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James P. George

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Forum Fights and Fundamental Rights: Amenability's Distorted Frame

James P. George*

Abstract. Framing—the subtle use of context to suggest a conclusion—is a dubious alternative to direct argumentation. Both the brilliance and the bane of marketing, framing also creeps into supposedly objective analysis. Law offers many examples, but a lesser known one is International Shoe's two-part test that underscores defendant's due process rights and contrasts it with plaintiff's "interests" which are often dependent on governmental interests. This equation ignores, both rhetorically and analytically, the injured party's centuries-old rights to—not interests in—a remedy in an open and adequate forum.

Even within the biased frame, the test generally works, if not in the trial court at least on appellate review. But exceptions stand out—the English manufacturer that structures its sales to evade United States jurisdiction for injuries in New Jersey where it shipped the defective machine. Not only do a few high profile cases underscore the test's failure, there's a larger concern of the framed analysis in cases that do not come to light, the lower-damage cases in close-call fact patterns that can be routinely dismissed with no appeal or a rubber stamp affirmance. Defendant's due process thumb on the scale no doubt has at least the same effect in those cases, which are unmeasurable but no doubt occur with at least the frequency of the McIntyre evasions.

The framed amenability test is contrary to forum-access rights dating to at least the Twelfth Century, expressly adopted by the American colonies, incorporated in Article III and six constitutional clauses, reflected in case law apart from the amenability test, but ignored over the last half-century of International Shoe's development. Recent Supreme Court opinions suggest that changing times and technology require a new look at jurisdiction. Based on the considerable history

* Professor of Law, Texas A&M University. Special thanks to Kelly Anne Basinger-Parr, Janet R. Bennett, Cynthia Burrell, Randy Gordon, Andrea Hudson, Brian Larson, Victoria Lepesant, Glynn Lunney, Huyen Pham, Tanya Pierce, Nancy Welsh, and Peter Yu.

offered here, that revision should focus on the parties and analyze rights versus rights, eliminating or reducing the ill-defined governmental interest analysis.

Introduction

Long-arm jurisdiction clearly is getting shorter.¹

Describing the long-arm's reduced reach, Professor Arthur Miller was not addressing state long-arm statutes as such, but the larger function of nonresident amenability. Miller was focused on three recent Supreme Court cases he argues are examples of jurisdictional safe harbors that allow foreign corporations to exploit a market without fear of answering to its courts.² Miller further noted the last few years' restructuring of the minimum contacts equation to limit plaintiffs' options, and argued that it has gone beyond the legitimate goals of creating a fair forum for defendants, and includes forum limits and biases (both explicit and implicit) that are not legitimate.³

This Article addresses the most pervasive and subtle of those biases—the distorted framing of the parties' rights in the fair-play and substantial-justice test, the second of two components of the minimum contacts test. The fairness test has a pro-defense bias that identifies defendant's due-process right, but then balances it against plaintiff's mere "interests" in obtaining relief. Compounding the imbalance, plaintiff's interests are often subordinated to those of the forum and other states' interests that might favor plaintiff. Plaintiffs are thus relegated to vaguely defined state "interests" while defendant enjoys a due process thumb on the scale.

Since 1945, we've used an evolving test for amenability. It began with little more than catch phrases and vague standards, but eventually split into a two-part test of contacts and fairness balancing.⁴ The contacts test recognizes both general and specific contacts—general contacts now

¹ Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 750 (2018).

² Specifically, *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and its reliance on a restrictive concept of corporate presence; *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U.S. 873 (2011), and its concept of manifest intent to be subjected to jurisdiction; and *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017), and its impairment of multi-state class actions. See Miller, *supra* note 1, at 747–50.

³ See Miller, *supra* note 1, at 749–50.

⁴ Unlike *Pennoyer v. Neff's* simple unitary requirement of in-forum service, *International Shoe's* test is multi-faceted and nuanced. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1878). The test evolved to the point that, in *World-Wide Volkswagen* and *Burger King*, the Court announced a two-part due process test. Nonresident defendants who did not consent, waive objection, or receive in-forum service must fall under the forum state's long-arm statute, and that statute's assertion of extraterritorial judicial jurisdiction must comply with due process under either specific or general jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). For those defendants satisfying the long-arm and having sufficient specific or general contacts, that forum's assertion of judicial jurisdiction must satisfy a five-part fairness balancing test. See generally James P. George, *Running on Empty: Ford v. Montana and The Folly of Minimum Contacts*, 30 GEO. MASON L. REV. 1 (2022).

reduced to at-home presence (one of Miller's complaints) though still theoretically available in rare cases.⁵ The amenability issues are in the specific-contacts cases, where much of the criticism lies. But contacts by themselves do not establish personal jurisdiction. Since *Burger King Corp. v. Rudzewicz*,⁶ once a specific contact is established the court must also find that subjecting defendant to jurisdiction in the forum is fair, based on a five-part balancing test.

Much less has been written about the second part of the test, the fairness balance. As the test took shape, it has increasingly leaned rhetorically in defendant's favor, accelerating with the enhanced concept of "state interest" in *World-Wide Volkswagen Corp. v. Woodson*.⁷ That rhetorical bias has resulted in skewed analyses that have shown up in some reported cases, but also—even worse—inevitably lurk in the unreported, unappealed cases.

This Article addresses that bias and its deviation from the historical underpinnings of plaintiffs' access to an adequate remedy in an adequate forum. In addressing that bias, this Article is about words and labels, and their framing effect on forum selection. Part I diagrams the semantic burying of plaintiffs' rights beneath the current balancing of state interests and defendant's due-process rights. Part II explains the considerable common law and constitutional bases for plaintiffs' forum access rights that are ignored in the current test. Part III offers an approach to equalizing the fundamental rights balance.

I. The Subduction of Plaintiffs' Forum-Selection Rights

In a 1966 article, Professors Arthur von Mehren and Donald Trautman discussed the inherent forum-selection bias favoring defendants in local litigation.⁸ In matters confined to a single state, they explained, amenability is not an issue, defendant benefits from venue rules, and there's little or no burden in plaintiff coming to defendant's or the situs' location.⁹ In multi-state disputes, however, they proposed moving away "from the bias favoring the defendant toward permitting the

⁵ See *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 413 (2017) (noting that exceptional cases could justify extending general jurisdiction beyond a corporation's place of incorporation and principal place of business).

⁶ 471 U.S. 462 (1985).

⁷ See 444 U.S. 286, 292 (1980).

⁸ See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127–28 (1966).

⁹ *Id.*; see also *World-Wide Volkswagen*, 444 U.S. at 292.

plaintiff to insist that the defendant come to him.”¹⁰ They noted further: “This argument becomes very strong when the defendants as a class are regularly engaged in extensive multistate activity that will produce litigation from time to time, while the plaintiffs as a class are localized in their activities.”¹¹

What we have instead is a bias favoring defendants in close calls and distorting the analysis in cases that shouldn’t be close at all.¹² It’s true that the post-*International Shoe Co. v. Washington*¹³ long-arm statutes greatly expanded courts’ geographic reach. But the constitutional analysis that follows long-arm service of process leans toward defendants because of the framing of the test in specific jurisdiction cases.¹⁴ This disparate balance is not only reflected in the minimum contacts test’s *application*, it is in the test’s *language*. From *Pennoyer v. Neff*¹⁵ on, defendants have ridden on due-process rights, while under *International Shoe*’s eventual test, plaintiffs’ forum access right is measured by interests which are often subsumed in (that is, defined by and limited to) the forum state’s interests.

“Subduction”—the Earth’s crust movement that forces one tectonic plate below another¹⁶—is an apt metaphor for the minimum contacts test’s gradual but consistent suppression of plaintiffs’ constitutional due-process rights, which now exist only as forum interests beneath defendant’s dominant due-process rights. Unlike geological plate movement, this misalignment can—and should—be corrected.

A. *Due Process and Interests*

According to *World-Wide Volkswagen*, the minimum contacts test assumes that plaintiffs’ access rights are vindicated in the “power to choose the forum.”¹⁷ To be clear, the Court did not state that equation as

¹⁰ See von Mehren & Trautman, *supra* note 8, at 1128.

¹¹ *Id.* at 1168 (footnote omitted).

¹² See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011), discussed *infra* notes 66–73 and accompanying text.

¹³ 326 U.S. 310 (1945).

¹⁴ This analysis is limited to specific jurisdiction. Following *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), a determination that defendant is “essentially at home” in the forum will most often affirm jurisdiction, eliminating the need for the fairness test that balances due process and interests. As the Court noted in *Daimler, International Shoe* is based on the idea of specific jurisdiction, while general jurisdiction remains a territorial concept. See *Daimler AG v. Bauman*, 571 U.S. 117, 132–33 (2014).

¹⁵ 95 U.S. 714 (1878).

¹⁶ See *Subduction*, MERRIAM-WEBSTER, <https://perma.cc/5FWB-42GS>. The term’s first use was in 1970, *id.*, after the jurisdictional process was well underway.

¹⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

succinctly as I've done here. Instead, in that case's first-ever articulation of the post-contact fairness-balancing test, the third factor is "plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum."¹⁸ Plaintiffs thus have the power to pick the forum, and when defendants object, plaintiffs' response is framed in "interests" rather than contrasting rights.¹⁹ Those plaintiff interests often prevail but would be fairer if articulated as the constitutional rights explained in Part III of this Article. And even though plaintiffs' interests do often prevail, it is frequently reliant on some perceived forum interest.²⁰

Amenability's due-process function started with *Pennoyer*, well before the rise of interest balancing. It was tied to defendant's rights in three seminal cases: *Pennoyer's* initial application;²¹ *International Shoe's* shift to contacts and fairness;²² and *Shaffer v. Heitner's*²³ elimination of in rem distinctions.²⁴ Due process's initial function in *Pennoyer* was simply to mandate that states follow the common law of amenability, but the underlying theory is that due process is a limit on state power, and overcoming that limit requires a showing of a state interest.²⁵ This is an understandable basis for using interest analysis, but it ignores the framing that occurs in balancing due process against "interests." As the test is currently framed, deciding in favor of plaintiff is a gain resulting from plaintiff's *interests* being realized, while deciding against defendant is not just a loss, but one that impacts due-process *rights*. In close cases, judges will be inclined to choose the answer that avoids a loss of due process when the only cost is denying plaintiff's gain of choosing the forum. This bias ignores the long English common-law history of a state's duty to

¹⁸ *Id.* (citation omitted).

¹⁹ *Id.*

²⁰ See, e.g., *McGee, Keeton, Burger King*, and *Ford*, all discussed on this point, *infra* at notes 30–31.

²¹ See *Pennoyer v. Neff*, 95 U.S. 714, 733–34 (1878).

²² See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 323–24 (1945).

²³ 433 U.S. 186 (1977).

²⁴ See *id. passim*.

²⁵ See, e.g., *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 775–76 (1984) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Under *Pennoyer*, prior to *International Shoe*, the state interest was implicit in territorial service of process. To the extent that *International Shoe* and long-arm jurisdiction introduced the issue of the forum applying its substantive law to a nonresident, due process is mandated by legislative jurisdiction. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–10 (1930). But the state "interest" in question is not necessarily substantive. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (discussing defendant's right as an individual liberty interest protected by due process). Professor Patrick Borchers suggests the term "non-substantive due process" for concepts including personal jurisdiction. See Patrick J. Borchers, *Jones v. Flowers: An Essay on a Unified Theory of Procedural Due Process*, 40 CREIGHTON L. REV. 343, 346–47 (2007).

furnish a forum for claims over defendants otherwise susceptible to service there, as explained below.

In 1957, *McGee v. International Life Insurance Co.*²⁶ conceived the measuring of plaintiff's rights as derivative of the forum state's interest.²⁷ Plaintiff won, and with only one mention of interest.²⁸ Notably, it was the forum's interest—as opposed to plaintiff's—and certainly not plaintiff's due-process right to meaningful access to a court, even though the state's interest was recited in terms of its resident's need for access.²⁹ Following *McGee*, and especially *World-Wide Volkswagen*, the interests-versus-rights dichotomy is underscored throughout the cases with repetitive due-process invocations for defendants, plaintiffs' counterbalanced interests, and forum interests on which plaintiffs are often dependent.³⁰ The tally is predictably consistent.³¹

²⁶ 355 U.S. 220 (1957).

²⁷ *See id.* at 223.

²⁸ *See id.*

²⁹ *See id.*

³⁰ In *McGee*, the Court based its approval of plaintiff's California forum choice on California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* Although the Court followed that conclusion with examples of plaintiff's inconvenience without a California forum, the "right" being applied was based on California's interest. *Accord Keeton*, 465 U.S. at 775–76. In *Asahi*, the lack of forum interest defeated forum access for a third-party contribution claim arising from an accident on a California road, when non-resident defendant manufacturer Cheng Shin now occupied plaintiff's position after settlement. *See Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114 (1987).

³¹ The originating case for minimum contacts, *International Shoe*, is aberrational because of Washington state's role as a governmental party levying a tax; it mentions due process twenty-two times, all for defendant, does not mention interest, and uses "power" in reference to Washington's taxing power which includes filing the claim. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 *passim* (1945). *McGee* mentions due process five times, all for defendant, and interest once regarding the forum's interest in its resident. *See McGee*, 355 U.S. *passim*. *Hanson* mentions due process five times, all regarding defendant, and interest five times, all regarding forum interest (none for the parties as such). *See Hanson v. Denckla*, 357 U.S. 235 *passim* (1958). *Shaffer* is also aberrational because of its function of addressing in rem and quasi in rem jurisdiction; it mentions due process sixteen times, all regarding defendants, and mentions interest forty-seven times, a mix of forum, plaintiff, and defendant interests in property. *See Shaffer v. Heitner*, 433 U.S. 186 *passim* (1977). *Kulko* mentions due process six times, all in relation to defendant, and interest six times, one for forum and plaintiff combined, the other five for the forum, all concerning plaintiff's interests. *See Kulko v. Superior Ct.*, 436 U.S. 84 *passim* (1978). *Keeton* mentions due process eight times for defendant, and interest eighteen times, all for New Hampshire's interest in providing a forum. *See Keeton v. Hustler Mag., Inc.*, 465 U.S. 770 *passim* (1984). *World-Wide Volkswagen* mentions due process fourteen times for defendant, and interest eight times, five in stating the fairness test, one for the forum state, and two generically to the balancing of all interests. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 *passim* (1980). *Burger King* mentions due process nineteen times for defendant, and interest thirteen times, two regarding defendant, five regarding the forum state, five regarding other states, and none regarding plaintiff, whose interest is subsumed in the forum's interest. *See Burger King Corp.*

B. *Framing*

As long as plaintiffs have their forum-choice arguments considered, does it matter how we label them? Are “rights” and “interests” synonymous? Judges may be skeptical, but a number of scholars would say it absolutely does matter. As Professor Shiri Krebs notes: “In any communication, the language and exact words used influence how the message will be processed and comprehended, creating a ‘framing effect,’ subtly shaping the way in which people interpret this information.”³² These word usages that affect choices can be fortuitous or deliberate, manipulating choices and thereby outcomes.³³

Framing studies range from adverse possession to zero-point value shifts and much in between, legal and other.³⁴ Justice Oliver Wendell Holmes, explaining the common-law view of adverse possession, noted

v. Rudzewicz, 471 U.S. 462 *passim* (1985). *Asahi* mentions due process twenty times, some stating the general rule and some for third-party defendant *Asahi*, discusses interest nineteen times, five for plaintiff (who had settled), eight for the forum state, five for other states, and one for federal foreign policy, and notably, no rights or interests discussion for defendant Cheng Shin which, having settled with plaintiff, now stood in Zurcher’s shoes seeking damages from the third-party tortfeasor. See *Asahi*, 480 U.S. *passim*. *McIntyre* mentions due process sixteen times for defendant, and interest four times, two for defendant (the liberty interest protected by the due process clause, see *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879–80 (2011)), two for the forum, none for plaintiff. See *id. passim*. *Bristol-Myers* mentions due process ten times, seven for defendant, and three in reference to involuntary class members in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and mentions interest fifteen times, one regarding a defendant’s interest in avoiding preclusion (defendant Phillips Petroleum in the *Shutts* case), the other fourteen regarding plaintiff or the forum’s interest in asserting jurisdiction. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 *passim* (2017). *Ford* mentions due process seven times for defendant, and interest six times, one for defendant, all others for various states, and none for plaintiffs’ (whose rights or interests are subsumed in state interests). See *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017 *passim* (2021).

³² Shiri Krebs, *Law Wars: Experimental Data on the Impact of Legal Labels on Wartime Event Beliefs*, 11 HARV. NAT’L SEC. J. 106, 122 (2020) (citations omitted). For a number of other applications of the framing phenomenon, see generally CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000), containing forty-two articles reporting various studies in a wide variety of contexts.

³³ See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCH. 341 (1984), reprinted in CHOICES, VALUES, AND FRAMES, *supra* note 32, at 1, 10.

³⁴ See generally CHOICES, VALUES, AND FRAMES, *supra* note 32. Regarding adverse possession, see David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 OSGOODE HALL L.J. 737 (1992), reprinted in CHOICES, VALUES, AND FRAMES, *supra* note 32, at 424, 435–36, discussing Richard Posner’s study of gains and losses as affecting the common law of adverse possession. For zero-point value shifts, see Daniel Kahneman, *Experienced Utility and Objective Happiness: A Moment-Based Approach*, reprinted in CHOICES, VALUES, AND FRAMES, *supra* note 32, at 673, 683–84.

that we intuitively place a higher value on losses than on gains.³⁵ Endorsing Holmes's point of this human instinct, Chief Circuit Judge Richard Posner explained it in terms of the marginal utility of income, but it may be better explained as a "prescient articulation of the endowment effect, that is, the disparity between the valuation of gains and losses."³⁶ Whatever view you take, all of this purports to explain the higher valuation of losses—the inclination to decide in favor of the party who will lose over the party who gains. But what if the identity of gain and loss is further manipulated by the labels applied?

Several studies demonstrate the tendency to make crucial decisions based on nothing more than the linguistic framing of the question. A 1982 study examined doctor and patient preferences for lung cancer therapies and found that choices varied significantly when the outcomes were described in terms of mortality, rather than survival.³⁷ The mortality estimation was less popular.³⁸ The phenomenon exists outside of formal studies; a good example is credit card companies dodging the label of "surcharges" by framing the use of cash as a discount. As Professors Daniel Kahneman and Amos Tversky report (if it's not obvious), consumers will avoid a surcharge but are willing to forego a discount for the convenience of a credit card.³⁹

A 1995 study looked at the framing of jury instructions for calculating pain and suffering awards: alternate instructions framed the question as (1) the amount required to make the victim whole (the making-whole perspective) and (2) if the injury had not yet occurred, the amount of money it would require for you to suffer the injury willingly (the selling-price perspective).⁴⁰

Across multiple study groups, the selling-price perspective yielded about twice the amount of the making-whole perspective.⁴¹ Although that study did not view this from a gain-loss point of view, that view is present with the making-whole seen as compensation from the status quo (the injury already happened, any compensation is a gain), and selling-price seen as the amount required to disturb the status quo.

³⁵ Oliver Wendell Holmes, Jr., Justice, *The Path of the Law*, Address Dedicating the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 476–77 (1897).

³⁶ Cohen & Knetsch, *supra* note 34, at 435.

³⁷ See Kahneman & Tversky, *supra* note 33, at 10.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See Edward J. McCaffery, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1356 (1995).

⁴¹ See *id.* at 1359.

A similar study examined the framing effects of complementary liability theories for injuries—negligence and strict liability.⁴² The study divided the 306 volunteer jurors into five groups, showing them different videos portraying the same hypothetical trial for a design defect.⁴³ Some jurors heard arguments using negligence terms, some with strict liability terms, and a control group heard only the facts without jury instructions or oral arguments.⁴⁴ The study revealed significant differences in:

- * jurors' willingness to award any damages;
- * the amount of damages awarded; and
- * the degree to which jurors' decisions about awarding damages under the given instructions matched their own sense of fairness.⁴⁵

All differences decidedly favored the use of negligence arguments over strict liability, and the authors' conclusion was that negligence entails a moral failing, while strict liability is seen as an unfortunate accident based on a technical product defect.⁴⁶

How does this tendency to value losses over gains apply to judges? Professors David Cohen and Jack Knetsch tested this thesis in a study of lower valuation of damages for claims involving adverse possession, recovery of lost profits, contract modifications (e.g., modifying a contract to promise an extra \$20,000 for timely delivery of goods already contracted for), gratuitous promises, opportunistic conduct (e.g., breach to take advantage of an unforeseen opportunity), and repossession.⁴⁷ They found consistency in judicial evaluation of damages: judges valued losses over gains.⁴⁸

Some may argue these framing studies—based on quantifiable issues or even issues of perceived or implicit value—are not applicable to amenability analysis; substantive legal choices for damages are not the same as amenability, or other procedural legal analyses lacking quantifiable values. But amenability can also be expressed as value-charged, a gain versus a loss. Deciding in plaintiff's favor means that plaintiff has a gain—but only of interests—while deciding against defendant means a loss of defendant's due-process rights. What's the

⁴² See Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 876 (2002).

⁴³ See *id.*

⁴⁴ See *id.* at 876–77.

⁴⁵ See *id.*

⁴⁶ See *id.* at 900, 937–40.

⁴⁷ See Cohen & Knetsch, *supra* note 34, at 439.

⁴⁸ See *id.* at 439–40.

balance in a decision producing a one-party gain in interest against the other party losing a due-process right?

Most important, in spite of our awareness of market manipulations, we're generally unaware of the manipulation caused by framing. Kahneman and Tversky note "the tendency of people to evaluate options in relation to the reference point that is suggested or implied by the statement of the problem."⁴⁹ This trusting compliance is no doubt enhanced when the instructions come from a credible source, in this case, the Supreme Court.

C. *The Distorted Picture in the Frame*

Even though the Supreme Court created the rights-versus-interest imbalance in forum contests,⁵⁰ the Court's language is overt only in a few places. In *World-Wide Volkswagen*, for example, the Court formulated that:

The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁵¹

Continuing in *World-Wide Volkswagen*, the Court crafted the first recitation of the fair-play and substantial-justice test, distinct from the contacts test: "Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, *while always a primary concern*, will in an appropriate case be considered in light of other relevant factors"⁵²

The other "relevant factors" (comprising the fairness-balancing test) are all denominated as "interests" belonging to the forum state, the plaintiff, the interstate system, and the shared interests of the several states.⁵³ Keep in mind that defendant will already have been found to have constitutionally sufficient contacts with the forum before getting to this

⁴⁹ Kahneman & Tversky, *supra* note 33, at 10. The authors further explain:

Studies of language comprehension indicate that people quickly recode much of what they hear into an abstract representation that no longer distinguishes whether the idea was expressed in an active or in a passive form and no longer discriminates what was actually said from what was implied, presupposed, or implicated.

Id.; see also McCaffery et al., *supra* note 40, at 1385 ("This might explain the apparent paradox that jurors consider a selling price perspective, even without the trial judge's ever being aware that it has been suggested to them.").

⁵⁰ See *supra* notes 29–31 and accompanying text.

⁵¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

⁵² *Id.* at 292 (emphasis added) (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

⁵³ *Id.*

fairness-balancing stage.⁵⁴ The articulation here is that defendant's due-process rights remain primary but may be overcome by some combination of other "interests."

Later, in *Bristol-Myers Squibb Co. v. Superior Court*,⁵⁵ Justice Alito explained minimum contacts by rephrasing *World-Wide Volkswagen's* "primary concern" formula: "In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include 'the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice.' But the 'primary concern' is 'the burden on the defendant.'"⁵⁶ Thus, plaintiffs' "interests" are weighed against the defendant's "burden," reinforced by defendant's rights being a "primary concern," and often ignoring the litigation burden's shift to plaintiffs if the initial forum choice fails.⁵⁷

The Court's overtly biased language (that is, a recitation of defendant's burden being the primary concern) is not routine in all amenability analyses. What is routine is the invocation of due process in both parts of the test—contacts and fairness—and a corresponding subversion of plaintiff's forum-selection rights to whatever "interests" the forum or other states are deemed to have. And though the due-process thumb on the scale begins with the contacts test, the bias is most apparent in the fairness-balancing test, the five-factor analysis that theoretically occurs only after a contact has been found. The bias exists both in the framing (defendant's due process contrasted with plaintiff's interests), and in the subsuming of plaintiff's interest in those of the forum.⁵⁸

*Asahi Metal Industry Co. v. Superior Court*⁵⁹ is a good example. California resident Zurcher was injured, and his wife killed, when his motorcycle tire blew out on a California highway.⁶⁰ Zurcher sued the tire manufacturer—Cheng Shin Rubber Industrial Company—a Taiwanese company with considerable California contacts.⁶¹ Cheng Shin impleaded Asahi Metal, the Japanese manufacturer of the failed tire valve.⁶² When Cheng Shin settled with Zurcher, leaving Cheng Shin as the putative claimant against third-party defendant Asahi, a Supreme Court plurality

⁵⁴ See *id.* at 291 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

⁵⁵ 137 S. Ct. 1773 (2017).

⁵⁶ *Id.* at 1780 (citations omitted) (first quoting *Kulko v. Superior Ct.*, 436 U.S. 84, 92 (1978); and then quoting *World-Wide Volkswagen*, 444 U.S. at 292).

⁵⁷ See *id.*

⁵⁸ Examples include *McGee*, *Hanson*, *Kulko*, *Keeton*, *Burger King*, *McIntyre*, and *Ford*. See *supra* note 31.

⁵⁹ 480 U.S. 102 (1987).

⁶⁰ See *id.* at 105–06.

⁶¹ See *id.* at 106.

⁶² *Id.*

agreed that California's interest dissipated when its resident was compensated, and on that basis found no amenability to suit for Asahi in California.⁶³

This ignored Cheng Shin's role as the remaining claimant—Zurcher's assignee—seeking reimbursement for a fatal accident on California roads. It assumed that California's only "interest" was in compensating its resident. One question is if Zurcher hadn't settled, would the stream-of-commerce theory validate California jurisdiction? That may be unlikely because of the Justice Sandra Day O'Connor plurality rejecting stream of commerce entirely, but the point remains that Justice William Brennan's group found no jurisdiction based on an assessment of "California's interest."⁶⁴ It's only speculation as to what effect the framing had on the decision, but the framing language is apparent: *Asahi* mentions due process twenty times, some stating the general rule and some for third-party defendant Asahi; discusses interest twenty times, five for settling plaintiff Zurcher, eight for California; six for other states or nations; one for federal foreign policy, and notably, no rights or interests for claimant Cheng Shin.⁶⁵

*J. McIntyre Machinery, Ltd. v. Nicastro*⁶⁶ is even more pronounced in its diminution of plaintiffs' rights. This was an injury in the forum state by a defendant's product sold to a customer who was clearly going to use it in the forum state.⁶⁷ Defendant McIntyre, rather than purposely availing itself of forum benefits, had purposely avoided direct forum contact and had exploited the U.S. market by limiting its own corporate contacts to only a few states.⁶⁸ Those other states would of course lack claim-related contacts for Nicastro, so the only available forum was defendant's home in England, in spite of the U.S. market being lucrative enough for defendant to create a wholly owned subsidiary to place its product. The Supreme Court result was another stream-of-commerce plurality, with four Justices echoing the Justice O'Connor group that rejected stream of

⁶³ See *id.* at 114–16.

⁶⁴ See *id.* at 116 (Brennan, J. concurring) (joining the majority Opinion in II-B, which held the California Supreme Court's definition of "California's interest . . . was overly broad").

⁶⁵ See *Asahi*, 480 U.S. *passim*. Interestingly, although the Justice O'Connor group rejected stream of commerce, and thus rejected jurisdiction at the contact stage, their analysis nonetheless heeded the frame by mixing the contacts and fairness tests, citing due process eleven times and "interest" twenty times, only five of which were in reference to third-party plaintiff Cheng Shen. See *id.* at 108–16.

⁶⁶ 564 U.S. 873 (2011).

⁶⁷ See *id.* at 878.

⁶⁸ See *id.* at 886.

commerce,⁶⁹ two concurring in the judgment,⁷⁰ and three dissenting.⁷¹ Once again it's speculation as to the framing effect, but again the language reflects framing; *McIntyre* mentions due process sixteen times for defendant; and interest four times—two for defendant (the “liberty interest preserved by the Due Process Clause”⁷²), two for the forum, and none for the plaintiff who lost his hand to defendant's machine in a forum-state accident.⁷³

The effect of rights-and-interest framing may reach further than the fairness-balancing test. Jurisdictional standards include the “traditional bases” recited in *Pennoyer*—residence, consent, waiver, and in-forum service.⁷⁴ Consent includes express consent as in forum-selection clauses.⁷⁵ Jurisdictional agreements were historically disfavored⁷⁶ but found Supreme Court acceptance in *National Equipment Rental, Ltd. v. Szukhent*⁷⁷ and reinforced in *M/S Bremen v. Zapata Off-Shore Co.*,⁷⁸ although both cases involved negotiated contracts.⁷⁹ The clauses spiked after *Carnival Cruise Lines, Inc. v. Shute*,⁸⁰ where the Supreme Court approved them for fine-print adhesion consumer contacts such as sea cruise tickets (and any number of other consumer contacts).⁸¹ It is possible the 1991 *Carnival Cruise* decision was driven, at least in part, by the rise of amenability framing with *World-Wide Volkswagen* in 1980, much quoted and firmly in the collective judicial mindset by 1991.

Carnival Cruise's language supports this speculation. The opinion does not mention due process; mentions interest twice (one for the defendant's interest in limiting its forum exposure, and one in the dissent regarding public policy interest); and mentions “right” six times (three in the majority discussing the inapplicability of plaintiffs' federal statutory right

⁶⁹ *Id.* at 877 (Kennedy, J., joined by Roberts, C.J., Scalia & Thomas, JJ.).

⁷⁰ *Id.* at 887 (Breyer, J., joined by Alito, J., concurring).

⁷¹ *Id.* at 893 (Ginsburg, J., joined by Sotomayor & Kagan, JJ., dissenting).

⁷² See *McIntyre*, 564 U.S. at 900 (Ginsburg, J., dissenting) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982)).

⁷³ See *id. passim* (all opinions). As in *Asahi*, four justices rejected stream-of-commerce, and thus should not have gotten beyond the contacts stage, but nonetheless considered “interests” three times: one for defendant, two for the forum, and none for plaintiff. See *id.* at 883–87 (plurality opinion).

⁷⁴ See *Pennoyer v. Neff*, 95 U.S. 714, 733–35 (1878).

⁷⁵ *E.g.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–15 (1972).

⁷⁶ *Id.* at 9–10 & n.10.

⁷⁷ 375 U.S. 311 (1964).

⁷⁸ 407 U.S. 1 (1972).

⁷⁹ *Nat'l Equip.*, 375 U.S. at 313; *M/S Bremen*, 407 U.S. at 2–3.

⁸⁰ 499 U.S. 585 (1991).

⁸¹ *Id.* at 594–95.

to a remedy, and three in dissent, discussing the denial of that right).⁸² The discussion included a federal statute's legislative intent to assure a "competent forum" and the plaintiffs' contractual intent, with no mention of a right to an accessible forum.⁸³ Ultimately, *Carnival Cruise* is simply the enforcement of an unnegotiated contract, with no consideration of the fundamental rights plaintiffs were waiving. Perhaps parties would not be seen as waiving jurisdictional options so readily in unilateral contracts if those options were recognized as fundamental rights.

But the concern is not so much the Supreme Court's analyses in particular cases (despite fundamentally flawed opinions like *Carnival Cruise*), and not necessarily even the federal appellate or state supreme court opinions. Rather, it's the volume of jurisdictionally dismissed cases in state and federal district courts. In these cases, the Supreme Court's framing of rights and interest—the misapplication and misapprehension—induces cursory analysis. Even more troublingly, that concern is unmeasurable and subject only to speculation as to how many marginally resourced plaintiffs—how many Shutes and Nicastro—never get their day in court.

Although framing is a fact, its effect on jurisdictional analyses is often speculation, much like the effects of framing in non-legal settings such as consumer sales. Professor Jonah Gelbach and others have noted both the importance and difficulty of deriving data about various aspects of litigation.⁸⁴ While data is available on some litigation outcomes, particularly in cases reaching judgment,⁸⁵ it is likely impossible to measure the jurisdictional dismissals caused by framing.

I can't tell you which jurisdictionally dismissed plaintiffs suffered from the skewed amenability framing, just like I can't tell you which teenagers took up smoking because of the overtly framed advertising aimed at them through the 1960s. But I can show you that we had enough belief in the framing in those advertisements to impose severe restrictions

⁸² *Id.* at 593, 596–97; *id.* at 601–03 (Stevens, J., dissenting).

⁸³ See 46 U.S.C. app. § 183c (current version at 46 U.S.C. § 30509), discussed in *Carnival Cruise*, 499 U.S. at 595–96.

⁸⁴ See, for example, Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 STAN. J. COMPLEX LITIG. 223 (2014) [hereinafter Gelbach, *Dark Arts*], especially 225–29; Jonah B. Gelbach, *Can We Learn Anything About Pleading Changes from Existing Data?*, 44 INT'L REV. L. & ECON. 72 (2015); Jonah B. Gelbach, Note, *Locking the Door to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L. J. 2270 (2012); and sources cited in all three articles.

⁸⁵ In *McIntyre*, for example, Justice Breyer offered a case count noting the sharp variation in plaintiffs' wins in tort cases in distinct urban areas in the United States. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 892 (2011) (Breyer, J., concurring).

on tobacco ads, starting in 1969.⁸⁶ The original tobacco advertising was conceived on speculation that targeted markets would increase tobacco purchases, and the resulting regulations were done on speculation that they would have an effect.⁸⁷ Both proved true.⁸⁸ It is no greater speculation that defendants' due-process rights balanced against plaintiffs' weakly phrased "interests" have a real but undetectable effect in close cases, particularly those done summarily at the trial level and not appealed.

The case filing volume alone is daunting. In 2019, federal district courts had 380,000 cases filed and state courts had 85 million.⁸⁹ Even with sampling, I'm not aware of any means of lower-court profiling of amenability dismissals attributable to framing. Crucial data would be the comparative rates of granting and denying amenability objections, distinguishing between local law (bad process, bad service, inapplicable long-arm statutes) and constitutional grounds.⁹⁰

Federal data on dismissals is more profiled, but even if it was adequate for this, federal dismissals are an unlikely proxy for the much larger volume of state court dismissals which are not collected. Gelbach cautions against invalid assumptions often used with available data,⁹¹ and the assumptions necessary here evade measurable validity.

If we could find the jurisdictional dismissal count, it's also impossible to assess the effect of framing, whose subtle influences don't allow measure. If the state and federal court systems were laboratories, it might be tested by reversing the frame—labeling plaintiffs with a due-process right to forum access (which in fact plaintiffs have as a nascent right) versus defendants' interest in minimizing or avoiding liability. But courts are not laboratories in that sense, and our only measure is based on data of actual cases—which is not available for jurisdictional dismissals.

⁸⁶ See Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–1341. For examples of the framed advertising of tobacco, see generally *Research into the Impact of Tobacco Advertising*, STANFORD UNIV. (2023), <https://perma.cc/Y46C-D8TN>.

⁸⁷ See generally Cheryl L. Perry, *The Tobacco Industry and Underage Youth Smoking: Tobacco Industry Documents from the Minnesota Litigation*, 153 ARCHIVES PEDIATRICS & ADOLESCENT MED. 935 (1999); U.S. DEP'T OF HEALTH AND HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* 15–41, 701–70 (2014).

⁸⁸ See *supra* note 87.

⁸⁹ See *Federal and State Caseload Trends, 2012–2021*, CT. STAT. PROJECT, <https://perma.cc/NW3K-JQ7E>; *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <https://perma.cc/DW68-8BVH>.

⁹⁰ The considerable litigation data gathered for state and federal courts do not assess dismissals in this detail. See *Federal Judicial Caseload Statistics 2020*, U.S. CTS., <https://perma.cc/2WK9-LHJC>; *State Court Caseload Digest: 2018 Data*, CT. STAT. PROJECT, <https://perma.cc/7H9G-Y2CJ>. Lexis and Westlaw also offer impressive data compilations and mining capacity, but that does not include the judges' mindset in interest balancing.

⁹¹ See Gelbach, *Dark Arts*, *supra* note 84 *passim*.

That lack of knowledge should not impede a correction of the framing problem. We also lack quantified knowledge of the ultimate effects of erroneous jury instructions (or for that matter, whether juries heed them) but we correct them. Under the current test, defendant has a due-process thumb on the scale. Our inability to assess and quantify the mismeasure should not prevent us from removing the thumb.

II. A Closer Look at Plaintiffs' Rights

The basis for the American court-access canon began with Magna Carta in thirteenth-century England, six reigns and 149 years after William the Conqueror's arrival in 1066.⁹² That period solidified the island's feudal kingdoms and centralized the government, resolving many old problems but creating new ones which came to a head at the end of King John's reign.⁹³

A. *Magna Carta and the King's Concessions of Individual Rights*

Historians trace many of our basic rights to Magna Carta, and its later interpretations under Coke and Blackstone,⁹⁴ notably including forum-access rights. King John placed his seal on the original in 1215 but successive versions appeared afterward, most notably from Henry III in 1225.⁹⁵ In 1215, the purpose of the meeting that led to Magna Carta was to resolve disputes—some created by King John and some going back well before.⁹⁶ Although there were a myriad of problems—taxation, land tenure, foreign, and domestic wars⁹⁷—this Article's thesis of court access limits this discussion to the barons' complaints about the English justice system.

⁹² See Thomas McSweeney, *English Judges and Roman Jurists: The Civilian Learning Behind England's First Case Law*, 84 TEMP. L. REV. 827, 856 (2012).

⁹³ This Article is being written in the wake of the decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), that overturned *Roe v. Wade*, 410 U.S. 113 (1973). Both *Roe* and *Dobbs* claim justification from opposing readings of thirteenth-century English law. Whatever you think of the *Roe* and *Dobbs* historical analyses, and however much you may condemn thirteenth-century views on other issues that have evolved, it is well-established that American notions of due process and other fundamental rights were shaped by those thirteenth-century views, and later advocates such as Coke and Blackstone. See J.C. HOLT, *MAGNA CARTA* 34–48 (3d ed. 2015). Early English law's role as an origin for fundamental rights does not make it the destination.

⁹⁴ See, e.g., *Kerry v. Din*, 576 U.S. 86, 91 (2015) (quoting inter alia Magna Carta and Lord Coke).

⁹⁵ See A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 23–25 (rev. ed. 1998); CLAIRE BREAY, *MAGNA CARTA: MANUSCRIPTS AND MYTHS* 44–45 (reissue ed. 2015).

⁹⁶ See HOWARD, *supra* note 95, at 4–8.

⁹⁷ *Id.*

Henry II (John's father) instituted judicial reform that included the appointment of five members of his council to hear "common pleas"—private disputes as opposed to claims involving the king.⁹⁸ Although constituting a separate forum, those five councilmembers were nonetheless part of the King's Bench and accordingly traveled with the king, frustrating claimants who were unable to get a timely hearing.⁹⁹ Historical accounts of Magna Carta do not address complaints about ecclesiastical courts, and chancery courts did not yet exist.¹⁰⁰ For purposes of King John and the barons' complaints, the judiciary complaints involved the King's Bench and its Common Pleas subset.¹⁰¹ The displeasure related to claimants' lack of access to the King's Bench and Common Pleas, to the king's use of his courts to pursue inappropriate goals, and to the fee structure—royal courts not only charged fees but for a price offered better options, which was supplanting the barons' manorial or feudal courts.¹⁰²

These were some of the many complaints circulating among the barons.¹⁰³ In an attempt to avoid internal war, on Easter weekend of 1215 the barons sent a demand to John for a meeting to be held on June 15 at Runnymede.¹⁰⁴ Professor Dick Howard emphasizes that—in spite of the fundamental rights King John granted in that meeting, all conceding that the king was subject to the "law of the land"—there was nothing high-minded about the barons' goals and they had no long-range plan to make the world, or even England, a better place.¹⁰⁵ They wanted an immediate fix, and the original document was hastily written and disorganized.¹⁰⁶

1. The Original Edicts in 1215

Five clauses in the original 1215 Magna Carta support plaintiffs' rights in forum access and selection.¹⁰⁷

⁹⁸ See *Court of Common Pleas*, BRITANNICA (July 17, 2018), <https://perma.cc/P8FY-J65E>.

⁹⁹ *Id.*

¹⁰⁰ See *Early Law Courts*, UK PARLIAMENT, <https://perma.cc/UTF5-97XE>.

¹⁰¹ See HOWARD, *supra* note 95, at 4, 12; HOLT, *supra* note 93, at 124; see also *English Medieval Legal Documents Database: A Compilation of Published Sources from 600 to 1535*, UNIV. S. CAL. (Aug. 11, 2021), <https://perma.cc/L7ZS-ZWL7>.

¹⁰² See BREAY, *supra* note 95, at 12, 28; Thomas R. Phillips, C.J., Sup. Ct. of Tex., *The Constitutional Right to a Remedy* (Feb. 28, 2002), in 78 N.Y.U. L. REV. 1309, 1320 n.35 (2003) and sources cited therein.

¹⁰³ See HOWARD, *supra* note 95, at 6.

¹⁰⁴ *Id.* at 7–8.

¹⁰⁵ *Id.* at 8–9.

¹⁰⁶ *Id.* at 3–4, 9; Phillips, *supra* note 102, at 1320 n.35.

¹⁰⁷ The 1225 issuance of Magna Carta was the one eventually codified in 1297. See BREAY, *supra* note 95, at 44. This Article relies on the translation and numbering of the original 1215 Magna Carta,

a. *Clause 17—Fixed Venue for Common Pleas Courts*

Common pleas are not to follow our court but shall be held in some fixed place.¹⁰⁸

As noted immediately above, private claims (those not involving the king) were heard by the Court of Common Pleas, a subset of the King's Bench that traveled with the king.¹⁰⁹ Clause 17 ended the need to follow the king just to get an audience, at least for ordinary lawsuits that could be litigated in Common Pleas courts.¹¹⁰ In place of following the king, Clause 17 designated a fixed venue, which turned out to be Westminster.¹¹¹

b. *Clause 18—Venue for Certain In Rem Disputes*

Recognitions of novel disseisin, mort d'ancestor, and darrein presentment are not to be held elsewhere than in their own counties, and in this manner: we, or if we should be out of the realm our chief justiciar, shall send two justices through each county four times a year who, with four knights of each county chosen by the county, are to hold the said assizes in the county court on the day and in the place of meeting of the county court.¹¹²

This set a fixed local venue for certain in rem actions and laid the concept for “local actions” (typically in rem) that must be tried in the county of the property's location.¹¹³ That concept of certain locally tried actions led to the distinction of transitory actions (with amenability created by in-forum service) that became important in the multi-jurisdictional colonies and individual States.¹¹⁴

as did Blackstone in *The Great Charter and his Commentaries*. See MAGNA CARTA: LAW, LIBERTY, LEGACY 169 (Claire Breay & Julian Harrison eds., 2015). So do later authoritative works by Holt, Howard, and Breay. Breay's reason for using the 1215 text is its “intrinsic adaptability of certain key clauses which allowed Magna Carta to be elevated to the iconic status which it has long enjoyed.” BREAY, *supra* note 95, at 7.

¹⁰⁸ See HOLT, *supra* note 93, at 385.

¹⁰⁹ *Court of Common Pleas*, *supra* note 98.

¹¹⁰ HOWARD, *supra* note 95, at 12.

¹¹¹ *Id.*

¹¹² HOLT, *supra* note 93, at 385.

¹¹³ See HOWARD, *supra* note 95, at 12–13.

¹¹⁴ “[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found, for every nation may . . . rightfully exercise jurisdiction over all persons within its domains.” *Burnham v. Superior Ct.*, 495 U.S. 604, 611 (1990) (alterations in original) (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 543, 554 (3d ed. 1846)).

c. *Clause 19—Extended Docket Days for the King's Bench*

And if the said assizes cannot be held on the day of the county court, so many knights and freeholders of those present in the county court on that day shall remain behind as will suffice to make judgments, according to the amount of business to be done.¹¹⁵

Even though manorial courts were held locally, the King's Bench was on circuit with the king, impeding or sometimes denying access to claimants.¹¹⁶ Clause 19 provided for holdover courts for the writs specified in Clause 18 that were not concluded on the regular docket; it extended court times to resolve excessive dockets.¹¹⁷ Together, Clauses 17, 18, and 19 guaranteed two levels of court—the King's Bench and Common Pleas—even though those courts pre-existed Magna Carta.¹¹⁸ These clauses assured not only the courts' existence but also their availability—in addition to the remaining baronial or feudal courts which were eventually phased out.¹¹⁹

d. *Clause 24—Barring Lesser Officials from Exercising Royal Judicial Jurisdiction*

No sheriff, constable, coroners or other of our bailiffs may hold pleas of our Crown.¹²⁰

Sir J.C. Holt, an English historian, reports several documented cases from 1194 to 1209 in which sheriffs and other local officers acted as judges in matters that should have been exclusively in the royal court.¹²¹ Interestingly, it was the barons, rather than King John, demanding the proper exercise of royal jurisdiction, although it's understandable that the barons would be more affected if matters such as property rights were adjudicated corruptly.¹²²

¹¹⁵ HOLT, *supra* note 93, at 385.

¹¹⁶ See HOWARD, *supra* note 95, at 12.

¹¹⁷ See *id.* at 13.

¹¹⁸ See *id.* at 12; *Court of Common Pleas*, *supra* note 98.

¹¹⁹ See *Manorial Court*, BRITANNICA (Feb. 15, 2007), <https://perma.cc/YW69-2QVX>.

¹²⁰ HOLT, *supra* note 93, at 385.

¹²¹ See *id.* at 274 n.135.

¹²² See *id.*

e. *Clause 34—Retaining Landholding Claims in the Barons' Courts*

The writ called *praecipe* is not, in future, to be issued to anyone in respect of any holding whereby a free man can lose his court.¹²³

Worded speciously as if to favor the tenant's access to the local baron's court for land claims, Holt suggests this was the barons' attempt to reinforce the feudal system from encroachment by the royal court.¹²⁴

f. *Clause 39—Due Process and Right to Jury Trial*

No free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.¹²⁵

Although seemingly directed to criminal prosecution or actions by the state, Clause 39 became the due process clause of the Fifth and Fourteenth Amendments.¹²⁶ Blackstone said that Clause 39 by itself “would have merited the title that it bears, of the *great charter*”¹²⁷ and used the phrase “by the law of the land” to coin “due course of law” which appears in many state constitutions in the United States.¹²⁸ Professor A.E. Dick Howard noted Clause 39's two important aspects—substance and procedure: “[T]he chapter [Clause 39] also requires that there must be more than the formality of a legal judgment; there must be a genuine trial, not a hollow mockery. This means that the trial must be before a competent tribunal that follows accepted procedures.”¹²⁹

¹²³ *Id.* at 387. The writ of *praecipe* is a writ “ordering a defendant to do some act or to explain why inaction is appropriate.” *Praecipe*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹²⁴ HOLT, *supra* note 93, at 274–75.

¹²⁵ *Id.* at 389.

¹²⁶ See HOWARD, *supra* note 95, at 14–15. Specifically, the Fifth Amendment provides in part that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law,” U.S. CONST. amend. V, and the Fourteenth Amendment states, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” U.S. CONST. amend. XIV, § 1.

¹²⁷ See HOWARD, *supra* note 95, at 14.

¹²⁸ See Phillips, *supra* note 102, at 1310 & nn.4, 7.

¹²⁹ See HOWARD, *supra* note 95, at 14.

g. *Clause 40—Justice as a Public Function and Not a Commercial Commodity; The Right to Court Access Without Excessive Fees or Costs*

To no one will we sell, to no one will we deny or delay right or justice.¹³⁰

Howard notes that Clause 40 did not mean there would be no fees, but rather that “justice is not an article of trade, and its price is not to be determined according to what the market will bear.”¹³¹ In the 1225 version of Magna Carta, renumbered to reflect the separation of portions into the Charter of the Forest, Clauses 39 and 40 of the 1215 version are combined into one Clause 29.¹³² The combined Clauses 39 and 40 are often cited together (or the one Clause 29 from the 1225 Magna Carta) as the basis of Anglo-American due process in general and an important aspect of habeas corpus.¹³³ These clauses are not the original grant of habeas corpus, which existed well before 1215, but a procedure that depended on court access and adequate process, both of which are specified there.¹³⁴

h. *Clause 45—Appointment of Qualified Judges*

We will not make justices, constables, sheriffs or bailiffs, except of such men who know the law of the realm and mean to observe it well.¹³⁵

Experiencing the benefits of the law of the land required not only available courts but also competent and honest officials who knew it and would apply it.¹³⁶ England had experienced corruption, incompetence, and inefficiency in its justice system, and this clause was directed to that.

Along with these quoted clauses directed to courts and process, several Magna Carta clauses—particularly 52, 55, 56, and 57—pledged that King John would undo broadly referenced royal acts that took property, imposed fines, and committed other acts without proper legal process.¹³⁷

¹³⁰ HOLT, *supra* note 93, at 389.

¹³¹ See HOWARD, *supra* note 95, at 15.

¹³² See *Magna Carta, 1225*, NAT'L ARCHIVES, <https://perma.cc/5PJV-QF9J>.

¹³³ See HOWARD, *supra* note 95, at 14–15.

¹³⁴ See Justin J. Wert, *With a Little Help from a Friend: Habeas Corpus and Magna Carta After Runnymede*, 43 PS 475, 475–78 (2010).

¹³⁵ HOLT, *supra* note 93, at 389.

¹³⁶ See *id.* at 288–89 (discussing the corruption and incompetence in England's thirteenth-century legal system).

¹³⁷ See *id.* at 391–93.

2. Later English Use of Magna Carta

King John was not happy, of course, with his coerced execution of a written document limiting his heretofore divinely given power. He sent an envoy to Pope Innocent III seeking a nullity declaration, which was granted.¹³⁸ As Howard notes, Magna Carta might not have survived this if John had lived much longer.¹³⁹ In the meantime, however, a combination of English baronial displeasure and French ambitions led to English civil war, requiring John to take the offensive.¹⁴⁰ During John's personally led military response, he caught dysentery and died in October 1216.¹⁴¹

His death led to the coronation of his nine-year-old son as King Henry III.¹⁴² William Marshall, Earl of Pembroke, was appointed to rule on Henry's behalf.¹⁴³ With the Pope having nullified Magna Carta, and the country in civil war, Lord Pembroke thought it wise to reissue Magna Carta, which he did within a month of John's death, and again in 1217.¹⁴⁴ This led to sufficient agreement between the loyalist and rebel barons to resolve the civil conflict.¹⁴⁵

Magna Carta's text was edited in both reissuances, and the 1217 version segregated a number of clauses into the Charter of the Forest, with the remaining document retaining the name Magna Carta.¹⁴⁶ When Henry III reached adulthood and assumed control, he reissued it again in 1225 and that became the relied-on version that was codified in 1297.¹⁴⁷ Even with the clarifying reissuances, there continued to be conflicting interpretations of the Latin text over the next centuries until Blackstone clarified it in his 1759 Commentaries on the Laws of England.¹⁴⁸

Magna Carta went relatively ignored under the Tudor kings but returned to life in the seventeenth century in the struggles between the crown and the rule of law.¹⁴⁹ Lord Coke in particular relied on Magna Carta, in both the courts and Parliament, while opposing the royal

¹³⁸ See BREAY, *supra* note 95, at 40.

¹³⁹ HOWARD, *supra* note 95, at 23–24.

¹⁴⁰ See BREAY, *supra* note 95, at 42–44.

¹⁴¹ See *id.*

¹⁴² See *id.* at 44.

¹⁴³ See *id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *id.*; HOWARD, *supra* note 95, at 23–24.

¹⁴⁶ See BREAY, *supra* note 95, at 44; HOWARD, *supra* note 95, at 24.

¹⁴⁷ See HOWARD, *supra* note 95, at 24.

¹⁴⁸ See HOLT, *supra* note 93, at 47.

¹⁴⁹ See Justin Champion & Alexander Lock, *English Liberties*, in MAGNA CARTA: LAW, LIBERTY, LEGACY, *supra* note 107, at 107, 108.

excesses of James I and Charles I.¹⁵⁰ With Coke's and others' advocacy, Magna Carta was a cornerstone in building several other legal reforms in England, including the Petition of Right in 1628, the Habeas Corpus Act in 1679, and the Bill of Rights in 1689.¹⁵¹

Holt speaks of the "myth" of Magna Carta, meaning the later interpretations creating rights not intended by the barons at Runnymede.¹⁵² Most important were the changes based on Clauses 39 and 40. Examples include the original phrase "lawful judgment of peers" to "trial by peers," which became trial by jury; the phrase "law of the land" becoming due process of law; and the term "no free man" becoming the more inclusive "no man of whatever estate or condition he may be."¹⁵³

While sounding his Magna Carta trumpet, Coke argued that its rights also protected English subjects outside of England, including the colonies,¹⁵⁴ and, with that lead-in, Coke participated in and influenced the drafting of several foundational legal documents in the colonies.

B. *Incorporation of Plaintiffs' Rights in the Colonies*

The great bronze doors on the U.S. Supreme Court depict eight legal history scenes, starting with the Shield of Achilles.¹⁵⁵ Two relate here: King John sealing Magna Carta under the coercion of a sword-wielding baron, and Lord Coke barring King James from sitting as a judge and thereby distinguishing the judiciary from the executive.¹⁵⁶

Coke helped draft the First Virginia Charter in 1606, which included all "Liberties, Franchises, and Immunities" as if they lived in England.¹⁵⁷ The same assurance of "the rights of Englishmen" was included in the colonial charters of Carolina, Connecticut, Maryland, Massachusetts Bay, Rhode Island, and Georgia.¹⁵⁸ William Penn wrote an essay on Magna Carta and used portions in drafting Pennsylvania law.¹⁵⁹ Many of those specific provisions of Magna Carta in colonial pacts and legislation

¹⁵⁰ See *id.* at 108–09.

¹⁵¹ See HOWARD, *supra* note 95, at 26–27; Alexander Lock & Justin Champion, *Radicalism and Reform*, in MAGNA CARTA: LAW, LIBERTY, LEGACY, *supra* note 107, at 161, 162.

¹⁵² See HOLT, *supra* note 93, at 39.

¹⁵³ See *id.* at 39–40.

¹⁵⁴ See Matthew Shaw, *Colonies and Revolutions*, in MAGNA CARTA: LAW, LIBERTY, LEGACY, *supra* note 107, at 137, 137.

¹⁵⁵ See *The Bronze Doors*, U.S. SUP. CT. (Nov. 8, 2021), <https://perma.cc/KL68-554S>.

¹⁵⁶ See *id.*

¹⁵⁷ See HOWARD, *supra* note 95, at 28.

¹⁵⁸ See *id.*

¹⁵⁹ See BREAY, *supra* note 95, at 46.

became revolutionary declarations,¹⁶⁰ and our Bill of Rights drew explicitly on Coke's reading of Magna Carta.¹⁶¹ Crucially to the argument here, the U.S. Constitution incorporates a number of rights originating in Magna Carta's guarantee of court access.¹⁶²

C. *The United States Constitution*

Just as American colonists used Magna Carta for guidance in colonial legal documents, the drafters of the Constitution included fundamental judicial-access guarantees in several constitutional doctrines, starting with Article III defining the federal judicial power and following through to include rights that would apply in the states.¹⁶³ These constitutional protections of forum access do not bar all limits on court access. Allowable limits include subject matter jurisdiction classifications,¹⁶⁴ time-bars such as limitation periods and statutes of repose, filing fees, stays or dismissals of parallel litigation, anti-suit injunctions against foreign litigation,¹⁶⁵ and various other limits on access to courts. However, the remaining constitutional protection is nonetheless formidable.

1. Article III—The Right to Federal Court Access and the Right to a Remedy

The Constitution's creation of the federal court system includes a duty to exercise the granted jurisdiction; not only in the national interest, but to protect private interests.¹⁶⁶ In *Marbury v. Madison*,¹⁶⁷ Chief Justice John Marshall explained the courts' duty as twofold: to exercise properly invoked jurisdiction,¹⁶⁸ and to provide a remedy for plaintiffs who establish

¹⁶⁰ See HOWARD, *supra* note 95, at 28–30. Breyer notes the Declaration of Independence's reference to "injuries and usurpations" echoes Magna Carta. See BREYER, *supra* note 95, at 46.

¹⁶¹ See MAGNA CARTA: LAW, LIBERTY, LEGACY, *supra* note 107, at 155.

¹⁶² See, e.g., *id.*; HOWARD, *supra* note 95, at 14–15.

¹⁶³ See Shaw, *supra* note 154, at 137; Robert W. Emerson & John W. Hardwicke, *The Use and Disuse of the Magna Carta: Due Process, Juries, and Punishment*, 46 N.C. J. INT'L L. 571, 625 (2021).

¹⁶⁴ Though subject matter limits may be unconstitutional if distinguishing between residents and nonresidents. See *Hughes v. Fetter*, 341 U.S. 609, 613 (1951).

¹⁶⁵ See *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 17 (1987) (denying a request for a federal court injunction against state litigation).

¹⁶⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

¹⁶⁷ 5 U.S. (1 Cranch) 137 (1803).

¹⁶⁸ The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is

the violation of a right.¹⁶⁹ Marshall's pronouncement looks to Article III but is not limited to federal jurisdiction. Instead, the duty to provide court access is drawn from English common law and is cited as a duty of common-law courts.¹⁷⁰

The Supreme Court most recently noted this right-to-a-remedy principle, albeit in dissent, in consideration of a securities fraud claim against third-party aiders and abettors.¹⁷¹ In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,¹⁷² the majority declined to extend the implied right of action under SEC Rule 10b-5 to collateral parties on whom plaintiffs had not directly relied.¹⁷³ Three Justices dissented, citing several cases as grounds to extend the implied remedy's reach because defendants' actions allegedly enabled the fraud.¹⁷⁴ This argument is notable, as one-third of the court would have applied the right-to-a-remedy canon to a claim that did not exist at the common law and is not an expressly created federal right, but merely one imputed to a federal regulation.¹⁷⁵

sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

Id. at 163; *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); *United States v. Raines*, 362 U.S. 17, 20 (1960) ("The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them."). *Raines* involved the appeal right of a criminal defendant, but nonetheless speaks to a party seeking judicial relief.

¹⁶⁹ "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, 5 U.S. (1 Cranch) at 163.

¹⁷⁰ In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law. "In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." And afterwards, p. 109, of the same vol. he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."

Id. at 163.

¹⁷¹ *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 176 (2008) (Stevens, J., dissenting).

¹⁷² 552 U.S. 148 (2008).

¹⁷³ *Id.* at 159.

¹⁷⁴ *Id.* at 167, 175–80 (Stevens, J., dissenting).

¹⁷⁵ *Id.* at 167–68.

As with most legal edicts, the duty to exercise jurisdiction is not absolute, as illustrated in the *Colorado River*¹⁷⁶ doctrine's formula for dismissing a federal case that parallels a first-filed state court case. Explaining the grounds for dismissal, Justice Brennan cautioned first that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."¹⁷⁷ Even when allowing dismissal of later-filed parallel cases, the doctrine requires an adequate alternative forum, and even then, the *Colorado River* Court warned that declining jurisdiction is not done lightly and that the presumption favors the exercise of jurisdiction.¹⁷⁸

Article III's role as a limit on federal power is contrasted by its assurances of court access, including diversity jurisdiction, which ensures plaintiffs and defendants (through removal) access to an adequate forum.¹⁷⁹ The Supreme Court has also done the converse, compelling state courts to hear federal claims.¹⁸⁰ These Article III rights are limited, of course, to federal courts or claims arising under federal law. As discussed below, several other fundamental rights also apply to state courts.

2. Full Faith and Credit and Court-Closing Rules

States have sometimes closed their courthouse doors to claims arising elsewhere.¹⁸¹ There are several reasons for this, including a forum-state policy declining injury or death claims arising elsewhere;¹⁸² limiting certain claims like wrongful death or workers' compensation to the forum's residents;¹⁸³ interpreting (rightly or wrongly) another state's statutory claim as intended only for that state's courts;¹⁸⁴ or the foreign claim violating the forum's public policy.¹⁸⁵ These jurisdictional limitations

¹⁷⁶ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

¹⁷⁷ *Id.* at 817.

¹⁷⁸ *See id.* at 817–18.

¹⁷⁹ *See* U.S. CONST. art. III, § 2 and various statutes in Title 28 authorizing diversity, for example, 28 U.S.C. § 1332, and removal jurisdiction, for example, 28 U.S.C. § 1441.

¹⁸⁰ *See* *Testa v. Katt*, 330 U.S. 386, 394 (1947); *see also* *Lea Brilmayer & Stefan Underhill, Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 827–29 (1983) (citing cases holding that state courts must provide access for federal claims comparable to that for state claims).

¹⁸¹ *Brilmayer & Underhill, supra* note 180, at 825.

¹⁸² *Id.* (citing *Hughes v. Fetter*, 341 U.S. 609, 611 (1951)).

¹⁸³ *Id.* at 826 (first citing *Mondou v. New York, New Haven, & Hartford R.R.*, 223 U.S. 1, 55–59 (1911); and then citing *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233 (1933)).

¹⁸⁴ *See, e.g., Tenn. Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 358 (1914).

¹⁸⁵ *Brilmayer & Underhill, supra* note 180, at 835 (citing *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 161–62 (1932)).

may have legitimate bases, but in all cases they limit—or sometimes bar—plaintiffs' access to adjudication. In many cases, such closures violate Article IV's Full Faith and Credit Clause.¹⁸⁶

In *Hughes v. Fetter*,¹⁸⁷ the Wisconsin Supreme Court dismissed a wrongful-death suit arising from an Illinois accident involving only Wisconsin parties.¹⁸⁸ The Wisconsin wrongful-death statute was directed to local deaths, so plaintiffs sued the Wisconsin defendants under the Illinois wrongful-death statute, as the deaths occurred there.¹⁸⁹ The Wisconsin Supreme Court dismissed the claim, based on its interpretation that the Wisconsin statute's exclusivity to Wisconsin claims necessarily barred claims under other state's laws.¹⁹⁰

The U.S. Supreme Court reversed, holding that Wisconsin had to furnish a forum for the Illinois-based claim that arose in Illinois.¹⁹¹ Specifically, the Court held that Full Faith and Credit prohibited a forum from declining a transitory action based on the statutory law of another state unless enforcement would be repugnant to the forum's public policy.¹⁹² The Court noted that Wisconsin's only basis for rejecting foreign wrongful-death claims was the questionable interpretation of their wrongful-death statute as barring foreign claims.¹⁹³ The Court concluded that, based on this slight and questionable Wisconsin interest, Full Faith and Credit required Wisconsin to recognize plaintiffs' rights under Illinois law and furnish them a forum in Wisconsin.¹⁹⁴

*Tennessee Coal, Iron & Railroad Co. v. George*¹⁹⁵ is the converse of *Hughes v. Fetter*. An Alabama workers' compensation statute limited enforcement to Alabama courts, but a Georgia court nonetheless applied the Alabama law to a claim arising in Alabama but litigated in Georgia.¹⁹⁶ The Supreme Court held in 1914 that the self-limiting Alabama law could nonetheless

¹⁸⁶ U.S. CONST. art IV, § 1.

¹⁸⁷ 341 U.S. 609 (1951).

¹⁸⁸ *Id.* at 610, 613.

¹⁸⁹ *Id.* at 610.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 613–14.

¹⁹² *Id.* at 611, 613.

¹⁹³ *Hughes*, 341 U.S. at 612.

¹⁹⁴ *Id.* at 613; *see also* *First Nat'l Bank of Chi. v. United Air Lines, Inc.*, 342 U.S. 396, 398 (1952) (holding Full Faith and Credit required Illinois to recognize claim for a plane crash death in Utah, in spite of an Illinois statute barring claims that could be tried in other states); *Broderick v. Rosner*, 294 U.S. 629, 647 (1935) (holding Full Faith and Credit required New Jersey courts to recognize a claim under New York law imposing assessments on stockholders).

¹⁹⁵ 233 U.S. 354 (1914).

¹⁹⁶ *Id.* at 358.

be applied in Georgia courts without violating Full Faith and Credit.¹⁹⁷ Both *Hughes* and *Tennessee Coal* upheld plaintiff's forum access.¹⁹⁸ Specifically, *Hughes* held that Full Faith and Credit required Wisconsin to provide a forum for the Illinois claim, while *Tennessee Coal* held that Full Faith and Credit did not prevent the Georgia forum from honoring an Alabama claim, in spite of the Alabama law's express geographic limit to Alabama courts.¹⁹⁹

Full Faith and Credit is not an absolute mandate.²⁰⁰ But even with less-than-total application in these settings, the important point is that Full Faith and Credit favors plaintiffs by (1) negating the forum state's door-closing rule, and (2) allowing the forum state to ignore another state's exclusivity rules.²⁰¹

3. Privileges and Immunities—The Right of United States Citizens to Use All States' Courts

The Privileges and Immunities Clause obliquely requires states to confer equal treatment on citizens of sister states.²⁰² One of its earliest judicial articulations cautioned that the Clause was limited to rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union.”²⁰³ One of those limited fundamental rights was the right “to institute and maintain actions of any kind in the courts of the state.”²⁰⁴

¹⁹⁷ *Id.* at 361.

¹⁹⁸ *Id.*; *Hughes*, 341 U.S. at 613–14.

¹⁹⁹ *Hughes*, 341 U.S. at 613–14; *Tenn. Coal*, 233 U.S. at 358, 361; see also *Ala. Packers Assoc. v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 550 (1935) (upholding California award of Alaska benefits to a non-resident alien because of his restricted access to an Alaska forum); *Atchison, Topeka and Santa Fe Ry. Co. v. Sowers*, 213 U.S. 55, 70–71 (1909) (upholding Texas' enforcement of New Mexico statute which provided a damages remedy exclusive to its courts); *Buccilli v. Timby, Brown & Timby*, 660 A.2d 1261, 1265 (N.J. Super. Ct. App. Div. 1995) (holding Full Faith and Credit required New Jersey court to apply Pennsylvania law to an employment claim arising in Pennsylvania, in spite of the Pennsylvania law's apparent exclusivity to Pennsylvania courts).

²⁰⁰ See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518–19 (1953) (affirming Pennsylvania federal court's refusal to apply Alabama's longer limitation period on a workers' compensation claim).

²⁰¹ See generally James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1, 47–48 (2006).

²⁰² U.S. CONST. art. IV, § 2; *id.* amend. XIV, § 1.

²⁰³ *Corfield v. Coryell*, 6 F. Cas. 546, 551 (Washington, Circuit Justice, C.C.E.D. Pa. 1823).

²⁰⁴ *Id.* at 552.

In *Dennick v. Railroad Company*,²⁰⁵ the Supreme Court gave a fuller explanation in its reversal of a New York court's dismissal of a wrongful death claim under New Jersey law.²⁰⁶ The Court first explained the English comity practice of entertaining transitory actions arising under foreign law,²⁰⁷ and explained further that, between courts in the United States, this practice was mandatory under Privileges and Immunities.

If . . . the rule as between subjects or citizens of different nations were otherwise, it would not affect the right of a citizen of one State to sue in the courts of another, as under the Federal Constitution he is entitled to all privileges and immunities of citizens in the several States, including the right of resorting to the same legal remedies.²⁰⁸

In *Blake v. McClung*,²⁰⁹ the Court applied Privileges and Immunities to strike down a Tennessee law that discriminated against nonresident creditors pursuing insolvent debtors.²¹⁰ Tennessee had not blocked nonresidents from local court access but had given priority to domestic creditors, thus limiting the nonresidents' right to a remedy.²¹¹

4. The Supremacy Clause—Opening State Court Doors to Federal Claims

States should not need reminding that federal law is supreme within constitutional boundaries. Even so, the Supreme Court has had to point out that the state courts, as well as being required to entertain sister-state claims, must also permit federal claims with concurrent jurisdiction in state and federal courts.²¹² In *Testa v. Katt*,²¹³ plaintiff sued a car dealer for excessive pricing that violated the federal Emergency Price Control Act,²¹⁴

²⁰⁵ 103 U.S. 11 (1880).

²⁰⁶ *Id.* at 21.

²⁰⁷ *Id.* at 14.

²⁰⁸ *Id.* at 14–15; *see also* *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934) (noting in dictum that: “The privileges and immunities clause [art. 4, § 2, cl. 1] requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens.”). For a holding limiting court access, *see* *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148, 151 (1907) (upholding an Ohio wrongful death statute which allowed claims arising outside Ohio only for Ohio residents). For a discussion of the evolution of the clause, *see* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, *CONFLICT OF LAWS* 176–78 (6th ed. 2018).

²⁰⁹ 172 U.S. 239 (1898).

²¹⁰ *Id.* at 254.

²¹¹ *Id.* at 241–42, 254.

²¹² *Testa v. Katt*, 330 U.S. 386, 393–94 (1947).

²¹³ 330 U.S. 386 (1947).

²¹⁴ 50 U.S.C. app. § 925(e) (terminated 1947).

which authorized up to treble damages for overcharges.²¹⁵ Plaintiff Testa sued in Rhode Island state court, which rejected the claim as a penalty that violated Rhode Island public policy against punitive damages.²¹⁶ The Supreme Court reversed, noting that Rhode Island did not reject punitive damages as such, and only rejected it here because of the “foreign” federal source.²¹⁷

*McKnett v. St. Louis & San Francisco Railway Co.*²¹⁸ similarly reversed Alabama’s dismissal of a claim under the Federal Employer’s Liability Act.²¹⁹ The injury occurred in Tennessee to a Tennessee resident who sued defendant railroad in Alabama where it was registered to do business.²²⁰ Alabama courts regularly accepted similar cases arising under Alabama law but rejected the federal claim. In reversing, the Supreme Court noted:

The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.²²¹

States also violate the Supremacy Clause even when accepting a federal claim, if they delegate it to a lesser court.²²² In *Haywood v. Drown*,²²³ the Court struck down a New York statute that assigned federal civil rights claims to the New York Court of Claims, which did not allow punitive damages or injunctive relief and was subject to a ninety-day claim deadline.²²⁴

Treaties can authorize private claims, and the Supremacy Clause requires state courts to accept those claims in the face of contrary state law.²²⁵ *Clark v. Allen*²²⁶ was a California probate contest between decedent’s German legatees (supported by a 1923 treaty with Germany) and her local relatives (supported by California law negating the Germans’ claims).²²⁷ The Supreme Court held that even though probate was a matter of local

²¹⁵ *Testa*, 330 U.S. at 387–88, 387 n.1.

²¹⁶ *Testa v. Katt*, 47 A.2d 312, 313–14 (R.I. 1946), *rev’d*, 330 U.S. 386 (1947).

²¹⁷ *Testa*, 330 U.S. at 388, 393–94.

²¹⁸ 292 U.S. 230 (1934).

²¹⁹ *Id.* at 233–34; 45 U.S.C. §§ 51–60.

²²⁰ *McKnett*, 292 U.S. at 230–31.

²²¹ *Id.* at 234; *see also* *Mondou v. N.Y., New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 55–59 (1912) (reversing Connecticut’s dismissal of an FELA case as contrary to Connecticut’s public policy and pointing out that federal law *is* Connecticut public policy).

²²² *Haywood v. Drown*, 556 U.S. 729, 740–41 (2009).

²²³ 556 U.S. 729 (2009).

²²⁴ *Id.* at 734, 740–41; *see also* HAY ET AL., *supra* note 208 at 516.

²²⁵ *See* *Clark v. Allen*, 331 U.S. 503, 508 (1947).

²²⁶ 331 U.S. 503 (1947).

²²⁷ *Id.* at 505–06.

law, California's situs law must defer, so could not refuse access to claims arising under a U.S. treaty.²²⁸

5. The First Amendment—The Right to Petition for Grievances

The First and Fourteenth Amendments protect the right to petition the government for a redress of grievances.²²⁹ In *Bill Johnson's Restaurants, Inc. v. NLRB*,²³⁰ the Supreme Court upheld an employer's right to sue in state court in response to employees' public protests and picketing, thus limiting a National Labor Relations Board injunction against the state lawsuit.²³¹ Although the First Amendment imposes limits only on federal laws, the Fourteenth Amendment extends that protection to bar state laws interfering with court access.²³² The Court found an exception in *California Motor Transport Co. v. Trucking Unlimited*,²³³ holding that the right to petition does not protect harassing lawsuits against competitors in an effort to monopolize a market.²³⁴

6. Due Process—The Fundamental Right to Court Access

This discussion of the constitutional bases for plaintiffs' forum-selection rights is arranged in sequential order starting with Article III. If the doctrines were arranged in order of significance, due process would be first. It is ironic that plaintiffs' strongest forum-access statements are from the same source as defendants' contrary argument. It is also notable that current terminology and rhetoric afford defendants that due-process label while generally withholding it from plaintiffs, which is the point of this Article. Some of these plaintiffs' rights doctrines—Privileges and Immunities, Equal Protection—offer protection only to specific categories. Due process applies to all parties.

²²⁸ *Id.* at 517–18.

²²⁹ See U.S. CONST. amends. I, XIV; *Edwards v. South Carolina*, 372 U.S. 229 (1963) (incorporating the petition right against the states).

²³⁰ 461 U.S. 731 (1983).

²³¹ *Id.* at 741.

²³² See *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 221 n.4 (1967) (holding freedom of speech, assembly, and petition guaranteed by First and Fourteenth Amendments gave union right to hire attorney on a salary basis to assist its members in assertion of their legal rights with respect to processing of workmen's compensation claims); accord *NAACP v. Button*, 371 U.S. 415 (1963).

²³³ 404 U.S. 508 (1972).

²³⁴ *Id.* at 513; see also *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1667–68 (2019) (Gorsuch, J., dissenting); George, *supra* note 201, at 31, 31 n.142.

The Supreme Court most recently considered this in 2008.²³⁵ *Boumediene v. Bush*²³⁶ was a challenge to indefinite confinement by accused enemy combatants held by the United States in Guantanamo Bay, Cuba.²³⁷ A number of detainees challenged confinement in a series of cases, and in response, the Department of Defense set up military tribunals to hear the habeas claims.²³⁸ In addition, Congress amended the Military Commission Act to strip other courts and judges of jurisdiction to hear the detainees' claims, except for appellate review of the military tribunals by the Circuit Court of Appeals for the District of Columbia.²³⁹ In *Boumediene*, the Supreme Court reversed the court of appeals and ruled (in a 5-4 split) that the jurisdiction-stripping act was an unconstitutional suspension of the constitutional right to court access to challenge confinement.²⁴⁰ In so ruling, *Boumediene* emphasizes the right of court access,²⁴¹ the right to meaningful process,²⁴² and the right to an adequate forum including a court of record.²⁴³ Admittedly, not every claim rises to the habeas level and the typical plaintiff is not always assured of a forum of choice, but the reasoning in *Boumediene* and the due process cases below clearly establish that court access is a function of due process.

*Wolff v. McDonnell*²⁴⁴ illustrated that Magna Carta and its American applications do not limit prisoners' claims to confinement challenges.²⁴⁵ In response to the government's argument that a Nebraska inmate challenging his limited rights in a disciplinary proceeding was not entitled to court review, the Supreme Court emphasized that a prisoner's due-process rights exceeded mere habeas challenges:

The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.²⁴⁶

In addition to court access to present fundamental claims, due process also provides a distinct cause of action against government actors who

²³⁵ *Boumediene v. Bush*, 553 U.S. 723, 785 (2008).

²³⁶ 553 U.S. 723 (2008).

²³⁷ *Id.* at 732-33.

²³⁸ *Id.* at 733-34.

²³⁹ *Id.* at 735 (discussing the amendment).

²⁴⁰ *See id.* at 733, 798.

²⁴¹ *Id. passim.*

²⁴² *Boumediene*, 553 U.S. *passim.*

²⁴³ *Id. passim.*

²⁴⁴ 418 U.S. 539 (1974).

²⁴⁵ *See id.* at 579.

²⁴⁶ *Id.* (discussing *Johnson v. Avery*, 393 U.S. 483 (1969)).

prevent or impede claimants' access.²⁴⁷ This is well illustrated in three federal appellate cases.²⁴⁸ In *Bell v. City of Milwaukee*,²⁴⁹ policeman Grady shot and killed Bell in 1958, claiming that Bell attacked him with a knife.²⁵⁰ Bell's father sued the next year, and settled for \$1,800 after a mistrial.²⁵¹ Nineteen years later, after Bell's father passed away, one of Grady's colleagues confessed to the district attorney that Bell was unarmed; they'd fabricated the story about the knife attack.²⁵² At this point, Grady said that his pistol accidentally discharged as he chased Bell.²⁵³ In 1979, Bell's siblings filed a civil rights claim based on obstruction of justice and the jury awarded over \$1.5 million.²⁵⁴ On appeal, the court upheld the award, and rejected defendants' argument that obstruction required more than merely impeding a private claim, noting that "[t]o deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses."²⁵⁵

*Delew v. Wagner*²⁵⁶ involved the coverup of plaintiff's daughter's death.²⁵⁷ Janet Wagner—the wife of a policeman—struck bicyclist Erin Delew with her car, killing her.²⁵⁸ Although the investigation exonerated Wagner, Delew's parents' civil suit showed that Wagner was speeding (thirty percent over the limit), had been drinking, and was allowed to leave the scene without an alcohol test.²⁵⁹ The parents sued the city for the coverup.²⁶⁰ After a district court dismissal of the coverup claim, the Court of Appeals for the Ninth Circuit reversed, holding that "the right of access to the courts is a fundamental right protected by the Constitution,"²⁶¹ and more specifically that "the Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where

²⁴⁷ See, e.g., *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984).

²⁴⁸ For a fuller account, see George, *supra* note 201, at 31–34.

²⁴⁹ 746 F.2d 1205 (7th Cir. 1984).

²⁵⁰ *Id.* at 1215–16.

²⁵¹ *Id.* at 1223.

²⁵² *Id.*

²⁵³ *Id.* at 1215 n.2.

²⁵⁴ *Id.* at 1224–25.

²⁵⁵ *Id.* at 1261.

²⁵⁶ 143 F.3d 1219 (9th Cir. 1998).

²⁵⁷ *Id.* at 1221.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 1222.

a party engages in pre-filing actions which effectively covers-up evidence and actually renders any state court remedies ineffective.”²⁶²

*Ryland v. Shapiro*²⁶³ was another action for concealing a death.²⁶⁴ Lavonna Ryland lived with former assistant district attorney Alfred Shapiro.²⁶⁵ One night Shapiro called assistant district attorney Edward Roberts and asked him to come over because Ryland had shot and killed herself.²⁶⁶ Following that, Shapiro and Roberts, along with district attorney Edwin Ware, allegedly prevented a full investigation by cancelling Ryland’s autopsy and then attempting to persuade coroners and other doctors to report suicide on her death certificate.²⁶⁷ The doctors refused, and in the meantime Shapiro was convicted of her murder.²⁶⁸ Ryland’s parents sued Shapiro for wrongful death, and sued the prosecutors for the coverup.²⁶⁹ Similar to rulings in *Bell* and *Delew*, the federal district court dismissed and the court of appeals reversed, noting that “[i]nterference with the right of access to the courts gives rise to a claim for relief under section 1983.”²⁷⁰

Although these three spoliation holdings focus on intentional coverups, access claims have been recognized for simple negligence, such as court clerks negligently handling filings.²⁷¹ Due process has also been used to bar filing fees for indigent divorces,²⁷² strike down a social-security provision barring review by a federal court,²⁷³ require inmate access to an

²⁶² *Delew*, 143 F.3d at 1222. (The court does not mention due process as such but cites to the due process holding in *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997)).

²⁶³ 708 F.2d 967 (5th Cir. 1983).

²⁶⁴ *Id.* at 969.

²⁶⁵ *State v. Shapiro*, 431 So. 2d 372, 379 (La. 1982).

²⁶⁶ *Ryland v. Shapiro*, 586 F. Supp. 1495, 1497 (W.D. La. 1984).

²⁶⁷ *Ryland*, 708 F.2d at 969.

²⁶⁸ Shapiro’s murder conviction was reversed for insufficient evidence, further showing the investigation’s inadequacy. *Id.* at 969 n.3.

²⁶⁹ *Ryland*, 586 F. Supp. at 1496; *Ryland*, 708 F.2d at 969.

²⁷⁰ *Ryland*, 708 F.2d at 972.

²⁷¹ See *McCray v. Maryland*, 456 F.2d 1, 5 (4th Cir. 1972) (“[A] section 1983 action may be based on negligence when it leads to a deprivation of rights.”); *Crews v. Petrosky*, 509 F. Supp. 1199, 1204 (W.D. Pa. 1981) (“An allegation that a clerk of state court has negligently delayed the filing of a petition for appeal, and that the delay has interfered [sic] with an individual’s right of access to the courts, may state a cause of action.”).

²⁷² *Boddie v. Connecticut*, 401 U.S. 371, 374, 380-81 (1971).

²⁷³ *Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) (noting that while a party’s court-access right is often couched in terms of separation of powers, it is also a due-process right, quoting Professor Redish); see MARTIN REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 7-34 (1980).

adequate law library for habeas filings and related litigation,²⁷⁴ bar a prison rule forbidding inmates to counsel other inmates on habeas relief,²⁷⁵ and require notice and hearing with a right to call witnesses for reduction of inmates' good time credit.²⁷⁶ Once again, there's a balance, and not every claim mandates the same access right. In *Walters v. National Association of Radiation Survivors*,²⁷⁷ the Supreme Court upheld Congress's virtual elimination of attorney fees for veterans' claims against the Veterans Administration.²⁷⁸

7. Equal Protection

The Equal Protection Clause²⁷⁹ has played a lesser role in this area, but nonetheless has been the basis for re-opening court access in the face of state laws imposing unreasonable bars.²⁸⁰ One example is unreasonable limitations periods. Equal protection requires that state laws distinguishing rights based on certain categories, such as race or gender, be at least rationally related to a legitimate state interest.²⁸¹ Judicial review imposes various levels of scrutiny for that rational relationship, and the requirement is intermediate scrutiny for limitations periods on paternity actions, and at least three states have failed.²⁸²

The Clause also provides protection from unfair classifications during litigation.²⁸³ In *Kentucky Finance Corp. v. Paramount Auto Exchange Co.*,²⁸⁴ the Supreme Court struck down a Wisconsin law that allowed local litigants to require the Kentucky plaintiff's corporate officer to submit to

²⁷⁴ *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam), *aff'g*, *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970).

²⁷⁵ *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

²⁷⁶ *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

²⁷⁷ 473 U.S. 305 (1985).

²⁷⁸ *Id.* at 334-35 (holding that Veterans Administration appeal fee limitation did not violate due process or First Amendment).

²⁷⁹ U.S. CONST. amend. XIV, § 1.

²⁸⁰ *E.g.*, *Ky. Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 551 (1923) (holding that the Equal Protection Clause prohibited Wisconsin from subjecting nonresident litigants to more "onerous" requirements than resident litigants).

²⁸¹ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁸² See *Mills v. Habluetzel*, 456 U.S. 91, 99-100 (1982) (invalidating Texas's one-year limitation period); *Pickett v. Brown*, 462 U.S. 1, 18 (1983) (invalidating Tennessee's two-year limitation period); *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (invalidating Pennsylvania's six-year limitation period); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (invalidating Illinois's 120-day period for obtaining a conference with the state employment commission).

²⁸³ *Ky. Fin. Corp.*, 262 U.S. at 551.

²⁸⁴ 262 U.S. 544 (1923).

deposition in any Wisconsin county, while Wisconsin residents could be examined only in their home counties, and nonresident deponents only at the site of service of subpoena.²⁸⁵ Noting that plaintiff's seeking of Wisconsin jurisdiction required it to submit to forum procedure, the Court nonetheless held that court access could not be impaired with onerous requirements not imposed on other litigants.²⁸⁶

D. *Plaintiffs' Forum Rights in Other Sources*

This Article rests its point of plaintiffs' forum rights on historical English rights and their lineage in the Constitution. A thorough list of sources would require a considerably longer discussion. Many state constitutions provide the same backdrop as the federal Constitution, particularly as to the right to a remedy and civil court access.²⁸⁷ On a federal statutory level, the Anti-Injunction Act limits federal injunctions against state litigation,²⁸⁸ and the federal abstention doctrines limit federal judicial interference with state litigation.²⁸⁹ The 1948 Universal Declaration of Human Rights,²⁹⁰ though merely aspirational, has been compared to Magna Carta²⁹¹ in its recognition of the right to life, liberty, and the security of person;²⁹² the right against arbitrary arrest, detention, or exile;²⁹³ the entitlement to a fair and public hearing in the determination of rights and obligations;²⁹⁴ and the freedom from arbitrary deprivation of property.²⁹⁵

E. *Plaintiffs' Three Fundamental Rights in Litigating Private Disputes*

From these historical and constitutional standards, the law has established three benchmarks in assessing plaintiffs' forum access: the right to a remedy, the right to court access in a given forum, and the right

²⁸⁵ *Id.* at 551.

²⁸⁶ *Id.*

²⁸⁷ See Phillips, *supra* note 102, at 1310 & n.6 (citing constitutional provisions in forty states).

²⁸⁸ 28 U.S.C. § 2283. See generally George, *supra* note 201, at 28-37.

²⁸⁹ See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 268-76 (8th ed. 2017) (statutory abstention); *id.* at 291-306 (federal common law abstention doctrines); *id.* at 306-15 (equitable abstention). Ironically, abstention doctrines both protect access to state courts and limit it to federal courts.

²⁹⁰ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

²⁹¹ See BREAY, *supra* note 95, at 46.

²⁹² G.A. Res. 217 (III) A, *supra* note 290, art. 3.

²⁹³ *Id.* art. 9.

²⁹⁴ *Id.* art. 10.

²⁹⁵ *Id.* art. 17.

to an adequate forum. These categories overlap, as explained below, and are better understood as a single right to access a court in an adequate location, offering an adequate remedy. On the other hand, each is also a distinct element. Although the third right—adequate forum—is the one most pertinent to my thesis regarding the amenability test, the other two play a role in forum selection.

1. The Right to a Remedy

Remedial justice—*Marbury's* right to a remedy—derives from Magna Carta's "law of the land" which became Blackstone's "due course of law" and later the United States Constitution's due process in the Fifth and Fourteenth Amendments.²⁹⁶ Through Coke, Blackstone, and general English practice, the guarantee of process evolved into the guarantee of a remedy for violations of a recognized right.²⁹⁷ This right is further supported not only by the First Amendment's right to petition, but also by the overwhelming majority of states who guarantee a right to a remedy.²⁹⁸

The right to a remedy is not, of course, unlimited. It is merely the right to judicial—and possibly executive—action in response to a violation of a recognized right. It does not demand creation of new substantive rights. One example is wrongful death. The common law did not recognize wrongful death as a claim, and judges deferred to legislatures rather than create the right judicially.²⁹⁹ But forum law's lack of a right did not negate plaintiff's claim. Where a right existed under the law of another state having legislative jurisdiction, a state lacking that substantive right, but having jurisdiction over the defendant, had to give full faith and credit to the other state's law, and entertain the claim.³⁰⁰ The right to a remedy may include issues subordinate to the main claim. One example is the due-process right to a fact finder determining damages, rather than a

²⁹⁶ "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta* [sic]." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). See also HOWARD, *supra* note 95, at 14–15 ("[T]he debt to Magna Carta's 'law of the land' is unquestionable."); Phillips, *supra* note 102, at 1320–21, 1321 n.44 (explaining Blackstone coined the term "due course of law" from Magna Carta's "by the law of the land").

²⁹⁷ See *supra* notes 148–153 and accompanying text. Along with the due process commitments in the "law of the land" language, the English barons obtained several direct remedies and promises of legal redress for various takings, both real and personal. See Clauses 52, 55, 56, and 57, quoted at HOLT, *supra* note 93, at 391–93. This redress for governmental takings is re-established in the Constitution's Fifth and Fourteenth Amendments' takings clauses, which, once again, guarantee due process.

²⁹⁸ See Phillips, *supra* note 102, at 1310–16.

²⁹⁹ *Id.* at 1341–42.

³⁰⁰ See *Hughes v. Fetter*, 341 U.S. 609, 613–14 (1951).

legislative pre-determination, although the Supreme Court has twice left that question open.³⁰¹

For amenability considerations, the fundamental right to a remedy should be seen in its larger context of a right to seek a specific claim in a specific forum. This is not, of course, an absolute right, but merely one that recognizes plaintiffs' right to have their filing choice be considered as a fundamental right to be balanced against defendant's rights. In performing that balance, we should recognize that defendant's convenience is limited to that—convenience and adequate defense opportunities—and not to the avoidance of a forum or law that defendant is properly subjected to. Professor Maggie Gardner notes that modern technology has made interstate and international evidence gathering easier and should not affect forum selection as it did in the past.³⁰² Her point was made regarding forum non conveniens but has the same application to initial amenability decisions.

2. The Right to Court Access in a Given Forum, or the Open Courts Provisions

In states with a suitable connection to the claim, courts must be open and available whether the forum's law is applied or not. The right of court access is the duty imposed on governments as to their own courts, and the duty of the federal government not to cut off rights in subordinate courts.³⁰³ Magna Carta emphasized the right to open, available courts in Clause 17's fixed venue for Common Pleas courts;³⁰⁴ Clause 18's venue for certain in rem disputes in the King's Bench;³⁰⁵ Clause 19's extended docket days for the King's Bench;³⁰⁶ Clause 34's barring the King's Bench from interfering with the baronial courts' jurisdiction over landholder claims;³⁰⁷ Clause 40's emphasis on justice as a public function and not a commercial

³⁰¹ See Phillips, *supra* note 102, at 1318 n.34 and cases discussed therein.

³⁰² Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 414–15 (2017). Although not the subject of this Article, the right to a remedy should also be considered in the face of forum non conveniens analyses, where the other considered forum lacks a sufficient remedy. This is not to void inconvenient forum objections, but only to frame the analysis properly—right versus right. If a plaintiff's forum choice were properly framed as cloaked in rights, *Bremen v. Zapata* would have come out the same and *Carnival Cruise* would not. Compare *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972), with *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594–95 (1991).

³⁰³ See *supra* notes 167–180 and accompanying text.

³⁰⁴ See *supra* notes 112–113.

³⁰⁵ See *supra* notes 113–117.

³⁰⁶ See *supra* notes 119–120.

³⁰⁷ See *supra* notes 125–126.

commodity (the right to court access without excessive fees or costs);³⁰⁸ and the promise of judicial review for royal takings in Clauses 52, 55, 56, and 57.³⁰⁹

The right is repeated in the Constitution's Article III as to access to federal courts for limited claims,³¹⁰ the Full Faith and Credit Clause's court-closing proscriptions,³¹¹ the Privileges and Immunities Clause's right of U.S. citizens to use all states' courts,³¹² the Supremacy Clause's opening of state court doors to federal claims,³¹³ and overall in the Due Process and Equal Protection clauses' rights to court access.³¹⁴ On a state level, as of 2003 forty states had open courts guarantees in their constitutions.³¹⁵

The right of access applies not only at plaintiff's home but also in the courts of other states.³¹⁶ Some states, and even the federal system, impose door-closing rules, including cost barriers, limitation periods, abstention laws, and forum non conveniens.³¹⁷ These access limitations, though often valid, are subject to constitutional scrutiny, which should be applied as rights versus rights, rather than plaintiff's "interests" versus defendant's due-process rights.³¹⁸

The access right should also apply in an amenability analysis if a forum's long-arm rules are unduly restrictive and disallow jurisdiction otherwise approved by due process. In these cases, the forum's long-arm acts more like a subject matter jurisdiction exclusionary rule, knocking out cases that a state could otherwise litigate. This is not to say that restrictive long-arms are suspect per se, but that a state should not use its long-arm statute to deny plaintiffs access to an otherwise appropriate forum.

There should be a presumption against access-limiting statutes, or constitutional interpretations that deny access. Professor Martin Redish has argued that to construe a jurisdictional statute "as somehow vesting a power in the federal courts to adjudicate the relevant claims without a

³⁰⁸ See *supra* notes 132-136.

³⁰⁹ See *supra* note 145.

³¹⁰ See *supra* notes 168-180 and accompanying text.

³¹¹ See *supra* notes 186-201 and accompanying text.

³¹² See *supra* notes 202-211 and accompanying text.

³¹³ See *supra* notes 213-226 and accompanying text.

³¹⁴ See *supra* notes 236-283 and accompanying text.

³¹⁵ See Phillips, *supra* note 102, at 1310-16, 1310 n.6.

³¹⁶ See *supra* notes 181-201 and accompanying text.

³¹⁷ See *supra* notes 182-185 and accompanying text.

³¹⁸ For a discussion on constitutional regulation of court access limiters, see *supra* Section II.C, notes 181-286 and accompanying text.

corresponding duty to do so is unacceptable.”³¹⁹ Although this is aimed at the exercise of federal subject matter jurisdiction, it should have equal application to the court-access doctrines originally heralded by Magna Carta.

3. The Right to an Adequate Forum

Remedies and open courts are hollow rights unless the accessible forum is adequate, including in location, procedure, and probable controlling law. The adequate-forum right is not about access within any given state or court, but about the balancing between alternative forums, and the need to consider both defendants’ and plaintiffs’ fundamental rights to fairness. The issue of forum adequacy arises when a competing alternative location impairs plaintiff’s realistic access,³²⁰ or when the alternative remedy is no remedy at all.³²¹

Forum adequacy was perhaps the most thoroughly addressed judicial concern at Runnymede.³²² The English barons considered location important, emphasizing it in Clause 17’s fixed venue for Common Pleas courts and Clause 19’s extended-docket days for the King’s Bench.³²³ The barons were also concerned about the quality of court, as shown in Clause 18’s venue for certain in rem disputes in the King’s Bench, Clause 24’s barring lesser officials from exercising royal judicial jurisdiction, Clause 34’s retaining landholding claims in the barons’ courts, Clause 45’s pledge to appoint qualified judges, and Clause 39’s right to a judgment of peers or under the law of the land.³²⁴ It is notable, too, that thirteenth-century England perceived adequacy as requiring multiple levels of court—royal, common pleas, and baronial or feudal.³²⁵ They insisted on each level retaining its jurisdiction and on access by demanding fixed venue for common pleas and holdover dockets for royal courts.³²⁶

³¹⁹ Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 112 (1984).

³²⁰ *Carnival Cruise*, a forum non conveniens case, is the best example. The dismissal required a retired couple in Washington state to travel to Florida for a claim arising off the California coast. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

³²¹ See *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 774 (5th Cir. 2016), discussed in James P. George, *Forum Clauses at the Margin*, 71 BAYLOR L. REV. 267 *passim* (2019).

³²² See BREAY, *supra* note 95, at 12, 28; see also Phillips, *supra* note 102, at 1320 n.35.

³²³ See HOLT, *supra* note 93 at 385.

³²⁴ *Id.* at 385–89.

³²⁵ See *supra* notes 107–137 and accompanying text.

³²⁶ See *supra* notes 107–137 and accompanying text; see generally HOWARD, *supra* note 95, at 12–16; HOLT, *supra* note 93, at 126.

The Constitution re-emphasized forum adequacy, starting with Article III's diversity jurisdiction,³²⁷ Full Faith and Credit requiring states to honor sister-state remedies,³²⁸ Privileges and Immunities opening state courts to citizens of other states,³²⁹ and the Supremacy Clause requiring state courts to litigate federal claims.³³⁰ Those constitutional standards support plaintiffs' historical rights, but do not overcome the problem occurring when plaintiffs' rights are downgraded to "interests" in contrast to defendant's due-process rights.

Location is important to both parties for the obvious reasons of witnesses, evidence, and other convenience, and was noted by von Mehren and Trautman as a reasonableness factor for minimum contacts.³³¹ The balance, though, has changed with advances in technology and transportation, and location should no longer tip the scales if one party has disproportionate resources to obtain and present the evidence. Even so, the analyses do not necessarily reflect the relative ease of cross-border litigation.³³²

Apart from location, forum adequacy includes an adequate law; both the remedy and the procedure. This is not a right to specific procedures in any forum, nor a right to the forum with the most favorable procedures, but the right, when choosing among multiple forums, to one with adequate procedures. If defendant is amenable to a state with a plaintiff-favorable law, defendant should not be able to evade that law by showing mere inconvenience. Amenability, at the very least, should create a presumption of legislative jurisdiction in that forum. It may be offset by significant inconvenience that either defeats jurisdiction or justifies a transfer, but plaintiff's choice of a favorable law should not be seen as "forum shopping," but instead as the exercise of a fundamental right—assuming the forum has legislative jurisdiction. This is not to displace the forum non conveniens concept that plaintiff isn't guaranteed the most favorable law, and it's not to enable tactical forum shopping, but to say that plaintiff has a right to a favorable law that should only be defeated by defendant's significant hardship. That is not the wording or flavor of the current test.

³²⁷ See U.S. CONST. art. III, § 2. The role of subject matter jurisdiction is beyond this Article's scope, but federal diversity jurisdiction's role in providing an alternative forum for common law and state-based claims is a prime example of the thirteenth-century goal of having adequate alternative forums.

³²⁸ See *supra* notes 181–201 and accompanying text.

³²⁹ See *supra* notes 202–211 and accompanying text.

³³⁰ See *supra* notes 212–228 and accompanying text.

³³¹ See von Mehren & Trautman, *supra* note 8, at 1167.

³³² See Gardner, *supra* note 302. For a case acknowledging those developments and ruling accordingly, see *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1349 (11th Cir. 2020).

III. Straightening the Frame

The second half of the minimum contacts test—the fairness-balancing test—is neither balanced nor fair. As explained in this Part, the fairness test’s many problems include: an over-reliance on interest analysis, the questionable premise that states have “interests” in private disputes, and (to the extent states do have interests) those interests’ lack of definition and inconsistent application.

But the fairness test goes further, labeling defendants’ forum choices as a due-process right that is “always a primary concern,” balanced against plaintiffs’ mere “interest” in a convenient forum.³³³ This formula’s adequacy cannot justify the outcomes in cases like *McIntyre*,³³⁴ let alone the summarily rendered dismissals, often in low-damages cases, that are not appealed and often not re-filed in another forum.³³⁵ The fairness test’s structure ignores the substantial history of plaintiff’s fundamental rights to a remedy in an adequate forum, independent of any one state’s “interest.” It’s time to reframe the test to get closer to fair play and substantial justice.

A. A Proposed Fairness Test

The fix appears simple: restore plaintiffs’ rights to the equation, balance rights versus rights, and label them accordingly. To accomplish this, however, the fix must consider the pervasive role of state interest balancing. There are no doubt multiple approaches to this, but I’ll propose a simple one that mimics the Court’s established test. The current fairness-balancing test has five factors: (1) the burden on the defendant; (2) the forum State’s interest in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies.³³⁶

³³³ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017).

³³⁴ See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), discussed *supra* notes 69–73.

³³⁵ See, e.g., *Prescott v. LivaNova PLC.*, No. 16-cv-00472, 2017 WL 2591270, at *8 (S.D. Iowa June 12, 2017).

³³⁶ See *World-Wide Volkswagen*, 444 U.S. at 292. Something interesting happens when we change the order of the five factors, switching the second and third, and the fourth and fifth. That results in a test with this sequence:

1. defendant’s burden;
2. plaintiff’s interest in convenient and effective relief;
3. the forum state’s interest;

To resolve the imbalance, the fairness test should eliminate the non-judicial interest-balancing factors and instead have three components:

- (1) defendant's right to a fair, convenient, and adequate forum (keeping in mind that defendant bears the burden of proving plaintiff's choice unfair);³³⁷
- (2) plaintiff's right to a fair, convenient, and adequate forum (keeping in mind that plaintiff has the ultimate trial burden);³³⁸ and
- (3) the interstate system's interest in efficient judicial resolutions.

The first two factors of this revised test—the parties' constitutional rights—should be amenability's focus. They are tempered by a third factor with lower priority: the collective state (or sometimes international) interest in efficient judicial resolution. This form of state interest is not a substantive law factor and will sometimes be an appropriate limit on amenability. The judicial-efficiency factor should consider issues typical of the public interest factors used in *forum non conveniens*. Rephrased from *Gulf Oil Corp. v. Gilbert*,³³⁹ these may include party and claim joinder, the need to avoid inconsistent adjudications, docket issues, jury pool imposition, and other local issues in the lawsuit's administration.³⁴⁰ Some of these factors such as claim and party joinder will have already been assessed in the first two factors governing the parties' needs for an adequate forum, and to that extent should not be double weighted in this third factor.

Public issues, such as docket crowding and the burden on the local jury venire, are important for some large cases, or disputes involving numerous filings that overwhelm the forum, but should not be imposed

4. the shared interests of the several states in fundamental substantive social policies; and
5. the interstate interest in efficient litigation.

Even though the test's original sequence is not explicitly ordered (though the Court has noted that defendant's burden is "the primary concern," see Justice Alito's quote from *Bristol-Myers*, discussed *supra* note 56) this re-ordering juxtaposes the parties as factors one and two, and the substantive or non-judicial state interests as three and four. In addition to being a more logical progression, the revised list illustrates that the original test positions plaintiff's "interests" after the forum's. And in spite of the factors' theoretical non-prioritization, plaintiff's subordination to and dependence on the forum's interests is reflected in the case law. See, e.g., *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 775–76 (1984).

³³⁷ See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

³³⁸ *Id.* at 800.

³³⁹ 330 U.S. 501 (1947). In *Gulf Oil*, the Court listed the non-exhaustive factors as (1) administrative difficulties from congested court dockets; (2) burden of jury duty on people in the forum; (3) in cases touching the affairs of many people, their interest in holding the trial in their view; and (4) interest in having local controversies decided at home. *Id.* at 508–09.

³⁴⁰ See *id.*

merely as a handy avoidance;³⁴¹ overuse of this factor violates plaintiff's right to seek a remedy in a forum where defendant is otherwise amenable. As a further reform, the forum non conveniens motion for cross-border transfers should be eliminated, as it's already been resolved at the amenability stage.³⁴²

B. *Elimination of Substantive and Non-Judicial State Interests*

Interest analysis, whatever that means, is expressly mentioned in four of the five factors of the fairness-balancing test but appears in widely varying degrees in the analyses. Two of those interest factors—the forum state's (factor two) and the several states' (factor five)—are much to blame for the current skew of the test.

The use of state interest analysis seems to have arisen with the idea that a state "interest" is necessary to submit defendant to the state's jurisdiction.³⁴³ For nonresident defendants, the forum interest might be that plaintiff is a forum resident, or the forum has expressed a regulatory interest in the case.³⁴⁴ Nonresident plaintiffs with a common law claim fall short of this equation and might well find that the forum has no "interest" in their claims. This line of reasoning, basing extraterritorial jurisdiction on the forum's "interest" in the claim, ignores the considerable history of plaintiffs' rights to an adequate forum to seek a remedy for defendant's violation of a recognized right.³⁴⁵

The legitimate state interest in extraterritorial jurisdiction arises instead from the forum's duty to honor plaintiffs' rights to a remedy in an adequate forum if the underlying wrong is sufficiently connected to the

³⁴¹ See Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 213–14 (1968).

³⁴² The need for a rights-versus-rights analysis goes beyond minimum contacts to include forum non conveniens. Plaintiff's fundamental right to a remedy, access, and adequacy are not met by consignment to a least-common-denominator forum. Instead, plaintiff has a right to seek a remedy in a forum connected to the case. If plaintiff's chosen forum has legislative jurisdiction (a reasonable connection to the dispute), defendant may have valid adequacy objections, but those objections should be balanced as right-versus-right. In all forum contests—amenability and forum non conveniens—we can accomplish this by labeling plaintiff's forum choice as a presumptive right, to be balanced against defendant's right to an adequate defense.

³⁴³ See, e.g., *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 775–76 (1984).

³⁴⁴ See, e.g., *id.* at 775–77 (New Hampshire's interest included the application of its single-publication rule in a defamation claim). The Court has also noted that the forum's strong interest in applying its own substantive law may not be enough. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (holding that the Due Process Clause may trump "even if the forum State has a strong interest in applying its law to the controversy").

³⁴⁵ See *supra* Part II, notes 92–332 and accompanying text.

forum.³⁴⁶ And, crucially, in every application of the minimum contacts test, that sufficient forum connection has already been established in the contacts test that precedes the fairness balancing test.³⁴⁷ State interest, to the extent it should be an amenability factor at all, is already satisfied by the contacts test.³⁴⁸

In addition to these doctrinal fallacies, the substantive state interests should not be amenability factors for at least three reasons.

1. Vagueness and Inconsistent Application

The concept of state interest is too vague and subject to uncertain and inconsistent application.³⁴⁹ What are state interests? Their use and application are so varied that it sometimes seems that state interests are simply whatever the brief or opinion drafter wants them to be.

Is it contacts with the dispute? If so, how do we assess them after contacts have already been counted to establish the specific jurisdiction, the predicate to the fairness test? What about a state's legal declarations that might be applied? That is, is a state's regulatory effort a contact that matters for amenability? If so, does a state interest require express regulatory declarations by the state? If so, what's a state's interest in the absence of express regulation? Can a state manipulate its interest by extending its regulatory scope or territory? If so, aren't we just talking about legislative jurisdiction? What role does that have in amenability, or judicial jurisdiction? Is the state's economic interest the kind of state interest we should include in deciding amenability? Isn't that better addressed in a direct regulatory action by the state, or litigation with the state as a party? Does the state's assertion of its economic interest in a private dispute, where inconsistent with a party's rights, amount to a taking?

Yet another conceptual tangent is interstate federalism, the subordination of forum state interests to those of other states. The Court has waxed and waned on this, but the Court seemed to reinvigorate it in

³⁴⁶ See *supra* notes 320–332 and accompanying text.

³⁴⁷ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

³⁴⁸ See *id.*

³⁴⁹ See, e.g., Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 105–07 (criticizing the concept of interest analysis and the inconsistent terminology). Interest analysis has ebbed and flowed. In 1987, Professor Stein noted an analytical shift favoring contacts and convenience and away from interest analysis. See Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987). This declining use was apparently reversed in *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780–81 (2017) (discussing interest analysis in general and interstate federalism in particular).

Bristol-Myers, denying California jurisdiction in a multi-state class action, in deference to other states where class members resided.³⁵⁰

2. Legitimacy

Do states even have “interests” in private disputes? They didn’t under *Pennoyer*’s power model, and Professor Stephen Sachs thinks we should reconsider that.³⁵¹ One reason to impute an interest is that the state’s law will govern the merits. But the existence of a forum law applicable to a claim should not amplify the forum’s interest beyond the rights of the parties to seek relief there. A forum’s “interest” in a private dispute should rest with the parties’ rights and legitimate needs in a given case—the plaintiff’s right to use that forum versus defendant’s ability to present an adequate defense there. This argument is supported not only by history and the Constitution, but also by the unworkability of the current interest-based test and the need, in private disputes, to focus on the parties’ rights.

3. Double Weighting

In addition to the vagueness and legitimacy problems noted above, interest analysis also results in double weighting, repeating an issue that’s already been addressed, and in doing so, adding additional and inappropriate weight to that factor. State contacts are one example. They include party residency, presence, legal status, and the claim’s underlying event. Those elements are already measured in two ways: (1) by the contacts test that established specific jurisdiction (if not, we wouldn’t be engaged in the fairness test), and (2) the fairness test’s first two factors considering the parties’ having an adequate forum, which necessarily includes access to witnesses, evidence, and other contact factors. If sufficient contacts don’t exist, then there’s no specific jurisdiction and we never reach the fairness test.

Residence is sometimes phrased as the forum’s interest in providing its residents a forum,³⁵² but that factor is already measured in the plaintiff’s convenience in litigating at home. The forum does have a duty to furnish its resident with a forum,³⁵³ but that should trigger only the consideration

³⁵⁰ See *Bristol-Myers*, 137 S. Ct. at 1780–81; see also George, *supra* note 4, at 51–54 and sources cited therein.

³⁵¹ See Stephen E. Sachs, *Pennoyer Was Right*, 96 TEX. L. REV. 1249, 1260–65 (2017).

³⁵² See *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985).

³⁵³ See *supra* notes 303–317 and accompanying text.

of amenability overall and not have additional weight in the fairness test (a weight that would usually favor plaintiff).

Governing law is another double-weighted factor in the current fairness test. The second and fifth state interest factors (forum's interest, several states' interest) are either directed to, or at least can include, substantive law and policy.³⁵⁴ The substantive law factors do nothing more than raise the issue of which law should govern the merits—the forum's law or, if jurisdiction is denied, the law of another state (assuming plaintiff is able to file in that other forum). Is plaintiff's picking a forum also picking that law? Not necessarily. Selecting forum law is done by plaintiff's forum-filed pleading alleging a claim on the merits, which will often—but not necessarily—be forum law. The right forming the cause of action need not be forum based and need not necessarily be controlled by forum's choice of law rule. Thus, plaintiff's decision to file in a forum may be a conscious choosing of that forum's law, but in most cases is simply choosing the lawsuit's location. In any event, these are plaintiff's choices, subject to defendant's objection based on lack of contacts or excessive inconvenience. But plaintiff's choice should not be double weighted (favoring either party) by adding a mythical state interest regarding which law governs a private dispute.

Conclusion

Since *World-Wide Volkswagen* and *Burger King*, amenability's due-process review has been a two-part test. The first part requires a sufficient forum contact, and the second part balances five factors to determine if otherwise sufficient forum contacts may still result in a constitutionally unfair forum for defendant.³⁵⁵ Those five factors begin with defendant's due-process right to a fair forum, followed by four measures of interest analysis, an ill-defined concept that now dominates the fairness test, ignoring the considerable history of plaintiffs' fundamental rights to pursue a remedy in an adequate forum.

That history of plaintiffs' rights traces from King John's forced concession to the barons' demands for court access (along with other rights), and continues with an enlarged application to common claims, championed by Coke and Blackstone. Those rights thread through American colonial jurisprudence, again with direct input from Coke and

³⁵⁴ See *supra* note 343. The Court has held (and this Article disputes) that a state may have an interest in having its law applied in some disputes where forum law is directed to that dispute, or plaintiff selected the forum because of that law.

³⁵⁵ See *Burger King*, 471 U.S. at 476–77.

Blackstone,³⁵⁶ and then in several constitutional clauses.³⁵⁷ They are the basis for a number of precedents regarding access to justice, none of which is more important than plaintiffs' ability to seek a remedy in an adequate forum.³⁵⁸

Those rights were oddly sidestepped, twice, in the mid-twentieth-century evolution of the minimum contacts test. The first misstep was the Court's needless invocation of ill-defined "state interests" to justify due-process protection for defendants; a protection they already implicitly had from *Pennoyer's* imposition of due process on amenability in general.³⁵⁹ The second misstep came with the mid-twentieth-century fascination with governmental interest analysis, encouraging the Court to craft the five-factor, interest-laden fairness test. The result crucially frames the analysis as defendants' due process "rights" versus plaintiffs' "interests" in a favorable litigation outcome, supplemented with various state interests that are ill-defined and haphazardly applied.

The imbalance is on display in reported opinions, mostly limited here to the Supreme Court,³⁶⁰ but the special danger is in lower courts' unreported opinions, where plaintiff's choice is weighed as an interest, often cabined by the forum state's purported "interest" in private litigation and balanced against defendant's due-process objection. Although there may be occasional *Nicastros* who catch our attention, the bigger concern should be in the close calls in routine cases that are dismissed with cursory or no appeal. Minimum contacts is now a complex, ill-defined, and often unworkable test. It needs revision both on fairness and comprehension grounds.

My proposed three-factor fairness test (following the contacts test) is one possibility. It calls for a balancing test that is—in fact—balanced, assessing the parties' rights without regard to state substantive interests, tempered only by a collective judicial interest in efficiency. This simple test is fairer, clearer, and more susceptible to trial court analysis and appellate review. If, however, state interest is necessary as part of the amenability test, then the concept of state interests needs defining and justification. Most importantly, whatever the components, the balance between the parties needs to reflect an equilibrium of the parties'

³⁵⁶ See *supra* notes 155–162.

³⁵⁷ See *supra* notes 163–286.

³⁵⁸ See *supra* notes 296–332.

³⁵⁹ The idea is that due process is a limit on state power, requiring a legitimate state interest to overcome that limit. See, e.g., *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 775–76 (1984). Before *International Shoe*, the state interest was implicit in territorial service of process, and afterward in the contacts/fairness test.

³⁶⁰ See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), discussed *supra* notes 69–73 and accompanying text.

fundamental rights at stake, rather than the current formulation, with its due-process thumb on the scale favoring only defendants.