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## **Access to Justice, Rationality, and Personal Jurisdiction**

Adam N. Steinman

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## ARTICLES

### **Access to Justice, Rationality, and Personal Jurisdiction**

*Adam N. Steinman* \*

*After more than twenty years of silence, the Supreme Court has addressed personal jurisdiction six times over the last six Terms. This Article examines the Court's recent decisions in terms of their effect on access to justice and the enforcement of substantive law. The Court's new case law has unquestionably made it harder to establish general jurisdiction—that is, the kind of jurisdiction that requires no affiliation at all between the forum state and the litigation. Although this shift has been justifiably criticized, meaningful access and enforcement can be preserved through other aspects of the jurisdictional framework, namely (1) the basic level of minimum contacts required for specific jurisdiction, and (2) the test for determining whether a case can proceed on a specific*

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*jurisdiction theory rather than having to satisfy the newly restrictive general jurisdiction standard.*

*This Article begins with a typology that identifies three situations where personal jurisdiction is most likely to threaten access to justice: the home-state scenario, the safety-net scenario, and the aggregation scenario. It then explains why the Court's recent decisions support an approach to minimum contacts that will—in most cases—permit a plaintiff who is injured in his or her home state to file suit there. Even beyond the home-state scenario, a case should be evaluated under the more lenient specific jurisdiction standard as long as there is a rational basis for the forum to adjudicate the availability of judicial remedies in that particular case. This rationality standard coheres with the Court's approach to other areas of law governing the permissible reach of a state's sovereign power. And it can permit jurisdiction when other courts are inadequate or unavailable (the safety-net scenario) and when proceeding in a single forum is necessary for effective adjudication of claims arising from a common course of conduct (the aggregation scenario).*

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## INTRODUCTION

Personal jurisdiction is once again on the Supreme Court's front burner. After more than two decades of silence on the subject, the Court has decided six personal jurisdiction cases in a six-year period.<sup>1</sup> Although scholars have devoted considerable attention to personal jurisdiction over the years,<sup>2</sup> the Court's newfound interest makes it particularly timely to examine what the new cases have (and have not) changed as a doctrinal matter, and to confront broader questions about why personal jurisdiction matters.

In all six of the Supreme Court's recent decisions, the Court found that asserting personal jurisdiction over the defendant violated the Due Process Clause. But it does not necessarily follow that the new cases have changed the overarching jurisdictional rules in ways that will undermine access to judicial remedies and the enforcement of substantive law. This Article's goal is twofold: first, to identify with greater precision the practical effect of the Court's recent decisions on

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1. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). See generally 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, *FEDERAL PRACTICE & PROCEDURE* § 1067.1 (4th ed. 2015 & Supp. 2018) (summarizing the Court's six recent decisions).

2. See, e.g., Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010); Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183 (1997); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward A Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189 (1998); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991); Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202 (2011); John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121 (2016); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward A New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207 (2014); George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347; Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249 (2017); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 CORNELL L. REV. 1129 (2015); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CALIF. L. REV. 913 (1985); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004).

access to justice, and second, to develop a way forward that addresses these concerns and coherently situates the various aspects of the Court's jurisdictional doctrine.

The fundamental constitutional standard for evaluating personal jurisdiction still derives from the Supreme Court's "pathmarking" 1945 decision in *International Shoe Co. v. Washington*:<sup>3</sup> a defendant must have "minimum contacts" with the forum state such that the suit "does not offend 'traditional notions of fair play and substantial justice.'"<sup>4</sup> During the latter half of the twentieth century, however, a more complex doctrinal structure evolved, under which a defendant's minimum contacts with the forum are not necessarily sufficient.<sup>5</sup> A court may need to assess whether the case falls within "specific jurisdiction" or "general jurisdiction."<sup>6</sup> Specific jurisdiction, which applies only when there is an "affiliation" between the forum and the underlying litigation, can be satisfied with mere "minimum" contacts.<sup>7</sup> General jurisdiction, which subjects a defendant to any and all claims, requires much more than minimum contacts.<sup>8</sup> In addition, a court may need to inquire whether jurisdiction would be "reasonable"—which might foreclose jurisdiction even if the requisite amount of contacts exist.<sup>9</sup>

In terms of the black-letter jurisdictional principles, the Supreme Court's new cases have provided little guidance regarding the basic minimum contacts threshold. The two most recent cases where the defendant's lack of minimum contacts was dispositive were *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>10</sup> and *Walden v. Fiore*.<sup>11</sup> Both decisions, however, hinged on unique aspects of the facts and records in those cases, and they left prior case law undisturbed.<sup>12</sup>

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3. 326 U.S. 310 (1945); see also *Bristol-Myers Squibb*, 137 S. Ct. at 1785 (Sotomayor, J., dissenting) (describing *International Shoe* as "pathmarking"); *Goodyear*, 564 U.S. at 919 (same); *McIntyre*, 564 U.S. at 893 (Ginsburg, J., dissenting) (same).

4. *Int'l Shoe*, 326 U.S. at 316.

5. See *infra* Section I.A.

6. See *infra* note 38 and accompanying text.

7. See *infra* notes 39–44 and accompanying text.

8. See *infra* notes 42–43 (describing the requirement that a defendant must have "continuous and systematic contacts" with the forum state to be subject to general jurisdiction).

9. See *infra* notes 45–47 and accompanying text. As discussed *infra* note 63 and accompanying text, the Supreme Court's recent case law instructs that this separate reasonableness inquiry is required only for specific jurisdiction.

10. 564 U.S. 873 (2011).

11. 571 U.S. 277 (2014).

12. See *infra* Part III.

For other parts of the jurisdictional framework, the Court has done significantly more. The most notable change has been with respect to the contacts required to establish general jurisdiction. Previously, state and federal courts would often find general jurisdiction over defendants simply because they made significant sales to the forum or had significant operations in the forum.<sup>13</sup> More recently, beginning with *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court has instructed that defendants are subject to general jurisdiction only when their contacts are “so continuous and systematic as to render them essentially at home in the forum State.”<sup>14</sup> In applying this standard, the Court’s current case law has rejected general jurisdiction even when defendants have a substantial physical presence in the forum state.<sup>15</sup> The only locations that are reliable venues for general jurisdiction are a corporate defendant’s principal place of business and its state of incorporation and an individual defendant’s domicile.<sup>16</sup>

Although the Court’s initial embrace of the “essentially at home” standard for general jurisdiction was unanimous, its subsequent applications of that standard have not been. In *Daimler AG v. Bauman*<sup>17</sup> and *BNSF Railway Co. v. Tyrrell*,<sup>18</sup> Justice Sotomayor disagreed sharply with the Court’s approach.<sup>19</sup> She has written alone on these issues, however. Other Justices—including ones who typically would favor greater access for plaintiffs—have joined in the Court’s restriction of general jurisdiction.<sup>20</sup> One explanation may be that, standing alone, narrowing general jurisdiction does not necessarily undermine access to justice.<sup>21</sup> Appreciating the distinct ways that personal jurisdiction relates to access and enforcement demonstrates why this is so.

Consider first what might be called the *home-state* scenario: a plaintiff is injured in her home state, relevant events occur in her home state, and she seeks remedies from an out-of-state defendant in the courts of her home state. Denying personal jurisdiction in this situation

13. See 4A WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1069.2, at 197–204.

14. 564 U.S. 915, 919 (2011) (citation and internal quotation marks omitted).

15. See *infra* notes 56–61 and accompanying text (citing the Court’s decisions in *Goodyear*, *Daimler*, and *BNSF*).

16. See *infra* notes 57–61 and accompanying text (noting that these venues are “paradigm bases for the exercise of general jurisdiction”).

17. 571 U.S. 117 (2014).

18. 137 S. Ct. 1549 (2017).

19. *Id.* at 1560–62 (Sotomayor, J., concurring in part and dissenting in part); *Daimler*, 571 U.S. at 146 (Sotomayor, J., concurring).

20. See *infra* note 264 and accompanying text.

21. See *infra* notes 135–139 and accompanying text.

not only flouts strong state interests but also can create inordinate burdens on in-state plaintiffs.<sup>22</sup> Here, however, personal jurisdiction does not depend on general jurisdiction. Because an affiliation between the forum and the underlying controversy clearly exists, a sensible approach to minimum contacts in the specific jurisdiction context will usually allow plaintiffs to sue in their home state when they are injured there.<sup>23</sup>

Two other situations, however, require a direct reckoning with other layers of the doctrinal framework. One is the *safety-net* scenario, where legal systems with stronger grounds for asserting personal jurisdiction over the defendant are unavailable or inadequate. Denying personal jurisdiction in U.S. courts can leave parties with no viable forum for asserting their substantive rights—including rights created by international law.<sup>24</sup> Another is the *aggregation* scenario, where multiple parties are involved in litigation arising from a common course of conduct. Denying personal jurisdiction can block the efficient aggregation of claims and may make it economically impossible to hold defendants accountable when the costs of individual lawsuits would exceed the likely individual recovery.<sup>25</sup> Prior to the Supreme Court's recent decisions, courts could often rely on general jurisdiction in these situations. The Court's narrowing of general jurisdiction, however, threatens to create an access-to-justice blind spot.

Informed by these areas of concern, this Article makes two arguments. First, it argues that the Court's recent case law does not mandate a more restrictive approach to the basic minimum contacts standard. A close reading of the *McIntyre* and *Walden* decisions shows that they should not be understood to create significant obstacles in most situations where a plaintiff sues in his or her home state based on events occurring there. When a defendant is benefiting from markets in the forum state, or has otherwise reached out to that state through its activities, it has established the requisite minimum contacts.<sup>26</sup>

Second, this Article develops a theory to guide what has become a particularly crucial feature of the doctrinal framework: the line between specific jurisdiction and general jurisdiction. The Court's most recent decision—*Bristol-Myers Squibb Co. v. Superior Court*<sup>27</sup>—is the

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22. See *infra* Section II.A.

23. Jurisdiction will not always be permissible, however—at least not as to every possible defendant. See *infra* notes 253–256, 277–278 and accompanying text (discussing examples).

24. See *infra* Section II.B.

25. See *infra* Section II.C.

26. See *infra* Part III.

27. 137 S. Ct. 1773 (2017).

first Supreme Court case in which the parties directly contested whether the specific jurisdiction or the general jurisdiction standard applied.<sup>28</sup> But the *Bristol-Myers* decision failed to provide a broader theory for what sort of “affiliation between the forum and the underlying controversy”<sup>29</sup> is sufficient to avoid the Court’s newly restrictive requirements for general jurisdiction.

This Article argues that *rationality* is the appropriate touchstone: a case may proceed as a specific jurisdiction case as long as there is a rational basis for the courts of the forum state to adjudicate the availability of the requested remedies against the defendant in that particular litigation. This rationality standard coheres with the Supreme Court’s approach to other areas of law where the permissible reach of a state’s sovereign power is tested—such as the constitutional constraints on choice of law. It also fits with the Court’s more general due process jurisprudence, which uses a rational basis standard when reviewing most forms of government action (such as laws that do not target fundamental rights).<sup>30</sup> More functionally, this proposal solves the safety-net and aggregation problems. It is only when no rational, dispute-related justification exists that the high threshold required for general jurisdiction should be imposed.

This Article proceeds as follows: Part I summarizes the Supreme Court’s post-*International Shoe* jurisdictional doctrine, describing where things stood in 1990 (before what would become a twenty-year hiatus from personal jurisdiction) and then highlighting the substantive changes made by the Court’s recent decisions. Part II uses three of the Court’s recent decisions to illustrate three distinct ways that personal jurisdiction doctrine can undermine access to justice and the enforcement of substantive rights and obligations—the home-state scenario, the safety-net scenario, and the aggregation scenario. Part III discusses the effect of the Court’s recent case law on the basic minimum contacts standard and argues that its decisions are consistent with an approach that will—in most cases—permit a plaintiff who is injured in his or her home state to file suit there. Part IV proposes a rationality standard for delineating between specific jurisdiction and general jurisdiction and explains how that approach would address the access-

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28. In one earlier case on this question, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), the plaintiffs conceded that the case should be evaluated under a general jurisdiction standard. See *infra* note 68.

29. See *infra* notes 39–40 and accompanying text.

30. See *infra* notes 267–271 and accompanying text.



to-justice concerns that arise in the safety-net and aggregation scenarios.

## I. SEVEN DECADES OF *INTERNATIONAL SHOE*

This Part summarizes the personal jurisdiction framework that has evolved since the Supreme Court's landmark decision in *International Shoe Co. v. Washington*.<sup>31</sup> Section A describes its first forty-five years, emphasizing the doctrinal structure that crystallized during a particularly intense period of Supreme Court activity in the 1980s. Section B addresses the Court's rather remarkable twenty-year hiatus from personal jurisdiction, which was followed by the current run of six decisions in six years. Section C clarifies some additional considerations regarding state statutory law and the scope of personal jurisdiction in federal court, but explains why the most significant aspect of the Supreme Court's case law continues to be the constitutional constraints on state courts.

### A. *International Shoe's First Forty-Five Years*

The Supreme Court's 1945 decision in *International Shoe* revolutionized the constitutional contours of personal jurisdiction. In the decades prior to that decision, courts and legislatures struggled to fit new social realities—such as “the nation's increasingly industrialized economy, the advent of high speed transportation and communication, and the mobility of the population”<sup>32</sup>—into notions of jurisdiction that fixated on the defendant's “presence” in the territory of the state seeking to assert jurisdiction<sup>33</sup> or on the defendant's “consent” to the jurisdiction of that state.<sup>34</sup>

Responsive to these concerns, *International Shoe* articulated a new constitutional standard. Chief Justice Harlan Stone declared that even if a defendant is not present in the forum state, due process is satisfied as long as the defendant has “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>35</sup> Even in this seminal decision, the Court recognized that the assessment of a defendant's “contacts” with the forum state might vary depending on

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31. 326 U.S. 310 (1945).

32. See 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1067, at 360.

33. *Int'l Shoe*, 326 U.S. at 316–17.

34. *Id.* at 318–19.

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

whether the lawsuit itself was related to those contacts. For example, the Court contrasted lawsuits based on “dealings entirely distinct from” the defendant’s activities in a state<sup>36</sup> with lawsuits based on “obligations” that “arise out of or are connected with the activities within the state.”<sup>37</sup>

In the wake of *International Shoe*—and with some help from Professors Arthur von Mehren and Donald Trautman—the Supreme Court distilled this insight into a distinction between “general jurisdiction” and “specific jurisdiction.”<sup>38</sup> Specific jurisdiction requires “affiliations between the forum and the underlying controversy”<sup>39</sup>—such as when the lawsuit “aris[es] out of or relate[s] to the defendant’s contacts with the forum.”<sup>40</sup> General jurisdiction allows a court to hear all claims against a defendant, regardless of whether the claims themselves have any connection to the forum state.<sup>41</sup> Not surprisingly, general jurisdiction imposes a “substantially higher threshold than is required in specific jurisdiction cases.”<sup>42</sup> As the Supreme Court put it, the defendant’s contacts must be “continuous and systematic.”<sup>43</sup> Specific jurisdiction does not require such continuous and systematic contacts, but it does require purposeful activity by the defendant directed at the forum—a notion that sometimes goes by the label “purposeful availment.”<sup>44</sup>

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36. *Id.* at 318.

37. *Id.* at 319.

38. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984) (citing Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80–81; and von Mehren & Trautman, *supra* note 2, at 1144–64).

39. von Mehren & Trautman, *supra* note 2, at 1136.

40. *Helicopteros*, 466 U.S. at 414 n.8 (citing von Mehren & Trautman, *supra* note 2, at 1144–64).

41. *See id.* at 414 n.9 (“When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum, the State has been said to be exercising ‘general jurisdiction’ over the defendant.”).

42. 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1067.5, at 529.

43. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952) (permitting Ohio courts to exercise jurisdiction over a corporation that was “carrying on in Ohio a continuous and systematic, but limited, part of its general business” even though “[t]he cause of action sued upon did not arise in Ohio and does not relate to the corporation’s activities there”); *see also Helicopteros*, 466 U.S. at 416 (considering whether the defendant’s contacts with the forum state “constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*”); *Calder v. Jones*, 465 U.S. 783, 787 (1984) (describing *Perkins* as “permitting general jurisdiction where defendant’s contacts with the forum were ‘continuous and systematic’”).

44. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (“[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, thus invoking the benefits and protections of its laws.” (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

In addition to the distinction between specific and general jurisdiction, the Supreme Court articulated what is sometimes called the “second prong” of the personal jurisdiction test.<sup>45</sup> Even when a defendant has established the requisite contacts with the forum state, a court must inquire whether jurisdiction would be “reasonable” and comport with “fair play and substantial justice.”<sup>46</sup> Factors relevant to this reasonableness inquiry include the burden on the defendant, the forum state’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, and the interstate judicial system’s interest in obtaining the most efficient resolution of controversies.<sup>47</sup>

### *B. Twenty Years of Silence, Then a Flurry of Activity*

From 1991 to 2010, the Court issued no decisions on personal jurisdiction. The lack of interest was particularly striking given how active the Court was from 1980 to 1990.<sup>48</sup> It decided more than a dozen cases on personal jurisdiction during this period,<sup>49</sup> and there were

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45. See, e.g., *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360 (Fed. Cir. 1998) (describing “the second prong of the traditional Due Process inquiry”); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 387 (5th Cir. 1989) (describing “the due process test’s second prong”).

46. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (describing the “fair play and substantial justice” element as requiring a “determination of the reasonableness of the exercise of jurisdiction”); *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.’” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 320 (1945))).

47. See *Asahi*, 480 U.S. at 113 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

48. It is perhaps more than a coincidence that the Court’s period of abstention from personal jurisdiction followed two notable decisions decided by the early Rehnquist Court that failed to generate majority opinions on important doctrinal questions. As discussed *infra* notes 196–206 and accompanying text, *Asahi* lacked a majority opinion on when jurisdiction is proper over a defendant whose products reach the forum through the so-called stream of commerce. And *Burnham v. Superior Court*, 495 U.S. 604 (1990), lacked a majority opinion on how to evaluate the constitutionality of “tag” jurisdiction—where the sole basis for jurisdiction is service of process on an individual who is temporarily present in the forum. The Roberts Court would quickly discover how difficult it is to garner the consensus of five Justices; its first decision in this more recent run of cases also failed to generate a majority opinion. See *infra* notes 90–96 and accompanying text (discussing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011)).

49. See, e.g., *Burnham*, 495 U.S. at 604; *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988); *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Asahi*, 480 U.S. at 102; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Burger King*, 471 U.S. at 462; *United States v. Morton*, 467 U.S. 822 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Underwriters Nat’l*

several instances where Justices openly dissented from the Court's refusal to grant certiorari.<sup>50</sup>

The hiatus ended at the beginning of the October 2010 Term, with the Court agreeing to hear two cases on personal jurisdiction.<sup>51</sup> In June 2011—on the final day of that Term—the Court broke its silence with decisions in *J. McIntyre Machinery, Ltd. v. Nicaastro*<sup>52</sup> and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>53</sup> That was only the beginning. The Court would hand down two personal jurisdiction decisions in 2014,<sup>54</sup> as well as two in 2017.<sup>55</sup>

In terms of the overarching doctrinal framework, the Court's recent decisions have made the clearest substantive changes to general jurisdiction. First, the Court declared—initially in *Goodyear* and then in subsequent cases—that general jurisdiction requires that the defendant's contacts be “so continuous and systematic as to render [it] essentially at home in the forum State.”<sup>56</sup> For an individual defendant, “the paradigm forum for the exercise of general jurisdiction is the individual's domicile.”<sup>57</sup> For a corporation, its state of incorporation and principal place of business are the “paradigm bases for the exercise of general jurisdiction.”<sup>58</sup> Although general jurisdiction “is not limited to

*Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691 (1982); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp.*, 444 U.S. at 286.

50. See, e.g., *Baxter v. Mouzavires*, 455 U.S. 1006 (1982) (White, J., dissenting from denial of certiorari, joined by Powell, J.); *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982) (White, J., dissenting from denial of certiorari, joined by Berger, C.J. & Powell, J.); *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907 (1980) (White, J., dissenting from denial of certiorari, joined by Powell, J.).

51. See *J. McIntyre Mach., Ltd. v. Nicaastro*, 561 U.S. 1058 (2010) (granting certiorari); *Goodyear Luxembourg Tires, S.A. v. Brown*, 561 U.S. 1058 (2010) (granting certiorari).

52. 564 U.S. 873 (2011).

53. 564 U.S. 915 (2011).

54. See *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Walden v. Fiore*, 571 U.S. 277 (2014).

55. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

56. *Daimler*, 571 U.S. at 126–27 (emphasis added) (quoting *Goodyear*, 564 U.S. at 919). See generally Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161 (2015) (describing “the Court's unexplained move from ‘continuous and systematic’ to ‘at home’”).

57. *Goodyear*, 564 U.S. at 924.

58. *Id.* (citing Lea Brilmayer, Jennifer Haverkamp & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)). The Supreme Court has yet to specify how to determine a corporation's principal place of business for purposes of general jurisdiction. To determine a corporation's citizenship for purposes of the federal diversity jurisdiction statute, the Court has clarified that a corporation's principal place of business is “the corporation's ‘nerve center,’” which “should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination.” *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010). Although the Supreme Court has not explicitly

these forums,”<sup>59</sup> the Court indicated that it would have to be an “exceptional case” for a defendant to be subject to general jurisdiction beyond these paradigms.<sup>60</sup> Indeed, the Court’s decisions in *Daimler AG v. Bauman* and *BNSF Railway Co. v. Tyrrell* rejected general jurisdiction even when the defendant had a substantial physical presence in the forum state.<sup>61</sup> This was a major shift. Previously, state and federal courts would often find general jurisdiction over defendants simply because they made significant sales to the forum or had significant operations in the forum.<sup>62</sup>

Second, the Court’s recent decisions have clarified that the second-prong “reasonableness” inquiry that crystallized during the 1980s does not apply in the general jurisdiction context. As long as a defendant is “genuinely at home in the forum State,” there is no need “to consider several additional factors to assess the reasonableness of entertaining the case.”<sup>63</sup>

On other aspects of the jurisdictional framework, it is hard to identify concrete substantive changes in the Court’s recent decisions. As explained in more detail below, the Court’s decisions in *J. McIntyre Machinery, Ltd. v. Nicaastro*<sup>64</sup> and *Walden v. Fiore*<sup>65</sup> hinged on the basic minimum contacts requirement, but they were highly fact-specific and left in place pre-existing case law.<sup>66</sup> The 2017 decision in *Bristol-Myers*

embraced the *Hertz* test in the context of personal jurisdiction, some lower courts have. *E.g.*, *Nespresso USA, Inc. v. Ethical Coffee Co.* SA, 263 F. Supp. 3d 498, 503 (D. Del. 2017) (“For jurisdictional purposes, a corporation’s principal place of business is its ‘nerve center’ . . .” (quoting *Hertz*, 559 U.S. at 80, 97)); *see also* Carol Andrews, *Another Look at General Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1060–61 (2012) (noting that “[t]he *Hertz* test has no direct application to general jurisdiction, which is a question of due process, not a question of federal statutory subject matter jurisdiction,” but arguing that “the state of a corporation’s nerve center under *Hertz* also should qualify as the corporation’s home for purposes of general jurisdiction”).

59. *BNSF*, 137 S. Ct. at 1558; *see also Daimler*, 571 U.S. at 136–37 (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”).

60. *BNSF*, 137 S. Ct. at 1558 (“[I]n an ‘exceptional case,’ a corporate defendant’s operations in another forum ‘may be so substantial and of such a nature as to render the corporation at home in that State.’” (quoting *Daimler*, 571 U.S. at 139 n.19)).

61. *See infra* notes 124–131 and accompanying text (discussing *Daimler*); *see also BNSF*, 137 S. Ct. at 1559 (rejecting personal jurisdiction even though “BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana”).

62. *See* 4A WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1069.2, at 197–204.

63. *Daimler*, 571 U.S. at 139 n.20; *see also id.* (stating that the “multipronged reasonableness check . . . articulated in *Asahi*” was “not . . . a free-floating test” and was only “to be essayed when specific jurisdiction is at issue” (emphasis omitted)); *see also infra* note 201 (discussing the role of the reasonableness inquiry in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987)).

64. 564 U.S. 873 (2011).

65. 571 U.S. 277 (2014).

66. *See infra* Section III.C.

*Squibb Co. v. Superior Court*<sup>67</sup> is the first Supreme Court case where the parties contested whether the case should be assessed under a specific jurisdiction or a general jurisdiction standard.<sup>68</sup> The *Bristol-Myers* decision failed, however, to provide a clarifying theory for what drives the distinction between general and specific jurisdiction and what should guide courts going forward.<sup>69</sup>

### C. Additional Considerations: State Statutes and Federal Courts

The constitutional doctrine described above is one aspect of the jurisdictional analysis in any given case. There are some additional requirements that vary depending on whether a case is filed in state court or in federal court, and whether there is any specialized federal statute or federal rule authorizing personal jurisdiction.

Consider first a case that is filed in state court. For a state court, the constitutional framework described above is a feature of the Due Process Clause of the Fourteenth Amendment, which explicitly applies to the states.<sup>70</sup> Jurisdiction in any given state court must also comply with that state's statutory requirements—sometimes called the state's

67. 137 S. Ct. 1773 (2017).

68. The only other arguable instance was *Helicopteros Nacionales de Colombia, S.A. v. Hall*, but in that case the plaintiffs, who sued in Texas, conceded that their claims did not arise out of and were not related to the defendant's activities in Texas, and therefore general jurisdiction was the only viable theory. 466 U.S. 408, 415 & n.10 (1984):

All parties to the present case concede that respondents' claims against Helicol did not 'arise out of,' and are not related to, Helicol's activities within Texas. . . . Because the parties have not argued any relationship between the cause of action and Helicol's contacts with the State of Texas, we . . . assert no view with respect to that issue.

In dissent, Justice Brennan did not accept this concession, and argued that "the undisputed contacts in this case between petitioner Helicol and the State of Texas are sufficiently important, and sufficiently related to the underlying cause of action" to justify specific jurisdiction. *Id.* at 420 (Brennan, J., dissenting).

69. See Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1280 (2018) (noting that *Bristol-Myers* "does not clarify what kind of a 'connection between the forum and the specific claims at issue' specific jurisdiction requires" (quoting *Bristol-Myers*, 137 S. Ct. at 1781)); see also *infra* notes 162–179 and accompanying text (discussing *Bristol-Myers*).

70. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law." (emphasis added)); see also, e.g., *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) ("We therefore inquire whether the Montana courts' exercise of personal jurisdiction under Montana law comports with the Due Process Clause of the Fourteenth Amendment."); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311 (1945) (describing the "question[] for decision" as "whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state"). But see *infra* note 267 (citing commentators critiquing the view that restrictions on personal jurisdiction are constitutionally compelled by the Due Process Clause).

“long-arm statute.”<sup>71</sup> In many states, however, the relevant statutes provide that their courts’ jurisdiction extends to the full range allowed by the Due Process Clause.<sup>72</sup> And even in states with more particularized jurisdictional statutes, state courts have often interpreted them to reach as far as the federal Constitution will allow.<sup>73</sup>

For cases filed in federal district court, the jurisdictional requirements are often identical to what would apply in state court. This is because most federal court actions are governed by the default jurisdictional provision in Federal Rule of Civil Procedure 4(k)(1)(A), which permits personal jurisdiction in federal court when jurisdiction would be proper in the state where the district court is located.<sup>74</sup> To comply with Rule 4(k)(1)(A), therefore, personal jurisdiction in federal court must satisfy both the relevant state’s long-arm statute and the constitutional restrictions that would apply in state court via the Fourteenth Amendment.<sup>75</sup>

Sometimes, however, a federal statute or a federal rule provides independent authorization for personal jurisdiction in a federal court.<sup>76</sup> In such cases, the constitutionality of personal jurisdiction in federal

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71. *E.g.*, *Paterno v. Laser Spine Inst.*, 23 N.E.3d 988, 992–96 (N.Y. 2014) (rejecting personal jurisdiction based on New York’s long-arm statute); *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007) (“Texas courts may assert in personam jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees.”).

72. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2018) (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”); 9 R.I. GEN. LAWS ANN. § 9-5-33 (West 2018) (providing that defendants “shall be subject to the jurisdiction of the state of Rhode Island . . . in every case not contrary to the provisions of the constitution or laws of the United States”).

73. *See, e.g.*, *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768 (Del. 1986) (stating that Delaware’s long-arm statute “has been broadly construed to confer jurisdiction to the maximum extent possible under the due process clause” (discussing DEL. CODE ANN. tit. 10, § 3104(c))).

74. *See* FED. R. CIV. P. 4(k)(1)(A) (“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”); 4A WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1069, at 124 (“[F]or constitutional purposes, a federal court proceeding under Rule 4(k)(1)(A) must assess the defendant’s contacts with the forum state . . . . Rule 4(k)(1)(A) authorizes personal jurisdiction in federal court only as far as would be authorized in state court.”).

75. *See, e.g.*, *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (citing FED. R. CIV. P. 4(k)(1)(A)); *Daimler AG v. Bauman*, 571 U.S. 117, 124–25 (2014) (same).

76. *See* FED. R. CIV. P. 4(k)(1)(C) (permitting personal jurisdiction “when authorized by a federal statute”); FED. R. CIV. P. 4(k)(2) (permitting personal jurisdiction “[f]or a claim that arises under federal law” when “the defendant is not subject to jurisdiction in any state’s courts” and “exercising jurisdiction is consistent with the United States Constitution and laws”); *see also, e.g.*, *Strauss v. Credit Lyonnais, S.A.*, 175 F. Supp. 3d 3, 26 & n.11 (E.D.N.Y. 2016) (citing 18 U.S.C. § 2234) (recognizing that the Antiterrorism Act of 1992 authorizes personal jurisdiction); *Siswanto v. Airbus*, 153 F. Supp. 3d 1024, 1027 (N.D. Ill. 2015) (citing 28 U.S.C. § 1697) (recognizing that the Multiparty, Multiforum Trial Jurisdiction Act of 2002 authorizes personal jurisdiction).

court is governed by the Due Process Clause of the Fifth Amendment—which, unlike the Fourteenth Amendment, applies to the federal government.<sup>77</sup> Although the Supreme Court has yet to address this issue directly,<sup>78</sup> a Fifth Amendment analysis is widely understood to hinge on the defendant's contacts with the United States as a whole rather than the particular state where the district court is located.<sup>79</sup> It

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77. See 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1068.1, at 727; see also, e.g., Noble Sec., Inc. v. MIZ Eng'g, Ltd., 611 F. Supp. 2d 513, 552 (E.D. Va. 2009) (“Unlike the assertion of jurisdiction under the state long-arm statute, where due process concerns are addressed under the Fourteenth Amendment’s due process clause, assertion of jurisdiction under a federal statute . . . requires application of the due process clause of the Fifth Amendment.”). One unresolved question is whether the Fourteenth or the Fifth Amendment would apply when Congress authorizes personal jurisdiction in *state* courts. This argument was raised but not decided in the *BNSF* case, where the plaintiffs argued that (1) section 56 of the Federal Employers Liability Act (“FELA”) created an independent basis for personal jurisdiction in any state where an employer is “doing business,” and (2) therefore the Fifth Amendment analysis would apply as to the constitutionality of a state court exercising personal jurisdiction under that federal statute. See Brief for Respondents at 36, *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (No. 16-405), 2017 WL 1192088, at \*36 (“[A]ny due process limitations that apply to Congress’s jurisdictional choices stem not from the Fourteenth Amendment, but from the Fifth Amendment as it applies to exercises of federal authority.”). The Supreme Court found that section 56 did not authorize personal jurisdiction, *BNSF*, 137 S. Ct. at 1553, so it had no need to address the constitutional standard that would apply in that situation.

78. See *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.5 (1987) (noting the theory that “a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant’s contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits” but declining “to consider the constitutional issues raised by this theory”); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.\* (1987) (O’Connor, J.):

We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

79. See, e.g., *Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V.*, 249 F.3d 413, 420 (5th Cir. 2001); *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001); *Siswanto*, 153 F. Supp. 3d at 1028; see also FED. R. CIV. P. 4 advisory committee’s note to 1993 amendment (subdivision (k)) (“The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party.”). Although it is generally accepted that the Fifth Amendment analyzes a defendant’s contacts with the United States as a whole rather than any particular state, there is a range of opinion regarding how to evaluate the “reasonableness” of jurisdiction for Fifth Amendment purposes—or even whether such an independent reasonableness inquiry is necessary. Compare, e.g., *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stevens, J., dissenting) (arguing that in the Fifth Amendment context there is no need to inquire “whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum”), with *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997):

A defendant’s ‘minimum contacts’ with the United States do not . . . automatically satisfy the due process requirements of the Fifth Amendment. There are circumstances, although rare, in which a defendant may have sufficient contacts with the United States as a whole but still will be unduly burdened by the assertion of jurisdiction in a faraway and inconvenient forum.



is generally accepted, however, that the potentially broader reach of the Fifth Amendment can only be accessed by explicit authorization—either an act of Congress or a rule of procedure adopted pursuant to the Rules Enabling Act.<sup>80</sup>

Accordingly, the Supreme Court's state-focused Fourteenth Amendment jurisprudence continues to play the dominant role when it comes to personal jurisdiction.<sup>81</sup> State long-arm statutes cannot extend

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See also FED. R. CIV. P. 4 advisory committee's note to 1993 amendment (subdivision (k)):

There also may be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of 'fair play and substantial justice' required by the due process clause, even though the defendant had significant affiliating contacts with the United States.

80. See FED. R. CIV. P. 4 advisory committee's note to 1993 amendment (subdivision (k)) (noting that the consequence of *Omni* was that a defendant could escape personal jurisdiction in a federal court if it had "insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction"); *Omni*, 484 U.S. at 108–09 (noting several obstacles to permitting federal courts to authorize personal jurisdiction without positive-law authorization); *United Rope Distrib.'s, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534–35 (7th Cir. 1991) ("*Omni* holds that personal jurisdiction may be created only by statute or federal rule with the force of statute. . . . Unless a federal or state law authorizes personal jurisdiction over the defendant, the court must dismiss the suit."); Jonathan Remy Nash, *National Personal Jurisdiction* (Feb. 6, 2018), <https://ssrn.com/abstract=3119383> [<https://perma.cc/FKK9-9SDQ>] (considering but rejecting the argument that national personal jurisdiction can be obtained by common law). To be clear, *Omni* did not categorically reject the notion that courts had "authority for common-law rulemaking" that might trigger a Fifth Amendment standard. 484 U.S. at 108–09. The Court held instead that "we would not fashion a rule for service in this litigation even if we had the power to do so." *Id.* at 109. Theoretically, therefore, it remains an open question whether federal courts—without independent positive-law authorization—might declare grounds for personal jurisdiction that would be subject only to Fifth Amendment scrutiny.

81. Some scholars have argued that, with respect to foreign defendants, the more lenient national-contacts standard should apply even in state court. See Dodge & Dodson, *supra* note 2, at 235–41; Robin J. Effron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. ONLINE 123, 129–30 (2018); Lilly, *supra* note 2, at 116–17. Relatedly, scholars have observed the tension between judicially imposed limits on foreign defendants asserting constitutional rights and the idea that foreign defendants may challenge personal jurisdiction on due process grounds. See, e.g., Effron, *supra*, at 130 (noting the "paradox" that "a litigant's alien status is often a barrier to a full or robust assertion of many due process rights, but alien status is simultaneously the foundation of the strongest possible assertion of the due process protection of resisting the personal jurisdiction of an American court"); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006) (discussing limitations imposed by *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); and *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). Although the Supreme Court has never squarely considered these arguments, its decisions have assumed that a foreign defendant may indeed challenge personal jurisdiction in state court on due process grounds, and that the jurisdictional analysis hinges on the defendant's contacts with the forum state. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918–19 (2011); *Asahi*, 480 U.S. at 113–14. It has applied the same approach when foreign defendants are sued in federal court based on Rule 4(k)(1)(A), which incorporates the jurisdictional restrictions that would apply to the state in which the district court sits. See, e.g., *Daimler AG v. Bauman*, 571 U.S. 117, 119–20 (2014).

jurisdiction beyond what the Fourteenth Amendment would allow (and they often extend to the full reach of the Constitution—whether explicitly or by judicial interpretation).<sup>82</sup> Even in federal court, most cases are subject to the same constraints that would apply in state court because of Rule 4(k)(1)(A).<sup>83</sup> Not surprisingly, all of the Supreme Court’s recent personal jurisdiction decisions—and nearly all of its earlier ones—have hinged upon whether the Due Process Clause of the Fourteenth Amendment would permit a state court to exercise personal jurisdiction over a particular defendant.<sup>84</sup>

## II. THREE EXAMPLES, THREE AREAS OF CONCERN

Three of the Supreme Court’s recent decisions can be used to highlight three distinct ways that the constitutional doctrine governing personal jurisdiction can undermine access to justice and the enforcement of substantive rights and obligations. The cases discussed below hinge on three different aspects of the overarching jurisdictional framework. *McIntyre* involved the basic threshold of minimum contacts required for specific jurisdiction. *Daimler* involved the contacts required for general jurisdiction. And *Bristol-Myers* involved the line between specific and general jurisdiction—that is, when is general jurisdiction the only option, such that the higher level of contacts required for general jurisdiction must be established?

It should be clarified at the outset that this Article’s analysis does not take a position on long-running debates over the goals and functions of adjudication.<sup>85</sup> The concerns detailed below regarding access and enforcement are troubling regardless of whether one believes that the core goal of adjudication is to resolve discrete disputes between litigants or to serve and expound public values.<sup>86</sup> Put simply,

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82. See *supra* notes 72–73 and accompanying text.

83. See *supra* notes 74–75 and accompanying text.

84. One exception was *Omni*, where jurisdiction failed to comply with Louisiana’s long-arm statute. 484 U.S. at 108.

85. See, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 454 (2009) (contrasting the “traditionally adversarial ‘dispute resolution’ model of adjudication” with a “‘public values’ model . . . in which judges articulate legal standards that affect large numbers of stakeholders” (first citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978); then citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–84 (1976); and then citing Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979))).

86. See Fiss, *supra* note 85, at 29 (“To my mind courts exist to give meaning to our public values, not to resolve disputes.”).

neither function is well served if litigation cannot be pursued because of a lack of personal jurisdiction.

### A. McIntyre and the Home-State Scenario

One access-to-justice concern is that a lack of personal jurisdiction can make it impossible for a plaintiff to obtain judicial remedies in his or her home state. A good example of this scenario is the first decision in the Supreme Court's recent group of cases, *J. McIntyre Machinery, Ltd. v. Nicaastro*.<sup>87</sup> The plaintiff, Robert Nicaastro, was a New Jersey resident who lost four fingers on his right hand while operating a metal-shearing machine at the New Jersey company where he worked.<sup>88</sup> He sued J. McIntyre Machinery, the British corporation that had manufactured the shearing machine, in a New Jersey state court.<sup>89</sup>

By a 6-3 vote, the Supreme Court found that J. McIntyre was not subject to personal jurisdiction in New Jersey. There was no majority opinion, however. Justice Kennedy wrote a plurality opinion, joined by Chief Justice Roberts and Justices Scalia and Thomas.<sup>90</sup> Justice Breyer authored a concurring opinion, joined by Justice Alito.<sup>91</sup> And Justice Ginsburg wrote the dissenting opinion, joined by Justices Sotomayor and Kagan.<sup>92</sup>

The fragmented Court reflected not only disagreement about the governing legal principles and their application but also disagreement about the factual record. All agreed that J. McIntyre had retained an Ohio-based company, McIntyre Machinery of America, to sell J. McIntyre's machines to customers in the United States.<sup>93</sup> J. McIntyre had also advertised its machines by sending its officials to trade shows in "such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego,

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87. 564 U.S. 873 (2011).

88. *Id.* at 878 (plurality opinion); *id.* at 895 (Ginsburg, J., dissenting) (noting that Nicaastro was injured "in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey").

89. *Id.* at 878 (plurality opinion); *id.* at 894 (Ginsburg, J., dissenting).

90. *Id.* at 877 (plurality opinion).

91. *Id.* at 887 (Breyer, J., concurring).

92. *Id.* at 893 (Ginsburg, J., dissenting).

93. *Id.* at 878 (plurality opinion) (describing the Ohio-based distributor as "an independent company" that had "agreed to sell J. McIntyre's machines in the United States"); *id.* at 887 (Breyer, J., concurring) (noting that J. McIntyre sold its machines "through an independent distributor in the United States"); *id.* at 896 (Ginsburg, J., dissenting) ("McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd. . . . as its exclusive distributor for the entire United States.").

and San Francisco,”<sup>94</sup> but never in New Jersey. It was unclear, however, whether only one of J. McIntyre’s shear machines—the one purchased by Nicastro’s employer—ended up in New Jersey, or whether as many as four such machines were sold to New Jersey customers.<sup>95</sup> The Justices also disagreed over whether they could consider either the size of New Jersey’s scrap-metal industry or the number of New Jersey businesses that had attended the U.S. trade shows where J. McIntyre officials had promoted its products, because that information had not been part of the lower-court record.<sup>96</sup>

Justice Kennedy’s plurality opinion asserted that personal jurisdiction comports with due process only to the extent that a party “submit[s] to a State’s authority.”<sup>97</sup> Although he recognized that jurisdiction may be appropriate over a manufacturer or distributor who “seek[s] to serve a given State’s market,”<sup>98</sup> Justice Kennedy reasoned that “[t]he defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum.”<sup>99</sup> And this targeting inquiry “requires a forum-by-forum, or sovereign-by-sovereign, analysis.”<sup>100</sup> Therefore, even though J. McIntyre targeted the United States,<sup>101</sup> “the United States is a distinct sovereign.”<sup>102</sup> For jurisdiction in a New Jersey court, what matters is the defendant’s “purposeful contacts with New Jersey, not with the United States.”<sup>103</sup>

Justice Ginsburg’s dissenting opinion argued that the British manufacturer’s machine “arrived in Nicastro’s New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and

94. *Id.* at 888 (Breyer, J., concurring); *see also id.* at 878 (plurality opinion) (noting that “J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre’s machines alongside the distributor” and that these conventions “took place in various States, but never in New Jersey”).

95. *Compare id.* at 878 (plurality opinion) (stating that “no more than four machines . . . including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey” but noting that “the record suggests only one”), *with id.* at 888 (Breyer, J., concurring) (“The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro’s employer.”).

96. *See infra* notes 108–109, 113 and accompanying text.

97. *McIntyre*, 564 U.S. at 880 (plurality opinion).

98. *Id.* (internal quotation marks omitted).

99. *Id.* (emphasis added).

100. *Id.* at 884.

101. *Id.* at 885 (noting that J. McIntyre “directed marketing and sales efforts at the United States”).

102. *Id.* at 884.

103. *Id.* at 886.

distribution system that McIntyre UK deliberately arranged.”<sup>104</sup> The defendant sought “to reach and profit from the United States market as a whole,”<sup>105</sup> including by engaging a U.S. distributor “to promote and sell its machines in the United States.”<sup>106</sup> Jurisdiction was proper, therefore, because the defendant had “‘purposefully availed itself’ of the United States market nationwide, not a market in a single State or a discrete collection of States.”<sup>107</sup> Justice Ginsburg also noted that New Jersey processed more scrap metal than any other U.S. state,<sup>108</sup> and that nearly one hundred New Jersey businesses were members of the industry group sponsoring the U.S. trade shows at which J. McIntyre officials promoted their machines.<sup>109</sup>

Although Justices Breyer and Alito agreed with the plurality on the ultimate result, they rejected Justice Kennedy’s “strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’”<sup>110</sup> Nonetheless, Justice Breyer’s concurring opinion found that the plaintiff “failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction” over the British manufacturer.<sup>111</sup> But he based this conclusion on a narrow view of the factual record. Justice Breyer deemed the record to include evidence of only a single New Jersey purchase of a J. McIntyre-manufactured machine.<sup>112</sup> And he emphasized that the plaintiff had introduced no evidence regarding either “the size and scope of New Jersey’s scrap-metal business” or “potential New Jersey customers who might . . . have regularly attended [the] trade shows” where J. McIntyre officials had advertised their products.<sup>113</sup>

As will be discussed in more detail below, the fragmented decision and the disputes about the factual record in *McIntyre* leave prior precedent undisturbed and broader doctrinal questions

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104. *Id.* at 898 (Ginsburg, J., dissenting).

105. *Id.*

106. *Id.* at 905.

107. *Id.*

108. *Id.* at 895 (citing data indicating that New Jersey facilities processed over two million tons of scrap metal in 2008 and that this “outpac[ed] Kentucky, its nearest competitor, by nearly 30 percent”).

109. *Id.* at 895 n.1 (citing the member directory of the Institute of Scrap Recycling Industries, Inc.).

110. *Id.* at 890 (Breyer, J., concurring) (quoting *id.* at 882 (plurality opinion)).

111. *Id.* at 887–88.

112. *Id.* at 888 (“The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro’s employer, Mr. Curcio.” (citations omitted)).

113. *Id.* at 889.

unanswered.<sup>114</sup> That said, *McIntyre* nicely illustrates a concern one can call the *home-state* scenario. A plaintiff is injured in her home state, relevant events occur in her home state, and she seeks remedies from an out-of-state defendant by suing in the courts of her home state. In this situation, the home state has a strong interest in adjudicating the case, which is brought on behalf of an in-state plaintiff who was injured as a result of in-state occurrences.<sup>115</sup> To require the plaintiff to seek judicial remedies outside her home state can impose significant cost and inconvenience.<sup>116</sup> The plaintiff in this scenario may lack the wherewithal—financial or otherwise—to access justice elsewhere. From the plaintiff’s perspective, the relevant events and injuries are home-state events that warrant judicial remedies from home-state tribunals.<sup>117</sup>

### B. Daimler and the Safety-Net Scenario

Access-to-justice concerns might also arise in cases where a particular court does not have a strong connection to the plaintiff or the underlying events, but exercising jurisdiction over the defendant is necessary to provide what might be called a remedial safety net. The Supreme Court’s recent decision in *Daimler AG v. Bauman*<sup>118</sup> provides a useful illustration.

The plaintiffs in *Daimler* sued Daimler AG, a German company with its headquarters in Stuttgart, Germany, under the Alien Tort Statute.<sup>119</sup> They alleged that Daimler’s Argentinian subsidiary

114. See *infra* Sections III.A & III.C.

115. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (“A State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.” (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957))).

116. See, e.g., *McIntyre*, 564 U.S. at 904 (Ginsburg, J., dissenting) (noting “the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre’s product at his workplace in Saddle Brook, New Jersey”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 348 (2013) (expressing concern that “consumers and employees would not be able to seek redress in the state where they purchase or receive defective products or services, or live, or were injured”).

117. See, e.g., John Vail, *Six Questions in Light of J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 517, 524 (2012) (describing the possibility that, under *McIntyre*, “one of Faulkner’s Mississippi mud farmers—another gentleman whose rich experiences were confined to a small geographic area—injured at his homeplace by a derelict Airbus jet” would have to “venture to [France] to file his action”).

118. 571 U.S. 117 (2014).

119. *Id.* at 120–22. The Alien Tort Statute, 28 U.S.C. § 1350 (2012), has provided subject-matter jurisdiction for a variety of claims based on international human rights obligations. See, e.g., *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 525 (4th Cir. 2014); *Filartiga v. Pena-*

committed human rights violations during the 1970s and 1980s.<sup>120</sup> The Ninth Circuit found that California could assert general jurisdiction over Daimler because of the activities of MBUSA, Daimler's U.S. subsidiary.<sup>121</sup> MBUSA was headquartered in New Jersey but had multiple facilities in California, made over \$4.6 billion in annual sales in California, and was the largest supplier of vehicles to the California market.<sup>122</sup>

With Justice Ginsburg writing the majority opinion, the Supreme Court concluded that Daimler was not subject to general jurisdiction. Justice Ginsburg first rejected the Ninth Circuit's conclusion that MBUSA's contacts could be attributed to Daimler for jurisdictional purposes.<sup>123</sup> More significantly, however, Justice Ginsburg then concluded that general jurisdiction would not be proper in California even if MBUSA's contacts were attributable to Daimler.

The *Daimler* Court began with a reprise of its 2011 *Goodyear* decision, in which it unanimously held that general jurisdiction requires that the defendant's "affiliations with the State" be "so continuous and systematic as to render them essentially at home" there.<sup>124</sup> Under this standard, the paradigm locations for general jurisdiction over a corporation are its state of incorporation and its principal place of business.<sup>125</sup> Even if MBUSA's contacts could be

Irala, 630 F.2d 876, 878 (2d Cir. 1980); *Krishanti v. Rajaratnam*, No. 2:09-cv-05395, 2014 WL 1669873 (D.N.J. Apr. 28, 2014).

120. *Daimler*, 571 U.S. at 121–22.

121. Although the *Daimler* case was filed in a California federal court, personal jurisdiction was based on Federal Rule of Civil Procedure 4(k)(1)(A). *See id.* at 124–26. Accordingly, personal jurisdiction hinged on whether it would be constitutional for a California state court to assert personal jurisdiction. *See id.*; *see also supra* notes 74–75 and accompanying text (discussing Rule 4(k)(1)(A)). *Daimler* did not address whether personal jurisdiction could be based on Rule 4(k)(2), which authorizes personal jurisdiction in federal court over claims arising under federal law when the defendant is not subject to jurisdiction in any state's courts. FED. R. CIV. P. 4(k)(2). This was apparently because the Ninth Circuit did not base its ruling on Rule 4(k)(2). *See Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 918 n.9 (9th Cir. 2011). Other lower courts, however, have recognized that Rule 4(k)(2) applies to Alien Tort Statute ("ATS") cases. *See, e.g., Mwani v. bin Laden*, 417 F.3d 1, 10–11 (D.C. Cir. 2005); *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 434–36 (S.D.N.Y. 2009). That could change the jurisdictional calculus because the constitutional outer limits would be governed by the Fifth Amendment rather than the Fourteenth Amendment. *See supra* notes 76–79 and accompanying text.

122. *See Daimler*, 571 U.S. at 123–24; *id.* at 147–48 (Sotomayor, J., concurring).

123. *See id.* at 134–36 (majority opinion).

124. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *see Daimler*, 571 U.S. at 121–22 (requiring that "the corporation's affiliations with the State in which suit is brought [must be] so constant and pervasive 'as to render it essentially at home in the forum State.'" (quoting *Goodyear*, 564 U.S. at 919)); *see also supra* notes 56–58 and accompanying text.

125. *See Daimler*, 571 U.S. at 136–37 ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] bases for general jurisdiction.'" (citations and internal quotation marks omitted)); *see also Goodyear*, 564 U.S. at 924.

attributed entirely to Daimler itself, California would not be one of those “paradigms.”<sup>126</sup>

*Daimler* did recognize that a corporation could potentially be subject to general jurisdiction beyond its state of incorporation or principal place of business.<sup>127</sup> But *Daimler* emphasized that a corporation is not subject to general jurisdiction “in every State in which a corporation engages in a substantial, continuous, and systematic course of business.”<sup>128</sup> Justice Ginsburg wrote that general jurisdiction is not simply a function of “the magnitude of the defendant’s in-state contacts.”<sup>129</sup> Rather, a court must make a comparative assessment of the defendant’s activities “in their entirety, nationwide and worldwide.”<sup>130</sup> Accordingly, “[a] corporation that operates in many places can scarcely be deemed at home in all of them.”<sup>131</sup>

Although Justice Sotomayor concurred in *Daimler* on other grounds, she strongly criticized this approach to general jurisdiction. She argued that Justice Ginsburg’s “proportionality requirement”<sup>132</sup> was inconsistent with the Court’s general jurisdiction precedents, under which the analysis properly focused on “the magnitude of the defendant’s in-state contacts, not the relative magnitude of those contacts in comparison to the defendant’s contacts with other States.”<sup>133</sup> Justice Sotomayor memorably wrote: “In recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly ‘too big to fail’; today the Court deems *Daimler* ‘too big for general jurisdiction.’”<sup>134</sup>

126. See *Daimler*, 571 U.S. at 138–39 (“[N]either *Daimler* nor MBUSA is incorporated in California, nor does either entity have its principal place of business there.”).

127. *Id.* at 136–38 (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”).

128. *Id.* at 138–39 (“That formulation, we hold, is unacceptably grasping.”).

129. *Id.* at 139 n.20.

130. *Id.*

131. *Id.*

132. *Id.* at 153–55 (Sotomayor, J., concurring). In the later *BNSF* decision, Justice Sotomayor criticized “the comparative contacts analysis invented in *Daimler*.” *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1561 (2017) (Sotomayor, J., concurring in part and dissenting in part).

133. *Daimler*, 571 U.S. at 148–51 (Sotomayor, J., concurring) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 915 (2011); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438, 447–48 (1952); and *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). Justice Sotomayor placed particular emphasis on the *Perkins* case, which the *Daimler* majority cited as a “textbook case” of general jurisdiction” but which Justice Sotomayor believed was “all but impossible to reconcile” with the majority’s “proportionality test.” *Id.* at 148–53 & nn.7–8 (discussing *Perkins*).

134. *Id.* at 143–45.



At first glance, it might indeed seem surprising that Justice Ginsburg led the way in rejecting jurisdiction over *Daimler* when she had dissented vigorously from the Court's refusal to permit jurisdiction over *J. McIntyre*.<sup>135</sup> The explanation, however, lies in the difference between specific and general jurisdiction. To accept general jurisdiction over *Daimler* in California would mean that *Daimler* could be sued in California "if a *Daimler*-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger."<sup>136</sup> As a practical matter, there may be little justification for allowing courts in California (or anywhere else in the United States) to have jurisdiction over what is often called a "foreign-cubed"<sup>137</sup> case—that is, a foreign plaintiff suing a foreign defendant based on acts occurring in a foreign country.<sup>138</sup>

Put another way, a case like *Daimler* does not present the same sort of access-to-justice concerns that were present in a case like *McIntyre*, where a plaintiff is injured in her home state, relevant events occur in her home state, and she seeks remedies from an out-of-state defendant in the courts of her home state. If a lawsuit involves events occurring in Argentina, conduct directed at Argentina, and injuries suffered in Argentina—for which a German corporation is allegedly responsible—then Argentina or Germany would seem to be more appropriate venues. That is precisely why the plaintiffs in *Daimler* invoked general jurisdiction. Their claims did not arise from or relate to any of the defendant's contacts with the forum state.<sup>139</sup>

Imagine, however, a case like *Daimler* where there were insurmountable obstacles to obtaining judicial remedies in the foreign countries that would have jurisdiction. It might be important to allow U.S. courts to hear such foreign-cubed claims—as a last resort—when foreign legal systems are unavailable or inadequate. There is no apparent safety-valve, however, in Justice Ginsburg's restrictive approach to general jurisdiction. And this could indeed undermine access-to-justice concerns that Justice Ginsburg—and other Justices who joined the *Daimler* majority—have identified in the transnational

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135. See *supra* notes 104–109 and accompanying text (discussing Justice Ginsburg's dissent).

136. *Daimler*, 571 U.S. at 121–23.

137. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1098 (2015) (describing "foreign-cubed" cases).

138. Oona Hathaway, *Kiobel Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/> [<https://perma.cc/F7LK-SDJ9>].

139. See *Daimler*, 571 U.S. at 121–23 ("Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where *Daimler* may be sued on any and all claims against it, wherever in the world the claims may arise.").

context. They did so, in fact, just nine months before the *Daimler* decision, in *Kiobel v. Royal Dutch Petroleum Co.*<sup>140</sup>

In *Kiobel*, Nigerian citizens residing in the United States sued foreign oil companies under the Alien Tort Statute (“ATS”), alleging that those companies and their subsidiaries aided and abetted violations of international law by the Nigerian government—including extrajudicial killings, torture, arbitrary arrest and detention, and property destruction.<sup>141</sup> The Court split 5-4, with Chief Justice Roberts’s majority opinion concluding that the lawsuit could not proceed because of “the presumption against extraterritoriality.”<sup>142</sup> That presumption applied to claims under the ATS, and therefore claims based on “violations of the law of nations occurring outside the United States” were barred.<sup>143</sup>

To Chief Justice Roberts, applying the presumption against extraterritoriality to the facts of *Kiobel* was fairly straightforward because “all the relevant conduct took place outside the United States.”<sup>144</sup> Chief Justice Roberts added, however, that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>145</sup> He observed: “Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.”<sup>146</sup>

Four Justices refused to join Chief Justice Roberts’s majority opinion. Although they agreed that the *Kiobel* case should be dismissed, Justice Breyer’s concurring opinion on behalf of himself and Justices Ginsburg, Sotomayor, and Kagan sketched out a very different

140. 569 U.S. 108 (2013).

141. *Id.* at 111–14.

142. *Id.* at 124.

143. *Id.*

144. *Id.* at 124–25.

145. *Id.*

146. *Id.* at 125. *Kiobel*’s presumption against extraterritoriality applies only with respect to the federal common law cause of action that the Supreme Court recognized for asserting federal jurisdiction under the ATS. *See id.* at 115 (noting that the Court had “held that federal courts may recognize private claims [for such violations] under federal common law” in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and that “[t]he question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign”). The presumption against extraterritoriality does not automatically apply to causes of action based on state law or foreign law. *See* Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 481 (2018) (“*Kiobel* rested on a presumption against interpreting federal statutes to apply extraterritorially, and said nothing about state courts proceeding under state common law.”).

approach to ATS claims. At the level of first principles, Justice Breyer argued against “invok[ing] the presumption against extraterritoriality.”<sup>147</sup> Instead, he would find jurisdiction under the ATS where “(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest.”<sup>148</sup> As to the third category, Justice Breyer noted the United States’ “distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”<sup>149</sup>

Justice Breyer then cited examples of lower federal court decisions that had invoked this distinct interest.<sup>150</sup> All of these were cases brought against individual defendants who (a) were citizens of foreign countries, (b) had perpetrated abuses outside the United States, and (c) were living in the United States at the time of the lawsuit. In that situation, personal jurisdiction is unlikely to be a problem because serving the defendant with process while they are physically in the United States creates personal jurisdiction in the state where service occurs.<sup>151</sup>

Suppose, however, that the “torturer or other enemy of mankind” is not an individual who is physically present in the United States. Imagine, instead, an individual or entity who engages in significant economic or other activity in the United States from afar. Or imagine a foreign entity that has a substantial physical presence in the United States but that—as an entity rather than a natural person—is

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147. *Kiobel*, 569 U.S. at 127 (Breyer, J., concurring).

148. *Id.*

149. *Id.*

150. *See id.* at 134–35 (discussing *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

151. *See Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion) (“The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’”); *id.* at 628–29 (Brennan, J., concurring) (“I agree with Justice Scalia that the Due Process Clause of the Fourteenth Amendment generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum State.”); *see also Kadic v. Karadzic*, 70 F.3d 232, 246–51 (2d Cir. 1995) (upholding personal jurisdiction based on in-forum service of process in an ATS case against the leader of Bosnian-Serb forces); *id.* at 247 (“[Federal Rule of Civil Procedure] 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction.” (citing *Burnham*, 495 U.S. 604)).

exempt from tag jurisdiction based on in-forum service of process.<sup>152</sup> It may be the case that justice in the defendant's home country—or the country where the abuses occurred—may be effectively unavailable.<sup>153</sup> Yet the Court's restrictive approach to general jurisdiction might prevent access to U.S. courts,<sup>154</sup> even though at least four Justices—and perhaps five<sup>155</sup>—would perceive jurisdiction to be in the United States'

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152. See, e.g., *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1064 (9th Cir. 2014) (“We hold that *Burnham* does not apply to corporations.”). Regardless of whether personal jurisdiction may be obtained, suits against foreign corporations now face the additional obstacle that the federal common law cause of action for enforcing violations of international law under the ATS does not extend to foreign corporate defendants. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (“[A]bsent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.”). Because this conclusion was based on the lack of congressional approval for a federal cause of action that would reach foreign corporate defendants, the logic of *Jesner* would not foreclose claims against foreign corporations based on causes of action authorized by state law or foreign law. See *Davis & Whytock*, *supra* note 146, at 405 (noting “the states’ distinct remedial authority within our federal system”); *id.* at 470 (“If, according to the forum’s choice-of-law rules, foreign law applies and provides a basis for the claim, then the suit might proceed.”). Even as to the federal ATS cause of action, *Jesner* does not address claims against entities other than corporations.

153. See *Curtis A. Bradley, The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 458 (2001) (“Needless to say, the victims of such abuses often are unable to obtain redress in their home countries.”); *Davis & Whytock*, *supra* note 146, at 399 (“Often, . . . victims of human rights abuses will find it futile to seek a remedy in a domestic court of the country where the abuses occurred.”). Whether an adequate alternative forum exists has long been relevant for deciding motions to dismiss based on *forum non conveniens*. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 & n.22 (1981) (noting that “[a]t the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum” and that “where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative”); see also, e.g., *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1226–30 (3d Cir. 1995) (affirming the district court’s conclusion that the judicial system in India was not an adequate alternative forum).

154. A foreign corporation with its principal place of business abroad, for example, would likely be immune from general jurisdiction in any U.S. court. See, e.g., *Davis & Whytock*, *supra* note 146, at 463 (“Some commentators suggest that the Court’s personal jurisdiction holding in *Daimler AG v. Bauman* makes personal jurisdiction an even more imposing barrier to human rights claims in U.S. courts.”); Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 163 (2014).

155. Justice Kennedy—although he joined Chief Justice Roberts’s majority opinion in *Kiobel*—wrote a brief concurrence clarifying that the majority “is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute” and that “the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation” in future cases. *Kiobel*, 569 U.S. at 125 (Kennedy, J., concurring). Some viewed this as a signal that Justice Kennedy may have been receptive to permitting ATS claims in the situations identified by Justice Breyer. See Cortelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053, 1114 (2015) (“Justice Breyer’s *Kiobel II* concurrence combined with Justice Kennedy’s opinion suggests there is still hope—and possibly a majority of the Justices—who believe that *jus cogens* violations committed abroad can be litigated under the ATS if not through other means.”); Note, *Clarifying Kiobel’s “Touch and Concern” Test*, 130 HARV. L. REV. 1902, 1909 (2017) (“Justice Kennedy provided the fifth vote for

national interest. Enforcement of the underlying substantive rights (such as those created by international law) might be thwarted by the lack of a judicial safety net in U.S. courts.<sup>156</sup>

Justice Sotomayor's approach to general jurisdiction in *Daimler* is less likely to create such a problem. As alluded to above, Justice Sotomayor did not rule out the possibility that *Daimler* would indeed have sufficient contacts with California to be subject to general jurisdiction.<sup>157</sup> Nonetheless, she found that *Daimler* should not be subject to jurisdiction in California because it would be "unreasonable" under the second prong of the constitutional test.<sup>158</sup> That reasonableness inquiry, however, would consider whether "a more appropriate forum is available."<sup>159</sup> Justice Sotomayor's analysis can account for the safety-net scenario, because the lack of an alternative forum strengthens the reasonableness of jurisdiction in U.S. courts. By contrast, the majority's approach threatens to preclude jurisdiction

the majority, and he seemed to want to leave the door open for extraterritorial ATS causes of action."). Whether the same holds true for Justice Kennedy's successor remains to be seen.

156. This is not to say that U.S. courts may act as a safety net with respect to all international law norms. For example, the Supreme Court has set a high bar for whether a particular claim is actionable under the ATS: "[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms" of "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715, 732 (2004); see also *id.* at 761–62 (Breyer, J., concurring) (noting that "substantive uniformity does not automatically mean that universal jurisdiction is appropriate" and arguing that "universal tort jurisdiction" requires a "procedural consensus"); *id.* at 762–63 (stating that such a "procedural consensus" exists for "torture, genocide, crimes against humanity, and war crimes" but not for "the claim at issue here—where the underlying substantive claim concerns arbitrary arrest, outside the United States, of a citizen of one foreign country by another"). Lawsuits based on state law or foreign law causes of action might adopt different formulae for identifying which international law norms are suitable for private civil actions. See *Davis & Whytock*, *supra* note 146, at 480 (noting that "*Sosa's* concerns about federal judicial authority do not all map onto state judicial authority" and that state courts, unlike federal courts, "may have common law authority to enforce [customary international law]").

157. See *supra* notes 132–134 and accompanying text. Justice Sotomayor ultimately found that the record was not sufficiently developed to assess whether *Daimler's* contacts with California could justify general jurisdiction, in part due to what she viewed as *Daimler's* concession on this issue in the lower courts. See *Daimler AG v. Bauman*, 571 U.S. 117, 146–49 (Sotomayor, J., concurring). She observed, however, that "what little we do know suggests that *Daimler* was wise to concede what it did." *Id.* at 146–48.

158. *Id.* at 141–43 (Sotomayor, J., concurring) ("The Court can and should decide this case on the far simpler ground that, no matter how extensive *Daimler's* contacts with California, that State's exercise of jurisdiction would be unreasonable"); *id.* ("Our personal jurisdiction precedents call for a two-part analysis."); see also *supra* notes 45–47 and accompanying text (describing the reasonableness inquiry). Justice Sotomayor's argument regarding reasonableness prompted the *Daimler* majority to reject the notion that the reasonableness inquiry plays *any* independent role in the context of general jurisdiction. See *supra* note 63 and accompanying text.

159. *Daimler*, 571 U.S. at 141–43 (Sotomayor, J., concurring).

“even if no other judicial system was available to provide relief.”<sup>160</sup> If the only jurisdictionally permissible judicial systems are effectively unavailable, there may be no way for plaintiffs to pursue their legal claims.

### C. Bristol-Myers and the Aggregation Scenario

A third situation where personal jurisdiction doctrine may undermine access to judicial remedies and the enforcement of substantive law can be called the aggregation scenario. Denying personal jurisdiction can block the efficient aggregation of claims and may make it economically impossible to hold defendants accountable when the costs of individual lawsuits outweigh the likely individual recovery.<sup>161</sup> The Supreme Court’s most recent decision on personal jurisdiction, *Bristol-Myers Squibb Co. v. Superior Court*,<sup>162</sup> illustrates the potential problem. *Bristol-Myers* involved a group of nearly seven hundred plaintiffs from thirty-four states who sued Bristol-Myers Squibb (“BMS”) in California state court for injuries relating to its blood-thinning drug Plavix. Each plaintiff asserted identical theories of liability, although only eighty-six of them were from California.<sup>163</sup>

As to the California plaintiffs, there was no doubt that specific jurisdiction was appropriate. BMS purposefully sold Plavix to the California market, leading to the sale of almost 187 million Plavix pills in the state and more than \$900 million in earnings from those sales.<sup>164</sup>

160. *Id.* at 158–59.

161. *See, e.g., In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 179 (3d Cir. 2013) (noting that class actions “may have an important deterrent value” with respect to “so-called negative value claims, that is, claims that could not be brought on an individual basis because the transaction costs of bringing an individual action exceed the potential relief”); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 73 (1975) (“Where the individual claims are too small to make actual compensation of the class members financially feasible, then the importance of the class action for deterrence, and hence for overall efficiency, must be assessed.”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 108 (2006) (noting that the “deterrence of future wrongdoing” is “the strongest justification for small-claims class action litigation”); Harry Kalven, Jr., & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941) (“[T]he suit which might not be brought at all because the demands on legal skill and time would be disproportionate to the original client’s stake can, when turned into a class suit, be brought and handled in a manner commensurate with its magnitude.”).

162. 137 S. Ct. 1773 (2017).

163. *See Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 877–78 (Cal. 2016).

164. *Bristol-Myers*, 137 S. Ct. at 1778; *see also Bristol-Myers*, 377 P.3d at 888 (“The California plaintiffs’ claims concerning the alleged misleading marketing and promotion of Plavix and injuries arising out of its distribution to and ingestion by California plaintiffs certainly arise from BMS’s purposeful contacts with this state . . .”).

But what about the non-California plaintiffs? As a Delaware corporation with its headquarters in New York, BMS would not be subject to general jurisdiction in California under the Supreme Court's recent case law.<sup>165</sup> The key question, therefore, was whether California could assert *specific* jurisdiction with respect to the claims by non-California plaintiffs.<sup>166</sup>

The Supreme Court of California found specific jurisdiction was proper. It reasoned that even the non-California plaintiffs' claims "related to" BMS's contacts with California, because of "BMS's extensive contacts with California as part of Plavix's nationwide marketing, its sales of Plavix in this state, and its maintenance of research and development facilities here."<sup>167</sup> The California Supreme Court also endorsed "a sliding scale approach to specific jurisdiction," under which "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."<sup>168</sup>

By an 8-1 vote, the Supreme Court disagreed, concluding that "the California courts cannot claim specific jurisdiction" with respect to the non-California plaintiffs.<sup>169</sup> At the outset, Justice Alito's majority opinion rejected the California Supreme Court's "sliding scale" approach, which he called "a loose and spurious form of general jurisdiction."<sup>170</sup> The Court then reaffirmed the basic principles the Court had articulated in previous decisions. Specific jurisdiction applies when the suit "aris[es] out of or relat[es] to the defendant's contacts with the forum," which requires "an affiliation between the forum and the underlying controversy."<sup>171</sup> Specific jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."<sup>172</sup>

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165. *See supra* notes 124–131 and accompanying text; *see also* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1554–59 (2017) (finding that Montana lacked general jurisdiction over a Delaware corporation with its principal place of business in Texas and noting that the defendant was not "so heavily engaged in activity in Montana 'as to render [it] essentially at home' in that State" (alteration in original) (quoting *Daimler*, 571 U.S. at 139)).

166. *Bristol-Myers*, 137 S. Ct. at 1777 ("The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.").

167. *Bristol-Myers*, 377 P.3d at 890–91.

168. *Id.* at 889 (internal quotation marks omitted) (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1098 (1996)).

169. *Bristol-Myers*, 137 S. Ct. at 1782.

170. *Id.* at 1781.

171. *Id.* at 1780 (internal quotation marks omitted) (first quoting *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014); and then quoting *Goodyear Dunlop Tires Operations, SA v. Brown*, 564 U.S. 915, 919 (2011)).

172. *Id.* (internal quotation marks omitted) (quoting *Goodyear*, 564 U.S. at 919).

Applying these principles, the majority found that specific jurisdiction could not include the claims by non-California residents. Justice Alito wrote that “[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims.”<sup>173</sup> He explained: “[A] defendant’s relationship with a third party, standing alone, is an insufficient basis for jurisdiction.’ This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents.”<sup>174</sup> It was also irrelevant “that BMS conducted research in California on matters unrelated to Plavix” because “[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”<sup>175</sup> Here, “[t]he relevant plaintiffs are not California residents and do not claim to have suffered harm in that State,” and “all the conduct giving rise to the nonresidents’ claims occurred elsewhere.”<sup>176</sup>

As with other cases on general jurisdiction, Justice Sotomayor was the lone dissenter. She expressed concern that the majority’s approach “will make it profoundly difficult for plaintiffs who are injured in different States by a defendant’s nationwide course of conduct to sue that defendant in a single, consolidated action,”<sup>177</sup> and “may make it impossible to bring certain mass actions at all.”<sup>178</sup> Whether Justice

173. *Id.* at 1781.

174. *Id.* (internal ellipses and citation omitted) (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

175. *Id.*

176. *Id.* at 1782.

177. *Id.* at 1789 (Sotomayor, J., dissenting).

178. *Id.* Justice Sotomayor noted, however, the possibility that the majority’s reasoning in *Bristol-Myers* might not apply with equal force to class actions, for which “[n]onnamed class members may be parties for some purposes and not for others.” *Id.* at 1789 n.4 (internal ellipses omitted) (citing *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002)) (“The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”). A split has already developed in the lower courts regarding whether *Bristol-Myers* applies to class actions. *Compare* *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114, 126 (D.D.C. 2018) (“[T]he court agrees with Plaintiffs and concludes that *Bristol-Myers* does not apply to class actions.”), and *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1369 (N.D. Ga. 2018) (finding notwithstanding *Bristol-Myers* that the court could “exercise jurisdiction over a nationwide class claim on the strength of its specific personal jurisdiction over the defendant as to the named plaintiff’s claim”), with *In re Dental Supplies Antitrust Litig.*, No. 16-CIV-696 (BMC)(GRB), 2017 WL 4217115, at \*9 (E.D.N.Y. Sept. 20, 2017) (“The constitutional requirements of due process does not wax and wane when the complaint is individual or on behalf of a class.”). It remains to be seen whether *Bristol-Myers* will affect consolidation of actions for pretrial proceedings under the multidistrict litigation (“MDL”) statute, 28 U.S.C. § 1407 (2012); it is an open question how courts should assess whether personal jurisdiction is proper in the MDL



Sotomayor is ultimately correct in this prediction remains to be seen. But there is legitimate cause for concern. If *Bristol-Myers* is read to require plaintiff-by-plaintiff assessment of whether jurisdiction is specific or general, it could be impossible in some situations to aggregate related claims on a nationwide basis.<sup>179</sup> For certain kinds of claims—especially negative-value claims<sup>180</sup>—this may make meaningful access to justice impossible.

Obstacles to aggregation might also impact requests for injunctive relief. There has been considerable controversy recently over whether federal courts have the power to issue so-called “nationwide injunctions”<sup>181</sup> in response to claims by particular plaintiffs that a particular government policy violates federal law.<sup>182</sup> For example, a federal judge in 2015 imposed a nationwide injunction prohibiting the Obama administration from implementing its Deferred Action for Parents of Americans (“DAPA”) program.<sup>183</sup> More recently, federal

transferee district—or even whether such an inquiry is required. See Bradt & Rave, *supra* note 69, at 1295–99 (describing the view that the “fiction of limited transfer allows MDL to get around the limits that Rule 4 places on a federal court’s personal jurisdiction over a class action or mass joinder” and that “the unique kind of consolidation in an MDL is an acceptable exercise of federal power under the Due Process Clause of the Fifth Amendment”); Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1208–15 (2018) (summarizing approaches to this issue by federal courts and the Judicial Panel on Multidistrict Litigation); *id.* at 1228 (arguing that “the Court should require that there be proper jurisdiction in both the transferor court and the transferee court, but measured under different criteria”).

179. That reading of *Bristol-Myers* would not foreclose nationwide aggregation in a forum where the defendant is subject to general jurisdiction—such as a corporation’s principal place of business or state of incorporation. See *Bristol-Myers*, 137 S. Ct. at 1783 (“Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware.”). This option likely would not be available, however, either for foreign defendants or in cases brought against multiple domestic defendants who do not share a principal place of business or state of incorporation. See *id.* at 1789 (Sotomayor, J., dissenting) (questioning whether it would be “possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States” or “against a defendant not headquartered or incorporated in the United States”). *Bristol-Myers* also does not foreclose the possibility that some state would have enough of a connection to all plaintiffs’ or class members’ claims to support specific jurisdiction. Whether specific jurisdiction is possible would depend not only on the underlying facts of a given case but also the methodology for evaluating whether a sufficient affiliation with the state exists to permit specific jurisdiction. The latter question is addressed *infra* Sections IV.A–IV.B.

180. See *supra* note 161.

181. *Summers v. Earth Island Inst.*, 555 U.S. 488, 500–01 (2009) (recognizing but not deciding “the question whether, if respondents prevailed, a nationwide injunction would be appropriate”).

182. See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017).

183. *Texas v. United States*, 86 F. Supp. 3d 591, 676 (S.D. Tex. 2015). The preliminary injunction was affirmed by the Fifth Circuit, which concluded that “[i]t is not beyond the power of

judges have imposed nationwide injunctions prohibiting the Trump administration from rescinding President Obama's Deferred Actions for Childhood Arrivals ("DACA") program.<sup>184</sup> Nationwide injunctions prohibiting the enforcement of several sections of Trump's executive orders on immigration made two trips to the Supreme Court.<sup>185</sup>

The permissible breadth of an injunction in any given case presents difficult questions. The debate on this issue has presumed, however, that if a nationwide class action were certified, a single court could issue a nationwide injunction.<sup>186</sup> If *Bristol-Myers* is read to prevent aggregation of claims by plaintiffs located in different states, however, this could be impossible. No single state—and no single federal district whose jurisdiction is aligned with the state where it is located under Rule 4(k)(1)(A)—might have jurisdiction to entertain so broad a suit unless the named plaintiffs choose a state or district that has general jurisdiction over all relevant defendants.<sup>187</sup>

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a court, in appropriate circumstances, to issue a nationwide injunction." *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015). An equally divided Supreme Court affirmed. *See United States v. Texas*, 136 S. Ct. 2271, 2271 (2016) (mem.).

184. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401 (E.D.N.Y. 2018).

185. In one round of litigation, the Supreme Court granted certiorari and stayed the lower court's injunction "with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2083, 2087 (2017). After the President's temporary executive orders expired, the Supreme Court declared that the case was moot and vacated the lower court judgment. *Trump v. Hawaii*, 138 S. Ct. 377, 377 (2017) (mem.). A challenge to President Trump's subsequent executive order led to another preliminary injunction, which was upheld by the Ninth Circuit but reversed by the Supreme Court. *See Hawaii v. Trump*, 878 F.3d 662 (2017), *reversed sub nom.*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Although one of the questions presented in the petition for certiorari was "[w]hether the global injunction is impermissibly overbroad," Petition for Writ of Certiorari at i, *Trump*, 138 S. Ct. 2392 (No. 17-965), 2018 WL 333818, the Supreme Court majority opinion did not resolve that particular question. *Trump*, 138 S. Ct. at 2423 ("Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court."). *But cf. id.* at 2424–25 (Thomas, J., concurring) ("Merits aside, I write separately to address the remedy that the plaintiffs sought and obtained in this case. . . . I am skeptical that district courts have the authority to enter universal injunctions.").

186. *See Bray, supra* note 182, at 419 (describing the problem as "in *non-class actions*, federal courts are issuing injunctions that are universal in scope—injunctions that prohibit the enforcement of a federal statute, regulation, or order *not only against the plaintiff, but also against anyone*" (first emphasis added)).

187. Imagine, for example, that the State of Hawaii—the plaintiff in one of the challenges to the Trump administration's executive orders on immigration—was the named plaintiff in a Rule 23(b)(2) class action on behalf of a nationwide class of plaintiffs. In the wake of *Bristol-Myers*, it might be argued that a court in Hawaii lacks personal jurisdiction with respect to claims by non-Hawaii class members.

*D. Solving the Access-to-Justice Problems*

Having described three scenarios where a lack of personal jurisdiction can undermine access to justice, this Section briefly summarizes the doctrinal obstacles facing each one. For the home-state scenario, the potential problem is that courts may adopt too restrictive an approach to the specific jurisdiction assessment of whether the defendant has established minimum contacts with the forum state, forcing plaintiffs to bear the cost of litigating outside of their home state. As Part III will establish, however, the Supreme Court's recent cases do not mandate a more restrictive approach to the basic minimum contacts standard. A sensible approach to minimum contacts is entirely consistent with the Court's case law to date, and will mitigate concerns that arise when plaintiffs who are injured in their home state sue in the courts of their home state.

For the safety-net and aggregation scenarios, the problem is not the basic minimum contacts standard. It was clear that *Bristol-Myers Squibb* would be subject to jurisdiction in California as to California plaintiffs,<sup>188</sup> and there would be little doubt that *Daimler AG* would be subject to jurisdiction in California in a case involving a vehicle that *Daimler* had designed and manufactured and that was sold to a California customer and caused an accident on California roads.<sup>189</sup> Problems arise when (1) a case is assessed under a general jurisdiction standard, and (2) jurisdiction is therefore subject to the Court's newly restrictive "essentially-at-home" test. As described above, applying the general jurisdiction test in the safety-net and aggregation scenarios can effectively prevent defendants from being held accountable—in the former because alternative forums may be unavailable, and in the latter because broad aggregation may be necessary to make meritorious claims economically viable. The solution—as Part IV will show—is to clarify the line between specific and general jurisdiction. Properly understood, the safety-net and aggregation scenarios can in many instances be treated as specific jurisdiction cases rather than general jurisdiction cases.

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188. See *supra* note 164 and accompanying text.

189. See *Daimler AG v. Bauman*, 571 U.S. 117, 127 n.5 (2014) ("[I]f a California plaintiff, injured in a California accident involving a *Daimler*-manufactured vehicle, sued *Daimler* in California court alleging that the vehicle was defectively designed, that court's adjudicatory authority would be premised on specific jurisdiction.").

### III. MODERN MINIMUM CONTACTS

This Part argues that the Supreme Court's recent cases do not mandate a more restrictive approach to the basic minimum contacts standard. Of the Court's six recent cases, only two address whether the defendant's contacts with the forum state were sufficient to establish specific jurisdiction: *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>190</sup> and *Walden v. Fiore*.<sup>191</sup> Section A discusses the *McIntyre* decision, situating that decision with the Court's earlier case law on personal jurisdiction in the context of what is often referred to as the "stream of commerce." Section B examines *Walden*, as well as earlier decisions addressing personal jurisdiction over intentional tort claims. Section C concludes by showing that *McIntyre* and *Walden* do not depart from the Court's earlier case law on the minimum contacts threshold, and that unusual factual aspects of those cases mean they should not be read to create significant obstacles when plaintiffs sue in their home state based on events occurring there.

#### A. The Stream of Commerce

One area where the basic minimum contacts requirement has been hotly contested is the so-called "stream of commerce." The Court's engagement with this issue began with *World-Wide Volkswagen Corp. v. Woodson*, where the Court endorsed the idea that personal jurisdiction is proper over a defendant "that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."<sup>192</sup> More specifically, the Court stated that

if the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.<sup>193</sup>

These rules did not, however, justify personal jurisdiction over the particular defendants in *World-Wide Volkswagen*. The plaintiffs,

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190. 564 U.S. 873 (2011).

191. 134 S. Ct. 1115 (2014). Although the *Bristol-Myers* decision also addressed the availability of specific jurisdiction, its focus was on whether the defendant's contacts with California were sufficiently *related* to particular plaintiffs' claims for purposes of specific jurisdiction. See *supra* notes 169–176 and accompanying text. There was no dispute that the defendant had established minimum contacts with California, and that these contacts sufficed with respect to plaintiffs whose claims arose in California. See *supra* notes 162–166 and accompanying text.

192. 444 U.S. 286, 298 (1980).

193. *Id.* at 297 (emphasis added).

who were injured in Oklahoma while driving a car they purchased in New York, filed suit in Oklahoma against two New York-based defendants—a New York car dealership and a New York distributor that served dealers in the New York City tri-state area.<sup>194</sup> As to those defendants, the “stream of commerce” ended in New York; they did not in any sense seek to serve the Oklahoma market.<sup>195</sup>

The Court revisited the stream of commerce several years later in *Asahi Metal Industry Co. v. Superior Court*, with the Court splitting 4-4-1 on whether a Japanese component manufacturer—whose tire valves were used in a tire tube that was manufactured in Taiwan but found its way onto a motorcycle purchased in California—had established minimum contacts with California.<sup>196</sup> Justice Brennan’s four-Justice coalition found that the minimum contacts requirement was met, noting *World-Wide Volkswagen’s* instruction above.<sup>197</sup> Justice O’Connor’s four-Justice coalition disagreed, reasoning that “placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”<sup>198</sup> Rather, there must be “[a]dditional conduct” indicating “an intent or purpose to serve the market in the forum State.”<sup>199</sup> Examples of such additional conduct include “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”<sup>200</sup>

194. *Id.* at 298–99.

195. *See id.* at 298; *see also* John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court’s Decisions in Goodyear Dunlop Tires and Nicastro*, 90 WASH. U. L. REV. 1707, 1735 (2013) (“The stream ended when the New York car dealer sold the car to the plaintiff in New York.”).

196. 480 U.S. 102 (1987).

197. *Id.* at 119–20 (Brennan, J., concurring):

[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers* in the forum State.

(internal quotation marks omitted) (quoting *World-Wide Volkswagen*, 444 U.S. at 297–98).

198. *Id.* at 112 (plurality opinion).

199. *Id.*

200. *Id.*

Justice Stevens declined to join either the Brennan or O'Connor opinions, depriving the Court of a majority opinion on the minimum contacts question.<sup>201</sup> A majority did, however, conclude that jurisdiction over the Japanese manufacturer would be unreasonable under the second-prong of the jurisdictional test.<sup>202</sup> But this holding was premised on the unusual posture of *Asahi*—the case involved only a claim by the Taiwanese tube manufacturer for indemnification from the Japanese component manufacturer.<sup>203</sup> *Asahi*'s reasoning on this point strongly indicates that a direct action by the injured in-state plaintiff against the Japanese manufacturer would not have failed the reasonableness prong.<sup>204</sup>

Accordingly, *Asahi*'s lack of a majority opinion on the minimum contacts questions left considerable uncertainty regarding how to approach the most typical stream-of-commerce situation—where an injured plaintiff sues an up-stream defendant in the state where the product was ultimately purchased and caused injury.<sup>205</sup> State and federal courts took different sides on the Brennan-O'Connor split, but there was no conclusive resolution.<sup>206</sup>

In terms of clarifying the governing principles, the 2011 *McIntyre* decision fared no better than *Asahi*. It is incorrect, however,

201. *See id.* at 121–22 (Stevens, J., concurring) (“An examination of minimum contacts is not always necessary to determine whether a state court’s assertion of personal jurisdiction is constitutional.” (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78) (1985))).

202. *See id.* at 113–14 (opinion of the Court) (noting “the unreasonableness of the assertion of jurisdiction over *Asahi*, even apart from the question of the placement of goods in the stream of commerce”); *see also supra* notes 46–47 and accompanying text (discussing the reasonableness factors).

203. *See Asahi*, 480 U.S. at 114 (“All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against *Asahi*.”).

204. For example, the *Asahi* Court recognized that “often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.” *Id.* Those interests were “slight” in an indemnification action between two foreign companies, but they would be quite strong in a claim by a California plaintiff injured in California. *See id.* (noting that “Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against *Asahi* in California rather than in Taiwan or Japan” and that “[b]ecause the plaintiff is not a California resident, California’s legitimate interests in the dispute have considerably diminished”). Indeed, the Court had explained just a few years before *Asahi* that “[a] State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.” *Burger King*, 471 U.S. at 473 (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

205. *See* 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1067.4, at 481 (“The *Asahi* Court’s four to four division on the scope of the stream of commerce principle left matters in somewhat of a muddle.”).

206. *See, e.g., Nat’l Union Fire Ins. Co. of Pittsburgh v. Aerohawk Aviation, Inc.*, 259 F. Supp. 2d 1096, 1105 (D. Idaho 2003) (noting that “the circuits have split over whether to follow Justice O’Connor or Justice Brennan’s articulation of the ‘stream of commerce’ theory”); *see also* 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1067.4, at 478–96 (citing cases).

to read *McIntyre* as requiring a more restrictive approach. Although Justice Kennedy's plurality opinion rejected Justice Brennan's invocation of *World-Wide Volkswagen's* "stream of commerce" language in *Asahi*,<sup>207</sup> that view did not garner five votes. If any opinion qualifies as the Court's holding in *McIntyre*, it would be Justice Breyer's concurrence.<sup>208</sup> And Justice Breyer explicitly disagreed with the plurality opinion's legal analysis, particularly its emphasis on the defendant's "inten[t] to submit to the power of a sovereign" and whether the defendant can "be said to have targeted the forum."<sup>209</sup> Justice Breyer's concurrence did not take a position on the deadlock between Justice Brennan and O'Connor in *Asahi*,<sup>210</sup> but rather found that the plaintiff had not even met the burden of establishing that the British manufacturer had delivered its goods in the stream of commerce "'with the expectation that they will be purchased' by New Jersey users."<sup>211</sup>

As mentioned earlier, the *McIntyre* concurrence was premised on a very restrictive understanding of the factual record.<sup>212</sup> Justices Breyer and Alito assumed that these were the only facts offered in support of jurisdiction:

- (1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro's employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its

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207. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 882–83 (2011) (plurality opinion).

208. *See, e.g.*, *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 178–79 (5th Cir. 2013) ("In *McIntyre*, Justice Breyer's concurring opinion, joined by Justice Alito, furnished the narrowest grounds for the decision and controls here."); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) ("Because *McIntyre* did not produce a majority opinion, we must follow the narrowest holding among the plurality opinions in that case. The narrowest holding is that which can be distilled from Justice Breyer's concurrence . . ." (citation omitted)). These opinions strive to identify the binding holding of *McIntyre* using what is known as the *Marks* rule, which instructs that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)). Although there are some interesting unresolved questions regarding how exactly one identifies the "narrowest ground" for purposes of *Marks*, there is no plausible understanding of *Marks* under which courts would be bound to reject personal jurisdiction solely because Justice Kennedy's *McIntyre* plurality would deem the defendant's contacts insufficient. For a summary of competing approaches to the *Marks* rule, *see* Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. (forthcoming 2018), <http://ssrn.com/abstract=3090620> [<https://perma.cc/N55G-WW68>]; Adam Steinman, *Nonmajority Opinions and Biconditional Rules*, 128 YALE L.J. F. 1, 2 (2018) (summarizing competing approaches to *Marks*); Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017).

209. *McIntyre*, 564 U.S. at 890 (Breyer, J., concurring) (internal quotation marks omitted).

210. *Id.* at 889 (citing all three *Asahi* opinions).

211. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

212. *See supra* notes 112–113 and accompanying text.

machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in “such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco.”<sup>213</sup>

This narrow reading of the facts excised J. McIntyre’s deliberate goal of accessing the entire U.S. market for its products. Justice Ginsburg recognized that J. McIntyre had “engag[ed]” a U.S. distributor in order “to promote and sell its machines in the United States,”<sup>214</sup> and had taken “purposeful step[s] to reach customers for its products ‘anywhere in the United States.’”<sup>215</sup> Justice Breyer, by contrast, saw a defendant who passively “permitted” and “wanted” such sales to occur.<sup>216</sup> Given Justice Breyer’s constricted framing of the relevant facts, it is not surprising that the case failed to meet a jurisdictional standard that hinges on a defendant’s “purpose[.]”<sup>217</sup>

Justice Breyer’s blinkered view of the record also explains his conclusion that J. McIntyre had not even “delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.”<sup>218</sup> Indeed, Justice Breyer left open the possibility that jurisdiction would have been proper if the record had contained either (1) evidence of “the size and scope of New Jersey’s scrap-metal business,”<sup>219</sup> (2) a “list of potential New Jersey customers who might . . . have regularly attended [the] trade shows” that J. McIntyre officials attended,<sup>220</sup> or (3) evidence of more than a single sale to a single New Jersey customer.<sup>221</sup>

By recognizing that such facts could permit New Jersey to exercise jurisdiction, the logic of Justice Breyer’s *McIntyre* opinion fits quite neatly with Justice Ginsburg’s idea that minimum contacts are established when a defendant “seek[s] to exploit a multistate or global

213. *McIntyre*, 564 U.S. at 888 (Breyer, J., concurring) (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 578–79 (N.J. 2010)).

214. *Id.* at 905 (Ginsburg, J., dissenting).

215. *Id.* at 898.

216. *Id.* at 888 (Breyer, J., concurring).

217. *Id.* at 891 (describing the “constitutional demand for ‘minimum contacts’ and ‘purposefu[l] avail[ment]’” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 297 (1980))).

218. *Id.* at 889 (quoting *World-Wide Volkswagen*, 444 U.S. at 298).

219. *Id.* (noting these as “other facts that Mr. Nicastro could have demonstrated in support of jurisdiction”); *cf. id.* at 895 (Ginsburg, J., dissenting) (using 2008 data on scrap metal recycling in New Jersey and indicating that New Jersey facilities processed over two million tons of scrap metal in 2008, which was the largest of all the states by a substantial margin).

220. *Id.* at 889 (Breyer, J., concurring) (“[Nicastro] has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows.”); *cf. id.* at 895 n.1 (Ginsburg, J., dissenting) (citing a 2011 member directory listing nearly one hundred New Jersey businesses as belonging to the industry group that sponsored the trade shows).

221. *Id.* at 888–89 (Breyer, J., concurring).



market” that includes the forum state.<sup>222</sup> The concurring opinion simply indicated that a plaintiff must show that there would likely be potential customers in the forum. That is why it would matter whether the record contained a “list of potential New Jersey customers who might . . . have regularly attended [the] trade shows” that J. McIntyre officials attended,<sup>223</sup> or information regarding “the size and scope of New Jersey’s scrap-metal business,”<sup>224</sup> or evidence of an actual sale to an additional New Jersey customer.<sup>225</sup> Such evidence would reveal the existence of a market for the defendant’s product in New Jersey and thus create an expectation of purchases by New Jersey consumers. Again, the concurring opinion did not rule out the possibility that jurisdiction would have been proper if it had been “shown that the British Manufacturer . . . delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.”<sup>226</sup> It simply concluded that no such expectation is created when there is only a single sale of the defendant’s product to a customer in the forum state, and there is no other evidence in the record suggesting potential customers in the forum state.<sup>227</sup>

Accordingly, Justice Breyer’s *McIntyre* concurrence is consistent with an understanding of personal jurisdiction that would not allow distant manufacturers who profit from sales in the forum state to

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222. *Id.* at 910 (Ginsburg, J., dissenting).

223. *Id.* at 889 (Breyer, J., concurring).

224. *Id.*

225. *Id.* at 888 (stating that the Court “has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant”).

226. *Id.* at 889 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980)). Some courts have emphasized Justice Breyer’s point that “the relevant facts found by the New Jersey Supreme Court show ‘no regular . . . flow’ or ‘regular course’ of sales in New Jersey.” *Id.* Justice Breyer’s concurrence does not, however, state that these are *necessary* for jurisdiction. Although a regular flow or course of sales in New Jersey would have been sufficient for jurisdiction, the concurrence also made clear that Mr. Nicaastro might also have “*otherwise* shown that the British Manufacturer . . . delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.” *Id.* (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 298).

227. It is possible, for example, that a defendant may seek to serve the U.S. market as a whole, but the economics are such that a market for the defendant’s products exists only in some states. For example, “[a] manufacturer of grapefruit-harvesting equipment might engage a distributor to access the entire U.S. market, but that would not necessarily create an expectation of purchases by users in Alaska, North Dakota, or other states where grapefruit are not harvested.” Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicaastro*, 63 S.C. L. REV. 481, 512 (2012). If one accepts the premise that the plaintiff bears the burden of establishing personal jurisdiction over the defendant, see *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982) (noting the plaintiff’s “burden of proof” when a defendant challenges personal jurisdiction), the plaintiff might have to provide evidence to confirm that a potential market existed in the forum state.

escape jurisdiction in those states when their products cause damage there. Nor would it give manufacturers a free pass to avoid jurisdiction simply because their products are sold via a distribution scheme that seeks out the U.S. market as a whole rather than each individual state.

### *B. Intentional Torts*

The other recent Supreme Court decision that hinges on the basic minimum contacts requirement was its 2014 decision in *Walden v. Fiore*.<sup>228</sup> *Walden* was based on an intentional tort—specifically the preparation of a false affidavit used to support the forfeiture of funds seized by the federal government.<sup>229</sup> In *Walden*, two Nevada residents sued a Georgia police officer who had been acting as a deputized Drug Enforcement Administration agent at the Atlanta airport.<sup>230</sup> When the plaintiffs were changing planes in Atlanta en route from Puerto Rico to Nevada, the defendant and another officer approached them, questioned them, and ultimately seized \$97,000 in cash.<sup>231</sup> The defendant later helped to draft an affidavit, which he forwarded to the U.S. Attorney, to show probable cause for the forfeiture of the funds.<sup>232</sup> Ultimately no forfeiture complaint was filed, and the funds were returned to the plaintiffs eight months after they had been seized.

The plaintiffs sued the defendant in a Nevada court seeking damages for violations of their constitutional rights, alleging that the defendant's drafting of a false affidavit led to a delay in returning the funds.<sup>233</sup> In a unanimous opinion, the Supreme Court rejected the argument that jurisdiction was proper on the basis that the defendant knew that the probable cause affidavit would affect persons with significant Nevada connections.<sup>234</sup> Justice Thomas explained that even when intentional torts are involved, jurisdiction "must be based on intentional conduct by the defendant that creates the necessary

228. 134 S. Ct. 1115 (2014).

229. *Id.* at 1119.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 1119–20. Although *Walden* was filed in a Nevada federal court, personal jurisdiction was based on Federal Rule of Civil Procedure 4(k)(1)(A). *See id.* at 1121. Accordingly, personal jurisdiction hinged on whether it would be constitutional for a Nevada state court to assert personal jurisdiction. *See id.* ("[I]n order to determine whether the Federal District Court in this case was authorized to exercise jurisdiction over petitioner, we ask whether the exercise of jurisdiction 'comports with the limits imposed by federal due process' on the State of Nevada." (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014))); *see also supra* notes 74–75 and accompanying text (discussing Rule 4(k)(1)(A)).

234. *See Walden*, 134 S. Ct. at 1124–25 (describing the Ninth Circuit's reasoning).

contacts with the forum”; “mere injury to a forum resident is not a sufficient connection to the forum.”<sup>235</sup>

*Walden* recognized, however, that personal jurisdiction would be proper over “defendants who have purposefully ‘reach[ed] out beyond’ their State and into another,” and that “physical presence in the forum state is not a prerequisite to jurisdiction.”<sup>236</sup> Accordingly, *Walden* left in place earlier decisions upholding personal jurisdiction in the intentional tort context. One such case was *Keeton v. Hustler Magazine, Inc.*, which unanimously approved jurisdiction in New Hampshire over a libel claim by a New York plaintiff against Ohio-based Hustler Magazine.<sup>237</sup> Hustler sold “some 10 to 15,000 copies of [its] magazine . . . each month” in New Hampshire, which was admittedly a “small portion” of the defendant’s nationwide sales.<sup>238</sup> The *Keeton* Court reasoned that “[t]he general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state.”<sup>239</sup> Therefore, such conduct “is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.”<sup>240</sup> The 2014 *Walden* decision explicitly reaffirmed *Keeton*, noting that the defendant had “circulat[ed] magazines to ‘deliberately exploi[t]’ a market in the forum State.”<sup>241</sup>

Another earlier decision was *Calder v. Jones*, in which entertainer Shirley Jones—who lived and worked in California—sued the National Enquirer magazine for libel based on an article asserting that the plaintiff “drank so heavily as to prevent her from fulfilling her professional obligations.”<sup>242</sup> *Calder* unanimously upheld personal jurisdiction not only over the magazine but also over the individual employees in Florida who wrote and edited the article.<sup>243</sup> Although the Court recognized that the employees were not responsible for their

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235. *Id.* at 1123, 1125.

236. *Id.* at 1122 (alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)).

237. 465 U.S. 770, 772 (1984).

238. *Id.* at 772, 775.

239. *Id.* at 774 (alteration in original) (internal quotation marks omitted).

240. *Id.* at 773–74.

241. *Walden*, 134 S. Ct. at 1122 (second alteration in original) (quoting *Keeton*, 465 U.S. at 781).

242. 465 U.S. 783, 788 n.9 (1984).

243. *Id.* at 788–89 (noting that California was “the focal point” of both the allegedly defamatory story and the harm suffered by the plaintiff, that the article was “drawn from California sources,” “concerned the California activities of a California resident,” and “impugned the professionalism of an entertainer whose television career was centered in California,” and that “the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California”).

employer's circulation and marketing decisions, their own "intentional, and allegedly tortious, actions were expressly aimed at California."<sup>244</sup> They knew that their article "would have a potentially devastating impact" on the plaintiff, and that "the brunt of that injury would be felt" in California—where the plaintiff "lives and works and in which the *National Enquirer* has its largest circulation."<sup>245</sup> *Walden* explicitly reaffirmed *Calder*, noting that the individual defendants in that case based their article "on phone calls to 'California sources,'" "wrote the story about the plaintiff's activities in California," and "caused reputational injury in California by writing an allegedly libelous article that was widely circulated in the State."<sup>246</sup>

By contrast, the defendant in *Walden* had not reached out to Nevada, nor did he benefit in some way from markets or other activity in Nevada. The ultimate result in *Walden*, therefore, hinged on the particular facts of that case. It did not reflect a more restrictive approach to personal jurisdiction compared to the Court's earlier case law.

### C. Revisiting the Home-State Scenario

As discussed earlier, one situation where personal jurisdiction doctrine can thwart access to justice is the home-state scenario: a plaintiff is injured in her home state, relevant events occur in her home state, and she seeks remedies from an out-of-state defendant by suing in the courts of her home state. Under current doctrine, this scenario falls under the specific jurisdiction umbrella. When a plaintiff is injured in her home state as a result of events occurring in her home state, a sufficient "affiliatio[n]" between the forum and the underlying controversy<sup>247</sup> certainly exists.<sup>248</sup>

244. *Id.* at 789–90.

245. *Id.*

246. *Walden*, 571 U.S. at 286–88 (quoting *Calder*, 465 U.S. at 788–89).

247. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (alteration in original) (internal quotation marks omitted) (quoting von Mehren & Trautman, *supra* note 2, at 1136).

248. This scenario should be evaluated under a specific jurisdiction framework regardless of whether a plaintiff injured by a defendant's product purchased the product in the forum state or elsewhere. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1787 & n.3 (2017) (Sotomayor, J., dissenting) (noting that the majority had not endorsed "a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim" and arguing that such a requirement "might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by *World-Wide Volkswagen*" (citing Brief of *Amici Curiae* Civil Procedure Professors in Support of Respondents 14–18 (No. 16-466))).

Read carefully, the Court's recent *McIntyre* and *Walden* decisions do not depart from the Court's earlier case law on the minimum contacts required for specific jurisdiction. Justice Breyer's tie-breaking *McIntyre* concurrence referenced the most permissive aspects of the Court's jurisprudence regarding out-of-state manufacturers whose products cause injury in the forum state, including the notion that jurisdiction is proper over a manufacturer who "delivered its goods in the stream of commerce 'with the expectation that they will be purchased'" in the forum state.<sup>249</sup> *Walden* explicitly left in place earlier decisions on personal jurisdiction in intentional tort cases—namely *Calder* and *Keeton*, both of which upheld jurisdiction in states where the defendant's conduct caused injury.<sup>250</sup>

Furthermore, both *McIntyre* and *Walden* arose from fairly unusual factual situations. In *McIntyre*, the tie-breaking concurring opinion adopted an exceptionally narrow view of the evidentiary record.<sup>251</sup> And in *Walden*, the underlying events stemmed from the plaintiffs physically coming to the defendant's home state, rather than the defendant making contact with the plaintiffs' home state.<sup>252</sup> Accordingly, these decisions do not compel a more restrictive approach to determining whether an out-of-state defendant has established minimum contacts with the forum state in the context of specific jurisdiction.

Insofar as "[t]he primary focus of [the Court's] personal jurisdiction inquiry is the defendant's relationship to the forum State,"<sup>253</sup> there will always be some plaintiffs in the home-state scenario who will be unable to sue every potential defendant in their home-state courts. This result may be inescapable when the defendant was not engaged in activities that focus on the forum state and was not benefiting from activities or markets in the forum state. That may well have been the case in *Walden*. The Nevada plaintiffs "reached out" to the defendant's state (Georgia) rather than vice-versa. And the defendant's conduct involved events that occurred in Georgia (not Nevada)—even though the ultimate consequences of the defendant's alleged conduct would have been felt by the plaintiffs in Nevada.<sup>254</sup>

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249. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 889 (2011) (Breyer, J., concurring) (quoting *World-Wide Volkswagen Corp.*, 444 U.S. 286, 297–98 (1980)); see *supra* notes 209–211 and accompanying text; see also *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) (concluding that Justice Breyer's concurrence constitutes the *McIntyre* holding and that under his opinion "the law remains the same").

250. See *supra* notes 236–246 and accompanying text.

251. See *supra* notes 212–221 and accompanying text.

252. See *supra* notes 230–235 and accompanying text.

253. *Bristol-Myers*, 137 S. Ct. at 1779.

254. See *supra* Section III.B.

That may also have been the case in *McIntyre*, but only under the narrow view of the factual record adopted by the concurring Justices. If there was no evidence of a market for the defendant's product in the forum state, one might legitimately conclude that the geographic scope of the defendant's activity did not contact the forum. In many situations, however, out-of-state defendants benefit—at least indirectly—from markets for their products in the forum state, even when they access those markets through distribution mechanisms that put them further up the “stream of commerce.” *McIntyre* does not foreclose jurisdiction in cases where the plaintiffs provide evidence establishing that market and the defendant's economic benefit therefrom.<sup>255</sup> That sort of relationship would support the conclusion that—in the words of the only Supreme Court opinion to garner a majority on this question—the defendant has made “efforts . . . to serve[,] directly or indirectly, the market for its product in other States” and has “deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”<sup>256</sup>

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255. See *supra* notes 222–227 and accompanying text. Examples of cases that reflect this understanding of *McIntyre* include: *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 176–79 (5th Cir. 2013) (finding personal jurisdiction in Mississippi over an Irish manufacturer whose forklifts were sold to U.S. customers through an Ohio-based distributor despite a lack of “specific knowledge” of sales in Mississippi, where the product injured a Mississippi resident and sales to Mississippi customers “accounted for approximately 1.55% of [the manufacturer's] United States sales”); *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Product Liability*, 888 F.3d 753, 779 (5th Cir. 2018) (“[P]laintiffs need only show that J & J delivered the product that injured them ‘into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state.’” (quoting *Ainsworth*, 716 F.3d at 177)); *Hilsinger Co. v. FBW Invs., LLC*, 109 F. Supp. 3d 409, 426–28 (D. Mass. 2015) (finding personal jurisdiction in Massachusetts in a trademark-infringement action brought by a Massachusetts company against an Arizona-based LLC that sold its products to “national retailers such as Walmart, Sears, and Amazon.com,” through which “[a]n unknown number—likely thousands—of products were sold . . . to consumers in Massachusetts”); *Butler v. JLA Indus. Equip., Inc.*, 845 N.W.2d 834, 846–47 (Minn. Ct. App. 2014) (finding that *McIntyre* “reflects a number of principles” including that “the stream-of-commerce theory is still a viable framework for analyzing whether a nonresident defendant may be subject to suit in a forum for tort claims relating to the use of its products by resident plaintiffs” and that “a majority of the justices once again rejected Justice O'Connor's approach to analyzing minimum contacts under the stream-of-commerce theory”); *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18, 29 (N.M. Ct. App. 2012) (“[A] manufacturer of an allegedly defective component part that has . . . placed it into a distribution channel with the expectation it will be sold in our national market cannot be insulated from liability simply because it does not specifically target or know its products are being marketed in New Mexico.”); *id.* at 33 (“Because *J. McIntyre Machinery* did not produce a majority opinion adopting either Justice O'Connor's or Justice Brennan's stream of commerce theory, and given Justice Breyer's reliance on current United States Supreme Court precedent, pre-*Asahi* case law utilizing the approach set forth in *World-Wide Volkswagen* remains binding in New Mexico.”).

256. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980).

## IV. SPECIFIC JURISDICTION, GENERAL JURISDICTION, AND RATIONALITY

This Part addresses the test for determining whether a defendant's contacts with the forum must be assessed using a specific jurisdiction standard or a general jurisdiction standard. Section A argues that a case should be evaluated as a specific jurisdiction case when it would be rational for the forum state to adjudicate the availability of the requested judicial remedies. Section B explains how this approach would permit personal jurisdiction in the safety-net and aggregation scenarios described above.<sup>257</sup> Section C discusses theories of personal jurisdiction that can be justified on grounds other than this Article's rationality-focused standard.

*A. Rationality as the Touchstone for Separating Specific and General Jurisdiction*

The Supreme Court has described the line between specific jurisdiction and general jurisdiction in a variety of ways. Specific jurisdiction applies when there is “an affiliatio[n] between the forum and the underlying controversy”<sup>258</sup>—such as “when the suit ‘aris[es] out of or relate[s] to the defendant’s contacts with the forum’”<sup>259</sup> or when there is “activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”<sup>260</sup> The Court has also stated that “specific jurisdiction is confined to adjudication of ‘issues deriving from, or connected with, the very controversy that establishes jurisdiction.’”<sup>261</sup>

What the Court has failed to provide—either in its more recent round of cases or in earlier precedent—is an underlying theory for

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257. See *supra* Sections II.B–II.C.

258. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (alteration in original) (internal quotation marks omitted) (quoting von Mehren & Trautman, *supra* note 2, at 1136).

259. *Id.* at 923–24 (alteration in original) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

260. *Id.* at 919. The Court stated that the required “affiliation” is “principally” some “activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation,” *id.*, but it has never—even in its more recent cases—said that such activity or occurrence is the *only* sort or “affiliation” that can justify specific jurisdiction. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (stating that “there must be ‘an affiliation between the forum and the underlying controversy, *principally*, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.’” (alteration in original) (emphasis added) (quoting *Goodyear*, 564 U.S. at 919)).

261. *Goodyear*, 564 U.S. at 919 (quoting von Mehren & Trautman, *supra* note 2, at 1136); see also *Bristol-Myers*, 137 S. Ct. at 1780 (quoting this language from *Goodyear*).

identifying what kind of “affiliation” between the forum and the underlying controversy is sufficient, or when a suit “relates to” the defendant’s contacts with the forum, or when issues are “connected with” the controversy that establishes jurisdiction.<sup>262</sup> This Article proposes the following answer: A case can be evaluated as a specific jurisdiction case when it would be rational for the forum state to adjudicate the availability of the requested judicial remedies. General jurisdiction, by contrast, is the kind of jurisdiction that exists even when there is no particular reason for the forum state to adjudicate a particular dispute.

Viewing the distinction between specific jurisdiction and general jurisdiction as a function of rationality illuminates why there has been such strong support on the Supreme Court for constricting the scope of general jurisdiction. It is hard to see why it would be rational for—as the Court put it—a Polish driver to bring a design-defect suit in California against the German manufacturer Daimler AG based on an accident that occurred in Poland.<sup>263</sup> The very *irrationality* of general jurisdiction—at least with respect to the particular lawsuit at issue—may explain why even Justices who generally favor greater access to courts and judicial remedies have supported (if not captained) the recent efforts to narrow general jurisdiction.<sup>264</sup>

By contrast, the existence of a rational basis for the forum to adjudicate the availability of judicial remedies in a given case provides the requisite “affiliatio[n] between the forum and the underlying controversy”<sup>265</sup> to support specific jurisdiction. This would include cases

262. See Andrews, *supra* note 58, at 1011 (“The biggest void is the threshold question of whether the plaintiff’s claim is unrelated to the defendant’s forum contacts (thereby triggering general jurisdiction analysis), or related (thereby triggering specific jurisdiction analysis . . .).”); Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 868 (2012) (noting “the fuzziness between general and specific jurisdiction”); Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1620 (2001) (“[T]he Court has never precisely defined the scope of specific personal jurisdiction.”); see also *supra* note 69 and accompanying text (describing the lack of guidance on this question from the 2017 *Bristol-Myers* decision).

263. See *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014).

264. That Justices Ginsburg, Breyer, and Kagan are generally sympathetic to access and enforcement is confirmed by a recent study that ranked the twenty-one Supreme Court Justices who served from 1970 to 2013 based on their votes in cases involving “private enforcement (defined to include access to court).” Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1570 (2014). Justice Ginsburg—who authored the Court’s opinions in *Daimler* and *BNSF*—ranked eighth out of twenty-one as voting most often in favor of private enforcement. *Id.* at 1572. Justices Breyer and Kagan—who joined Justice Ginsburg’s *Daimler* and *BNSF* opinions—ranked ninth and fourth respectively. *Id.*

265. *Goodyear*, 564 U.S. at 919 (alteration in original) (internal quotation marks omitted) (quoting von Mehren & Trautman, *supra* note 2, at 1136).



where there is “activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation,” but it would also include cases where a state has some other legitimate interest in the case that makes it rational for that state’s courts to exercise adjudicative authority.<sup>266</sup>

Using rationality to demarcate the line between specific and general jurisdiction makes particular sense given that the Court’s jurisprudence on personal jurisdiction is grounded in the Due Process Clause.<sup>267</sup> Rationality is a well-established component of what “due process of law” requires. For example, unless legislation is subject to heightened scrutiny (such as when it affects fundamental rights),<sup>268</sup> it will comport with the Due Process Clause as long as it is supported by a rational basis.<sup>269</sup> A rationality standard also coheres with the

266. *Cf., e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985) (describing how, with respect to substantive choice of law, the existence of “state interests” will “ensure that the choice of [the forum state’s] law is not arbitrary or unfair”); *see also infra* notes 270–271 and accompanying text (discussing the constitutional limits on substantive choice-of-law determinations).

267. Some have criticized the notion that the Supreme Court’s limits on personal jurisdiction are properly rooted in the Due Process Clause, arguing that jurisdictional limits ought to be either abandoned entirely, allocated to other constitutional provisions, or treated as sub-constitutional law. *See, e.g., Patrick J. Borchers, The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 20 (1990) (“I believe the Court should . . . abandon the notion that state court personal jurisdiction is a matter of constitutional law . . .”); Erbsen, *supra* note 2, at 68 (noting that “alternative sources might exist” to the Due Process Clause); Sachs, *supra* note 2, at 1252:

Personal jurisdiction isn’t a matter of constitutional law, or even of federal law. Instead, it’s a matter of general law—that unwritten law, including much of the English common law and the customary law of nations, that formed the basis of the American legal system and that continues to govern unusual corners of the system today;

Weinstein, *supra* note 2, at 172 (“[L]imitations on state court jurisdiction stem[ ] not from the Due Process Clause, or any other provision protecting individuals from untoward assertions of state power, but from federal common law rules . . .”). Although these critiques merit consideration, this Article accepts the premise—whether correct or not—that the Due Process Clause imposes limits on a court’s exercise of personal jurisdiction.

268. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (“The [Due Process] Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests.”).

269. *See, e.g., Duke Power Co. v. Carolina Env’tl. Study Grp., Inc.*, 438 U.S. 59, 84–85 (1978) (“It is by now well established that [such] legislative Acts . . . come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” (alteration in original) (internal quotation marks omitted) (quoting *Usery v. Turner Elkhorn Mining Co.* 428 U.S. 1, 15 (1976))); *Cleland v. Nat’l Coll. of Bus.*, 435 U.S. 213, 219 (1978) (rejecting due process challenge to restrictions on the educational courses for which veterans’ benefits are available under the GI Bill because “[i]t was not irrational for Congress to conclude that” the restrictions “would minimize the risk that[] veterans’ benefits would be wasted on educational programs of little value”); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955) (finding that a regulation violates

Supreme Court's approach to other areas of law where the permissible reach of a state's sovereign power is tested. Consider, specifically, constitutional constraints on choice of law—which are themselves grounded in the Due Process Clause.<sup>270</sup> A state has the authority to apply its own substantive law to a particular dispute as long as applying its law “is neither arbitrary nor fundamentally unfair.”<sup>271</sup>

This Article's proposal is not alone in seeking to bring general due process principles to bear on personal jurisdiction.<sup>272</sup> It is distinct, however, in that it would not eliminate the basic requirement that a defendant must establish minimum contacts with the forum state. Others have argued that the minimum contacts inquiry should be jettisoned because it is irrelevant to such due process values as avoiding “injustice or undue harm to the individual litigant,”<sup>273</sup> or “protect[ing] against arbitrary assertions of governmental power.”<sup>274</sup> This Article's proposal, by contrast, preserves current doctrine's core requirement of minimum contacts. It embraces the due process notion of rationality merely to inform the crucial line between specific and general jurisdiction. Rather than overhauling the existing doctrinal framework, a focus on remedial rationality provides a sensible approach to

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due process only when it “has no rational relation” to its objective); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1938):

[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

See generally, e.g., Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 841 (2003) (describing the aspect of substantive due process “that prohibits ‘irrational’ governmental conduct”).

270. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (noting that constitutional constraints on choice of law derive from both the Due Process Clause and the Full Faith and Credit Clause).

271. *Phillips Petroleum*, 472 U.S. at 818; *Allstate*, 449 U.S. at 308; see also, e.g., Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1061–62 (2013) (citing *Phillips* as establishing the principle that “the Fourteenth Amendment's Due Process Clause controls irrational state choices of law”).

272. See *infra* notes 273–274 and accompanying text.

273. See Redish, *supra* note 2, at 1133; see also *id.* at 1115 (arguing against “the ‘minimum contacts’ test[s] . . . concern for prelitigation contacts” (footnote omitted)).

274. See Spencer, *supra* note 2, at 634 (arguing for replacing the minimum contacts requirement with an inquiry into “what is indeed a proper due process limitation on jurisdiction: state assertions of jurisdiction may not be arbitrary”); see also Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 504–05 (2015) (arguing for “a . . . theory of jurisdiction based on the concept of nonarbitrariness” and recognizing that under this theory “there is a point at which the connection between a lawsuit and the forum is so strong that the assertion of personal jurisdiction is permissible even if the defendant has no connection to the forum”).

identifying when the required “affiliatio[n] between the forum and the underlying controversy” exists.<sup>275</sup>

To be clear, the existence of a rational basis for the forum state to adjudicate a particular lawsuit would not be sufficient by itself to permit personal jurisdiction. Rather, satisfying this rationality requirement means that the constitutionality of jurisdiction should be evaluated as a matter of specific jurisdiction—that is, jurisdiction would be constitutional where both (1) the defendant has established minimum contacts with the forum state, and (2) jurisdiction would be “reasonable” in light of various factors the Court has identified.<sup>276</sup> Failing to satisfy one of these two requirements would preclude jurisdiction *even if* it would be rational for the forum to adjudicate the case. Consider, for example, *World-Wide Volkswagen*.<sup>277</sup> There was surely a rational basis for an Oklahoma court to adjudicate claims arising from an accident that occurred in Oklahoma. But Oklahoma nonetheless lacked personal jurisdiction over the two local New York defendants—a car dealership and distributor that served only New York-area markets—because they did not themselves have minimum contacts with Oklahoma.<sup>278</sup>

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275. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (alteration in original) (internal quotation marks omitted) (quoting von Mehren & Trautman, *supra* note 2, at 1136).

276. See *supra* notes 35–47 and accompanying text (describing the requirements for specific jurisdiction). There may be some overlap between the rationality inquiry proposed by this Article and the second-step reasonableness inquiry required in specific jurisdiction cases. For example, the reasonableness of jurisdiction depends in part on “the forum State’s interest in adjudicating the dispute,” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), which is certainly relevant to this Article’s rationality inquiry. They may be distinct in some respects, however. As discussed *infra* note 278, in some situations a state may have a rational basis to adjudicate a particular case but the burden such litigation would impose on a particular defendant may make jurisdiction unreasonable.

277. See *supra* notes 192–195 and accompanying text (discussing the *World-Wide Volkswagen* case).

278. See *supra* notes 194–195 and accompanying text. Or consider a hypothetical “small Egyptian shirt maker,” “Brazilian manufacturing cooperative,” or “Kenyan coffee farmer” whose products reach the United States “through international distributors.” *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 892 (2011) (Breyer, J., concurring) (discussing these examples). If a product manufactured by such a defendant injures a consumer in the United States, it would be rational for the state where the injury occurred to adjudicate the lawsuit. And depending on the circumstances, one could plausibly argue that such a defendant has made minimum contacts with that state insofar as it “delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by” users in the forum state. *Id.* at 889 (quoting *World-Wide Volkswagen*, 444 U.S. at 298); see also *supra* notes 222–227 and accompanying text (explaining that such activity by a defendant can still satisfy the minimum contacts requirement). It might still be unreasonable, however, to assert personal jurisdiction in light of the burden on such a defendant. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (stating that “[a] court must consider the burden on the defendant” as one of “several factors” relevant to “the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an

The inquiry into rationality for this purpose will not necessarily be identical to the rationality tests that govern other areas of due process.<sup>279</sup> Ultimately, courts would be asking a distinct question regarding the rationality of *adjudication* in a particular forum, which may not map precisely onto these other doctrinal areas. So it is possible that rationality for personal jurisdiction purposes would be a more stringent requirement than one would typically see in, say, constitutional rational basis jurisprudence.<sup>280</sup> Indeed, there are some contexts where rationality connotes more careful scrutiny. A court is permitted to grant summary judgment only when a *rational* fact finder could not render judgment for the nonmoving party.<sup>281</sup> Yet, for better or worse, courts have claimed for themselves fairly broad power to grant summary judgment on the basis that it would be irrational or unreasonable for a fact finder to reach a particular verdict.<sup>282</sup>

Put another way, this proposal does not necessarily dictate an especially deferential form of rationality review. Even in the context of constitutional challenges to substantive legislation, courts and commentators have identified a “rational basis with bite” standard that operates in some situations.<sup>283</sup> The key point is that the decision to evaluate a case under the specific jurisdiction rubric should entail a pragmatic inquiry into the *reasons* for adjudicating a specific case in a

evaluation of several factors”); see also Steinman, *supra* note 227, at 513–14 (arguing that Justice Breyer’s concern that “[i]t may be fundamentally unfair” to permit jurisdiction over such defendants in the United States “could be vindicated . . . by using the reasonableness prong of the Court’s jurisdictional doctrine”).

279. See, e.g., *infra* notes 296–299 and accompanying text (discussing how rationality in the context of personal jurisdiction in multistate class actions would differ from rationality in the context of choice of law in multistate class actions).

280. One often finds rational basis review described as “toothless.” E.g., *In re Agnew*, 144 F.3d 1013, 1014 (7th Cir. 1998); H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 248 (2011) (“Williamson-style rational-basis review is virtually toothless.”).

281. E.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” (quoting *First Nat’l Bank of Az. v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968))).

282. See, e.g., Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (criticizing the Supreme Court’s decision in *Scott v. Harris*, 550 U.S. 372 (2007)).

283. See, e.g., *CTIA-The Wireless Ass’n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1069 (N.D. Cal. 2015) (observing that the presence of “an arguable First Amendment interest” would warrant a “more exacting [form] of rational basis review (which some commentators have labeled ‘rational basis with bite’), which requires an examination of actual state interests and whether the challenged law actually furthers that interest rather than the traditional rational basis review which permits a law to be upheld if rationally related to any conceivable interest” (citations omitted) (citing, for example, *Bishop v. Smith*, 760 F.3d 1070, 1099 (10th Cir. 2014))).

specific forum.<sup>284</sup> As explained below, this inquiry should include an assessment of alternative forums and consider the extent to which obstacles to personal jurisdiction can deprive plaintiffs of any adequate alternative forum—as can be the case in the safety-net and aggregation scenarios. Using rationality as an overarching standard accounts for these situations by recognizing that personal jurisdiction can be rational in a particular forum precisely *because* denying personal jurisdiction would thwart access to justice due to the lack of viable alternatives. Therefore, as explained in the next Section, it has the capacity to address the access-to-justice concerns identified in this Article.

### *B. Rationality and Access to Justice*

Of the three access-to-justice concerns described earlier, the home-state scenario is undoubtedly assessed under a specific jurisdiction standard. And as described in Part III, a sensible approach to the minimum contacts requirement will, in most situations, permit a plaintiff who is injured in his or her home state to file suit there. The other two areas of concern—the safety-net scenario and the aggregation scenario—involve defendants who have significant contacts with the forum, but who would not qualify for general jurisdiction under the Supreme Court’s new case law. In these situations, the viability of personal jurisdiction depends entirely on whether the specific jurisdiction or the general jurisdiction standard applies. The rationality

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284. This inquiry would be more expansive than approaches that have been embraced by some courts and commentators. Professor Lea Brilmayer, for example, proposed a test that hinges on the “substantive relevance” of the defendant’s contacts with the forum state. Brilmayer, *supra* note 2, at 1452. If the defendant’s contacts either are “part of the substantive story underlying the dispute” or—under a more restrictive approach—are *legally* relevant to the dispute under the applicable rules of law, then the specific jurisdiction rubric applies. *Id.* at 1454–55 (proposing both a “weak version,” which “treats as ‘related’ any facts that are properly part of the story” and a “strong version,” which “requires that the applicable rules of law actually make the contact in question one of substantive relevance”). Professor Mary Twitchell has argued that specific jurisdiction could be proper “when a defendant’s forum conduct is similar to, but not causally related to, the conduct that forms the basis for the cause of action.” Twitchell, *supra* note 2, at 660. Others have framed the inquiry in terms of causation, allowing specific jurisdiction if the defendant’s contacts with the forum state are either a “but-for” or, alternatively, a “proximate” cause of the plaintiff’s claim against the defendant. *See, e.g.*, Andrews, *supra* note 58, at 1028–29 (describing the “but-for” and “proximate cause” tests used in various federal courts). Professor Andrews has proposed a “midlevel causation” test, which requires “a ‘meaningful link’ between the defendant’s forum contact and the claim.” *Id.* at 1042 (quoting *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 324 (3d Cir. 2007)). These inquiries might potentially inform whether, under this Article’s approach, it would be rational for the forum state to exercise its adjudicative authority. But they would not be the exclusive means of doing so.

inquiry developed in the preceding Section provides a workable solution.

As discussed above, there may be some circumstances where there is a significant interest in providing a U.S. forum even when all of the relevant conduct occurred abroad—such as when “a torturer or other common enemy of mankind” would otherwise escape accountability.<sup>285</sup> That interest would provide a rational basis for providing a remedy for such international law violations as long as the defendant had made purposeful contacts with the forum state—even if the basis for the lawsuit did not hinge on those contacts.<sup>286</sup>

The Court’s recent decisions on general jurisdiction do not consider this kind of argument. The claims in *Daimler* were brought under the Alien Tort Statute<sup>287</sup>—which might indeed be a vehicle for claims against “torturer[s] or other common enem[ies] of mankind.”<sup>288</sup> The plaintiffs in *Daimler*, however, did not attempt to justify jurisdiction on the basis that a strong interest existed for allowing Daimler AG to be sued in the United States, or that foreign legal systems would be inadequate for considering the *Daimler* plaintiffs’ claims.

The safety-net scenario might apply in other situations as well. Consider *Minholz v. Lockheed Martin Corp.*, where the plaintiff sued Lockheed Martin in New York based on injuries suffered in Antarctica.<sup>289</sup> Because the defendant was a Maryland corporation, the district court ruled that general jurisdiction was not permitted in New

285. See *supra* notes 147–155 and accompanying text.

286. Some interesting federalism dimensions may be present when individual states (say, California or Massachusetts) act in service of international law norms. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (finding that a Massachusetts statute restricting state contracts with companies doing business with Burma was preempted by a federal sanctions regime). Absent federal preemption, however, states have a legitimate interest in providing remedies for violations of international law. See *Davis & Whytock, supra* note 146, at 404–05 (describing a “state’s interest in exercising its remedial authority to provide redress for the victims of human rights violations” and arguing that “wrongs involved in many human rights cases . . . may be redressed through relief under state law in federal courts, or in state courts under state or foreign tort law or under international law”). With respect to cases that proceed in federal court under the ATS, personal jurisdiction can be based on Rule 4(k)(2). See *supra* note 121. The constitutionality of Rule 4(k)(2) jurisdiction is governed by the Fifth Amendment, see *supra* notes 76–79 and accompanying text, for which the interests of the United States as a whole (rather than any particular state) would be relevant. As discussed above, however, the ATS does not give federal courts carte blanche to assert universal jurisdiction regarding international law violations; the Supreme Court has placed considerable restrictions on which sort of international law norms are enforceable through a federal cause of action. See *supra* note 156.

287. See *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014).

288. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 127 (Breyer, J., concurring).

289. 227 F. Supp. 3d 249, 261–62 (N.D.N.Y. 2016).

York under the Supreme Court's recent case law.<sup>290</sup> Although the court recognized that "Antarctica does not have a judicial system which would allow Plaintiff to bring her action where she was injured," it found that the plaintiff could simply "sue in a location that could exercise general personal jurisdiction over Lockheed Martin—presumably the State of Maryland."<sup>291</sup> One could imagine, however, a variant on *Minholz* where events occurring in Antarctica gave rise to a claim against a foreign defendant with significant activities in New York, but for whom a lawsuit in the defendant's home country would not be adequate. Courts already inquire into the adequacy of foreign judicial systems in the context of *forum non conveniens*.<sup>292</sup> In a case where there is no viable general jurisdiction alternative—and no adequate judicial system where the injury occurred—a safety net in New York (or some other state) could be necessary to provide access to judicial relief. The lack of an adequate foreign forum can create a rational basis for a U.S. court to exercise personal jurisdiction.

This Article's theory can also address the aggregation scenario.<sup>293</sup> There is a range of ways a rationality inquiry might apply to aggregation, with some facilitating aggregation more than others. At a minimum, asserting personal jurisdiction over an aggregated proceeding would be rational when the costs of litigation make such aggregation necessary to feasibly enforce the governing law and obtain judicial remedies.<sup>294</sup> Some, admittedly, have read the Court's *Bristol-Myers* decision to prevent courts in one state from invoking specific jurisdiction with respect to claims by plaintiffs injured in other states.<sup>295</sup> But *Bristol-Myers* did not consider the possibility that aggregation *beyond* the claims of in-state plaintiffs might be necessary to make the claims of in-state plaintiffs economically viable. There was no need for the Court to explicitly confront that theory in *Bristol-Myers*. Neither the plaintiffs nor the California Supreme Court made that argument. And the particular claims at issue in *Bristol-Myers* may not have been the sort of negative-value claims that require aggregation (or at least not nationwide aggregation) in order to be effectively litigated. Accordingly, *Bristol-Myers* does not foreclose the possibility that the

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290. *Id.* at 261–62.

291. *Id.* at 262.

292. *See supra* note 153 (describing how courts, in the context of *forum non conveniens*, inquire whether a foreign forum is an adequate alternative).

293. *See supra* Section II.C.

294. *See supra* note 161 and accompanying text.

295. *See, e.g.,* *Chavez v. Church & Dwight Co.*, No. 17 C 1948, 2018 WL 2238191, at \*10 (N.D. Ill. May 16, 2018) (recognizing the argument that *Bristol-Myers* prevents a plaintiff from "assert[ing] claims on behalf of either a nationwide or multistate class"); *see also supra* notes 162–176 and accompanying text (describing *Bristol-Myers*).

need for aggregation to facilitate the claims of in-state plaintiffs can create a rational basis for joining a broader group of claims in a single proceeding.

Parenthetically, this situation illustrates how rationality might operate differently for personal jurisdiction than it does for other aspects of due process, such as substantive choice of law. One of the Supreme Court's leading cases on substantive choice of law—*Phillips Petroleum Co. v. Shutts*—involved a class action on behalf of plaintiffs from multiple states that was brought in Kansas state court against a Delaware corporation with its principal place of business in Oklahoma.<sup>296</sup> The Supreme Court held that it was unconstitutionally arbitrary for Kansas courts to apply Kansas substantive law to all class members' claims.<sup>297</sup> With respect to choice of law, it is hard to see why a court *would* have a rational interest in applying substantive Kansas law to claims that have no connection to Kansas. There is no practical impediment to a Kansas court applying different states' laws to different claims based on where the relevant events for each plaintiff occurred. That is, all class members' claims might proceed in Kansas court, but the court would apply Oklahoma law to Oklahoma plaintiffs, Texas law to the Texas plaintiffs, and so on.<sup>298</sup> Personal jurisdiction is different. Where broad aggregation in a *single* forum is necessary for claims to be economically viable,<sup>299</sup> that can provide a rational basis for *some* court to have jurisdiction over an aggregated proceeding that includes claims by out-of-state plaintiffs.

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296. 472 U.S. 797, 799 (1985).

297. *Id.* at 822 (“[A]pplication of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.”).

298. Some courts, admittedly, have refused to certify class actions in part because class members' claims would be subject to different states' substantive laws. *See, e.g.,* *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743 (5th Cir. 1996) (reversing class certification under Federal Rule of Civil Procedure 23 in part because the district court “failed to perform its duty to determine whether the class action would be manageable in light of state law variations”). Although particular judges and judicial systems may differ over whether variations in state law should preclude class certification, it is surely not impossible for aggregated proceedings to account for such variations. *See, e.g., In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) (finding that, despite “variances in products liability among the jurisdictions, . . . plaintiffs have made a creditable showing, which apparently satisfied the district court, that class certification does not present insuperable obstacles”). Whether a class action is permissible under a given state's procedural law (or under a federal court's approach to Federal Rule of Civil Procedure 23) is a distinct question. The issue here is: Assuming the governing procedural law *would* allow aggregation (either through a class action or some other joinder device), does the personal jurisdiction inquiry make aggregation impossible?

299. *See supra* note 161 (describing how aggregation can be necessary to make low-value claims economically viable).



The rationality inquiry might also consider the nature of particular aggregated proceedings. In a prescient article on this subject, Professor Diane Wood (now Chief Judge of the Seventh Circuit) drew a distinction between “joinder” and “representational” class actions.<sup>300</sup> The joinder variant of a class action is merely “a straightforward device for bringing together similarly situated persons for the adjudication of common claims.”<sup>301</sup> In the representational variant, however, the cohesiveness of the class and the alignment of interests between the representative and the absent class members justify treating the named representative as truly acting on behalf of the class as a whole.<sup>302</sup> For a representational class action, the “specific jurisdictional links with the named plaintiff alone” could support personal jurisdiction with respect to the entire class, at least insofar as one accepts the “public law litigation” model of class actions.<sup>303</sup>

This theory might apply, for example, to money damages class actions with low-value individual claims—personal jurisdiction vis-à-vis the named plaintiff could be sufficient for the entire class.<sup>304</sup> As Chief Judge Wood explained: “The defendant might not be enthusiastic about defending a claim for hundreds of thousands of dollars, rather than hundreds of dollars, but this is basically a convenience argument as long as one is satisfied that the forum is proper for the principal suit.”<sup>305</sup> A similar approach could support personal jurisdiction in class

300. Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 599 (1987). In addition to anticipating the complicated questions courts are now wrestling with in the wake of *Bristol-Myers*, she predicted almost perfectly the Supreme Court’s recent moves on general jurisdiction. See *id.* at 614 (“The point of general jurisdiction theory is to permit suit in the defendant’s ‘home’—the one or two places where a person or entity has settled.”).

301. *Id.*

302. *Id.* at 599, 601 (writing that the representational model “treats the class action as a unique species of lawsuit, in which a properly qualified representative may appear in court on behalf of others” and that “[t]he degree to which a court ought to move from the representational model toward the joinder approach is a function of the cohesiveness of the class before the court”).

303. *Id.* at 617.

304. See *id.* at 616 (“If a small-stakes money damage class action is properly treated as a pure representational action, which the theory of public law litigation suggests it is, then the contacts supporting the individual’s claim against the defendants should support the entire class’s claims.”); *id.* at 621 (“Public law small claim class actions for damages are probably best viewed as purely representational . . . .”); see also *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1789 n.4 (2017) (Sotomayor, J., dissenting) (“The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.” (citing Wood, *supra* note 300, at 616–17)).

305. Wood, *supra* note 300, at 616. Using the facts of *Shutts* as an example, Chief Judge Wood wrote that a low-value individual claim based on a Kansas lease brought by a Kansas named plaintiff “would be less about the recovery of the \$100 related to the Kansas lease than about private attorney general enforcement of the oil and gas regulatory scheme” and that “[t]he

claims for injunctive relief.<sup>306</sup> Put more generally, “the cohesiveness of the class, the practical difficulties posed by piecemeal litigation, and the frequent public law character of the claim could justify what would otherwise be an impermissible expansion of one specific jurisdiction claim to many other unrelated claims.”<sup>307</sup>

A rationality inquiry might also be satisfied in a broader universe of cases in light of the efficiencies that aggregation can provide. That is, where a court has jurisdiction over a defendant in a lawsuit involving a certain course of conduct, it is rational to adjudicate claims for remedies arising from that same conduct. Indeed, the Supreme Court recognized this explicitly in the *Keeton* case discussed earlier.<sup>308</sup> The Court found that New Hampshire had jurisdiction to award damages arising from the distribution of allegedly defamatory magazines throughout the United States, even though only a “small portion” of the defendant’s magazines were sold in New Hampshire.<sup>309</sup> It was proper to require the defendant “to answer to a multistate libel action in New Hampshire,”<sup>310</sup> because New Hampshire had not only a legitimate interest in redressing injuries that occur within the State, through “the deception of its citizens”<sup>311</sup> but also “a substantial interest in cooperating with other States . . . to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding.”<sup>312</sup>

Reconciling *Keeton* and *Bristol-Myers* is a bit of a challenge. As Justice Sotomayor pointed out in her *Bristol-Myers* dissent, the logic of *Keeton* would seem to support jurisdiction in a multistate proceeding like *Bristol-Myers*.<sup>313</sup> California has jurisdiction with respect to claims

absentees all share the same interest in Phillips’ adherence to proper legal standards of behavior, and they are all aggrieved by deviations from that standard, wherever they occur.” *Id.* at 616 n.50.

306. *Id.* at 617 (“Pure representational actions for injunctive relief would be analyzed in the same way, with the propriety of resting the entire suit on the specific jurisdictional links with the named plaintiff alone depending on the extent to which the public law litigation model is accepted.”).

307. *Id.* at 618.

308. See *supra* notes 237–240 and accompanying text.

309. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984).

310. *Id.* at 777–78.

311. *Id.* at 776.

312. *Id.* at 777. The *Keeton* case did recognize that it would be a question of New Hampshire law whether the plaintiff could recover for damages resulting from the deception of out-of-state readers. *Id.* at 778 n.9 (“The actual applicability of the ‘single publication rule’ in the peculiar circumstances of this case is a matter of substantive law, not personal jurisdiction.”).

313. *Bristol-Myers*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting) (“[O]ur decision in *Keeton* suggests that there should be no such barrier to the exercise of jurisdiction here.” (citation omitted)).

by plaintiffs injured in California, and its interest in efficiently litigating damages claims arising from BMS's common course of conduct would justify jurisdiction with respect to claims by out-of-state plaintiffs. Justice Alito wrote in *Bristol-Myers*, however, that *Keeton* "concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State."<sup>314</sup> Yet Justice Alito did not explain why this distinction matters for purposes of personal jurisdiction.<sup>315</sup> When a defendant's conduct causes injuries in multiple states, what difference does it make whether one plaintiff or many plaintiffs seek remedies for those injuries? In *Keeton*, it was not the distribution of magazines in New Hampshire that caused injuries in California or Texas. But because the defendant's liability hinged on the same conduct—the allegedly defamatory story—there was no jurisdictional impediment to vindicating even those injuries suffered outside New Hampshire.

It would be rather strange, in fact, to make each plaintiff's *claim* the crucial unit for which specific jurisdiction must exist. Focusing on conduct makes more sense given that the "[t]he primary focus of our personal jurisdiction inquiry is the *defendant's* relationship to the forum State."<sup>316</sup> Indeed, to treat each plaintiff's claim as an independent unit that must independently qualify for specific jurisdiction is contrary to the way courts conceptualize jurisdiction in other contexts. Article III of the Constitution, for example, permits jurisdiction over claims that lack an independent basis for federal subject-matter jurisdiction provided those claims arise "from a common nucleus of operative fact" with claims that do fall within one of the categories authorized by Article III.<sup>317</sup> This includes claims by additional plaintiffs, even when those plaintiffs have no claims that would independently satisfy Article III.<sup>318</sup> The same logic should apply to personal jurisdiction. When the

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314. *Id.* at 1782 (majority opinion).

315. *Id.* at 1788 (Sotomayor, J., dissenting):

The majority today dismisses *Keeton* on the ground that the defendant there faced one plaintiff's claim arising out of its nationwide course of conduct, whereas *Bristol-Myers* faces many more plaintiffs' claims. But this is a distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States.

(citation omitted).

316. *Id.* at 1779 (majority opinion) (emphasis added).

317. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

318. *See* 28 U.S.C. § 1367(a) (2012) ("Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."); *Exxon Mobil Corp. v. Allapattah Servs.*,

claims of all plaintiffs arise from a common nucleus of operative fact regarding the defendant's conduct, personal jurisdiction should be permissible regarding all plaintiffs' claims, so long as that common course of conduct by the defendant was purposefully directed at the forum state.<sup>319</sup>

Ultimately, courts considering the line between specific and general jurisdiction in the aggregation context should confront the *reasons* why a court in one state might adjudicate claims based on injuries occurring both inside and outside that state. Although Justice Alito's *Bristol-Myers* opinion deemed it insufficient that the California and non-California plaintiffs "sustained the same injuries" or that the California plaintiffs "can bring claims similar to those brought by the nonresidents,"<sup>320</sup> he did not consider the practical value of aggregating related claims arising from the same underlying conduct. Permitting broad aggregation would be rational due to the tangible benefit of (as the Court said in *Keeton*) "efficiently litigating" the "issues and damage claims" arising from a common course of conduct.

The argument is even stronger with respect to claims for injunctive relief. It is more efficient to litigate in a single proceeding claims seeking an injunction based on a particular policy, action, or inaction.<sup>321</sup> In addition, aggregation permits the court to craft a uniform order of prospective relief that avoids subjecting the defendant to conflicting injunctive commands.<sup>322</sup> Thus, the rationality standard developed here can address obstacles that personal jurisdiction might

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Inc., 545 U.S. 546, 559 (2005) ("[T]he last sentence of § 1367(a) makes clear that the provision grants supplemental jurisdiction over claims involving joinder or intervention of additional parties.").

319. This notion finds further support in the doctrine of pendent personal jurisdiction that some lower courts have endorsed. See 4A WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1069.7, at 341 (noting that pendent personal jurisdiction addresses the situation where "a defendant is subject to personal jurisdiction for one or more claims asserted against it, but not as to another claim or claims"). Under this Article's theory, pendent personal jurisdiction would be a subset of the wider category of cases where a defendant has established the basic level of minimum contacts with the forum state and there is a rational basis for the forum to adjudicate the availability of judicial remedies against that defendant.

320. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781, 1782 (2017).

321. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362–63 (2011) (stating that "[w]hen a class seeks an indivisible injunction benefitting all its members at once" it is "self-evident" that a "class action is a superior method of adjudicating the dispute").

322. See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 853–54, 860 (2016) (describing how Rule 23(b)(1)(A) permits mandatory class actions to avoid "a risk of inconsistent judgments" in cases involving prospective decrees and how Rule 23(b)(2) permits mandatory class actions in cases seeking "system-wide" injunctive relief as to which "all class members can rely on the resulting injunction or declaration").

create for nationwide classes seeking nationwide injunctions based on a defendant's common course of conduct.<sup>323</sup>

### C. Beyond Rationality

The theory described in the preceding sections of this Part is not the exclusive basis for obtaining personal jurisdiction over a defendant. A forum that satisfies the Supreme Court's newly restrictive test for general jurisdiction would have personal jurisdiction over a defendant notwithstanding a lack of remedial rationality.<sup>324</sup> When a defendant is "essentially at home"—even under the Court's very narrow definition of that concept—jurisdiction can be justified by the traditional principle that a defendant is subject to jurisdiction in his or her state of "domicile" or "citizenship."<sup>325</sup>

The same might hold true for transient or "tag" jurisdiction. Such jurisdiction is controversial precisely because it is hard to square with any dispute-related rationale. When the Supreme Court last addressed transient jurisdiction in 1990, however, a four-Justice plurality concluded that "its validation is its pedigree."<sup>326</sup> The other four-Justice coalition found that tag jurisdiction satisfied an "independent inquiry into [its] fairness,"<sup>327</sup> based in part on the defendant's "avail[ment] . . . of significant benefits provided by the State" while voluntarily present within its borders: "His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well."<sup>328</sup> What was ultimately dispositive for the concurrence, however, was "the fact that American courts have announced the rule for perhaps a century," which

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323. See *supra* notes 181–186 and accompanying text. Regarding both monetary and injunctive relief, this approach would make it unnecessary for courts to treat class actions differently from other forms of aggregation, such as "mass actions," where large numbers of individually named plaintiffs join together in a single action. See *supra* note 178 (discussing the disagreement among lower courts about the applicability of *Bristol-Myers* to class actions). Because the required "affiliation" for purposes of specific jurisdiction would be the rational connection between the defendant's conduct and the forum state, this understanding would justify a specific jurisdiction analysis regardless of whether aggregation occurred through a class action or some other procedural mechanism.

324. See *supra* notes 56–61, 263–264 and accompanying text.

325. See, e.g., *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) ("As in case of the authority of the United States over its absent citizens, the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state." (citation omitted)).

326. *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (plurality opinion).

327. *Id.* at 629 (Brennan, J., concurring) (internal quotation marks omitted).

328. *Id.* at 637–38 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

in turn “provides a defendant voluntarily present in a particular State today ‘clear notice that [he] is subject to suit’ in the forum.”<sup>329</sup>

Jurisdiction based on a defendant’s consent or waiver might also be justified by notions other than remedial rationality.<sup>330</sup> This could include jurisdiction based on a defendant’s registration to do business in the forum state, at least in cases where the relevant state law deems such registration to constitute consent to general jurisdiction.<sup>331</sup> Whether jurisdiction can be based on corporate registration statutes alone, however, has been a contentious question.<sup>332</sup> As with transient jurisdiction, it can conceivably permit jurisdiction even in cases where there is no dispute-related rationale for the case to proceed in the particular forum. Yet it is arguably supported by the defendant’s *ex ante* consent to such jurisdiction.<sup>333</sup>

Interestingly, these situations where personal jurisdiction exists despite a lack of remedial rationality find their legitimacy in pre-*International Shoe* jurisdictional notions. Jurisdiction based on domicile, in-forum service, and consent remain viable (though hardly free from criticism<sup>334</sup>) for reasons other than the new jurisdictional conduit that *International Shoe* endorsed. The solution to the access-to-justice concerns discussed in this Article, however, will come from a clearer understanding of *International Shoe* itself: a defendant’s minimum contacts with the forum state can justify specific jurisdiction when there is a rational basis for the forum to adjudicate the availability of judicial remedies in that particular case.<sup>335</sup>

329. *Id.* at 636–37 (alteration in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

330. See 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1067.3, at 456 (“[P]ersonal jurisdiction can be based on the defendant’s consent to have the case adjudicated in the forum, or the defendant’s waiver of the personal jurisdiction defense.”); see also *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (noting that jurisdiction is proper in cases “in which that mode of service may be considered to have been assented to in advance”).

331. See 4A WRIGHT, MILLER & STEINMAN, *supra* note 1, § 1069.2, at 220–23 (noting that some recent decisions on this issue have hinged on whether state law does, in fact, deem registration to constitute consent to general jurisdiction).

332. See Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1359–71 (2015) (reviewing state corporate registration statutes and arguing that corporate registration should not equate to consent to jurisdiction); Preis, *supra* note 2, at 130–32 (reviewing the split among lower courts regarding whether corporate registration amounts to consent for personal jurisdiction).

333. See, e.g., *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 438 (D.N.J. 2015) (upholding jurisdiction based on the defendant’s registration to do business in the forum state and rejecting the argument that *Daimler* foreclosed general jurisdiction because “the present situation . . . principally concerns establishing jurisdiction through consent to service”).

334. See, e.g., Borchers, *supra* note 267, at 21–22 (calling transient jurisdiction “one of the most exorbitant state court jurisdictional devices”); Monestier, *supra* note 332, at 1347 (criticizing the idea that registration to do business in the forum state constitutes consent).

335. See *supra* Sections IV.A–IV.B.

## CONCLUSION

Establishing personal jurisdiction over a defendant is a crucial first step for injured parties wishing to obtain access to judicial remedies. The Supreme Court's renewed interest in this topic prompts important questions about the particular ways that the rules governing personal jurisdiction can undermine access to justice. This Article has identified three particular areas of concern: (1) the *home-state* scenario, where a plaintiff is injured in her home state, relevant events occur in her home state, and she seeks remedies from an out-of-state defendant in the courts of her home state; (2) the *safety-net* scenario, where alternative forums are unavailable or inadequate; and (3) the *aggregation* scenario, where proceeding in a single forum is necessary for effective adjudication of claims arising from a common course of conduct.

Although the Supreme Court's recent decisions impose some new obstacles to personal jurisdiction, they need not be read to undermine access to judicial remedies and the enforcement of substantive law. A sensible approach to minimum contacts—combined with a rational basis standard for evaluating whether a specific jurisdiction analysis applies—can make sense of the current case law, clarify the overall doctrinal structure, and keep the courthouse doors open.