

ESSAY

FORD'S HIDDEN FAIRNESS DEFECT

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INTRODUCTION

A consumer saves up to buy a used car. Unbeknownst to him, the vehicle has a design defect—and in a crash, the airbag fails to deploy, leaving his passenger severely injured. Under state law, the injured party has a right to sue the vehicle manufacturer: but where? The obvious forum is the plaintiff's home forum—it's where the owner purchased the car, the accident happened, the injured party was hospitalized, and the plaintiff is able to interview local attorneys with experience in local courts.

But there's a problem—the car manufacturer didn't sell the car in-state. It sold the car elsewhere, and the used car dealer, or an earlier owner, brought the car into the forum state where it was purchased by its current owner. Of course, the car manufacturer conducted other extensive in-state activities—it advertised its vehicles and marketed its brand, it serviced its vehicles (new and used), and it sold similar models in-state. But is that enough for personal jurisdiction? That question of whether strict causation is needed for personal jurisdiction is scheduled for argument before the United States Supreme Court this month in consolidated cases involving Ford Motor Company.¹ The Court's resolution of this issue will significantly affect future litigation.² Most immediately, the case will determine whether injured plaintiffs can access a

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¹ See Docket Sheet, *Ford Motor Co. v. Mont.* Eighth Judicial Dist. Ct., 140 S. Ct. 917 (2020) (No. 19-368), <https://www.supremecourt.gov/search.aspx?filename=docket/docketfiles/html/public/19-368.html> [https://perma.cc/7D9M-M3LC].

² See Charles W. “Rocky” Rhodes, Cassandra Burke Robertson & Linda Sandstrom Simard, *Ford's Jurisdictional Crossroads*, 109 *GEO. L.J. Online* 102, 103 (2020).

convenient forum in products liability cases. In the long run, however, the case may have a broader and less obvious impact. Specifically, even a seemingly narrow win for Ford could result in an analytical short circuit that cuts off inquiry into the factors that the Supreme Court once held to be primary guarantors of “fair play and substantial justice.”³

I

THE TANGLED DEVELOPMENT OF THE FAIRNESS FACTORS

Seventy-five years ago, *International Shoe Co. v. Washington* first announced the minimum contacts test as a tool for interpreting due process limitations on personal jurisdiction, stating that “due process requires only that in order to subject a defendant to a judgment in personam . . . he have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁴ The Court linked the concept of minimum contacts to the due process standard of “traditional notions of fair play and substantial justice,” explaining that when a state imposes obligations on an out-of-state defendant that “arise out of or are connected with” the defendant’s in-state activities and obligations, “a procedure which requires the [defendant] to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”⁵

The Court later expanded on this standard, holding that a defendant must engage in purposeful in-state conduct before becoming subject to a state’s jurisdictional power.⁶ But upon a showing that the nonresident defendant “deliberately has engaged in significant activities within a State,” the analytical lens of the test, according to the Court, expands beyond the defendant’s forum activities and contacts to consider what have become known as the “fairness factors.”⁷

These fairness factors extend the court’s inquiry beyond

³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁴ 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁵ *Id.* at 319.

⁶ *World-Wide Volkswagen*, 444 U.S. at 297 (“When a corporation ‘purposefully avails itself of the privilege of conducting activities within the forum State,’ it has clear notice that it is subject to suit there” (citation omitted)); *Hanson v. Denkla*, 357 U.S. 235, 253 (1958) (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.”).

⁷ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76 (1985) (citation omitted).

merely the defendant's conduct, weighing the defendant's litigation burdens against the plaintiff's interest in convenient relief, the systemic efficiency of resolving the dispute in the forum court, the forum state's underlying interest in controversy, and the shared substantive interests of the states.⁸ These factors ensure that the interests of the other relevant parties and institutions will be considered in resolving the ultimate question: Does the assertion of jurisdiction comport with "fair play and substantial justice?"⁹

Not surprisingly, though, confusion exists over the role of the fairness factors. Even though it's been nearly a century and a half since the Supreme Court first explained that the Due Process Clause limits the states' exercise of personal jurisdiction over out-of-state defendants,¹⁰ and even though the Supreme Court has never wavered from that understanding in all the decades since, the Court has still failed to articulate a consistent explanation of the underlying interests protected by the doctrine. From an emphasis on state power in *Pennoyer v. Neff*,¹¹ to "traditional notions of fair play and substantial justice" in *International Shoe*,¹² to sovereignty and convenience in *World-Wide Volkswagen Corp. v. Woodson*,¹³ to the defendant's liberty interest in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,¹⁴ to the protection of horizontal federalism in *Bristol-Myers Squibb Co. v. Superior Court*,¹⁵ the Court's rationale for imposing limits

⁸ *World-Wide Volkswagen*, 444 U.S. at 292.

⁹ *Burger King*, 471 U.S. at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (citing *Int'l Shoe Co.*, 326 U.S. at 320)).

¹⁰ See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

¹¹ *Id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.").

¹² 326 U.S. at 316.

¹³ 444 U.S. at 291-92 ("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.").

¹⁴ 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

¹⁵ 137 S. Ct. 1773, 1776, 1780 (2017) (concluding that the "federalism interest may be decisive," in some cases and that personal jurisdiction protects "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question").

on state court authority has circled around a variety of interests without settling on a coherent framework incorporating these interests together.¹⁶

Even without consistency from the Supreme Court, however, lower courts largely converged around a familiar three-part test for defendants not “at home” in the forum pieced together from the Court’s decisions: (1) purposeful forum contacts by the defendant; (2) a nexus between the contacts and the litigation; and (3) a “reasonableness check” evaluating the fairness factors.¹⁷ Taking a cue from Justice William Brennan’s approach in *Burger King Corp. v. Rudzewicz*,¹⁸ though, lower courts did not always attempt to keep the three parts of the test conceptually separated; instead, when jurisdiction was a close question, the courts would often look to the fairness factors in the third prong to inform the court’s analysis.¹⁹

¹⁶ For a sampling of the literature on the Court’s shifting rationales, see generally Ray Worthy Campbell, *Personal Jurisdiction and National Sovereignty*, 77 WASH. & LEE L. REV. 97, 144–56 (2020); Allan Erbsen, *Wayfair Undermines Nicasastro: The Constitutional Connection Between State Tax Authority and Personal Jurisdiction*, 128 YALE L.J.F. 724 (2019); Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It’s Not General Jurisdiction, or Specific Jurisdiction, But Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 582–95 (1998); Adam Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicasastro*, 63 S.C. L. REV. 481, 496–504 (2012).

¹⁷ See *Daimler AG v. Bauman*, 571 U.S. 117, 126–27, 139 n.20 (2014) (recognizing specific jurisdiction requires in-state activities by the nonresident defendant that are related to the litigation, subject to a “multipronged reasonableness check”).

¹⁸ 471 U.S. 462, 477 (1985) (“These [fairness] considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”).

¹⁹ See, e.g., *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994) (recognizing that “an especially strong showing of reasonableness may serve to fortify a borderline showing of relatedness and purposefulness”); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990) (“Having determined that [the defendant’s] contacts with Florida are insufficient to establish constitutionally-required minimum contacts, we now look to other considerations outlined by the Supreme Court. . . . [that] may in exceptional cases serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”); *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986) (recognizing “jurisdiction may be exercised with a *lesser showing of minimum contact* than would otherwise be required if considerations of reasonableness dictate” (citing *Burger King*, 471 U.S. 475–76)); *Wells Dairy, Inc. v. Food Movers Int’l, Inc.*, 566 F. Supp. 2d 933, 945 (N.D. Iowa 2008) (“In a case like this, where the minimum contacts are at least questionable concerning physical contacts, it is prudent to analyze whether exercising personal jurisdiction over a nonresident defendant would ‘offend traditional notions of fair play and substantial justice.’” (quoting *Int’l Shoe*), *aff’d*, 607 F.3d 515 (8th Cir. 2010); *Nat’l Petroleum Mktg., Inc. v. Phoenix Fuel Co.*, 902 F. Supp. 1459, 1467 (D. Utah 1995) (opining that earlier case from the Tenth Circuit “appears to subscribe to the proposition that libel

Judicial analysis of the fairness factors thus came to play two important roles: it allowed courts to steer litigation away from inappropriate forums, acting as a kind of *forum non conveniens* analysis,²⁰ and it also bolstered decisions in close cases to avoid dismissal when the interests weighed heavily in favor of the forum state.²¹ The first role made sure that cases weren't heard in an inappropriate forum, and the second role helped to keep cases in an appropriate one. The second of those two roles is now at risk.

II

HOW FORD'S ARGUMENT SHORT-CIRCUITS THE JURISDICTIONAL ANALYSIS

Ford argues that a defendant who engages in purposeful conduct aimed at a forum state may only be subject to personal jurisdiction for obligations that are proximately caused by that conduct.²² Courts have long held, of course, that when a defendant engages in purposeful conduct aimed at a forum state and that conduct gives rise to litigation, the exercise of jurisdiction almost always comports with fair play and substantial justice.²³ But even though a causal nexus presents

claims, in contrast to business tort claims, are ones for which 'considerations [of fair play and substantial justice] sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.'" (alteration in original) (quoting *Burger King*, 471 U.S. at 477)); *Quikrete Cos. v. Nomix Corp.*, 705 F. Supp. 568, 573 (N.D. Ga. 1989) (explaining that the "prongs of the *Burger King* test, minimum contacts and fairness, are designed to work together to establish or deny jurisdiction. A strong showing of either can compensate for a lesser showing of the other."); *Mahon v. E. Moline Metal Prods.*, 579 A.2d 255, 256–57 (Me. 1990) (holding jurisdiction appropriate after analyzing fairness factors and concluding that such "considerations 'sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.'" (quoting *Burger King*, 471 U.S. at 477)); *Beckers v. Seck*, 14 S.W.3d 139, 144 (Mo. App. 2000) ("Considering the set of facts here and these five factors, this court holds that the nature and quality of appellant's acts 'serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.'" (quoting *Burger King*, 471 U.S. at 477)).

²⁰ See Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 434 (2017) (noting that the fairness factors "overlap significantly with forum non conveniens.").

²¹ See, e.g., *Wells Dairy*, 566 F. Supp. 2d at 945 (employing fairness factors to buttress holding on "questionable" existence of minimum contacts); *Mahon*, 579 A.2d at 256–57 (holding jurisdiction appropriate based on fairness-factor evaluation); *Beckers*, 14 S.W.3d at 144 (analyzing fairness factors to bolster defendant's amenability).

²² Brief for Petitioner at 11, 24–25, *Ford Motor Co. v. Mont.* Eighth Judicial Dist. Ct., 140 S. Ct. 917 (2020) (No. 19-368), 2020 WL 1154744.

²³ *Burger King*, 471 U.S. at 477 (stating that under such circumstances defendant must make a "compelling case" to avoid jurisdiction).

a particularly strong justification for jurisdiction, the Supreme Court has never held that it is the only scenario that justifies a state's assertion of specific personal jurisdiction. To the contrary, the Court has repeatedly described the required nexus in terms of obligations that arise out of, relate to, or are connected with, a defendant's purposeful forum contacts.²⁴ The Court's recent narrowing of jurisdiction in *Bristol-Myers Squibb*, however, created an opening for Ford to argue in favor of a more limited nexus standard requiring causation.²⁵

On its face, Ford's argument appears narrow—it doesn't directly challenge the fairness factors, instead only raising the question of nexus. But if Ford's argument is adopted, the nexus requirement will weigh the defendant's interest so strongly that courts will rarely be permitted to address the fairness factors at all. Currently, when jurisdiction appears to be a close case, courts engage in a “multi-factored reasonableness check” using the fairness factors to determine if the exercise of jurisdiction in a particular context is unreasonable.²⁶ Under Ford's preferred test, by contrast, the jurisdictional analysis would end if the defendant's contacts are not the proximate cause of the plaintiff's claim, making the reasonableness check irrelevant. A causation requirement would thus short-circuit the jurisdictional analysis, so that the interests of the plaintiff, the states, and the court system itself would no longer play a role in directing litigation to an appropriate forum.

Not only would Ford's test exclude the interests of the other players in determining the reasonableness of the forum when causation *isn't* satisfied, but it would allow the defendant to raise the interests of other parties in an attempt to escape jurisdiction when causation *is* satisfied. Thus, for example, when the defendant's in-state action directly causes harm, the defendant could argue that the state's interest isn't strong enough to support jurisdiction or that the plaintiff could more conveniently sue elsewhere. But when the causation element

²⁴ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (holding that a state can exercise specific jurisdiction when the suit is “connected with” the defendant's in-state activities); *see also Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (describing specific jurisdiction over a suit that is “relat[ed] to” the defendant's forum activities); *Burger King*, 471 U.S. at 472 (“relate[d] to”); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 & n.8 (1984) (“related to”).

²⁵ Brief for Petitioner, *supra* note 22, at 14.

²⁶ *Daimler*, 571 U.S. at 139 n.20 (suggesting that a “multipronged reasonableness check” is relevant to a determination of specific jurisdiction (citing *Burger King*, 471 U.S. at 476-78)).

isn't satisfied, the plaintiff would be precluded from relying on even a strong state interest or an inability to conveniently access the courts of another state to support jurisdiction. Ford's test would thus allow the fairness factors to be wielded as a one-way ratchet. Instead of protecting the interests of the other players, the fairness factors would protect only the defendant.²⁷

III

SHORT-CIRCUITING THE FAIRNESS FACTORS UNDERMINES JURISDICTIONAL PRINCIPLES

The Supreme Court's recent personal jurisdiction jurisprudence has already taken a formalist turn that minimizes the import of the fairness factors. The Court's retrenchment of general jurisdiction in *Daimler AG v. Bauman*²⁸ in favor of a largely mechanical determination of the defendant's home forum extinguished the prevailing lower court approach that applied the fairness factors to general jurisdiction.²⁹ In specific jurisdiction cases, the Court has narrowed both the minimum contacts prong and the nexus prong in ways that foreclose jurisdiction even in cases where the fairness factors weigh heavily in favor of jurisdiction.³⁰ This narrow formalism has made it more difficult for plaintiffs to sue in their home forums (or even, in some cases, within their home countries),³¹ and has limited the power of federal courts

²⁷ Cf. *Burger King*, 471 U.S. at 474 (“[T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.”).

²⁸ 571 U.S. at 137 (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011))).

²⁹ Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 759 (2012) (explaining that “[m]any lower federal courts, without guidance let alone direction from the Supreme Court, started to apply second-branch fairness factors to assertions of general jurisdiction.”); accord Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 899–902 (2004) (discussing prevailing lower court approach to and underlying rationales supporting applying fairness factors to general jurisdiction).

³⁰ See Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 24–25 (2018); Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 394–400 (2020).

³¹ As Professor Childress has pointed out, this formalist approach has created an odd situation where, in *Nicastro*, “the most-concerned state was not the United Kingdom, where the *Nicastro* case would have had to be filed under the Court’s approach, but the State of New Jersey.” Donald Earl Childress III,

to allow the joinder of related claims, so that products liability actions in many cases must now go forward in multiple states at once.³²

A further retreat into formalism—and thus a continued retreat from the fairness factors—risks undermining the due process foundations of the doctrine. The defendant’s liberty interest is part of that due process foundation; the defendant, after all, risks the regulation of its conduct, the restraint of its activities, and the potential deprivation of its property from the state’s authority to render a binding judgment through judicial proceedings.³³ But the defendant’s interest is only one part of the due process fabric. Procedural due process requires a balancing of the underlying interests—public as well as private.³⁴

This means plaintiffs have significant due process interests of their own. The plaintiff’s loss of rights or property is not merely a speculative concern for the future. Instead, the plaintiff is seeking judicial redress now for an injury that has already happened.³⁵ Access to the judicial system is the heart of the plaintiff’s due process interest. The personal jurisdiction analysis, however, has traditionally focused on the defendant’s interest rather than the plaintiff’s—likely because the courts historically gave significant deference to the plaintiff’s choice of forum. Now that the Supreme Court has reduced that deference and limited the range of available forums, there is a greater risk that plaintiffs will be shut out of court if their due

Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction, 54 WM. & MARY L. REV. 1489, 1555 (2013). As a result, it is entirely possible that if the plaintiff injured in New Jersey were to file suit in the United Kingdom, then the foreign court may well apply New Jersey law in any case. *Id.*

³² See, e.g., *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1315–22 (11th Cir. 2018) (dismissing one defendant, Union Carbide, on jurisdictional grounds in multi-defendant mesothelioma lawsuit because the plaintiff was not exposed to Union Carbide’s products in the forum, even though Union Carbide conducted substantial, ongoing in-state business activities).

³³ See Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 604–10 (2007) (detailing defendants’ liberty interests implicated in state jurisdictional assertions).

³⁴ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); see Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 263 (2012) (recognizing due process involves “an interest-balancing approach to determine what process is due in a particular case”).

³⁵ See Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636–40 (2004) (“The due process guarantees in the federal constitution protect fundamental rights against arbitrary abridgement. The right to a remedy is one of these fundamental rights historically recognized in our legal system as central to the concept of ordered liberty.” (footnote omitted)).

process interests are not explicitly considered in the jurisdictional analysis.³⁶

The other three fairness factors focus on systemic and institutional interests rather than party interests, but they are likewise essential to a due process analysis.³⁷ The Court in *International Shoe* recognized that due process included these public interests, writing that personal jurisdiction should be evaluated “in relation to the fair and orderly administration of the laws which . . . [is] the purpose of the due process clause to insure.”³⁸ The due process analysis requires a balancing of concerns and defies the mechanical application of bright-line rules. As the Court has written, in another context, “due process is flexible and calls for such procedural protections as the particular situation demands.”³⁹

The systemic fairness factors offer a way to incorporate essential procedural protections by helping to steer litigation to a forum where the underlying interests can be fully and fairly heard. Providing deference to the state’s regulatory interest ensures that states are able to enforce their laws and protect their citizens—a fundamental aspect of our federalist system.⁴⁰ Steering litigation to an efficient forum where related claims can be joined saves both party and taxpayer money, and it reduces the risk of duplicative litigation and the attendant risks of inconsistent verdicts that undermine trust in the judicial system.⁴¹ Examining the substantive interests of the several states (and even of foreign states, as in *Asahi*) protects horizontal federalism interests in domestic litigation and applies traditional notions of comity in transnational

³⁶ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (“[J]urisdictional rules may not be employed in such a way as to make litigation ‘so gravely difficult and inconvenient’ that a party unfairly is at a ‘severe disadvantage’ in comparison to his opponent.” (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972))

³⁷ *Stravitz*, *supra* note 29, at 764 (“The concept of fair and orderly administration of the law is not solely limited to fairness to defendants. Consequently, the sovereign interest of a forum state in administering its laws, and fair play to all parties, including plaintiffs, must logically and inherently be considered if due process is to be accorded.”).

³⁸ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

³⁹ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also* *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) (“These cases ‘underscore the truism that “[d]ue process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.”).

⁴⁰ *See* *Rhodes, Robertson & Simard*, *supra* note 2.

⁴¹ *See* *Dodson*, *supra* note 30, at 3–5 (detailing the “burdens, inefficiencies, and potential unfairness of individualized litigation” as compared to aggregated claims involving common issues).

litigation.⁴²

If these factors are relegated to mere “context” and made relevant only after (and if) the plaintiff successfully traverses a narrow jurisdiction test focused only on the defendant’s liberty interest, then these larger due process interests will no longer be protected. In the Ford case, for example, where can plaintiffs sue if they buy a car on the second-hand market and its defect leads to a serious accident? Not in their home state, if Ford didn’t sell that particular vehicle there. Possibly in the state where Ford originally sold the car when new—but that state would have only a tenuous connection to the litigation. The state of first sale is almost certain to be a mere fortuity.

It may be that the only forum realistically available is the manufacturer’s home state. In a domestic case, it may be feasible for some plaintiffs to sue in the defendant’s home—as long as they have the resources to litigate outside their own home state. In a transnational case, the hurdle will be significantly higher. Few plaintiffs will be equipped to sue in a foreign country over products they bought in their home state.

And what if the plaintiffs want to join other parties in the suit—for example, allowing the injured passenger to sue the driver as well as the manufacturer? In products cases, component parts are also often at issue—it may not be clear whether the defect arose from a defective airbag, defective tires, or some other part of the product. With the possible forum choices so limited, it is likely that the plaintiff will not find a forum where all possible defendants can be joined in a single action. The plaintiff may need to sue the vehicle manufacturer in Michigan (or Korea), the tire manufacturer in Ohio (or Japan), and the driver in the parties’ home state.

Of course, the doctrine of personal jurisdiction cannot ensure an ideal forum. But at the very least, the doctrine should not hinder the search for one. And yet that is likely to be the consequence if the Supreme Court continues to narrow the focus of the personal jurisdiction test, apply a formalist inquiry focused exclusively on the defendant’s interest, and minimize the remaining fairness factors to the point of nonexistence. The Roberts Court is not always comfortable with a wide-ranging due process analysis; instead, it deals better with clear rules and bright-line tests.⁴³ Nevertheless, as

⁴² See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114–15 (1987).

⁴³ See Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 788–90 (2017).

other scholars have pointed out, a degree of disruption and uncertainty is “the price of a constitutional right that is defined by its flexibility and responsiveness to changing circumstances.”⁴⁴

CONCLUSION

Ford asserts that a strict causation-based nexus requirement will simplify the minimum contacts test. But the Due Process Clause has never been about simplicity. It is about fairness and reasonableness. Rather than falling for the illusion of simplicity, the Court should recognize that the minimum contacts test is a tool for determining when the exercise of jurisdiction meets “traditional notions of fair play and substantial justice,” a determination that is inherently complex. Indeed, the Court long ago recognized that the personal jurisdiction “determination is one in which few answers will be written in ‘black and white. The greys are dominant and even among them the shades are innumerable.”⁴⁵ The Court should not silently relegate the fairness factors to the dustbin of history in the illusory pursuit of simplicity because these factors protect important interests in the due process analysis.

⁴⁴ Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1158–59 (2019).

⁴⁵ *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).