessing the legacy and continuing role of interstate federalism in personal jurisdiction. In *Ford Motor Co. v. Montana Eighth Judicial District*,[6] the Court unanimously affirmed a continuing role for interstate federalism.[7] In *Mallory v. Norfolk Southern Railway Co.*,[8] the Court assessed the ability of parties to consent to personal jurisdiction in ways that have adverse effects on interstate federalism.[9] These cases shine the limelight on interstate federalism and offer a new opportunity to consider its doctrinal role and future.

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2. *E.g.*, Mallory v. Norfolk S. Pac. Ry. Co., 600 U.S. 122, 144 (2023) (plurality opinion) (asserting that, despite any federalism implications, "personal jurisdiction is a *personal* defense that may be waived or forfeited"); *id.* at 156 (Alito, J., concurring in part and concurring in the judgment) ("Despite these many references to federalism in due process decisions, ... [t]he Due Process Clause confers a right on persons, not States. If a person voluntarily waives that right, that choice should be honored." (internal quotation marks and citation omitted)); *see also id.* at 149 (Jackson, J., concurring) ("[T]he personal-jurisdiction requirement is an individual, waivable right . . . .").

3. *See infra* Part I. Interstate federalism is the personal-jurisdiction nomenclature of horizontal federalism, which encapsulates doctrines pertaining to the harmonious coexistence of quasi-separate states. Horizontal and interstate federalism are distinct from vertical federalism, which encapsulates doctrines pertaining to the relationship between the states and the federal government. *See* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 502–03 (2008) (defining horizontal and vertical federalism).

4. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (questioning how structural principles of federalism can be waived by right of the parties).

5. A notable effort is Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 61–74 (2010) (offering a framework for integrating interstate federalism into personal jurisdiction).

6. 592 U.S. 351 (2021).

7. *Id.* at 360 (affirming that personal jurisdiction is designed to protect interstate federalism).

8. 600 U.S. 122 (2023).

9. *Id.* at 144 (plurality opinion) (explaining that interstate federalism does not trump consent); *id.* at 156 (Alito, J., concurring in part and concurring in the judgment) (same).

In this Article, I analyze the interstate-federalism component of personal jurisdiction and argue that whatever interstate-federalism value personal jurisdiction might, in theory, protect, the doctrine today does not adequately protect it. States and private parties have too much power to expand personal jurisdiction beyond interstate-federalism boundaries using the doctrine of consent. And states have too much autonomy to use state law to restrict their personal jurisdiction to create gaps where interstate federalism would presume a state would exercise jurisdiction. As a result, state and party control over personal jurisdiction leaves in disarray whatever federalism values supposedly inhere in personal jurisdiction.

I therefore urge that notions of interstate federalism should be relegated to the dustbin of personal-jurisdiction doctrine. Doing so might create space for other, more appropriate constitutional provisions to protect those federalism values, especially the Dormant Commerce Clause and the unconstitutional-conditions doctrine to control expansive assertions of personal jurisdiction, and the Privileges and Immunities Clause, the Petition Clause, and the Due Process Clause to control excessively narrow state-law restrictions on personal jurisdiction. Where other constitutional protections fall short, nonconstitutional law, such as the doctrines of conflict of laws and forum non conveniens, as well as state law regulating consent, can fill in to reallocate cases along interstate federalism lines. And perhaps in the end, interstate federalism need not be policed stringently; overlapping state jurisdiction may have practical benefits of experimentation, cooperation, and market-based opportunities to improve civil justice. But all that can happen only if the Court excises interstate federalism from its constitutional personal-jurisdiction doctrine.

My argument proceeds as follows. Part I documents the development of the idea of interstate federalism in the personal-jurisdiction cases and commentary. Interstate federalism, which speaks to the relationship among states, is distinct from due process and sovereign authority, which justify the exercise of state power over parties. The interstate-federalism component of personal jurisdiction is designed to fix the scope of state courts' personal jurisdiction to keep interstate relations harmonious. Good fences, the saying goes, make good neighbors.[10]

Part II begins the work of showing how inept personal-jurisdiction doctrine is at maintaining these fences. It describes how states can move their fences outward, ostensibly invading the territorial sovereignty of other states, by extracting consent to personal jurisdiction in circumstances that otherwise would not meet the constitutional tests for specific or general

10. ROBERT FROST, *Mending Wall*, *in* NORTH OF BOSTON (1914).

jurisdiction. The Court sanctioned just such an approach last Term,[11] but states have long extracted consent in a variety of other contexts. The problem consent poses for interstate federalism is not about the consent of the party but about the disregard of the interests of the offended state. As with a neighbor who continually feeds a cat despite the cat owner's objection, consent makes the fences hardly a barrier at all.

Part III continues the attack on interstate federalism by showing how states, on their own whims, can constrict their personal-jurisdiction reach to create gaps that leave plaintiffs without a forum for suit. Some states, such as New York, already do so for specific jurisdiction;[12] states also can do so for general jurisdiction. Delaware, for example, could narrow the scope of general jurisdiction its courts can exercise, thus making suit against Delaware companies more difficult in Delaware.[13] States might do so for a variety of reasons: to attract business, to shunt judicial workloads onto other states, or to score points in state or national politics. To carry the metaphor forward, such narrowing is akin to a homeowner who, lacking the will or resources to remove a dead tree on the edge of their property, just moves their fence inward to exclude the dead tree as a declaration of abdication of responsibility for it. In the same way that property law (and perhaps neighborhood rules) would disallow such abdication, interstate federalism presumes that states will exercise adjudicatory authority over their territory.[14] Wide latitude for states to restrict their personal jurisdiction to create gaps in personal-jurisdiction coverage thus interferes with the plan of interstate federalism. Between the expansions and contractions of personal jurisdiction by the states, the design of personal jurisdiction to set the boundaries of interstate federalism lacks force.

Part IV then highlights an important implication of that reality: state control undermines Rule 4(k)'s vertical-federalism ideal of aligning federal-court personal jurisdiction with state-court personal jurisdiction.[15] The more that states restrict their own personal jurisdiction, the more likely it becomes that *no* state will have personal jurisdiction, thereby triggering Rule 4(k)(2)'s saving clause providing for *nationwide* personal jurisdiction in

11. *Mallory*, 600 U.S. 122.

12. *See* Stonegardens Advisory LLC v. DeepMedia.AI, No. 24-CV-02178, 2024 WL 5047628, at *4 (S.D.N.Y. Dec. 9, 2024) (stating that New York's long-arm statute does not extend to the limits of the Due Process Clause).

13. *Cf.* Genuine Parts Co. v. Cepec, 137 A.3d 123, 127, 142–43 (Del. 2016) (worrying about expansive general jurisdiction).

14. *See infra* Section III.B.

15. FED. R. CIV. P. 4(k)(1)(A) (establishing federal-court personal jurisdiction when the defendant is subject to state-court personal jurisdiction).

federal court for federal-question cases.[16] And because consent to personal jurisdiction in state court is not necessarily the same as consent to personal jurisdiction in federal court, states have significant power to create divergence between state-court personal jurisdiction and federal-court personal jurisdiction.[17] For all these reasons, whatever interstate-federalism component of personal jurisdiction still exists should be discarded.

Part V envisions a personal-jurisdiction doctrine untethered to the goal of interstate federalism. Several benefits arise. For one, the doctrine of personal jurisdiction can focus, as it should, on the relationship between the state and the defendant, without getting sidetracked by the relationship among states. That refocusing can be done without overruling any of the Court's precedent.[18] For another, interstate federalism can be lodged under the protection of other constitutional provisions and doctrines better geared toward its values. The doctrine of unconstitutional conditions and the Dormant Commerce Clause are prime candidates for reining in excessive expansions of personal jurisdiction, while the Privileges and Immunities Clause, Petition Clause, and Due Process Clause can put limits on how much a state can create gaps in coverage through state-law restrictions on personal jurisdiction.[19] Nonconstitutional safeguards, like conflict of laws and forum non conveniens, can ameliorate interstate frictions.[20] Any remaining distortions of interstate federalism might, in the end, present benefits, such as the ability to adapt personal jurisdiction more quickly to the evolving needs of technological and commercial advancement, the opportunity for states to cooperate to resolve disputes effectively, and the recognition that party choice in forum can improve efficiencies for both litigants and courts alike.[21] For all these reasons, personal jurisdiction need not—and should not—do the work of policing interstate federalism.

I. THE DEVELOPMENT OF INTERSTATE FEDERALISM IN PERSONAL JURISDICTION

This Part traces the historical development of interstate federalism in personal jurisdiction. That history makes clear that federalism is related to, but distinct from, the conceptualization of personal jurisdiction as an exercise of state sovereign authority over a party. Interstate federalism is

16. FED. R. CIV. P. 4(k)(2) (providing for nationwide federal-court jurisdiction when no state would have personal jurisdiction).
17. *See infra* Section IV.B.
18. *See infra* Section V.A.1.
19. *See infra* Section V.A.2.
20. *See infra* Section V.A.2.c.
21. *See infra* Section V.B.

concerned with the legitimacy of court authority, not from the perspective of the party, but from the perspective of other states.

A. Origins

In colonial America, personal jurisdiction did not have a strong interstate-federalism component. The colonies inherited the British common law of court authority, which was established through voluntary or compelled appearance.[22] Compelled appearance by way of civil arrest gradually gave way to constructive arrest by service of a summons.[23] The domicile of the defendant was irrelevant to this regime; court authority over both domestic and foreign defendants required either voluntary or compelled appearance.[24] Nor was the nature of the cause of action relevant; if the defendant showed up in the forum court, the court had personal jurisdiction, regardless of where the cause of action arose.[25]

After independence, and then ratification of the Constitution, the unique federal structure of the fledgling nation demanded consideration of interstate harmony, and an important aspect of interstate harmony was the idea that good fences make good neighbors.[26] Cross-border service, especially to seize another state's citizen, was seen as an affront to the invaded state. Accordingly, American jurists insisted upon territorial limits to service of process.[27] Joseph Story wrote, in his influential *Commentaries on the Conflict of Laws*, that "no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions."[28] The Supreme Court endorsed this view in *Pennoyer v. Neff*: "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."[29] The emphasis on territorial limits reinforced the understanding that service-based personal jurisdiction was valid only if the defendant was served *within* the forum state.[30]

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22. Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1595 (2018).
23. Scott Dodson, *The Complexities of Consent to Personal Jurisdiction*, 113 CALIF. L. REV. 333, 339 (2025).
24. *Id.*
25. Scott Dodson, *Rule 4 and Personal Jurisdiction*, 99 NOTRE DAME L. REV. 1, 6 (2023).
26. *See* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1325 (2017).
27. European countries had developed this tradition as well. *See* Alex Mills, *The Private History of International Law*, 55 INT'L & COMPAR. L.Q. 1, 25–27 (2006). In addition, pre-ratification courts often followed the rule that service was confined to territorial borders. *See, e.g.*, Kibbe v. Kibbe, 1 Kirby 119, 125–26 (Conn. Super. Ct. 1786).
28. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539, at 450 (1834).
29. Pennoyer v. Neff, 95 U.S. 714, 720 (1878); *see also id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.").
30. *Id.* at 724–25.

Territorial limits can be conceived as a component of sovereign authority vis-à-vis the defendant, in that the defendant's voluntary presence or activity within the state justifies the state's assertion of jurisdictional authority. That connection remains an important justification for personal jurisdiction today, as I explain below.[31] But, by the time of *Pennoyer*, territorial limits were less concerned with the relationship between the defendant and the state and more concerned with the relationship among the states.[32] As *Pennoyer* explains, because "[t]he several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others,"[33] exorbitant exercise of jurisdiction is "an encroachment upon the independence of [another] State" and a "usurpation" of that state's authority.[34] Earlier cases from the Supreme Court and state courts offered similar rationales.[35] Personal jurisdiction at the time of *Pennoyer* thus was designed, at least in part, to ensure that states operated within their defined regions—not so much for the benefit of the defendant, but to avoid stepping on the toes of other states.[36]

B. Interstate Federalism and Due Process

Pennoyer maintained this traditional framework for personal jurisdiction but allowed the challenge to the validity of the judgment to be made on direct appeal under the Due Process Clause of the Fourteenth Amendment.[37] The transition of personal jurisdiction to due process had the effect of shifting some of the underlying rationales of personal jurisdiction away from the relationship among states and toward the relationship between the

31. *See infra* Section I.C.

32. *See* James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 41 (1992) (stating that the development was to advance "the larger enterprise to 'form a more perfect union'").

33. *Pennoyer*, 95 U.S. at 722.

34. *Id.* at 723.

35. *E.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 359 (1827) (noting that exorbitant jurisdiction could affect the "harmonious distribution of justice throughout the Union"); Weinstein, *supra* note 32, at 27–42 (documenting the sentiment in state courts).

36. An analogous rationale persisted in federal courts, subject to congressional override. *See* Picquet v. Swan, 19 F. Cas. 609, 612 (Story, J., Circuit Justice, C.C.D. Mass. 1828) (No. 11,134) ("[T]he exercise of the jurisdiction of the circuit courts by compulsive process was essentially confined, by their very organization, within the limits of their respective districts."); *Ex parte* Graham, 10 F. Cas. 911, 912 (Washington, Circuit Justice, C.C.E.D. Pa. 1818) (No. 5,657) ("[The circuit] courts . . . have no authority, generally, to issue process into another district . . . . The absence of such a power, would seem necessarily to result from the organization of the courts . . . [as] allotted to each of the districts, . . . [which] necessarily confines the jurisdiction of the local tribunals, within the bounds of the respective districts, within which they are directed to be holden.").

37. *Pennoyer*, 95 U.S. at 733; *see also* Sachs, *supra* note 26, at 1288 (explaining this role of the Fourteenth Amendment).

forum state and the defendant.[38] However, the Court continued to invoke interstate federalism as a justification, albeit with periodic skepticism. Even the landmark case of *International Shoe Co. v. Washington*,[39] which broke from *Pennoyer*'s rigid territorial limits to embrace a new form of personal jurisdiction based on "certain minimum contacts with [the forum],"[40] pegged the new test to "the quality and nature of the activity *in relation to the fair and orderly administration of the laws*."[41] The admonition that the minimum-contacts test must take into account "the fair and orderly administration of the laws" suggests some lingering consideration of different states' prerogatives within the community of states.[42]

In the wake of *International Shoe*, the Court continued to invoke interstate federalism as a foundation of personal jurisdiction, while also recognizing its somewhat uncomfortable fit with due process. In *Hanson v. Denckla*, the Court asserted that personal jurisdiction was "a consequence of territorial limitations on the power of the respective States."[43] And in *World-Wide Volkswagen Corp. v. Woodson*, the Court, relying heavily on *Hanson*, asserted that state lines must be relevant to personal jurisdiction to "remain faithful to the principles of interstate federalism embodied in the Constitution," namely, that "[t]he sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States," and that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[44]

Despite the awkward pairing of interstate federalism and due process,[45] the Court has continued to invoke interstate federalism in its personal-

38. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021) ("These rules derive from and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism.'").

39. 326 U.S. 310 (1945).

40. *Id.* at 316 ("[T]he jurisdiction of courts to render judgment *in personam* [wa]s grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him.").

41. *Id.* at 319 (emphasis added).

42. *Id.*

43. Hanson v. Denckla, 357 U.S. 235, 251 (1958). In *Shaffer v. Heitner*, the Court uncharitably dismissed that statement as "simply mak[ing] the point that the States are defined by their geographical territory," 433 U.S. 186, 204 n.20 (1977), but more recent opinions have reinvigorated *Hanson*'s statement, *see infra* text accompanying notes 44–48.

44. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293–94 (1980).

45. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 144 (2023) (plurality opinion) ("[O]ur personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State."); *see also id.* at 156 (Alito, J., concurring in part and concurring in the judgment) ("[W]e have never held that a State's assertion of jurisdiction unconstitutionally intruded on the prerogatives of another State when the defendant had consented to jurisdiction in the forum State."); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (stating that "federalism and the character of state sovereignty vis-à-vis other States . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause").

jurisdiction opinions. In *Bristol-Myers Squibb Co. v. Superior Court*, the Court quoted the federalism language from *Hanson* and *World-Wide* to highlight the problem of "submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[46] And in *Ford Motor Co. v. Montana Eighth Judicial District*, the Court acknowledged that the rules of personal jurisdiction "derive from and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism,'" which the Court defined as the interests "of the States in relation to each other."[47] The Court continued: "One State's sovereign power to try a suit, we have recognized, may prevent sister States from exercising their like authority. The law of specific jurisdiction thus seeks to ensure that States with little legitimate interest in a suit do not encroach on States more affected by the controversy."[48] Thus, despite the difficulty of tying structural principles of interstate federalism with the due-process source of personal jurisdiction, the Court has adhered to interstate federalism as an animating principle.[49]

C. Interstate Federalism and State Sovereignty

Interstate federalism is distinct from another tension within personal-jurisdiction doctrine—the connection between due process and state sovereignty. Personal jurisdiction, like all exercises of state power, requires justification, and the fractured decision in *J. McIntyre Machinery, Ltd. v. Nicastro*[50] reveals a simmering debate among the justices as to whether the justification is based primarily on fairness and reasonableness or on consent and submission to state authority. But, as I will show, this debate is orthogonal to the interstate-federalism component of personal jurisdiction.[51]

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46. Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263 (2017).

47. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021) (quoting *World-Wide*, 444 U.S. at 293). *But cf. Shaffer*, 433 U.S. at 204 (asserting that "the mutually exclusive sovereignty of the States" was not "the central concern" of personal jurisdiction).

48. *Ford Motor*, 592 U.S. at 360 (citations and internal quotation marks omitted).

49. Commentators have questioned personal jurisdiction's effect on any state intrusion. *See* Jacobs, *supra* note 22, at 1637 ("[I]t is unclear how the *state*'s sovereign authority is upset by such an intrusion [of another state exercising personal jurisdiction]. . . . [S]tates do not suddenly lack authority over their citizens simply because another state exercises jurisdiction over a dispute involving one of them. If, for example, the State of Oklahoma had asserted jurisdiction over the New York-based car dealership's dispute with the plaintiffs in *Woodson*, what exactly would the injury be to New York's sovereign interests?").

50. 564 U.S. 873 (2011).

51. For a similar conclusion, see Haley S. Anderson, The Sovereignty of Personal Jurisdiction 21–28 (May 27, 2025) (unpublished manuscript) (on file with the author). Professor Allan Erbsen has argued that interstate federalism can help mediate between the various theories of personal jurisdiction, but he does not grapple with state disruption to, and supersession of, the constitutional design. *Compare*

In *Nicastro*, an injured New Jersey worker sued the foreign manufacturer of the machine that injured him in New Jersey. The manufacturer had relied on an independent distributor to sell machines in the United States and did not target New Jersey specifically; as few as one machine was sold in the state.[52] The Court rejected New Jersey's exercise of personal jurisdiction over the foreign manufacturer under those circumstances but could not muster majority support for the rationale.

Justice Kennedy, in his plurality decision, justified personal jurisdiction in terms of submission to sovereignty authority, and he characterized the known bases for personal jurisdiction—in-state service, consent, citizenship, and minimum contacts—as conduct "from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State."[53] As he concluded: "The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[54] By contrast, Justice Ginsburg, in dissent, rejected the rationale of submission to sovereign power: "[T]he constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."[55] Instead, she saw the animating due-process values of "reason and fairness."[56] Scholars have contributed to the debate by adding theories of political consent,[57] political legitimacy,[58] and other justifications for state power.[59]

Erbsen, *supra* note 5, at 7, 38 (arguing that the sovereignty and due-process components of personal jurisdiction cannot be understood without reference to interstate federalism), *with id.* at 12–13 (deeming state law "irrelevant" to "how the Constitution limits the choices that a state may make about the powers that it wants to assert").

52. *Nicastro*, 564 U.S. at 878 (plurality opinion).

53. *Id.* at 880–81.

54. *Id.* at 884.

55. *Id.* at 899 (Ginsburg, J., dissenting).

56. *Id.* at 903.

57. *See* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 853 (1989) (justifying personal jurisdiction with notions of political consent).

58. Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1310–15 (2014).

59. *E.g.*, John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 588 (1984) (emphasizing due process); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1114 (1981) (focusing on undue burdens); Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 241 (2005) (relying on pragmatic effects like predictability and stability); Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RSRV. L. REV. 769, 772 (2016) (arguing that "state sovereignty should be seen as a basic theoretical justification for the constitutional restrictions on personal jurisdiction"); Allan R. Stein, *Styles of Argument and*

Justifying state assertions of personal jurisdiction over particular defendants remains an important and unsettled issue. But in focusing on the relationship between a particular state and a particular defendant, the issue is different from interstate federalism. Interstate federalism in personal jurisdiction is a nonrights structural principle designed to ensure interstate harmony and the proper geographic allocation of cases in a union of states.[60] It limits state sovereignty not by inherent limits of political theory or by application of individual rights but by the external constraints imposed by the sovereignty of other states. As *Pennoyer* put it, "[t]he several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."[61] Thus, the interstate-federalism component of personal jurisdiction has a role to play in personal-jurisdiction doctrine that is independent of the bilateral struggle between legitimate sovereign authority and individual rights.[62]

D. The Role of Interstate Federalism in Personal Jurisdiction

That role is to set boundaries of state authority to promote interstate harmony.[63] Some scholars have termed this the "anti-busybody principle" of keeping states from interfering in other states' domains.[64] But the basic idea is to define and enforce lines between where one state's adjudicatory

Interstate Federalism in the Law of Personal Jurisdiction, 65 TEX. L. REV. 689, 689 (1987) (arguing that jurisdiction "ought to reflect the general limits on state sovereignty inherent in a federal system").

60. *See* Scott Dodson, *Jurisdiction and Its Effects*, 105 GEO. L.J. 619, 640–41 (2017) (exploring the role of personal jurisdiction in "determining forum in a multiforum system").

61. Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

62. The justices themselves have occasionally blurred the distinction. *E.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality opinion) (arguing that a fairness theory of personal jurisdiction could "upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States"); *see also id.* at 899 (Ginsburg, J., dissenting) ("New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any other State.").

63. As the Court has recognized, the interstate-federalism component of personal jurisdiction is not unlike the interstate-federalism component of legislative jurisdiction. *See* Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." (citation and internal quotation marks omitted)).

64. Howard M. Erichson, John C.P. Goldberg & Benjamin C. Zipursky, *Case-Linked Jurisdiction and Busybody States*, 105 MINN. L. REV. HEADNOTES 54, 75–76 (2020) (coining the term and defining it as the principle that "a state's courts ought not meddle in affairs beyond the state's legitimate domain of interest"); *see also* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 416 (2020) (defining interstate federalism as "whether the exercise of jurisdiction by one state impermissibly burdens residents of other states or infringes on other states' regulatory authority").

authority begins and another's ends to stave off conflict.[65] Like a tranquil neighborhood in which each resident's property is separated by a fence, the interstate-federalism component of personal jurisdiction is designed for thin seams, with neither unclaimed nor overlapping space. And like an authoritative neighborhood association, the constitutional source of personal jurisdiction establishes these seams with the expectation that they cannot be altered at the whim of any one state. After all, if one state could expand or contract the scope of its authority at will, then the whole purpose of interstate harmony would be subverted. The interstate-federalism ideal fixes authority at state borders.

As the next Part begins to show, that ideal is a myth.

II. EXPANSIONS OF STATE POWER

Part II begins the work of showing how inept personal-jurisdiction doctrine is at maintaining these fixed boundaries. It describes how states can extend their authority beyond the expectations of interstate federalism—essentially invading the prerogatives of other states—by extracting consent to personal jurisdiction in circumstances that otherwise would not meet the constitutional tests for personal jurisdiction. States have long extracted consent in a variety of contexts, and the Court in *Mallory* permitted those efforts, even in the face of severe mangling of the idea of interstate federalism. *Mallory* and related consent cases also offer broad license for parties to use consent to select forums contrary to the allocations directed by interstate federalism. Consent thus makes the fences, like for the neighborhood cat, hardly a barrier at all.

A. State-Extracted Consent

In the 1800s, interstate federalism posited that states generally could not reach out to subject nonresidents to suit unless the nonresident voluntarily appeared or was served in the state.[66] Yet the rise of corporations and improved mobility increased cross-state activity to a sufficient degree that states began to devise other ways to hold nonresidents accountable in the courts of a state for injuries they caused in that state.[67]

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65. Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After* Walden v. Fiore, 19 LEWIS & CLARK L. REV. 769, 772 (2015) ("[P]rinciples of horizontal federalism—which govern relationships between states in a federal system—can help courts allocate jurisdictional authority among potential fora.").

66. *See supra* Section I.D.

67. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 129–30 (2023) (recounting this history).

The primary vehicle for doing so was the doctrine of consent.[68] In 1855, for example, the Supreme Court upheld Ohio's exercise of personal jurisdiction over an Indiana insurance company based on in-state service on the Ohio agent that Ohio law obligated the company to appoint as a condition of doing business in Ohio.[69] Such agent-appointment statutes were prevalent in the 1800s and early 1900s, and the Supreme Court repeatedly upheld state exercise of jurisdiction based on them.[70] States expanded that theory in the 1900s to encompass nonresident motorist statutes, in which a state would deem a nonresident's use of a state's roads as implicitly consenting to the appointment of a state official for purposes of in-state service of process for any suit arising out of the nonresident's use of those roads.[71] Although I have argued elsewhere that these cases are not direct consent-to-jurisdiction cases, but instead are consent-to-agent-appointment cases in which in-state service on the agent can then lead to personal jurisdiction,[72] the Supreme Court has retrofitted these cases into the doctrine of consent to personal jurisdiction.[73]

In *Mallory*, the Supreme Court sanctioned these uses of state-extracted consent as a powerful and relatively unconstrained way of expanding a state's personal jurisdiction.[74] There, the Supreme Court upheld the exercise of Pennsylvania's personal jurisdiction over a nonresident railroad for injuries caused outside of Pennsylvania.[75] The Court reasoned that, by registering to do business in Pennsylvania, the railroad consented to general personal jurisdiction in that state, a condition that the Pennsylvania

68. Robin J. Effron & Aaron D. Simowitz, *The Long Arm of Consent*, 80 N.Y.U. ANN. SURV. AM. L. 179, 191 (2024) (stating that "forum states eager to solve the growing problem of how to reach out-of-state defendants in lawsuits in the growing interstate economy . . . passed increasingly aggressive laws to demand or infer consent to jurisdiction").

69. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 406 (1856).

70. *E.g.*, Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); St. Clair v. Cox, 106 U.S. 350 (1882). In one exception, the Supreme Court refused to uphold personal jurisdiction when the agent-appointment statute implied appointment of a state official as the business's agent for purposes of general jurisdiction. *See* Old Wayne Mut. Life Ins. Ass'n of Indianapolis v. McDonough, 204 U.S. 8, 22 (1907).

71. *See* Hess v. Pawloski, 274 U.S. 352, 356 (1927).

72. *See* Dodson, *supra* note 23 at 343 ("[I]n all these cases, consent was with respect to specific conditions of in-state service, not to personal jurisdiction directly.").

73. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 135 (2023) (characterizing *Pennsylvania Fire* as "consent to suit"); *id.* at 130 (plurality opinion) (characterizing the agent-appointment statutes as "consent to in-state suits"); Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) (characterizing *French* and *St. Clair* as "holding the corporation amenable to suit . . . by resort to the legal fiction that it had given its consent to service and suit").

74. The Court left open the possibility of constraints outside the Due Process Clause. *See Mallory*, 600 U.S. at 157 (Alito, J., concurring in part and concurring in the judgment) (considering the Dormant Commerce Clause). I address these constraints below in Part V.

75. *Id.* at 125–26 (majority opinion).

business-registration statute extracted.[76] Further, the Court held that consent alone was sufficient to allow Pennsylvania to exercise personal jurisdiction; no questions of interstate federalism could negate it.[77] As Justice Alito put it in his concurrence: "[W]e have never held that a State's assertion of jurisdiction unconstitutionally intruded on the prerogatives of another State when the defendant had consented to jurisdiction in the forum State."[78] *Mallory* gives states broad power to disrupt the boundaries of interstate federalism.

They are likely to do so. To be sure, no other state has a statute like Pennsylvania's, and some states have interpreted their business-registration statutes *not* to extract consent to general personal jurisdiction.[79] But states have long resisted the restrictions that constitutionally designed interstate federalism imposes.[80] And all states have business-registration statutes imposing conditions on registrants.[81] Under *Mallory*'s aegis, states are likely to consider amending or interpreting those conditions to use consent doctrine more aggressively to assert jurisdiction when in their interests to do so even if inconsistent with interstate federalism. Indeed, Professor Zach Clopton reported that, as of 2018, "courts in at least ten states have found general jurisdiction based on corporate-registration consent."[82] And Professor Rocky Rhodes and Professor Cassandra Robertson have urged the Uniform Law Commission—which proposed the widely adopted UCC for

76. *Id.* at 144 (plurality opinion) (characterizing the railroad's choice to register as "submit[ting] to suit in the forum State"); *id.* at 151 (Alito, J., concurring in part and concurring in the judgment) ("[B]y registering, it consented to all valid conditions imposed by state law.").

77. *Id.* at 135 (majority opinion) ("[S]uits premised on these grounds do not deny a defendant due process of law.").

78. *Id.* at 156 (Alito, J., concurring in part and concurring in the judgment); *see also id.* at 144 (plurality opinion) ("To date, our personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State.").

79. *E.g.*, Aybar v. Aybar, 177 N.E.3d 1257, 1266 (N.Y. 2021) ("We have never conflated statutory consent to service with consent to general jurisdiction, and the fact remains that, under existing New York law, a foreign corporation does not consent to general jurisdiction in this state merely by complying with the Business Corporation Law's registration provisions." (footnote omitted)); Chavez v. Bridgestone Ams. Tire Operations, LLC, 503 P.3d 332, 348 (N.M. 2021) (holding that the New Mexico business-registration statute "does not clearly, unequivocally, and unambiguously express an intent to require a foreign corporation to consent to general personal jurisdiction in New Mexico"); Figueroa v. BNSF Ry. Co., 390 P.3d 1019, 1030 (Or. 2017) ("Nothing in the text of those provisions or the comment suggests that, by requiring domestic corporations to appoint a registered agent for service of process, the corporation consented to jurisdiction.").

80. *Mallory*, 600 U.S. at 133 (plurality opinion) (recounting state resistance).

81. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1363 (2015) ("Every state has a registration statute that requires corporations doing business in the state to register with the state and appoint an agent for service of process.").

82. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 441–42 (2018); *see also* Cooper Tire & Rubber Co. v. McCall, 863 S.E.2d 81, 83, 90 (Ga. 2021) (confirming that Georgia statutes and court precedent extract consent to general personal jurisdiction from business registrants).

commercial contracts—to draft a Model Act that uses registration-consent statutes to expand personal jurisdiction in specific instances, such as for pendent personal jurisdiction, or if the plaintiff is from the forum state, or if the defendant's fortuitous contacts with the state cause injury, or the like.[83] These extensions of constitutional personal jurisdiction, under the banner of consent, seem both attractive and reasonable for experimentation.

B. Private-Agreement and Unilateral Consent

State-extracted consent arguably is limited both to the legislative whim of a particular state and to the particular condition offered—typically, the right to do business in the state. But other forms of consent are less limited. One pervasive form is private-agreement consent, in which a party consents to personal jurisdiction in a state as part of a private contract or agreement. This form is often called, perhaps too broadly, a forum-selection clause.

Here, I am concerned primarily with "inbound" forum-selection clauses that select a court for dispute and purport to extract the consent of the parties to personal jurisdiction in that selected court, even if that court would otherwise lack personal jurisdiction.[84] An example is the following agreement provided by Google's terms and conditions: "[A]ll disputes arising out of or relating to these terms . . . will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts."[85] Google, with its headquarters in California, is already subject to general personal jurisdiction there, so these terms primarily extract consent from its worldwide users to be sued *by Google* in Santa Clara.

Such a forum-selection agreement is lawful. Courts historically viewed private-agreement consent-to-jurisdiction clauses with skepticism.[86] But

83. Rhodes & Robertson, *supra* note 64, at 381. Under current law, neither the in-state residence of the plaintiff nor the in-state location of the harm is always sufficient to justify personal jurisdiction in the state. *See* Walden v. Fiore, 571 U.S. 277 (2014); Kulko v. Superior Ct., 436 U.S. 84 (1978).

84. John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65, 70–71 (2021).

85. *Google Terms of Service*, GOOGLE: PRIVACY & TERMS (May 22, 2024), https://policies.google.com/terms [https://perma.cc/6BUT-NN2X].

86. *See* Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 AM. J. COMPAR. L. 127, 128–29 (2018) (stating that forum-selection clauses historically were considered "contrary to public policy and therefore invalid"); Effron & Simowitz, *supra* note 68, at 183 ("One of the most aggressive uses of consent, the enforcement of valid forum selection clauses, did not emerge as a widespread phenomenon until the last few decades of the century."); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1014–15 (2008) (documenting hostility to forum-selection clauses until the 1970s); *e.g.*, Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (rejecting the validity of forum-selection clauses).

ever since the Supreme Court's own reinvigoration of private-contract rights starting in the 1970s,[87] state courts have routinely enforced such clauses,[88] and the Supreme Court has never found a Due Process Clause problem with them.[89] Today, "courts now routinely enforce a diverse array of contractual adjudication provisions—even ones found in boilerplate consumer contracts that lack options for individual negotiation."[90]

Some courts have even enforced forum-selection clauses against *nonsignatories* to a contract when those nonsignatories are sufficiently related and foreseeable.[91] Nonsignatories can include individuals, such as spouses of signatories or high-ranking officers of a corporate signatory, as well as related corporate entities, such as subsidiaries or parent companies.[92]

A variation on the forum-selection clause is a "floating" form-selection clause, in which "the floating clause does not name a specific jurisdiction" but instead "ties the choice of forum to a mutable fact that can change after the contract is signed."[93] Businesses might prefer such clauses to ensure that, whenever the dispute arises, the forum selected will be the business's home state, even if that home state has changed over time.[94] For example, the clause might read: "For any dispute between the parties, the parties

87. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12–13 (1972) (urging validation of forum-selection clauses in private contracts); *see also* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 56 (2013) (enforcing a forum-selection clause on venue transfer); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (enforcing a forum-selection clause against an unsophisticated consumer). Although *The Bremen* and *Carnival Cruise Lines* were really not jurisdictional-consent cases—because the selected forum already had jurisdiction, *see* Effron & Simowitz, *supra* note 68, at 206–07—they heralded a new acceptance of the validity of forum-selection clauses, *see* Marcus, *supra* note 86, at 1021–27 (recounting these cases' effect on contractual consent); Linda S. Mullenix, *Another Easy Case, Some More Bad Law:* Carnival Cruise Lines *and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 367–70 (1992) (arguing that these cases ushered in an age of "contractual personal jurisdiction").

88. Coyle & Richardson, *supra* note 84, at 71 (finding an enforcement rate of around eighty percent).

89. *Id.* ("We show that the Supreme Court has determined that the Due Process Clause of the Fourteenth Amendment imposes virtually no restrictions on the ability of state courts to enforce such clauses."). Parties can only modify the law to the extent the law allows them to, and, for personal jurisdiction, the law allows them to expand, but not oust, it. *See* Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 46–49 (2014).

90. Rhodes & Robertson, *supra* note 64, at 425.

91. *See* John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187, 212 (2021) ("Over the past decade, the courts have increasingly relied on the closely-related-and-foreseeable test to conclude that the constitutional requirements of due process were satisfied in cases where a signatory plaintiff invoked a clause against a non-signatory defendant.").

92. *See id.* at 212–13, 223.

93. John F. Coyle & Robin J. Effron, *The Puzzle of Floating Forum Selection Clauses*, 56 N.Y.U. J. INT'L L. & POL. 183, 183 (2024).

94. *Id.* at 184–85.

consent to personal jurisdiction where Party X has its headquarters office."[95] If Party X is the defendant, such consent is irrelevant because Party X already would be subject to personal jurisdiction in the headquarters state at the time of the lawsuit, but if Party X is the plaintiff, then the other party has consented to personal jurisdiction in a to-be-named state that it may have no contacts with. According to come commentators, courts "routinely enforce these clauses."[96]

In addition to bilateral private agreement, parties can always unilaterally consent to the personal jurisdiction of a court that otherwise has no business adjudicating the dispute. Voluntary submission has been a basis for personal jurisdiction since before *Pennoyer*,[97] and the Federal Rules of Civil Procedure provide that parties waive the defense of lack of personal jurisdiction by not asserting it in a procedurally proper manner.[98] Still other courts have held that parties can waive or forfeit their right to challenge personal jurisdiction through post-motion litigation conduct that is contrary to the invocation of the defense.[99] The rub of all this is that parties "have a wide world of express consent at their fingertips."[100]

C. Effect of Consent on Interstate Federalism

These many vehicles for consent to personal jurisdiction—whether extracted by the state, or bilaterally arranged by the parties, or unilaterally given by one party—can wreak havoc on personal jurisdiction's vision of interstate federalism. The Massachusetts Supreme Judicial Court once declared in 1856, "The rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law. . . . [T]o allow them to be changed by the agreement of parties would disturb the symmetry of the law,

95. *Cf.* Brock v. Baskin-Robbins USA Co., 113 F. Supp. 2d 1078, 1082 (E.D. Tex. 2000) ("Any dispute arising under or in connection with the Agreement and any claim affecting its validity, construction, effect, performance, or termination . . . shall be resolved exclusively by the federal or state courts in the judicial district in which Baskin-Robbins has its principal place of business . . . .").

96. Coyle & Effron, *supra* note 93, at 185. Floating forum-selection clauses that attenuate the predictability of the forum—such as a clause that extracts consent to personal jurisdiction in the forum that one party unilaterally can select at the time of suit—have received more skepticism from courts. *Id.* at 187–88.

97. *See* Dodson, *supra* note 25, at 339–41.

98. FED. R. CIV. P. 12(h); *cf.* York v. Texas, 137 U.S. 15, 19–21 (1890) (upholding personal jurisdiction when a defendant's attempt to challenge personal jurisdiction was improper).

99. *See, e.g.*, Boulger v. Woods, 917 F.3d 471, 477 (6th Cir. 2019); Dodson, *supra* note 23, at 355–56 (arguing that the failure to appeal the denial of a proper Rule 12(b)(2) motion should be deemed a forfeiture of the defense on remand).

100. Effron & Simowitz, *supra* note 68, at 183.

and interfere with such convenience."[101] But today, courts routinely allow party consent to alter structurally optimal geographic allocations,[102] and that consent is widespread.[103] Indeed, enabling a state to have personal jurisdiction when it otherwise shouldn't is the very aim of many private contracts.[104]

The result is to put interstate federalism in some disarray. As the Delaware Supreme Court explained:

> [I]n our federal republic, exacting such a disproportionate toll on commerce [through registration-consent statutes] is itself constitutionally problematic. Such an exercise of overreaching by Delaware will also encourage other states to do the same. . . . As the home of a majority of the United States' largest corporations, Delaware has a strong interest in avoiding overreaching in this sensitive area. If all of our sister states were to exercise general jurisdiction over our many corporate citizens, who often as a practical matter must operate in all fifty states and worldwide to compete, that would be inefficient and reduce legal certainty for businesses. Human experience shows that "grasping" behavior by one, can lead to grasping behavior by everyone, to the collective detriment of the common good.[105]

The Delaware Supreme Court's fears of fifty-state concerted action to subject all businesses to nationwide personal jurisdiction are not overblown—only recently has the Supreme Court jettisoned the "doing business" basis for general jurisdiction that subjected many businesses to nationwide personal jurisdiction.[106] Consent-based jurisdiction has not yet reached that scope, but even one state's use of registration consent can

101. Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174, 184 (1856).

102. To be fair, some applications of consent may enhance interstate federalism.

103. *See* Effron & Simowitz, *supra* note 68, at 181 ("As the Supreme Court has narrowed both general and specific personal jurisdiction, litigants and legislatures have turned to consent as a basis of jurisdiction that can take up the slack."). Some commentators have defended consent doctrines as aiding the selection of convenient or fair forums. *See, e.g.*, Rhodes & Robertson, *supra* note 64, at 423 ("Jurisdictional consent can thus play a key role in facilitating a remedy in situations involving eminently fair and reasonable jurisdictional assertions when neither general nor specific jurisdiction, as reshaped by the Roberts Court, currently exists."). Perhaps so, *see, e.g.*, Coyle & Effron, *supra* note 93, at 188 n.16 (reporting that some foreign insurance companies agree to personal jurisdiction wherever their customer elects to sue them as a way to attract business), but those party-centric concerns are often what exacerbate consent's impact on interstate federalism.

104. *See* Coyle & Richardson, *supra* note 84, at 99–100 (reporting on the "long and sordid history in the United States of companies suing their customers in jurisdictions other than the place of the customer's residence," which has been enabled by contractual consent to personal jurisdiction).

105. Genuine Parts Co. v. Cepec, 137 A.3d 123, 142–43 (Del. 2016).

106. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919–20 (2011) (restricting general jurisdiction to where the defendant is "essentially at home").

offend interstate federalism. Consider the facts of *Mallory*: the railroad was based in Virginia, the plaintiff was based in Virginia, and the plaintiff alleged that he was exposed to the railroad's asbestos in Virginia.[107] And the railroad was likely served in Virginia.[108] Under these facts, Virginia is the most natural forum for the dispute, and Pennsylvania's assertion of jurisdiction, having virtually no interest in doing so, would surely offend Virginia's prerogatives under principles of interstate federalism.[109] Yet the Court allowed Pennsylvania, through facile use of consent, to reach into Virginia's territory to assert jurisdiction over one of Virginia's residents to adjudicate a dispute brought by a Virginia resident involving conduct in Virginia.[110] If that isn't the clearest target of interstate federalism's aim, it is hard to see what would be. Yet in *Mallory*, as in private-agreement and unilateral-consent cases, consent trumps interstate federalism.[111]

III. CONSTRICTIONS OF STATE POWER

States can subvert interstate federalism not only by using consent to expand the scope of personal jurisdiction but also by using state law to constrict the scope of personal jurisdiction in ways that create gaps in coverage. Although interstate federalism is often framed as preventing encroachment into the prerogatives of other states, the corollary proposition assumes that a state will, in fact, exercise personal jurisdiction when interstate federalism allocates it a case. As *Daimler* explains, general jurisdiction's focus on where the defendant is "at home" ensures "at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."[112] But states can negate this assurance by using state law to narrow general jurisdiction to create gaps in personal-jurisdiction coverage. And, paradoxically, personal jurisdiction prohibits neighboring states from expanding their reaches beyond their own borders to fill the gaps, even though a neighboring state in that context would no longer be encroaching on any prerogatives that the other state wishes to preserve. This Part first describes how states can constrict personal jurisdiction and then discusses the implications of those constrictions.

107. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 125 (2023).

108. *See* Dodson, *supra* note 23, at 350 n.115.

109. *Mallory*, 600 U.S. at 169–71 (Barrett, J., dissenting) (pointing out these facts and making this point).

110. *Id.* at 135 (majority opinion).

111. *See id.* at 144 (plurality opinion) ("To date, our personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State.").

112. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014).

A. State-Law Constrictions

States have often restricted the exercise of their courts' specific jurisdiction.[113] But specific jurisdiction can be thought of as a case-driven exception to the usual allocation of cases established by interstate federalism.[114] Restrictions of that exception promote rather than subvert interstate federalism. By contrast, constrictions of general personal jurisdiction are direct disruptions of the interstate-federalism ideal. Accordingly, I focus here on general jurisdiction.

The separate sovereignty of the states authorizes them to give their courts less general-jurisdiction authorization than what the Constitution would permit. For example, in *Burnham v. Superior Court*,[115] a tag-jurisdiction case, Justice Scalia's plurality opinion states: "Nothing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction."[116] And in *Perkins v. Benguet Consolidated Mining Co.*,[117] the Supreme Court, after finding that Ohio could exercise general personal jurisdiction over a Philippines company that had temporarily relocated its operations to Ohio, remanded the case back to the Ohio courts to allow those courts, in the first instance, to determine whether to exercise general jurisdiction under state law.[118] The Court repeatedly stated that the Due Process Clause neither prohibited *nor required* the exercise of general jurisdiction in the case,[119] and it explicitly held: "The

113. Specific jurisdiction gaps existed prominently in the immediate aftermath of *International Shoe*, when most states did not have long-arm statutes that would enable them to fully exercise the new scope of personal jurisdiction allowed under the Due Process Clause. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 493 (2004) ("For nearly a decade after *International Shoe*, the new jurisdictional authority to reach outside the boundaries of the states lay largely dormant, in part because, to extend authority, state legislatures had to create a long-arm statute."). Illinois was the first to adopt a comprehensive statute, in 1955, and it was an enumerated statute that left gaps. *Id.* at 494. Today, several states grant their courts less specific personal jurisdiction than the Constitution grants. *E.g.*, Fraser v. Smith, 594 F.3d 842, 848 (11th Cir. 2010) (stating that Florida's long-arm statute has stricter requirements for finding specific personal jurisdiction than federal law does); *see also* Citizens State Bank v. Winters Gov't Secs. Corp., 361 So. 2d 760, 762 (Fla. Dist. Ct. App. 1978) (stating that the statute "requires more activities or contacts to sustain service of process than are . . . required by decisions of the Supreme Court of the United States").

114. *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1230 (2018) ("For another state to assert personal jurisdiction over a domestic defendant is an intrusion on [the] authority of the home state and might be an inappropriate intrusion unless justified by the kind of contacts with the second state that would give rise to specific jurisdiction.").

115. 495 U.S. 604 (1990).

116. *Id.* at 627 (plurality opinion).

117. 342 U.S. 437 (1952).

118. *Id.* at 448.

119. *See id.* at 446 ("Using the tests mentioned above we find no requirements of federal due process that either prohibits Ohio from opening its courts to the cause of action here presented or compels

suggestion that federal due process compels the State to open its courts to such a case has no substance."[120] In other words, a state can exercise less general jurisdiction than what the Due Process Clause otherwise permits.[121]

In practice, some states authorize personal jurisdiction to the full extent allowed under the U.S. Constitution.[122] Many others appear to have gaps in coverage.[123] Potentially, the most extreme gaps are for those states that do not appear to statutorily authorize *any* form of general jurisdiction but instead statutorily authorize personal jurisdiction only based on case-linked in-state activities.[124] Absent some other general-jurisdiction authorization, these states' courts lack explicit statutory authority to exercise general personal jurisdiction over individuals domiciled in the state or over entities headquartered in or organized under the laws of the state.[125] Some of these states have construed their statutes to provide such authority implicitly or

Ohio to do so."); *id.* at 448 ("[W]e conclude that, under the circumstances above recited, it would not violate federal due process for Ohio either to take or decline jurisdiction of the corporation in this proceeding.").

120. *Id.* at 440.

121. *See, e.g.*, Thomason v. Chem. Bank, 661 A.2d 595, 602 (Conn. 1995) (stating that "the legislature did not intend to authorize Connecticut courts to exercise the full measure of 'general' jurisdiction that would have been constitutionally permissible"), *abrogated by* Adams v. Aircraft Spruce & Specialty Co., 284 A.3d 600, 625 (Conn. 2022). Perhaps the Constitution forbids certain extreme levels of restriction—such as if Delaware refused to allow its courts to exercise general personal jurisdiction over Delaware companies. I explore that possibility below. *See infra* Section V.A.1.

122. *E.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2024) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."). Rhode Island was the first state, in 1960, to enact a long-arm statute keyed to the constitutional scope of personal jurisdiction. *See* Act of May 6, 1960, ch. 124, 1960 R.I. Pub. Laws 453, 453–54 (authorizing jurisdiction over defendants "that shall have the necessary minimum contacts with the state of Rhode Island"), *codified as amended at* R.I. GEN. LAWS § 9-5-33 (2024). As of 2020, at least eleven states' statutes expressly extended to the scope of the Constitution. *See* Zachary D. Clopton, *Long Arm "Statutes*,*"* 23 GREEN BAG 2D 89, 99–102 (2020) (Alabama, Arizona, Arkansas, California, Nevada, New Jersey, Oklahoma, Rhode Island, Texas, Vermont, and Wyoming). It appears that others have recently added full-scope authorization language. *E.g.*, 735 ILL. COMP. STAT. 5/2-209(c) (2024) ("A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States."); IND. R. TRIAL PROC. 4.4(A) ("In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States."). In certain others, the state supreme courts have interpreted seemingly narrower language to nevertheless authorize the full constitutional scope. *E.g.*, Pinner v. Pinner, 225 A.3d 433, 443 (Md. 2020). *See generally* McFarland, *supra* note 113, at 498 (describing this tendency).

123. Clopton, *supra* note 122, at 92 ("[U]nless the long arm extends all the way to the constitutional limit, it has the effect of restricting a state's personal jurisdiction relative to what the Constitution would permit.").

124. *See id.* at 99–102 (identifying, as of 2020, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, and West Virginia). I refer to state "statutes" even though codifications of jurisdictional authorization take different forms. *Id.* at 90.

125. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (identifying these "paradigm" scenarios of general jurisdiction); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (same).

have found the authority elsewhere.[126] But the potential for such a gap would be alarming to the assumption of interstate federalism that states will exercise the general jurisdiction allowed by the Constitution.

Even those remaining states that authorize some form of general jurisdiction—either by referring to traditional bases like domicile, presence, or formation, or by referring to substantial in-state activity, such as "continuous and systematic contacts"[127]—likely have gaps. States authorizing general jurisdiction based only on traditional bases[128] likely lack authorization for exercising general jurisdiction in the "exceptional" case of *Perkins*.[129] In 2012, for example, the Sixth Circuit concluded that Ohio's statute did not authorize general jurisdiction over nonresidents, even in circumstances authorized by the Fourteenth Amendment.[130] Ohio then had to amend its long-arm statute to provide for personal jurisdiction "on any basis consistent with the Ohio Constitution and the United States Constitution."[131] Other states are likely to have similar *Perkins*-style gaps in general jurisdiction.

And if the constitutional test for general jurisdiction over unincorporated entities parrots the "members" test from diversity jurisdiction[132] rather than

126. *E.g.*, Safari Outfitters, Inc. v. Superior Ct., 448 P.2d 783, 784 (Colo. 1968) (construing Colorado's long-arm statute to extend to the full reach of the Due Process Clause); Cook Assocs. v. Lexington United Corp., 429 N.E.2d 847, 851–52 (Ill. 1981) (following a state common-law rule that "doing business" in Illinois amounts to implied consent to personal jurisdiction in Illinois); Prouse, Dash & Crouch, L.L.P. v. DiMarco, 876 N.E.2d 1226, 1228 (Ohio 2007) ("It is axiomatic that Ohio courts can exercise jurisdiction over a person who is a resident of Ohio.").

127. *See* Clopton, *supra* note 122, at 99 (identifying statutes with this language).

128. *E.g.*, MASS. GEN. LAWS ch. 223A, § 2 (2024) (providing for general jurisdiction "over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in" the state); N.D. R. CIV. P. 4(b)(1) ("A court of this state may exercise personal jurisdiction over a person found within, domiciled in, organized under the laws of, or maintaining a principal place of business in, this state as to any claim for relief.").

129. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438–48 (1952); *see* BNSF Ry. Co. v. Tyrrell, 581 U.S. 402, 413 (2017) (characterizing *Perkins* as "exemplif[ying]" an exceptional case in which a "corporate defendant's operations . . . [are] 'so substantial and of such a nature as to render the corporation at home in that State'" (quoting *Daimler*, 571 U.S. at 139)).

130. *See* Conn v. Zakharov, 667 F.3d 705, 717 n.6 (6th Cir. 2012) ("Ohio law does not appear to recognize general jurisdiction over non-resident defendants."), *superseded by statute*, Act effective Dec. 16, 2020, 2020 Ohio H.B. 272 (codified at OHIO REV. CODE ANN. § 2307.382 (West 2024)).

131. Act effective Dec. 16, 2020, 2020 Ohio H.B. 272 (codified at OHIO REV. CODE § 2307.382 (West 2024)).

132. *See* Americold Realty Tr. v. ConAgra Foods, Inc., 577 U.S. 378, 382–84 (2016) (setting a "members" test for diversity citizenship of unincorporated entities under 28 U.S.C. § 1332(a)); Carden v. Arkoma Assocs., 494 U.S. 185, 187–90 (1990) (same). *But cf.* 28 U.S.C. § 1332(d)(10) (providing that unincorporated businesses sued in certain class actions are citizens, for statutory diversity-jurisdiction purposes, in their state of organization and in the state of their principal place of business).

following an analogous test for corporations,[133] state statutes providing for general jurisdiction based on the corporation test or on substantial activity will not capture unincorporated business entities lacking in-state members even when the entity is organized under the laws of the state. Michigan, for example, provides for tag jurisdiction over individuals, general jurisdiction over individuals domiciled in Michigan, general jurisdiction over all entities incorporated or formed under the laws of Michigan, and general jurisdiction over all entities carrying on continuous and systematic business within the state.[134] This authorization is broad enough to cover all the traditional bases and all the "at home" scenarios for general jurisdiction except a members-test basis for unincorporated organizations.

Perhaps the existing gaps are, in practice, fairly narrow. But, in theory, states could widen them substantially. And states may see good reasons to do so. After all, states are interested in protecting their residents' and businesses' assets from flowing out of the state through civil lawsuits brought by out-of-state plaintiffs,[135] and they are interested in protecting their taxpayers from funding public courts for the resolution of suits brought against their residents and businesses that otherwise are unrelated to significant state interests. The Supreme Court has recognized that states might legitimately wish to curtail their courts' personal jurisdiction,[136] and state judges have expressed support for a narrowed jurisdictional scope.[137]

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133. The Supreme Court has not identified the "paradigm" circumstances for when the Due Process Clause authorizes a state to exercise general jurisdiction over an unincorporated business entity. *See* Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (addressing only individuals and corporations); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (same). Courts are split on whether those circumstances should mirror the corporate test or incorporate the "members" test from diversity jurisdiction. *See* Susan Gilles & Angela Upchurch, *Finding a "Home" for Unincorporated Entities Post*-Daimler AG v. Bauman, 20 NEV. L.J. 693, 695, 713 (2020).

134. MICH. COMP. LAWS § 600.701 (2024) (providing for general personal jurisdiction over individuals present or domiciled at the time process is served); *id.* § 600.711 (providing for general personal jurisdiction over corporations incorporated in the state or "carrying on of a continuous and systematic part of its general business within the state"); *id.* § 600.721 (providing for general personal jurisdiction over unincorporated entities formed under the laws of the state or "carrying on of a continuous and systematic part of its general business within the state"); *id.* § 600.731 (same).

135. This interest is the traditional rationale for federal diversity jurisdiction. *See* Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 270 (2019) (recounting this tradition).

136. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 140 n.7 (2023) ("Surely, too, some States may see strong policy reasons for proceeding differently than Pennsylvania has.").

137. *E.g.*, Genuine Parts Co. v. Cepec, 137 A.3d 123, 127 (Del. 2016) ("In our republic, it is critical to the efficient conduct of business, and therefore to job- and wealth-creation, that individual states not exact unreasonable tolls simply for the right to do business."); State *ex rel.* Am. Cent. Life Ins. Co. v. Landwehr, 300 S.W. 294, 297 (Mo. 1927) (refusing to construe Missouri's registration-consent statute as *Pennsylvania Fire* did because of "the legislative policy in this state"), *overruled by* State *ex rel.* Phoenix Mut. Life Ins. Co. v. Harris, 121 S.W.2d 141, 147 (Mo. 1938); Cooper Tire & Rubber Co. v. McCall, 863 S.E.2d 81, 92 (Ga. 2021) (Bethel, J., concurring) (noting that a broad registration-consent statute "creates a disincentive for foreign corporations" to do business in the state and would conflict with Georgia's claim to be "business-friendly").

In theory, the competition for business and high-wealth individuals could incentivize ever-smaller grants of general jurisdiction, spurring a race to the bottom and creating wide jurisdictional gaps in domestic-jurisdiction coverage.[138]

B. The Effect of Constrictions on Interstate Federalism

The effect of unilateral state constrictions of personal jurisdiction is to give states wide latitude to create gaps in personal-jurisdiction coverage. Although interstate federalism is often framed as preventing one state's encroachment on or infringement of other states' sovereign prerogatives, the assumption is that the states *will* exercise those sovereign prerogatives. The Supreme Court's seminal case on general jurisdiction, *Daimler AG v. Bauman*, contemplates that general jurisdiction "afford[s] plaintiffs recourse to at least one clear and certain forum in which a . . . defendant may be sued on any and all claims."[139] In *Bristol-Myers Squibb Co. v. Superior Court*, the Supreme Court assumed that plaintiffs from different states could join together without personal-jurisdiction problems by suing in a domestic defendant's home court.[140] And in *J. McIntyre Machinery, Ltd. v. Nicastro*, the plurality stated: "If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction" such that "if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance."[141] State constriction of general jurisdiction flies in the face of this core assumption of interstate federalism.

Worse, personal jurisdiction does not allow other states to fill in the gap by moving in to take over jurisdictional authority abdicated by other states. If New Jersey restricts its general-jurisdiction reach to residents who also work in New Jersey, personal jurisdiction would not suddenly allow New York to assume general adjudicatory dominion over New Jersey residents who work in New York.[142]

Scholars have noted that constitutional restrictions on general jurisdiction can leave no state available to hear a claim against a foreign

138. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 44–45 (2018) ("[N]othing prevents a state from limiting the scope of its general jurisdiction over its residents, further insulating them from litigation and generating a race to the bottom among states seeking to attract businesses through promises of limited personal jurisdiction.").

139. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014).

140. Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 268 (2017) ("Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS.").

141. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality opinion).

142. *Cf. Daimler*, 571 U.S. at 137 (limiting general jurisdiction to "at home" states).

defendant.[143] But state-law restrictions on general jurisdiction can leave no state available to hear a claim against a *domestic* defendant. Both expansions and contractions of personal jurisdiction thus disrupt the constitutional design of personal jurisdiction to set the boundaries of interstate federalism.

IV. IMPLICATIONS FOR VERTICAL FEDERALISM

Interstate federalism is horizontal, in that it addresses the relationship between states. The subversion of that horizontal-federalism ideal of personal jurisdiction also affects vertical federalism—the relationship between the states and the national government. State manipulation of personal jurisdiction's horizontal scope undermines Rule 4(k)'s vertical-federalism ideal of aligning federal-court personal jurisdiction with state-court personal jurisdiction.[144] Conflicts between state and federal personal jurisdiction arise primarily when states constrict their personal-jurisdiction reach.

A. The Vertical Federalism of Personal Jurisdiction

Federal courts today exercise personal jurisdiction at a scope normally pegged to state-court personal jurisdiction. Such a constraint is not imposed by the Constitution, which authorizes at least nationwide jurisdiction for the federal courts.[145] The constraint instead is imposed by Rule 4(k)(1) of the Federal Rules of Civil Procedure, which provides: "Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[146] This provision generally restricts federal-court personal jurisdiction to the same scope that state courts exercise.

In fact, the Federal Rules have long used territorial restrictions on service to mirror state-court personal jurisdiction. When the Federal Rules were adopted in 1938, Rule 4 provided for service "within the territorial limits of the state in which the district court is held" unless Congress authorized a

143. *See* Dodge & Dodson, *supra* note 114, at 1220.

144. FED. R. CIV. P. 4(k)(1).

145. *See* Fuld v. Palestine Liberation Org., 145 S. Ct. 2090, 2108–10 (2025). For a broader argument, see generally Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703 (2020) (arguing that the Fifth Amendment imposes virtually no geographic limits on federal-court personal jurisdiction).

146. FED. R. CIV. P. 4(k)(1).

greater scope.[147] After *Milliken v. Meyer* and *International Shoe Co. v. Washington* construed the Due Process Clause to allow state-court personal jurisdiction in certain circumstances even when service was made outside the state,[148] courts began interpreting Rule 4 to authorize out-of-state service when authorized by state law.[149] The 1963 amendments codified this practice in Rule 4,[150] based on the rulemakers' desire to keep federal personal jurisdiction generally parallel with state personal jurisdiction.[151]

That desire stemmed from deeply rooted notions of vertical federalism. Since 1789, Congress has directed federal courts to apply state law in certain circumstances,[152] and some scholars have argued that that directive applies to state laws regulating personal jurisdiction.[153] Even absent congressional directive, some courts had concluded that federal common law should incorporate state personal-jurisdiction limits on federal courts hearing state-law claims out of respect for state policy and to encourage intrastate uniformity.[154]

This vertical parallelism seemed fine for cases against domestic defendants, but the state-court-based limits on federal service meant that some foreign defendants could escape federal-court personal jurisdiction even when violating federal law within the United States. In *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*,[155] a suit against a foreign defendant for violations of federal law within the United States, the

147. FED. R. CIV. P. 4(f) (1938).

148. Milliken v. Meyer, 311 U.S. 457, 462 (1940) (in-state citizens served out of state); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) (out-of-state corporations served out of state but having sufficient case-linked contacts with the forum state).

149. *See* Dodson, *supra* note 25, at 16 (recounting that history); McFarland, *supra* note 113, at 492–97 (citing examples).

150. FED. R. CIV. P. 4(e)–(f) (1963) (authorizing service "beyond the territorial limits of that state" when service was "made under the circumstances and in the manner prescribed" by state law).

151. *See* Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 739 (1988) (making this observation).

152. *See* Judiciary Act of 1789, § 34, ch. 20, 1 Stat. 73 (current version at 28 U.S.C. § 1652).

153. *E.g.*, Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565, 568 (2019) (arguing that the Rules of Decision Act directs application of state personal-jurisdiction law in federal court for all claims absent congressional override); *see also* Leslie M. Kelleher, *Amenability to Jurisdiction as a "Substantive Right": The Invalidity of Rule 4(k) Under the Rules Enabling Act*, 75 IND. L.J. 1191, 1227 (2000) (arguing that the Rules of Decision Act directs federal courts to apply state personal-jurisdiction law to state-law claims). The view is not universally shared. *See* Sachs, *supra* note 145, at 1721 (disagreeing that the Rules of Decision Act applies to personal jurisdiction); A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 988 (2019) (same).

154. *E.g.*, Arrowsmith v. United Press Int'l, 320 F.2d 219, 227 (2d Cir. 1963) ("State policy is involved . . . , and in the absence of an overriding federal interest intimated by Congress or its delegate, should be equally respected."). One commentator has argued that policies of predictability and stability support federal-court incorporation of state personal-jurisdiction limits. *See* Jacobs, *supra* note 22, at 1625–28.

155. 484 U.S. 97 (1987).

Supreme Court held that the federal court lacked personal jurisdiction because the state long-arm statute did not reach the defendant under the circumstances.[156] The Court invited an amendment to Rule 4 to rectify that situation,[157] and the rulemakers obliged by adding Rule 4(k)(2), which provides that, "[f]or a claim that arises under federal law, serving a summons . . . establishes personal jurisdiction over a defendant if . . . the defendant is not subject to jurisdiction in any state's courts."[158]

Rule 4 thus generally pegs federal-court personal jurisdiction at the same scope as state-court personal jurisdiction, except for federal-law claims in which no state court can exercise personal jurisdiction over the defendant.[159] For the most part, then, the vertical-federalism vision mimics the interstate-federalism vision of personal jurisdiction. But the consent-based expansions and state-law restrictions of state-court personal jurisdiction complicate the matter considerably.

B. State Personal Jurisdiction's Effects on Vertical Federalism

State expansions of personal jurisdiction via consent can create divergence between state and federal personal jurisdiction over foreign defendants. For example, if a foreign business registered to do business in Pennsylvania but in fact conducted no business in the United States and caused harm in Mexico, an injured party could potentially sue the business in Pennsylvania state court on grounds that the business consented to Pennsylvania courts' personal jurisdiction under *Mallory*. So Pennsylvania state courts would have personal jurisdiction, notwithstanding any limits of the Fourteenth Amendment, because of consent. But although Rule 4(k)(1) would authorize a federal court in Pennsylvania to exercise personal jurisdiction in the same lawsuit, the *Fifth* Amendment arguably would not, both because the defendant lacks sufficient contacts with the United States and because the Pennsylvania statutory regime extracts only consent to *state*-court personal jurisdiction not federal-court personal jurisdiction.[160]

Consent-based expansions do not create any vertical divergence for domestic defendants. The Fifth Amendment likely authorizes every federal

156. *Id.* at 108.

157. *Id.* at 111.

158. FED. R. CIV. P. 4(k)(2); *see also id.* advisory committee's note to 1993 amendment (stating that the new rule "responds to the suggestion of the Supreme Court").

159. Congress also can statutorily provide for nationwide personal jurisdiction. *See* Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1474 n.67 (2019) (collecting examples).

160. *See* Dodson, *supra* note 23, at 363–66 (discussing some of these complexities of consent in the context of state and federal laws on personal jurisdiction).

court to exercise personal jurisdiction over every domestic defendant for any lawsuit.[161] As a result, only the limits of Rule 4(k) constrain a federal court's personal jurisdiction over a domestic defendant. Thus, for domestic defendants, Rule 4(k) effectively mirrors state-court consent.

But state constrictions of personal jurisdiction can disrupt vertical federalism for domestic defendants. As discussed above, Rule 4(k)(2) permits a federal court to exercise nationwide personal jurisdiction in a federal-question case when no state court would have personal jurisdiction.[162] That provision is primarily aimed at foreign defendants, such as the defendant sued in *Omni Capital.*[163] After all, the presumption of interstate federalism is that at least one state will always have general jurisdiction over domestic defendants.[164] But if states significantly constrict their general jurisdiction, then even a domestic defendant might not be subject to any one state's personal jurisdiction.[165] If the claim arises under federal law, Rule 4(k)(2) kicks in to allow any federal court to exercise personal jurisdiction over the domestic defendant. That expansive authorization for federal-court personal jurisdiction—made possible by the constriction of state-court personal jurisdiction—seriously disrupts Rule 4(k)'s design of paralleling state-court and federal-court jurisdiction for domestic defendants.

To illustrate, say New York, to attract businesses, grants its courts general jurisdiction over New York corporations only when the plaintiff is also a New York business or domiciliary. If a New Jersey resident is injured by a New York corporation (that also has its headquarters in New York) based on conduct that would not give rise to specific personal jurisdiction in any state, it is likely that no state will have personal jurisdiction over the New York corporation for that action.[166] If the claim arises under federal law, though, Rule 4(k)(2) kicks in to allow a New York federal court to exercise personal jurisdiction over the New York corporation. Thus, New York federal courts could exercise personal jurisdiction at a broader scope than New York state courts, even for New York defendants. Further, because *no* state courts could exercise personal jurisdiction, *any* federal court could exercise personal jurisdiction over the New York defendant,

161. *See* Sachs, *supra* note 58, at 1319–20 (making this argument).

162. FED. R. CIV. P. 4(k)(2).

163. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987). For discussion, see *supra* text accompanying notes 155–161; *see also* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality opinion) ("Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.").

164. *See supra* text accompanying notes 139–141.

165. *See supra* Part III.

166. These hypothetical facts are similar to the facts of *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, except that the defendant is a New York company rather than a foreign company.

even federal courts outside New York. A Hawaii federal court could exercise personal jurisdiction over the New York defendant—all because New York state courts could not! Such a scenario makes a mockery of the longstanding vertical-federalism design of personal jurisdiction that federal-court personal jurisdiction typically mirrors state-court personal jurisdiction.[167]

The rub is that the more that states restrict their general jurisdiction to create gaps, the more that federal courts will end up with nationwide personal jurisdiction under Rule 4(k)(2), and the more vertically disuniform federal-court personal jurisdiction will be from state-court personal jurisdiction. State power over interstate federalism, then, can also wreak havoc with vertical federalism.

V. PERSONAL JURISDICTION WITHOUT INTERSTATE FEDERALISM

Because state control over personal jurisdiction makes a hash of federalism goals, whatever interstate-federalism component of personal jurisdiction still exists should be discarded.[168] This Part imagines what a federalism-free doctrine of personal jurisdiction might look like. It projects several benefits, including doctrinal coherence, state experimentation and cooperation, and party autonomy in a marketplace of forums.

A. Doctrinal Coherence

Relieving personal jurisdiction from the responsibility of policing interstate federalism—which it does not do well—will both clarify personal jurisdiction and allow space for more appropriate doctrines to regulate interstate federalism.

1. Clarifying Personal Jurisdiction

Removing interstate federalism from personal jurisdiction will streamline, rather than disrupt, jurisdictional doctrine. Removal refocuses the debate about personal jurisdiction's theoretical basis, and it changes no prior precedent.

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167. To be clear, this scenario is only ludicrous if viewed through a federalism lens. Setting aside interstate federalism, the scenario is perfectly sensible on access-to-justice grounds. *Some* court should be open to hear such federal-law claims, and if the state courts are not, then federal courts should be. *See* Spencer, *supra* note 153, at 986–87 (arguing that federal courts should be able to hear cases that fall through the cracks of state-court personal jurisdiction). And once in federal court, the case can be transferred to the location most convenient for the parties and witnesses. *See* 28 U.S.C. § 1404(a).

168. For the argument that the interstate-federalism component of personal jurisdiction should be dropped for reasons of incompatibility with due process, see Anderson, *supra* note 51, at 43–45.

As discussed above, the primary debate about the theoretical basis of personal jurisdiction is between submission to state sovereignty and fairness and reasonableness.[169] Neither of those justifications for the exercise of personal jurisdiction has anything to do with intrusion upon the prerogatives of another state. Rather, both theories speak to the relationship between the defendant and the forum state. For general jurisdiction, the strong relationship between the defendant and the forum suggests both that the forum's exercise of personal jurisdiction over the defendant is always fair,[170] and that the defendant has, by creating that strong relationship in the first place, submitted to the forum state's personal jurisdiction.[171] For specific jurisdiction, the relationship between the defendant and the state is supplemented by case-linked elements that help cement the forum state as either a fair forum[172] or a forum to which the defendant has submitted for purposes of the specific case.[173] Judges and commentators continue to disagree about whether fairness or submission should carry the day when they point in different directions,[174] but who prevails is independent of considerations of interstate federalism. Removing interstate federalism will refocus the debate on which principles justify the exercise of state power.

That refocusing does not require overruling any of the four post-*International Shoe* cases invoking interstate federalism. *Hanson*'s statement that personal jurisdiction is "more than a guarantee of immunity from inconvenient or distant litigation" but instead is "a consequence of territorial limitations on the power of the respective States"[175] does not necessarily mean that one state's prerogatives curtail other state's exercise of personal jurisdiction. Rather, the statement merely rejects the exercise of personal jurisdiction based solely on a lack of inconvenience or burden and instead demands that personal jurisdiction be based on some contacts linking the defendant to the forum state. *Hanson* makes that clear by following that statement with a finding that the defendant had no such contacts with the

169. *See supra* Section I.C.

170. *See* Daimler AG v. Bauman, 571 U.S. 117, 139 n.20 (2014) (stating that when a defendant is "at home" in the forum state, any further reasonableness check would be "superfluous").

171. *See Nicastro*, 564 U.S. at 880–81 (plurality opinion) (describing consent, tag jurisdiction, and general jurisdiction as "general submission to a State's powers").

172. *See id.* at 898, 903 (Ginsburg, J., dissenting) (arguing that the defendant's purposeful targeting of the United States makes suit in the state of injury "entirely appropriate" under the values of "reason and fairness").

173. *See id.* at 881 (plurality opinion) (describing specific jurisdiction as "submission through contact with and activity directed at a sovereign").

174. *Compare id.* at 886 (finding no submission), *with id.* at 903–04 (Ginsburg, J., dissenting) (finding fairness and reasonableness).

175. Hanson v. Denckla, 357 U.S. 235, 251 (1958).

forum state.[176] State borders matter because some purposeful conduct by a domestic defendant *with the forum state* is essential to both theories of fairness and submission.[177]

World-Wide requires more explanation. There, the Court stated that personal jurisdiction "perform[s] 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 states as coequal sovereigns in a federal system."[178] And, the Court continued, "even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[179]

The explanation is that both fairness and submission require more than convenience to the defendant and state interest. Both fairness and submission demand that the defendant make some purposeful connection to the forum state. The Court in *World-Wide* explained that "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there."[180] Only then does the defendant have "clear notice that it is subject to suit there" and give the defendant the opportunity to "act to alleviate th[at] risk."[181] In those circumstances, the exercise of personal jurisdiction by the forum "is not unreasonable."[182] Nowhere in *World-Wide* did the Court compare the relative interests of the forum state and other states, nor did the Court suggest that the forum state's exercise of personal jurisdiction would infringe upon the prerogatives of other states. Instead, the Court's analysis pertained to whether the defendant's contacts with the forum were sufficiently purposeful.[183] That analysis fits comfortably within both the fairness and submission theories of personal jurisdiction, without any assistance from interstate federalism.

176. *Id.* ("We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State . . . .").

177. State borders are arguably irrelevant to personal jurisdiction over a foreign defendant. *See* Dodge & Dodson, *supra* note 114, at 1234–40 (making this argument).

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

179. *Id.* at 294.

180. *Id.* at 297.

181. *Id.*

182. *Id.*

183. *Id.* at 297–98.

Bristol-Myers Squibb also does not depend upon interstate federalism. There, the Court quoted the interstate-federalism language of *World-Wide* and stated that, "at times, this federalism interest may be decisive."[184] But, like *World-Wide*, *Bristol-Myers Squibb* does not use principles of interstate federalism like state intrusion and state prerogatives to analyze personal jurisdiction. Instead, the Court focused on the "connection between the forum and the specific claims at issue."[185] That connection can be made a part of both submission and fairness as those theories apply to specific jurisdiction. For submission, a defendant does not implicitly submit to a forum state's authority to adjudicate a specific claim absent some link between the claim and the forum. And for fairness, it would be unfair to force a defendant to litigate in a forum that lacked any connection to the claim—not because of inconvenience or burden but because the defendant could not reasonably expect an unrelated state's laws and juries to apply to adjudication of the claim.[186] As with *World-Wide*, the holding in *Bristol-Myers Squibb* requiring some connection between the forum and the claim need not be based on interstate federalism but rather can be folded into theories of fairness and submission.

Ford's invocation of interstate federalism is the hardest to address. There, the Court cited *World-Wide*'s separation of personal jurisdiction's values into "treating defendants fairly and protecting interstate federalism."[187] The Court also directly linked interstate federalism with encroachment and prerogatives: "One State's sovereign power to try a suit, we have recognized, may prevent sister States from exercising their like authority. The law of specific jurisdiction thus seeks to ensure that States with little legitimate interest in a suit do not encroach on States more affected by the controversy."[188] And in applying this principle, the Court compared the relative interests of the forum states against those of other states.[189] So *Ford*'s discussion of interstate federalism cannot easily be recharacterized as matters of submission or fairness.

But *Ford*'s discussion can be dismissed as unimportant to the outcome of the case. It was enough that the strong connections linking the defendant,

184. Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263 (2017).

185. *Id.* at 265.

186. Justice Sotomayor asserted that the forum state's assertion of jurisdiction was reasonable, but her conclusion was based on burden and inconvenience, not on being subjected to the laws and juries of a state with no connection to the claim. *Id.* at 274 (Sotomayor, J., dissenting) (stating that the forum's exercise of jurisdiction was "reasonable" because the defendant was already subject to similar claims in that court and because litigating elsewhere "would prove far more burdensome").

187. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021) (citation and internal quotation marks omitted).

188. *Id.* (citation and internal quotation marks omitted).

189. *Id.* at 368.

claims, and forums justified personal jurisdiction in the forum states; the Court's consideration of interstate federalism merely "support[ed] jurisdiction" by showing that the forums had stronger connections than other states.[190] The Court did not hold, and has never held, that only the state with the strongest connection can exercise specific jurisdiction. Instead, the Court has insisted on a "minimum contacts" threshold independent of the comparative strength of connections with other states.[191] And the defendant in *Ford* assuredly met that threshold.[192] Accordingly, *Ford*'s invocation of interstate federalism as a comparative inquiry can be dismissed without affecting the outcome of the case.

2. Interstate Federalism Outside Due Process

Removing interstate federalism from personal jurisdiction requires consideration of how to protect the values of interstate federalism that do exist in the constitutional order. Federalism should be relocated from the individual-rights-focused doctrine of personal jurisdiction, where it fits uncomfortably, to other doctrines better equipped to safeguard interstate federalism.[193] In addition, some components of interstate federalism can be protected through state practices and policies. In this subpart, I briefly discuss these possibilities, though my aim is merely to identify them as options rather than to comprehensively defend their applicability.

a. Constitutional Limits on Expansions

The two most prominent constitutional limits on expanding personal jurisdiction's reach through consent are the unconstitutional-conditions doctrine and the Dormant Commerce Clause.

190. *Id.*; *see also* Erichson et al., *supra* note 64, at 81 (pointing out that the forums in *Ford* were not being busybodies because the accidents happened there).

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

192. *Ford*, 592 U.S. at 371 ("[T]he connection between the plaintiffs' claims and Ford's activities in those States—or otherwise said, the relationship among the defendant, the forum[s], and the litigation—is close enough to support specific jurisdiction." (second alteration in original) (citation and internal quotation marks omitted)); *see also id.* at 372 (Alito, J., concurring in the judgment) ("That standard is easily met here.").

193. For a discussion of prominent constitutional doctrines of horizontal federalism, see Erbsen, *supra* note 3.

i. Unconstitutional Conditions

The unconstitutional-conditions doctrine prevents states from coercing extractions of waivers of federal rights.[194] A state could not, for example, condition the choice of an individual to reside in the state on the individual's relinquishment of rights under the Fourteenth Amendment's Due Process Clause,[195] even though those rights are, ordinarily, waivable.[196]

The unconstitutional-conditions doctrine often focuses on the coercive nature of the condition from the perspective of the coerced rightsholder.[197] From that perspective, some courts and commentators have questioned whether consent-extraction business-registration statutes are, or could be, unconstitutional conditions.[198]

But three factors suggest that, in the ordinary course, consent-extraction business-registration statutes are unlikely to be deemed unconstitutional

194. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013) (stating that the doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up"). For commentary, see Ryan C. Williams, *Unconstitutional Conditions and the Constitutional Text*, 172 U. PA. L. REV. 747 (2024); PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM (2021); Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61 (2013); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479 (2012); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988).

195. *E.g.*, Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 599 (1926) ("We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guaranteed by the due process clause of the Fourteenth Amendment; and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed.").

196. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972) (recognizing that due-process rights can be bargained away); Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971) (acknowledging that "the hearing required by due process is subject to waiver").

197. *See Koontz*, 570 U.S. at 604–05 (recognizing that the rightsholder plaintiffs were likely to be "especially vulnerable" to coercive actions); *cf.* N.F.I.B. v. Sebelius, 567 U.S. 519, 581 (2012) (calling an unconstitutional Spending Clause threat to withhold funds "a gun to the head" of a noncompliant state).

198. *See* Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 569–71 (Pa. 2021) (holding Pennsylvania's consent-to-jurisdiction statute violative of the unconstitutional-conditions doctrine), *vacated*, 600 U.S. 122 (2023); Chavez v. Bridgestone Ams. Tire Operations, LLC, 503 P.3d 332, 336 (N.M. 2021) (noting the argument); Dodson, *supra* note 23 (discussing the issue); D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 3–6 (1990) (arguing that consent-to-service statutes are unconstitutional conditions); Sam Heyman, Note, Mallory v. Norfolk Southern Railway Company*: The Unwarranted End of Consent to General Jurisdiction in Pennsylvania*, 95 TEMP. L. REV. 169, 197–200 (2022) (arguing the opposite); *cf.* S. Ry. Co. v. Greene, 216 U.S. 400, 415–18 (1910) (holding that a corporation does not waive equal protection rights by registering to do business under a discriminatory state statute).

conditions, at least not when viewed solely from the perspective of the rightsholder registrant. First, the Court has insisted that the personal-jurisdiction right is easily and frequently waived, often by sophisticated rightsholders, and that courts routinely honor that waiver.[199] Second, consent extraction is inherently relevant to business registration, in that activity in the state is likely to generate lawsuits against that business in the state, lawsuits that the state may reasonably wish to facilitate by eliminating the business's personal-jurisdiction defense.[200] Third, the Court's long tradition of upholding business-registration statutes that extract some condition leading to personal jurisdiction in the state[201] suggests that such statutes are not, at least in the ordinary course, unconstitutional conditions.

But perhaps the structural elements of interstate federalism can give the unconstitutional-conditions doctrine more heft in certain circumstances. If a state's consent extraction is so broad that it invades the legitimate interests of other states, then the condition affects not just the rightsholder defendant but also the interests of other states, as well as principles of horizontal federalism in the constitutional order. Those interests ought not be fully subordinated to one defendant's waiver.[202] Indeed, the Court has expressed skepticism about conditions "inconsistent with the federal structure of our Government established by the Constitution."[203] Perhaps the unconstitutional-conditions doctrine prevents a state from extracting consent—and a defendant from validly consenting—when such consent would dramatically depart from the constitutional plan of horizontal federalism, such as in *Mallory*.[204]

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199. *Mallory*, 600 U.S. at 144–46 (plurality opinion) (discussing the ways defendants can consent to personal jurisdiction or waive the defense); *id.* at 156 (Alito, J., concurring in part and concurring in the judgment) ("If a person voluntarily waives that right, that choice should be honored."); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703–05 (1982) (documenting how personal jurisdiction can be waived or consented to in a variety of circumstances "whether voluntarily or not").

200. *Mallory*, 600 U.S. at 129–30 (plurality opinion).

201. *See* Dodson, *supra* note 23 (canvassing that history).

202. *See* Dodson, *supra* note 89 (arguing that party conduct is subordinate to the law).

203. New York v. United States, 505 U.S. 144, 177 (1992); *cf.* S. Pac. Co. v. Denton, 146 U.S. 202, 207 (1892) ("But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right [to remove a case to federal court] . . . , was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions.").

204. In *Mallory*, the Court refused to find a *Due Process Clause* violation based on federalism when the defendant consented to personal jurisdiction. 600 U.S. at 144 (plurality opinion) ("To date, our personal jurisdiction cases have never found a Due Process Clause problem sounding in federalism when an out-of-state defendant submits to suit in the forum State. After all, personal jurisdiction is a *personal* defense that may be waived or forfeited."); *id.* at 156–59 (Alito, J., concurring in part and concurring in the judgment) (agreeing that consent solved the Due Process Clause issue but considering whether the Dormant Commerce Clause nevertheless might invalidate the statute). But the Court did not consider whether the doctrine of unconstitutional conditions might supply a different result.

ii. Dormant Commerce Clause

A second possible constitutional limit on consent-based expansion of personal jurisdiction is the Dormant Commerce Clause. The Interstate Commerce Clause gives Congress power over interstate commerce,[205] and, by negative implication, denies states the power to unduly restrict interstate commerce.[206] That negative, or dormant, component is designed to foster a national economy unfettered by individual states.[207] As Justice Alito suggested in *Mallory*, the Dormant Commerce Clause may limit the ability of a state to extract consent to personal jurisdiction as a condition on the right to do business in the state.[208]

Several prior applications of the Dormant Commerce Clause support its applicability to state consent-extraction statutes. In *Davis v. Farmers Co-Operative Equity Co*., the Court invalidated, under the Commerce Clause, a Minnesota statute that conditioned the right of a company to provide a soliciting agent in the state on the company's consent to appointment of that agent to receive in-state service for purposes of establishing general jurisdiction over the company in the state.[209] The Court reasoned that the Minnesota statute "unreasonably obstruct[ed], and unduly burden[ed], interstate commerce."[210] And in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, the Court invalidated a state statute tolling limitations periods for claims against out-of-state defendants until those defendants appoint an in-state agent for purposes of service of process and general personal jurisdiction.[211] The Court reasoned that the state statute's forced choice between submitting to general jurisdiction and forfeiting a limitations defense violated the Dormant Commerce Clause by imposing too significant a burden on interstate commerce.[212]

A state can avoid invalidity under the Dormant Commerce Clause if the statute advances a "legitimate . . . public interest,"[213] which some consent-extraction statutes may do. But a state is unlikely to have a sufficient interest in adjudicating a dispute—like Mallory's—between two nonresidents for

205. U.S. CONST. art. I, § 8, cl. 3.
206. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 515 (2019).
207. Healy v. Beer Inst., 491 U.S. 324, 335–36 (1989).
208. *Mallory*, 600 U.S. at 158–59 (Alito, J., concurring in part and concurring in the judgement); *see also* Int'l Textbook Co. v. Pigg, 217 U.S. 91, 107–12 (1910) (stating that the Dormant Commerce Clause protects an out-of-state corporation's right to do business in a state unencumbered by discriminatory or burdensome business registration rules).
209. Davis v. Farmers Coop. Equity Co., 262 U.S. 312, 315 (1923).
210. *Id.* at 317.
211. 486 U.S. 888, 889–90 (1988).
212. *Id.* at 891–93.
213. South Dakota v. Wayfair, Inc., 585 U.S. 162, 173 (2018) (citation omitted).

conduct that did not occur in the state.[214] For those reasons, the Dormant Commerce Clause likely circumscribes consent-extraction statutes like the one in *Mallory*.[215]

b. Constitutional Limits on Restrictions

Several constitutional provisions may play a role in policing how aggressively states can use state law to restrict their courts' personal jurisdiction.[216] The Supreme Court in *Perkins* held that Ohio could, consistent with the Due Process Clause, decline to exercise general jurisdiction over a Philippines company "under the circumstances" of that case,[217] but the Court did not consider other constitutional provisions protecting the right of court access, and the circumstances of that case were, as the Court has later acknowledged, unusual.[218] *Perkins*, in other words, does not hold that states have no constitutional limits on how far they may restrict the personal jurisdiction of their courts. For extreme restrictions that cause serious gaps in interstate federalism's design of some civil-court access, constitutional protections of court access—embodied in the Privileges and Immunities Clause, the Petition Clause, and the Due Process Clause—may control excessive state restrictions on personal jurisdiction.

The Privileges and Immunities Clause guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[219] One of those privileges is "the right of a citizen of one State . . . to maintain actions in the courts of [any other State] . . . ."[220] The right of court access, however, is comparative: a state cannot *discriminate* against other states' citizens with respect to access to its courts.[221] In

214. *Mallory*, 600 U.S. at 163 (Alito, J., concurring in part and concurring in the judgment) ("[A] State generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State.").

215. *See* John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 133–55 (2016).

216. Although I focus here on provisions of the federal Constitution, provisions in various state constitutions may be more protective of court access than the federal Constitution.

217. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952).

218. Daimler AG v. Bauman, 571 U.S. 117, 139 n.19 (2014) (calling *Perkins* "an exceptional case").

219. U.S. CONST. art. IV, § 2.

220. Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871); *see also* Corfield v. Coryell, 6 F. Cas. 546, 552 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3,230) (listing among the privileges protected by the clause the right "to institute and maintain actions of any kind in the courts of the state").

221. *See* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 565 (1999) ("That access to court is protected by the Article IV Privileges and Immunities Clause means only that a state may not grant judicial access to its own citizens while denying it to non-citizens. It does not mean that it is a constitutional guarantee for all citizens.").

addition, the clause applies only to individuals, not to business entities.[222] Still, the clause may prevent a state from denying its courts personal jurisdiction over a particular defendant simply because the plaintiff is a citizen of another state; thus, Delaware may not restrict general jurisdiction over Delaware companies to suits brought by Delaware citizens.[223] This nondiscriminatory protection is a principle of horizontal federalism that helps ensure the availability of court access across state lines.

The First Amendment's Petition Clause, which prohibits "abridging . . . the right of the people . . . to petition the Government for a redress of grievances,"[224] likely sets some limits on how much states can restrict the personal jurisdiction of their own courts. The Supreme Court has held the clause applicable to civil courts,[225] and commentators agree that the Petition Clause affirms the obligation of courts to consider and respond to complaints.[226] Excessive infringement of the right of access to a state's courts may infringe the Petition Clause.[227] It is likely that a state could not, consistent with the Petition Clause, so constrict the personal jurisdiction of its courts as to wholly deny plaintiffs the opportunity to seek judicial relief for recognized causes of action.

Finally, the Due Process Clause preserves some court access. In *Boddie v. Connecticut*, the Court concluded that the imposition of filing fees as a predicate to court access for a marriage-dissolution proceeding violated due

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222. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1869) (limiting the clause to "natural persons").

223. Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts . . . is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens."). The clause may also prevent a state from allowing its courts personal jurisdiction over out-of-state citizens under circumstances when it would deny personal jurisdiction over in-state citizens; thus, Delaware may not subject out-of-state citizens to tag jurisdiction while eliminating tag jurisdiction for in-state citizens.

224. U.S. CONST. amend. I.

225. Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011) ("[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.").

226. *See* Andrews, *supra* note 221, at 560 (identifying "the right of court access under the Petition Clause"); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 758 (1999) ("[T]he First Amendment right to petition restates and emphasizes the federal courts' obligations to consider filings—petitions—brought to their attention and to respond in some fashion to those filings.").

227. *See* Andrews, *supra* note 221, at 569–73. Professor Andrews concludes that the court access guaranteed by the Petition Clause does not override personal-jurisdiction limits imposed by the Due Process Clause, but she does not consider whether the Petition Clause might override personal-jurisdiction limits imposed by state law. *Id.* at 668 (noting "jurisdictional limits imposed by *federal* due process requirements" and concluding that those limits "seemingly would limit the right to petition state courts" such that "a citizen would not have a First Amendment right to file a complaint in state court against a defendant over whom the state *cannot* assert personal jurisdiction" (emphasis added)).

process.[228] However, that holding was grounded in the unique features of marital relations,[229] and the Court disavowed any due-process right guaranteeing access for all individuals in all circumstances.[230] Indeed, the Court subsequently refused to extend *Boddie* to filing fees in bankruptcy cases because the "interest in the elimination of . . . debt burden . . . does not rise to the same constitutional level" as marital relations and because a debtor's remedy is not "utter[ly] exclusive[]" to the courts but could be negotiated privately with the creditor.[231] Still, the Court has invoked the Due Process Clause when the court is made physically inaccessible, and, as part of that reasoning, has interpreted *Boddie* to require state civil courts to "afford to all individuals a meaningful opportunity to be heard."[232] And the Court has found that state attempts to restrict prisoners' access to courts to be in violation of the Due Process Clause.[233] In the same way, extreme limits on personal jurisdiction over a defendant could effectively prevent court access in violation of the Due Process Clause.

True, all three of these constitutional provisions primarily safeguard individual rights, not federalism. But they nevertheless could be appropriate vehicles for safeguarding structural principles of horizontal federalism because a plaintiff's constitutional rights to access to courts likely will be infringed when a state so excessively restricts state-court personal jurisdiction that the horizontal-federalism promise of *some* court availability is abridged. I note, too, that these constitutional rights focus on the right of *plaintiffs* to access civil courts, not on the right of defendants to avoid the jurisdiction of a state's courts. Accordingly, these constitutional protections may be effective counterweights to excessive state attempts to overprotect defendants at the expense of plaintiffs.

c. Nonconstitutional Safeguards of Interstate Federalism

In addition to the constitutional doctrines discussed above,[234] several nonconstitutional doctrines offer additional correctives to federalism distortions caused by manipulations of personal jurisdiction.

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228. Boddie v. Connecticut, 401 U.S. 371, 375–76 (1971).

229. *Id.* at 374 (emphasizing "the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship").

230. *Id.* at 382–83.

231. United States v. Kras, 409 U.S. 434, 444–45 (1973).

232. Tennessee v. Lane, 541 U.S. 509, 532 (2004) (citation omitted).

233. *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974).

234. Another possibility is Article IV's Privileges and Immunities Clause, U.S. CONST. art. IV, § 2 ("[T]he citizens of each state shall be entitled to all privileges and immunities of citizens in the

One is horizontal choice of law. States have broad leeway to apply a different state's law to resolve a dispute,[235] and most states have adopted choice-of-law rules that take into consideration other states' interests.[236] If a state like Pennsylvania exercises personal jurisdiction over the railroad in *Mallory*, the state might apply the law of Virginia to resolve Mallory's dispute,[237] and, in that way, ameliorate Pennsylvania's intrusion on Virginia's sovereign authority to regulate its citizens and in-state conduct and to compensate injuries occurring there.

Another is the doctrine of forum non conveniens, in which a court with jurisdiction nevertheless dismisses the case because of inconvenience so that the case can be refiled in a different court that is more convenient. The doctrine necessarily requires consideration of some available and convenient alternative forum for the dispute, and thus the doctrine can be seen as a geographic case-allocation doctrine in the vein of horizontal federalism. The U.S. Supreme Court has blessed the doctrine,[238] as have most states, including Pennsylvania.[239] Indeed, in *Rini v. New York Central Railroad Co.*, the Pennsylvania Supreme Court affirmed a Pennsylvania trial court's forum non conveniens dismissal of a FELA claim against a railroad employer when the plaintiff resided in Ohio, the injury occurred in Ohio, and none of the witnesses resided in Pennsylvania.[240] Those facts would be good support for a forum non conveniens dismissal of a case like *Mallory*, so that it could be refiled in, say, Virginia. Forum non conveniens is an example of state-level measures to reallocate exorbitant exercises of personal jurisdiction.

A final nonconstitutional vehicle for protecting interstate federalism is state law on consent enforcement. Federal law defines consent to personal jurisdiction under the Fourteenth Amendment, but state law defines consent

several states."), which may also serve as a limit on consent-by-registration by giving every U.S. citizen an equal right to do business in any state, *see* Toomer v. Witsell, 334 U.S. 385, 396 (1948), though only natural persons are considered "citizens" for those purposes, *see* Ry. Express Agency, Inc. v. Virginia, 282 U.S. 440, 443–44 (1931) (excluding corporations); Hemphill v. Orloff, 277 U.S. 537, 548–51 (1928) (excluding a commercial investment trust).

235. *See* Richards v. United States, 369 U.S. 1, 12–13 (1962) (allowing states to take into account other states' interests).

236. *See generally* SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006) (documenting states' use of interest analysis).

237. Pennsylvania applies the "significant relationship" and "governmental interest" tests to tort conflicts. *See* Kilmer v. Conn. Indem. Co., 189 F. Supp. 2d 237, 243 (M.D. Pa. 2002) (citation omitted); Griffith v. United Air Lines, Inc., 203 A.2d 796, 806 (Pa. 1964).

238. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).

239. *See* Plum v. Tampax, Inc., 160 A.2d 549 (Pa. 1960).

240. Rini v. N.Y. Cent. R.R., 240 A.2d 372, 374 (Pa. 1968).

to personal jurisdiction under state law.[241] Thus, states can control the ability of private parties to consent to personal jurisdiction in their courts by refusing to enforce that consent as a matter of state-authorized personal jurisdiction.[242] Many states, including Pennsylvania, decline to enforce consent to jurisdiction when that jurisdiction would be inconsistent with the structural choices of the sovereign to allocate cases to different courts—including geographic divisions of courts—to advance systemic values of efficiency and predictability.[243] For similar reasons, in many courts, parties cannot consent around the doctrine of forum non conveniens when the factors favoring dismissal are overwhelming.[244] By analogy, then, states could refuse to honor consent to personal jurisdiction that drastically alters the plan of interstate federalism and the horizontal allocation of cases.

B. Practical Benefits

Although the provisions discussed in the previous subpart may help constrain state manipulations of personal jurisdiction that distort the interstate-federalism framework, I am open to the possibility that interstate federalism cannot be perfectly—and perhaps should not be perfectly—policed. In fact, I see some benefits of jurisdictional flexibility. Those benefits include adaptability, cooperation, and party preference.

1. Adaptability

Tethering interstate federalism to the personal-jurisdiction component of the Due Process Clause risks rapid obsolescence. The Supreme Court can hear only so many personal-jurisdiction cases a year,[245] and the multifaceted

241. Dodson, *supra* note 23, at 362 ("State prerogatives over state law apply to consent under state law. States are free to define consent and the conditions under which it confers personal jurisdiction under state law.").

242. *Cf.* Coyle & Richardson, *supra* note 84, at 99–101 (reporting that some states refuse to enforce contractual forum-selection clauses in consumer contracts that select a state other than where the consumer resides).

243. *E.g.*, Oil City v. McAboy, 74 Pa. 249, 250–51 (1873) (refusing to honor a county's consent to the jurisdiction of another county's courts when defending against a local action because the geographic restriction of judicial authority under state law is "founded in the convenience and policy of the state").

244. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); D'Alterio v. N.J. Transit Rail Operations, Inc., 845 A.2d 850, 855 n.2 (Pa. Super. 2004) (finding "no prohibition on *sua sponte* dismissal of an action under [the Pennsylvania forum non conveniens statute] provided that the private and public factors weigh strongly in favor of dismissal").

245. From 1990 to 2011, the Court did not decide a single personal-jurisdiction case. Since 2011, in what scholars have called a "resurgence" or a "revolution," the Court has mustered about one a year. *See* Effron & Simowitz, *supra* note 68, at 186; Alexandra D. Lahav, *The New Privity in Personal Jurisdiction*, 73 ALA. L. REV. 539, 578 (2022).

and complex nature of the doctrine stymies opportunities for broad holdings through a single case.[246] In addition, the buildup of precedent and commitment to stare decisis inhibits drastic doctrinal revision.[247] Yet corporate practices, interstate travel, commerce, and technology have all evolved quickly[248]—too quickly for the Court's plodding approach to doctrine to adapt. As one telling example, the Court has never decided a personal-jurisdiction case involving Internet contacts.

State law—unconstrained by interstate-federalism components of the Due Process Clause—shows more promise. States have more flexibility to use state law to modify personal jurisdiction with those economic, sociological, and legal changes in mind, and, by using state law, they need not worry about the uncertainties of due process or interstate federalism. For example, a state might require that, as a condition of forming an unincorporated business entity under its laws, the entity consents to general jurisdiction in the state. Such a state law would take the uncertainty out of the *Daimler* "at home" test for general jurisdiction over unincorporated business entities. Or, consider the difficulty, acknowledged by the Supreme Court, in determining a corporation's principal place of business when the corporation "divide[s] the[] command and coordinating functions among officers who work at several different locations, perhaps communicating over the Internet."[249] A state could obviate that difficulty by conditioning such a corporation's right to do business in the state on consent to general personal jurisdiction while the CEO resides in the state. Or, if the corporation has two physical headquarters offices, each state could extract consent to general personal jurisdiction as a condition of establishing those offices.[250] Or, to go the other way, a state could provide for general

246. *E.g.*, Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 154 (2023) (Alito, J., concurring in part and concurring in the judgment) (stressing that precedent controls "due to the clear overlap with the facts of this case"); Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 277 n.3 (2017) (Sotomayor, J., dissenting) (noting the "factbound" nature of the decision). An exception is *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), which adopted a new test for general jurisdiction far more restrictive than what courts and commentators had understood the test to be. *See* Scott Dodson, *Personal Jurisdiction in Comparative Context*, 68 AM. J. COMPAR. L. 701, 711 (2020).

247. *Compare Mallory*, 600 U.S. at 134 ("[Precedent] controls this case."), *and* Ford Motor Co. v. Mont. Eighth Jud. Dist., 592 U.S. 351, 362 n.3 (2021) (adhering to "this Court's longstanding approach" in "reject[ing]" the invitation to chart a new direction with personal jurisdiction), *with id.* at 375 (Gorsuch, J., concurring in the judgment) (questioning the Court's "battered" and "quaint" framework for specific jurisdiction).

248. For commentary on how COVID-spurred technological advances in the practice of law should affect personal jurisdiction, see Scott Dodson, *Videoconferencing and Legal Doctrine*, 51 SW. L. REV. 9, 14–15 (2021).

249. Hertz Corp. v. Friend, 559 U.S. 77, 95–96 (2010).

250. For discussion of the complexity of general jurisdiction over Amazon after Amazon completes its HQ2 in Virginia, see D.E. Wagner, Note, Hertz *So Good: Amazon, General Jurisdiction's*

jurisdiction over a foreign corporation only if the corporation established a physical principal place of business within the state. Either way, state law can provide for clear and certain jurisdictional results without waiting for—and without regard to—clarification from the Supreme Court.

2. Cooperation

Another potential benefit is that disregarding interstate-federalism limits on personal jurisdiction could facilitate cooperation among the states. Interstate federalism paternalistically attempts to protect the supposed state interest in avoiding incursion by other states, but the evidence strongly suggests that states care very little about such incursions and may even welcome them in circumstances that invite collaboration.

Disruptions of interstate federalism do not appear to perturb the states. Before 2011, the dominant understanding of the Due Process Clause standard for general jurisdiction was that any company with "continuous and systematic contacts" with a state was subject to that state's general jurisdiction, meaning that companies with significant operations in each state would be subject to general jurisdiction in every state.[251] States could have rejected, under state law, that highly expansive and horizontally intrusive conception of general jurisdiction. Yet states generally did not. Many states' long-arm statutes extended their state courts' reach to the full extent of the Due Process Clause,[252] and others expressly adopted the expansive general-jurisdiction standard by parroting the "continuous and systematic contacts" phrase.[253] I know of no sustained complaint from any state that its neighbors were exercising general jurisdiction in ways that infringed on interstate authority and sovereignty.

One way to interpret that silence is as a passive-aggressive tit-for-tat response in which each state decides to retaliate by extending its own courts' jurisdictional reach as far into other states as possible. But a more likely scenario is that the states, far from being rivalrous, cranky neighbors, instead see themselves as a cooperative and trustworthy community of

Principal Place of Business, and Contacts Plus as the Future of the Exceptional Case, 104 CORNELL L. REV. 1085, 1118–24 (2019).

251. *See* Scott Dodson, *Personal Jurisdiction, Comparativism, and* Ford, 51 STETSON L. REV. 187, 188 (2022).

252. *See supra* text accompanying note 122.

253. *E.g.*, 42 PA. CONS. STAT. §§ 5301(a)(2)(iii), (a)(3)(iii) (2024) (providing for general personal jurisdiction over any business entity that "carr[ies] on . . . a continuous and systematic part of its business within this Commonwealth"). Many other statutes use similar phrases with the same effect. *E.g.*, N.C. GEN. STAT. § 1-75.4(1)(d) (2024) (providing for general personal jurisdiction over a defendant "engaged in substantial activity within this State").

sovereigns, with well-placed faith in each other.[254] The Court even acknowledged that aspect of cooperative horizontal federalism in the personal-jurisdiction case *Keeton v. Hustler Magazine, Inc.*,[255] in which a New York plaintiff sued a Ohio corporation with its principal place of business in California in New Hampshire federal court for libel based on a nationwide distribution of a false story about her.[256] Even though the plaintiff had no connection to New Hampshire, the Supreme Court upheld personal jurisdiction in New Hampshire based on the defendant's direct distribution of libelous stories into New Hampshire.[257] Further, the Court acknowledged that the plaintiff could recover, in that New Hampshire lawsuit, damages she suffered in other states as well.[258] Rejecting the defendant's argument that New Hampshire lacked sufficient interest, as compared to other states, in adjudicating the plaintiff's nationwide injuries, the Court stated:

> New Hampshire also has a substantial interest in cooperating with other States . . . to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits. In sum, the combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States . . . demonstrates the propriety of requiring respondent to answer to a multistate libel action in New Hampshire.[259]

One can imagine many other circumstances—from products liability to consumer claims—in which the states all share a common interest that any one of them could faithfully implement through a single adjudication,

254. *See* Ray Worthy Campbell, *Personal Jurisdiction and National Sovereignty*, 77 WASH. & LEE L. REV. 97, 100–01 (2020) ("[R]ather than treating the states as rivals involved in a zero sum game, where an assertion of power by one undercuts the power and dignity of another, the Court should recognize the polycentric, pluralistic nature of U.S. governance, where state members of a 'more perfect union' coordinate, collaborate, pursue shared goals independently, and only sometimes compete."); *id.* at 156 ("By focusing on rivalry, rather than shared interests, the sovereignty analysis as it is being developed sees states not as partners in a common scheme of governance but as adversaries jealous of their rights and prerogatives."); *cf.* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 111 (2014) (noting "robust, cooperative networks among federal, state, and local officials that can and do safeguard horizontal federalism").

255. 465 U.S. 770 (1984).

256. *Id.* at 772.

257. *Id.* at 773–74 ("Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.").

258. *Id.* at 774.

259. *Id.* at 777–78 (citation and footnote omitted).

thereby saving the rest the burdens of multiplicative litigation. Valid state expansion of personal jurisdiction to allow such a cooperative enterprise could be not an affront but a relief to the other states.[260]

3. Party Choice in a Marketplace of Forums

A final benefit in eliminating interstate federalism from personal jurisdiction is the ability of parties to select a forum from a marketplace of states offering adjudication services. States can use differential personal jurisdiction to cater to commercial activity or types of litigants,[261] while litigants can use forum-selection clauses to seek out preferred states.[262] Removing the specter of interstate federalism from personal jurisdiction could allow such a market to improve efficiency in civil litigation.

Delaware, for example, has marketed its judicial system as expert in business law. Its website states:

> Delaware is world-renowned for its efficient and professional court system, which is particularly prominent in the areas of corporate, business, and commercial law. For many experienced lawyers throughout the world, the principal reasons to recommend organizing in Delaware are the Delaware courts and the body of case law developed by those courts.[263]

Perhaps sophisticated business entities would prefer to take advantage of Delaware courts' expertise, established law, and efficiency, even when neither the claims nor the parties have any connection to Delaware. They can do so by consenting to jurisdiction in the Delaware courts. That choice can be rational and efficient for everyone.

True, other states may have a more closely related connection to the dispute, but, in the spirit of cooperativism, those states may not mind if parties take their business suits elsewhere. Perhaps New York doesn't care about being the corporate-law mecca but instead would prefer to market

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260. Justice Sotomayor raised similar points in *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255, 276 (2017) (Sotomayor, J., dissenting) ("What interest could any single State have in adjudicating respondents' claims that the other States do not share?"), but the problem there was a lack of personal jurisdiction under the Due Process Clause, not a valid expansion of personal jurisdiction by the forum state.

261. The literature has documented instances of "forum selling," in which courts (or states) vie to attract cases, though not all selling is seen as benign. *See generally* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

262. Dodson, *supra* note 138, at 43 ("[B]usiness entities have nearly unfettered power to control forum selection through contractual forum selection clauses.").

263. *Litigation in the Delaware Court of Chancery and the Delaware Supreme Court*, DELAWARE.GOV: DELAWARE CORPORATE LAW, https://corplaw.delaware.gov/delaware-court-chancery-supreme-court/ [https://perma.cc/92RA-74ZC].

itself as the premier locus of banking law. Delaware's specialization and attraction of corporate-law cases could free up New York courts to develop that specialty, and parties with sophisticated banking-law litigation can choose New York courts. State-generated consent to personal jurisdiction and party-based preferences can harness some of the advantages of court specialization, creating a race to the top in litigation efficiency and expertise.

Not everything in this scenario is so rosy. Party consent could be extracted through duress or coercion or disparate bargaining power for purposes that disadvantage one party over another. Such a practice could leave to the inverse: unfairness, inefficiency, and a race to the bottom. But two controls on that practice exist. The first is state law, which can limit the role of consent to personal jurisdiction in its courts, and some courts have, in fact, refused to enforce adhesion-contract consent that disadvantages individuals like consumers.[264] And the other is diversity jurisdiction, which often will allow such disadvantaged parties to select federal court, rather than state court, and then, perhaps, seek venue transfer to a more convenient location.[265]

Still, a marketplace coupled with party choice is likely to produce some unfairness and gamesmanship. I do not mean to ignore that possibility, which is part of American litigation's culture of forum shopping.[266] I only mean to suggest that some win-win benefits are also possible, and that interstate federalism's resistance to such a marketplace is likely overkill. Eliminating that resistance opens space for a conversation about how best to harness the advantages of state-structured personal jurisdiction while minimizing its downsides.

CONCLUSION

Personal jurisdiction's interstate-federalism role has outlived its usefulness and has been subordinated to other aspects of personal-jurisdiction doctrine. The Court should update the doctrine—as it did in *International Shoe*—to abandon the interstate-federalism component. Interstate federalism should instead be protected in other constitutional and nonconstitutional doctrines that speak more naturally to its values.

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264. *See supra* note 242.

265. The presence of a forum-selection clause can affect the conditions for venue transfer. *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 59–60 (2013) (holding that forum-selection clauses should be given heavy weight in decisions to transfer venue).

266. *See generally* Scott Dodson, *The Culture of Forum Shopping in the United States*, 57 INT'L LAW. 307 (2024).

This story of interstate federalism and personal jurisdiction reveals a deeper truth about personal-jurisdiction doctrine: its constitutional framework, for all the focus and attention it receives, is incredibly weak. The states and the parties have far more control over the allocation of cases than the doctrine purports to establish. Interstate federalism, then, may offer a lesson that endures beyond its interment: because state law on personal jurisdiction can play a substantially meaningful role, perhaps lawmakers, courts, commentators, and parties should attend to state law more than the Supreme Court's interpretation of the Due Process Clause.