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Personal Jurisdiction and the Fairness Factor(s)

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Personal Jurisdiction and the Fairness Factor(s)

Cover Page Footnote

It has been more than seventy-five years since the Supreme Court decided *International Shoe Co. v. Washington*, yet questions surrounding the personal jurisdiction doctrine loom large. Over the past decade, the Roberts Court has issued a handful of personal jurisdiction opinions, including *Ford Motor Co. v. Montana Eighth Judicial District Court*, a case decided in 2021 that addressed an issue related to specific jurisdiction. What is more, courts across the country, including several state supreme courts, have been grappling with the question whether a corporation's registration to do business constitutes consent to personal jurisdiction in that state. This consent issue is particularly divisive in states like Georgia and Pennsylvania—where jurisdiction via registration is expressly provided for by statute. Indeed, over the past two years the Supreme Court of Georgia upheld the exercise of consent jurisdiction in *Cooper Tire & Rubber Co. v. McCall*, while the Supreme Court of Pennsylvania struck down its statute as unconstitutional in *Mallory v. Norfolk Southern Railway Company*. The conflicting decisions in *McCall* and *Mallory* have now teed up the consent-by-registration question for the U.S. Supreme Court. Under *International Shoe's* bifurcated test, personal jurisdiction over nonresident defendants comports with due process when the defendants have sufficient minimum contacts with the state and the exercise of jurisdiction is fair or reasonable. Until recently, the Roberts Court's personal jurisdiction jurisprudence relegated the fairness prong of this test to, at most, an afterthought. However, *Ford* bucks that trend, providing hope that courts will once again turn to fairness considerations when making tough calls on jurisdiction. Using *Ford* as a launching pad, this Article argues that fairness—specifically, the fairness factors first articulated in *World-Wide Volkswagen Corp. v. Woodson*—should be part of every jurisdictional calculus, whether the plaintiff is relying on specific jurisdiction, general jurisdiction, or one of the traditional grounds for personal jurisdiction such as consent by registration. Applying a uniform methodology to the flexible due process standard will improve the consistency and predictability of personal jurisdiction determinations over time, while still allowing courts to decide these questions on a case-by-case basis.

PERSONAL JURISDICTION AND THE FAIRNESS FACTOR(S)

*Megan M. La Belle**

ABSTRACT

It has been more than seventy-five years since the Supreme Court decided International Shoe Co. v. Washington, yet questions surrounding the personal jurisdiction doctrine loom large. Over the past decade, the Roberts Court has issued a handful of personal jurisdiction opinions, including Ford Motor Co. v. Montana Eighth Judicial District Court, a case decided in 2021 that addressed an issue related to specific jurisdiction. What is more, courts across the country, including several state supreme courts, have been grappling with the question whether a corporation's registration to do business constitutes consent to personal jurisdiction in that state. This consent issue is particularly divisive in states like Georgia and Pennsylvania—where jurisdiction via registration is expressly provided for by statute. Indeed, over the past two years the Supreme Court of Georgia upheld the exercise of consent jurisdiction in Cooper Tire & Rubber Co. v. McCall, while the Supreme Court of Pennsylvania struck down its statute as unconstitutional in Mallory v. Norfolk Southern Railway Company. The conflicting decisions in McCall and Mallory have now teed up the consent-by-registration question for the U.S. Supreme Court.

Under International Shoe's bifurcated test, personal jurisdiction over nonresident defendants comports with due process when the defendants have sufficient minimum contacts with the state and the exercise of jurisdiction is fair or reasonable. Until recently, the Roberts Court's personal jurisdiction jurisprudence relegated the fairness prong of this test to, at most, an afterthought. However, Ford bucks that trend, providing hope that courts will once again turn to fairness considerations when making tough calls on jurisdiction. Using Ford as a launching pad, this Article argues that fairness—specifically, the fairness factors first articulated in World-Wide Volkswagen Corp. v. Woodson—should be part of every jurisdictional calculus, whether the plaintiff is relying on specific jurisdiction, general jurisdiction, or one of the traditional grounds for personal jurisdiction such as consent by registration. Applying a uniform methodology to the flexible due process standard will improve the consistency and predictability of personal jurisdiction

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INTRODUCTION

It has been more than seventy-five years since the Supreme Court decided *International Shoe Co. v. Washington*,¹ yet questions surrounding the personal jurisdiction doctrine loom large. Over the past decade, the Supreme Court has issued a handful of personal jurisdiction opinions, including *Ford Motor Co. v. Montana Eighth Judicial District Court* and *Ford Motor Co. v. Bandemer*, two cases decided last term that address an issue related to specific jurisdiction.² What is more, courts across the country, including several state supreme courts, have been grappling with the question whether a corporation's registration to do business constitutes consent to personal jurisdiction in that state.³ This consent issue is particularly divisive in states like Georgia and Pennsylvania—where jurisdiction via registration is expressly provided for by statute.⁴ Indeed, over the past two years, the Supreme Court of Georgia upheld the exercise of consent jurisdiction in *Cooper Tire & Rubber Co. v. McCall*,⁵ while the Supreme Court of Pennsylvania struck down its statute as unconstitutional in *Mallory v. Norfolk Southern Railway Co.*⁶ The conflicting decisions in *McCall* and *Mallory* have now teed up the consent-by-registration question for the U.S. Supreme Court.

As the Supreme Court has taken an interest in personal jurisdiction recently, so have scholars. A good deal has been written about the Court's restriction of general jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *Daimler AG v. Bauman*;⁷ the arguably narrow interpretations of specific jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro* and *Bristol-Myers Squibb Co. v. Superior Court of California*;⁸ and the various cases that have addressed the consent-by-registration issue.⁹ This Article takes a step back and considers the fundamental question that should underlie all personal jurisdiction decisions: When is the exercise of jurisdiction over an out-of-state defendant fair? Or, as the Supreme Court put it in *International Shoe*, when does jurisdiction over a nonresident comport with “traditional notions of fair play and substantial

¹ 326 U.S. 310, 310 (1945).

² *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1032 (2021).

³ *See, e.g., Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 90–92 (Ga. 2021); *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 546–47 (Pa. 2021).

⁴ *See cases cited supra* note 3.

⁵ 863 S.E.2d at 90–92.

⁶ 266 A.3d at 546–47.

⁷ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011); *Daimler AG v. Bauman*, 571 U.S. 117, 121–22 (2014).

⁸ *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011); *Bristol-Myers Squibb Co. v. Superior Ct. of Ca.*, 137 S. Ct. 1773, 1781 (2017).

⁹ *See, e.g., Murray v. Am. LaFrance, LLC*, 2018 PA Super 267, ¶ 1 (Sep. 25, 2018), *withdrawn*, 2018 Pa. Super. LEXIS 1320, at *1 (Pa. Super. Ct. Dec. 7, 2018) (ordering rehearing by *en banc* panel).

justice”¹⁰ While the Supreme Court provided guidance on that question more than forty years ago,¹¹ widespread confusion about the role that fairness (or, reasonableness, as it is often called) ought to play in the personal jurisdictional analysis persists.

Historically, personal jurisdiction was limited by traditional conceptions of territorial power as pronounced in *Pennoyer v. Neff*.¹² This meant that only those nonresidents who consented or were served with process in the state (i.e., tagged) were subject to personal jurisdiction. That changed with the landmark decision in *International Shoe*, which established the minimum contacts test.¹³ The Court held that nonresident defendants could be subject to personal jurisdiction in states where they have sufficient minimum contacts and the exercise of jurisdiction “does not offend traditional notions of fair play and substantial justice.”¹⁴ Applying that test, the *International Shoe Co.*—a Delaware corporation with its principal place of business in St. Louis, Missouri—was subject to personal jurisdiction in Washington based on the nature of its contacts with that state and the reasonableness of jurisdiction.¹⁵

In the wake of *International Shoe*, courts struggled to figure out how to apply the minimum contacts test. In cases like *McGee v. International Life Insurance Co.*,¹⁶ *Hanson v. Denckla*,¹⁷ *World-Wide Volkswagen Corp. v. Woodson*,¹⁸ *Burger King Corp. v. Rudzewicz*,¹⁹ and *Asahi Metal Industry Co., Ltd v. Superior Court of California*,²⁰ the Supreme Court developed a bifurcated test for the doctrine that came to be known as specific jurisdiction, where the defendant’s contacts with the forum state are linked to the plaintiff’s claim. The first part of the test assessed the defendant’s contacts with the forum state, while the second part asked if the exercise of jurisdiction was reasonable.²¹

¹⁰ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

¹² 95 U.S. 714, 720 (1877).

¹³ *Int’l Shoe*, 326 U.S. at 319.

¹⁴ *Id.* at 316 (internal quotation marks omitted) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁵ *Id.* at 313, 320.

¹⁶ 355 U.S. 220, 223 (1957).

¹⁷ 357 U.S. 235, 253 (1958).

¹⁸ 444 U.S. 286, 292 (1980).

¹⁹ 471 U.S. 462, 474 (1985).

²⁰ 480 U.S. 102, 112 (1987).

²¹ *World-Wide Volkswagen*, 444 U.S. at 291–92.

In *World-Wide Volkswagen*, the Court articulated particular “fairness factors” to be considered for the latter portion of the personal jurisdiction analysis.²² Those factors include the burden on the defendant, as well as:

the forum State’s interest in . . . the dispute[;] . . . the plaintiff’s interest in obtaining convenient and effective relief[;] . . . the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies[.]²³

Such factors help ensure that the exercise of jurisdiction comports with due process first, by “protect[ing] out-of-state defendants from the burden of litigating in distant or inconvenient forums” and, second, by “ensuring ‘that [s]tates through their courts[] do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.’”²⁴ What is more, the Court explained, “[t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”²⁵ On the flip side, even if the contacts portion of the test is satisfied, defendants can avoid jurisdiction on fairness grounds if they make a “compelling case.”²⁶

But even with these factors and additional guidance from the Supreme Court, questions remained about when this fairness analysis should apply, whether some factors predominate over others, and whether interstate federalism and state sovereignty interests should really play a role in determining the reasonableness of jurisdiction as the list of factors suggests.²⁷ So, when the Supreme Court returned to personal jurisdiction in 2011 after an extended hiatus and decided six cases in as many years,²⁸ there was hope that these longstanding unresolved questions about fairness would be answered. Disappointingly, the Supreme Court in this “new era” of personal jurisdiction shied away from

²² *Id.* at 292.

²³ *Id.* This list is non-exhaustive, however, and some courts have considered other factors in deciding whether the exercise of specific jurisdiction would be fair. *See, e.g.,* Megan M. La Belle, *Patent Litigation, Personal Jurisdiction, and the Public Good*, 18 GEO. MASON L. REV. 43, 47–48 (2010) (discussing how the U.S. Court of Appeals for the Federal Circuit precludes the exercise of jurisdiction in certain types of cases because it would discourage the settlement of patent disputes).

²⁴ La Belle, *supra* note 23, at 83–84 (alterations in original).

²⁵ *Burger King*, 471 U.S. at 477.

²⁶ *Id.*

²⁷ *See infra* Section III.A.

²⁸ *See* Richard D. Freer, *Justice Black Was Right About International Shoe, but for the Wrong Reason*, 50 U. PAC. L. REV. 587, 588 (2019).

fairness considerations in the specific jurisdiction context and focused almost exclusively on the contacts portion of the test instead.²⁹

Alongside specific jurisdiction, courts since *International Shoe* have developed the “general jurisdiction” doctrine as the other thread of the minimum contacts test. For a nonresident to be subject to general jurisdiction, the defendant must have continuous and systematic contacts with the forum state that render it essentially “at home” there.³⁰ Until recently, it was unclear what role fairness played in the general jurisdiction analysis.³¹ In *Daimler*, however, the majority addressed this question—despite it not being briefed by the parties—and concluded that a fairness inquiry is superfluous when a nonresident is “at home” in the forum state.³² Thus, with respect to general jurisdiction, the Court in the “new era” did not simply downplay the role of fairness, but rejected it altogether.³³ Justice Sotomayor, on the other hand, concurred in *Daimler* because she believed the defendant was not subject to general jurisdiction in California based on the fairness prong of the jurisdictional test.³⁴ Justice Sotomayor is the lone member of the current Court to continuously approach personal jurisdiction as a “holistic, nuanced contacts analysis backed by considerations of fairness and reasonableness,” as *International Shoe* instructed.³⁵

Another issue courts have struggled with post-*International Shoe* is whether personal jurisdiction over nonresident defendants could still be premised on the traditional bases recognized in *Pennoyer*—namely, in rem jurisdiction, tag jurisdiction, and consent. The Supreme Court held in *Shaffer v. Heitner* that an exercise of in rem jurisdiction must comply with the requirements established in *International Shoe*.³⁶ Yet, barely a decade later, in *Burnham v. Superior Court of California*, the Justices split on whether the *International Shoe* test applied to tag jurisdiction³⁷ (although they agreed on the holding that tag jurisdiction

²⁹ *Id.* at 597–98.

³⁰ *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (citations omitted).

³¹ 4 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1067.5 (4th ed. 2022).

³² *Daimler*, 571 U.S. at 139 n.20; see also Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 731 (2019).

³³ Freer, *supra* note 28, at 601.

³⁴ *Daimler*, 571 U.S. at 143–44 (Sotomayor, J., concurring).

³⁵ *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring in part and dissenting in part).

³⁶ 433 U.S. 186, 212 (1977). Jurisdiction based on the court’s power over property within the forum state is called “in rem” or “quasi in rem” jurisdiction. *Id.* at 199. “The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.” *Id.* (footnote omitted).

³⁷ Compare 495 U.S. 604, 621 (1990), with *id.* at 629 (Brennan, J., concurring).

comports with due process).³⁸ With the *McCall* and *Mallory* cases creating a divide on the consent-by-registration issue, it is no surprise that the U.S. Supreme Court has granted certiorari to settle this longstanding question of how *Pennoyer*-era jurisdictional theories should be evaluated in a post-*International Shoe* world.³⁹

This Article argues that fairness—specifically, the fairness factors articulated in *World-Wide Volkswagen*—should be part of every jurisdictional calculus, whether the plaintiff is relying on specific jurisdiction, general jurisdiction, or one of the traditional grounds for personal jurisdiction. Although the Supreme Court’s personal jurisdiction cases since the turn of the century have largely eschewed fairness and focused on the defendant’s contacts with the forum state instead,⁴⁰ the recent decision in *Ford* offers some hope that the tide is shifting. To be sure, *Ford* does not refer to the fairness factors explicitly; however, citing *World-Wide Volkswagen*, the Court explained that rules regarding specific jurisdiction “derive from and reflect two sets of values—treating defendants fairly and protecting ‘interstate federalism.’”⁴¹ Then, applying those values, the Court concluded that subjecting *Ford* to jurisdiction “treats *Ford* fairly” and “can hardly be said to be undue,” which sounds an awful lot like the first fairness factor (burden on defendant).⁴² Moreover, the Court reasoned, principles of interstate federalism support jurisdiction because the forum state has a significant interest in “providing [its] residents with a convenient forum for redressing injuries” and “enforcing [its] own safety regulations,” especially compared to the interests of other states where the litigation might proceed.⁴³ Again, without stating so directly, the *Ford* Court appeared to take the other fairness factors into account to support its conclusion that personal jurisdiction comports with due process.

This shift in the Court’s approach to personal jurisdiction may be subtle, but it is nonetheless significant. It indicates a willingness to factor reasonableness

³⁸ 495 U.S. 604, 622 (1990).

³⁹ *Mallory v. Norfolk Southern Railway Co.*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/mallory-v-norfolk-southern-railway-co/> (last visited Oct. 2, 2022) (indicating that the U.S. Supreme Court granted certiorari in the *Mallory* case on April 25, 2022).

⁴⁰ Charles W. “Rocky” Rhodes, *The Roberts Court’s Jurisdictional Revolution Within Ford’s Frame*, 51 STETSON L. REV. 157, 185 (2022) (“[T]he Roberts Court has not listed these [fairness] factors as part of a bifurcated analysis in any of its decisions, with merely a singular oblique reference to a ‘multipronged reasonableness check’ for specific jurisdiction in a footnote in *Daimler . . .*” (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014))).

⁴¹ *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

⁴² *Id.* at 1029–30.

⁴³ *Id.* at 1030 (citations omitted).

into the jurisdictional equation in a way the Court has not done for decades. While *Ford* is a specific jurisdiction case—the type of case where the fairness factors traditionally were applied—perhaps the Court’s new openness to considering reasonableness will extend beyond specific jurisdiction to general jurisdiction and *Pennoyer*-era theories of jurisdiction, such as in rem, consent, and tag jurisdiction. Such an approach would be consistent with *International Shoe* and the due process clause from which the personal jurisdiction doctrine emanates. Indeed, because personal jurisdiction is governed by the due process standard, as opposed to a bright-line rule, applying a well-defined methodology would lead to more predictable and just results whereby litigation proceeds in the most appropriate forum.⁴⁴

The remainder of this Article proceeds as follows. Part I provides an overview of personal jurisdiction doctrine before *International Shoe*, first outlining the traditional grounds for personal jurisdiction under *Pennoyer v. Neff* and then explaining why those started to evolve as society became more technologically advanced ultimately leading to the landmark decision in *International Shoe* and the minimum contacts test. Part II describes the trajectory of the personal jurisdiction doctrine since *International Shoe*, describing the development of two strains of the minimum contacts test—specific jurisdiction and general jurisdiction—and then reconsidering the traditional jurisdictional theories discussed in Part I and exploring what effect, if any, *International Shoe*’s minimum contacts test has on in rem jurisdiction, tag jurisdiction, and consent. Part III of this Article then turns to the question of fairness generally, and the fairness factors from *World-Wide Volkswagen* specifically, and shows how the Court in the twenty-first century lost sight of the reasonableness prong of the personal jurisdiction analysis. However, the Court’s most recent decision in *Ford* indicates that reasonableness may be regaining traction. Thus, this final Part uses *Ford* as a launching pad to argue that courts should apply the fairness factors to resolve *all* difficult personal jurisdiction questions, including the consent-by-registration issue presented in *McCall* and *Mallory* that is currently under consideration at the Supreme Court.⁴⁵

⁴⁴ See Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141, 2149–52 (2016) (discussing the benefits of using rules as opposed to standards).

⁴⁵ See *supra* note 39 (indicating the petition for certiorari was filed Feb. 18, 2022); *Cooper Tire & Rubber Co. v. McCall*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/cooper-tire-rubber-company-v-mccall/> (last visited Oct. 2, 2022) (indicating the petition for certiorari was filed December 20, 2021).

I. PERSONAL JURISDICTION DOCTRINE BEFORE *INTERNATIONAL SHOE*A. *Traditional Grounds for Personal Jurisdiction Before International Shoe*⁴⁶

Personal jurisdiction, meaning the “court’s power to bring a [party] into its adjudicative process,”⁴⁷ was traditionally a territorial doctrine, as outlined in the landmark decision of *Pennoyer v. Neff*.⁴⁸ Neff, who owned land in Oregon but no longer resided there, was sued in Oregon state court for allegedly failing to pay the fees of his attorney, J.H. Mitchell.⁴⁹ In accordance with Oregon law, jurisdiction over Neff was obtained through service of summons by publication.⁵⁰ After Neff defaulted, his Oregon property was sold to satisfy the judgment and title ultimately passed to Pennoyer.⁵¹ In a second lawsuit—this one between Neff and Pennoyer over title to the land—the court had to decide if the default judgment in the underlying suit was valid.⁵² The answer to that question turned on whether Neff was subject to personal jurisdiction in Oregon.⁵³

In holding that there was no personal jurisdiction,⁵⁴ the *Pennoyer* Court was driven by its territorial notion of personal jurisdiction. Informed by universal principles of public international law as well as the Due Process Clause of the Fourteenth Amendment,⁵⁵ the Court explained that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory” and “no State can exercise direct jurisdiction and authority over persons and property without its territory.”⁵⁶ Thus, under *Pennoyer*, a

⁴⁶ The question whether a defendant is subject to personal jurisdiction in a forum state is a two-part inquiry. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 311 (1945). The first prong focuses on whether the exercise of jurisdiction comports with the state’s long-arm statute, while the second prong asks whether it comports with federal due process. See *id.* The majority of states have limits-of-due-process long arm statutes, meaning the first and second prongs merge into one. See, e.g., LaBelle, *supra* note 23, at 63–64. This Article does not address any particular state’s long-arm statute, but instead focuses on the due process inquiry and how that doctrine has evolved over time.

⁴⁷ *Personal Jurisdiction*, BLACK’S LAW DICTIONARY (8th ed. 2004).

⁴⁸ 95 U.S. 714, 720 (1877). For a detailed discussion of how early American courts approached personal jurisdiction before *Pennoyer*, see Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1269–87 (2017).

⁴⁹ *Pennoyer*, 95 U.S. at 719.

⁵⁰ *Id.* at 720.

⁵¹ *Id.* at 719.

⁵² *Id.*

⁵³ *Id.* at 721–22.

⁵⁴ *Id.* at 748.

⁵⁵ Wendy Collins Perdue, *What’s “Sovereignty” Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 730–31 (2012).

⁵⁶ *Pennoyer*, 95 U.S. at 722.

nonresident defendant is only subject to personal jurisdiction if he consents or is served while physically present in the forum state.

For a time, this territorial approach to personal jurisdiction worked fine; American society was agrarian, travel was limited, and litigation was mostly local.⁵⁷ But that began to change with the dawn of the industrial revolution. Technological advances, increased interstate travel, and expanding corporate activity meant plaintiffs were more likely to be injured by nonresident defendants.⁵⁸ Only being able to sue in the forum state where the defendant was physically present became increasingly frustrating for plaintiffs. Consequently, litigants and courts began to adjust to the new societal and economic reality, and personal jurisdiction jurisprudence evolved accordingly.⁵⁹ More specifically, courts began to expand traditional theories of jurisdiction that existed at the time of *Pennoyer*, such as in rem jurisdiction and consent.

Davis v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co. provides a good example of a post-*Pennoyer* case that relies on in rem—or, more precisely, quasi in rem—jurisdiction.⁶⁰ It was well established at the time of *Pennoyer* that courts had the power to exercise in rem jurisdiction, meaning jurisdiction over property located within the forum state,⁶¹ and *Pennoyer* did nothing to change that. Indeed, since Neff owned property in Oregon, had Mitchell attached the property at the start of the litigation and relied on in rem instead of personal jurisdiction, the result likely would have been different.⁶² So, thirty years later, when *Davis* held that an Ohio-based defendant that owned property in Iowa could be sued in Iowa over an accident that occurred in Illinois,⁶³ the Court was not establishing new law but was relying on traditional quasi in rem jurisdiction. Simply put, what was once old became new again.

Turning now to consent, there were a number of cases after *Pennoyer* where the Supreme Court held a defendant subject to personal jurisdiction based on either explicit or implicit consent. The Court, for instance, upheld state laws

⁵⁷ See, e.g., Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1594 (2018); Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y 209, 214–15 (2015).

⁵⁸ *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977); Jacobs, *supra* note 57, at 1596.

⁵⁹ *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (“As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.”).

⁶⁰ 217 U.S. 157, 179 (1910).

⁶¹ *In Rem Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁶² See James Mooney, *Pennoyer v. Neff: An Oregon Landmark*, EXPERIENCE, Fall 2003, at 34, 37 (“[T]he Supreme Court's holding in *Pennoyer v. Neff* was that to obtain in rem or quasi in rem jurisdiction over real property, a plaintiff had to attach the property at the outset of litigation, which Mitchell had failed to do.”).

⁶³ *Davis*, 217 U.S. at 165, 169.

providing that nonresident motorists consented to jurisdiction by driving on roads in the forum state, even absent the appointment of an agent for service of process.⁶⁴ More pertinent to this Article, however, are cases involving nonresident companies and consent statutes. Specifically, a number of states enacted statutes that required corporations to register to do business and appoint an agent for service of process in order to conduct business in the forum state. The question courts faced was whether compliance with such statutory mandates constituted consent to personal jurisdiction.

In *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining and Milling Co.*, a case that will be discussed in more detail later in this Article,⁶⁵ the defendant complied with a Missouri statute requiring it to file a power of attorney with the superintendent of the insurance department, thereby consenting that service of process upon the superintendent is deemed personal service.⁶⁶ When Pennsylvania Fire was subsequently sued in Missouri, it argued that the exercise of personal jurisdiction violated due process since the plaintiff's claim was unconnected to the forum state.⁶⁷ The Missouri Supreme Court disagreed, interpreting the statute in question as consent to personal jurisdiction in Missouri.⁶⁸ The U.S. Supreme Court granted certiorari and affirmed.⁶⁹ In so doing, the Court held that this interpretation of the Missouri statute was rational, as evidenced by the fact that similar laws in other states had been construed the same way.⁷⁰ Although Pennsylvania Fire may have been surprised, the Court explained that such an interpretation "did not deprive the defendant of due process of law."⁷¹ Accordingly, the Missouri court's exercise of jurisdiction over defendant was proper because Pennsylvania Fire consented.⁷²

Finally, when there was no basis for asserting jurisdiction based on an in rem or consent theory, courts began expanding the notion of presence to assert power over nonresident defendants. In more than one case, the Supreme Court held that corporate defendants were subject to personal jurisdiction in states where they conducted business because they were constructively present there.⁷³ Unlike in

⁶⁴ Hess v. Pawloski, 274 U.S. 352, 356–57 (1927); Kane v. New Jersey, 242 U.S. 160, 164–69 (1916).

⁶⁵ See *infra* Section III.B.

⁶⁶ 243 U.S. 93, 94–95 (1917).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 97.

⁷⁰ *Id.* at 95.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See, e.g., Bank of Am. v. Whitney Cent. Nat'l Bank, 261 US 171, 173 (1923); St. Louis Sw. Ry. Co. of Tex. v. Alexander, 227 US 218, 227–28 (1913).

rem jurisdiction and consent, this notion of constructive presence based on doing business was a legal fiction unknown at the time of *Pennoyer*.⁷⁴ And it was this new theory of personal jurisdiction that ultimately led to the landmark decision in *International Shoe* and the minimum contacts test.

B. *International Shoe and the Minimum Contacts Test*

In the seventy years between *Pennoyer* and *International Shoe*, society, industry, and the nature of litigation changed dramatically. To adapt jurisdiction doctrine and provide plaintiffs with greater flexibility on where to file suit, courts and lawyers initially tried to work within the confines of *Pennoyer*.⁷⁵ In some instances, however, legal fictions were created that arguably stretched the boundaries of *Pennoyer* too far, thus prompting the Court to adopt a new framework for evaluating personal jurisdiction over non-resident defendants.⁷⁶

The International Shoe Company, which was incorporated in Delaware and headquartered in St. Louis, Missouri, employed shoe salespeople who lived and worked in the state of Washington for a number of years.⁷⁷ When International Shoe failed to contribute to Washington's unemployment compensation fund, the state sued.⁷⁸ Under the relevant Washington statute, a nonresident defendant like International Shoe could receive notice of the assessment of delinquent contributions through registered mail.⁷⁹ International Shoe made a special appearance to challenge personal jurisdiction, but its argument was rejected by the Washington state courts.⁸⁰ International Shoe then sought review at the U.S. Supreme Court, which, like the courts below, held that the exercise of jurisdiction did not violate due process.⁸¹

Instead of relying on a constructive presence theory as it had done in the past, the Supreme Court announced a new—albeit closely related—theory of personal jurisdiction. Under the minimum contacts test, as it came to be known, defendants who are not present are nonetheless subject to personal jurisdiction if they have “certain minimum contacts” with the forum state “such that the maintenance of suit does not offend traditional notions of fair play and

⁷⁴ Jacobs, *supra* note 57, at 1603–04.

⁷⁵ See Jack B. Harrison, *Here and There and Back Again: Drowning in the Stream of Commerce*, 44 STETSON L. REV. 1, 9 (2014).

⁷⁶ See *id.* at 11 (citation omitted).

⁷⁷ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 313 (1945).

⁷⁸ *Id.* at 312.

⁷⁹ *Id.*

⁸⁰ *Id.* at 312–13.

⁸¹ *Id.* at 312–13, 320.

substantial justice.”⁸² As the Court explained, a corporation’s “presence” within a state “can be manifested only by activities carried on in its behalf by those who are authorized to act for it.”⁸³ In deciding if those activities are sufficient to subject a defendant to personal jurisdiction, “[a]n ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business” is relevant.⁸⁴

Applying this new test, the Court held that International Shoe was subject to personal jurisdiction in Washington because its activities in the forum state “were neither irregular nor casual.”⁸⁵ To the contrary, International Shoe conducted a significant amount of business in Washington over multiple years and, in return, benefitted from and was protected by the laws of the state.⁸⁶ The Court further noted that these very activities in Washington gave rise to the claim against International Shoe.⁸⁷ Finally, there was no indication that subjecting International Shoe to suit in Washington was unfair, so the exercise of personal jurisdiction was upheld.⁸⁸

Yet, there was some difference of opinion among the Justices about the rationale underlying the *International Shoe* decision. Justice Black criticized the minimum contacts test as vague, uncertain, and confusing, and predicted that it would “curtail the exercise of State powers to an extent not justified by the Constitution.”⁸⁹ Although Justice Black acknowledged the appeal of considering fair play, justice, and reasonableness, because those terms are not included in the due process clause, he believed they should not be used as a “measuring rod” to invalidate state and federal laws enacted by elected officials.⁹⁰ He worried, in other words, that this flexible reasonableness test would be used by courts to narrow the exercise of jurisdiction over nonresident defendants, thereby depriving plaintiffs of access to the courthouse.⁹¹

Like with most landmark decisions, the Court left much unsaid in *International Shoe*. Was this new minimum contacts test the only way to analyze personal jurisdiction going forward? Or was it simply an additional avenue that

⁸² *Id.* at 316 (citation and internal quotation marks omitted).

⁸³ *Id.*

⁸⁴ *Id.* at 317 (citation omitted).

⁸⁵ *Id.* at 320.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 323.

⁹⁰ *Id.* at 325.

⁹¹ Freer, *supra* note 28, at 588–90.

supplemented the options set forth in *Pennoyer*? And how were lower courts and litigants supposed to apply this test, which, as Justice Black argued, was vague and unpredictable? Although more than three-quarters of a century have passed since *International Shoe*, the search for answers to these questions continues.

II. PERSONAL JURISDICTION DOCTRINE AFTER *INTERNATIONAL SHOE*

A. *The Minimum Contacts Test*

Although generally considered a landmark decision, the extent to which *International Shoe* actually changed personal jurisdiction law is the subject of debate. While some scholars claim that the decade or so after *International Shoe* was the “high water mark” for expansive jurisdiction,⁹² others argue that the same results could have been reached in those cases under the supposedly restrictive territorial model of *Pennoyer*.⁹³ What we know for certain is that, in the decades following *International Shoe*, courts and scholars alike struggled to make sense of the minimum contacts test, first by delineating between specific and general jurisdiction,⁹⁴ and second by tacking on additional requirements not contemplated by *International Shoe*.⁹⁵ Although this attempt at line-drawing and categorization of personal jurisdiction doctrine is understandable, it has taken us off track over the past seventy-five years. Before laying out prescriptive measures to right the ship, so to speak, this Part of the Article considers the development of minimum contacts jurisprudence after *International Shoe*, so we understand how we got to this point in the first place.

1. *Specific Jurisdiction*

For about a half century after *International Shoe*, the Court’s personal jurisdiction jurisprudence focused primarily on specific jurisdiction. In the immediate wake of *International Shoe*, it appeared that specific jurisdiction would be relatively easy to prove since *McGee* held that even a single contact was enough for jurisdiction as long as that contact was connected to plaintiff’s

⁹² See, e.g., Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 716 (1987); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 535 (1995). The case decided during this “high water mark” was *McGee v. International Life Insurance Co.* See Stein, *supra*; Weintraub, *supra*.

⁹³ Jacobs, *supra* note 57, at 1611.

⁹⁴ See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (introducing the concepts of “specific jurisdiction” and “general jurisdiction” based on *International Shoe*).

⁹⁵ E.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

claim.⁹⁶ But that did not last very long. Just a few years later, the Court took up specific jurisdiction again in *Hanson v. Denkla* and held that the defendant's contact with the forum state not only has to be connected to the plaintiff's claim, but also must be purposeful.⁹⁷ This new requirement for specific jurisdiction—known as purposeful availment—has plagued litigants and courts since *Hanson*.

a. Purposeful Availment

In *Hanson*, Dora Browning Donner executed a trust instrument in Delaware in 1935 and named a Delaware trust company as trustee.⁹⁸ At the time the trust was created, Donner was domiciled in Pennsylvania, but she subsequently moved to Florida where she remained until her death.⁹⁹ Upon Donner's death, a dispute arose over who had a right to certain trust assets.¹⁰⁰ A Florida court held that the property passed to one group of claimants under Donner's will, while a Delaware court held that a separate group of claimants was entitled to the assets pursuant to the trust.¹⁰¹ In reaching this conclusion, the Delaware court refused to grant full faith and credit to the Florida judgment on the grounds that the Delaware trustee, an indispensable party, was not subject to personal jurisdiction in Florida.¹⁰²

The Supreme Court affirmed the Delaware court, holding that the trustee did not have sufficient minimum contacts with Florida as required by *International Shoe* because there must 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.”¹⁰³ Unlike in *McGee*, where the nonresident defendant solicited a reinsurance agreement with plaintiff in the forum state, the Delaware trustee established a relationship with Donner when she resided in Pennsylvania and never solicited business in Florida.¹⁰⁴ The Court reasoned, therefore, that the trustee was not subject to personal jurisdiction in Florida because its contacts with the forum were not purposeful.¹⁰⁵

⁹⁶ See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

⁹⁷ *Hanson*, 357 U.S. at 253.

⁹⁸ *Id.* at 238.

⁹⁹ *Id.* at 238–39.

¹⁰⁰ *Id.* at 240.

¹⁰¹ *Id.* at 242.

¹⁰² *Id.* at 243.

¹⁰³ *Id.* at 253 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

¹⁰⁴ *Id.* at 251–52.

¹⁰⁵ *Id.* at 252.

Before discussing the impact of *Hanson*, it is important to note that the decision was split, with four Justices dissenting.¹⁰⁶ Justice Black's dissent, joined by Justices Burton and Brennan, concluded that there was a sufficient connection between the Delaware trustee and the state of Florida, since that was where Donner resided and from where she conducted trust business.¹⁰⁷ In the dissenters' view, "where a transaction has as much of a relationship to a State as Mrs. Donner's appointment had to Florida," the courts must have the "power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as 'traditional notions of fair play and substantial justice.'"¹⁰⁸ In other words, instead of creating a new purposeful avilment requirement, the dissent believed the case should be decided on fairness grounds where, as here, the defendant has contacts with the forum state that are related to the plaintiff's claim. Along those same lines, Justice Douglas opined in a separate dissent that the question in cases like this should be "whether the procedure is fair and just, considering the interests of the parties."¹⁰⁹ Had the dissent persuaded just one other Justice that the focus should be on fairness, the trajectory of personal jurisdiction jurisprudence would have been quite different—and much better. More to come on that later in the Article.

In the meantime, what did the majority decision in *Hanson* mean for personal jurisdiction doctrine? At first blush, the new purposeful avilment requirement seemed to involve a fairly straightforward quid pro quo: if the defendant benefits from having contacts with the forum state, those contacts are sufficiently purposeful for jurisdiction.¹¹⁰ Beginning with *World-Wide Volkswagen Corp. v. Woodson*,¹¹¹ however, it soon became clear that this new requirement for specific jurisdiction would cause difficulties for courts and litigants alike, particularly in the context of what has come to be known as the stream of commerce.

In *World-Wide Volkswagen*, Harry and Kay Robinson, who resided in New York, purchased a new Audi automobile in 1976 from Seaway Volkswagen, Inc.

¹⁰⁶ *Id.* at 256 (Black, J., joined by Burton & Brennan, JJ., dissenting); *id.* at 262 (Douglas, J., dissenting).

¹⁰⁷ *Id.* at 258–59 (Black, J., dissenting).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 262–63 (Douglas, J., dissenting) (citations omitted).

¹¹⁰ *See, e.g.,* Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1032 (1995) (“[T]he Chief Justice [in *Hanson*] conferred constitutional status upon the quid pro quo principle that a defendant must pay with jurisdictional bondage for whatever benefits he may have received from his intra-forum activities.”).

¹¹¹ *See* 444 U.S. 286, 291, 297–99 (1980).

(“Seaway”) in Massena, New York.¹¹² The following year, the Robinsons were involved in a car accident in Oklahoma, suffered severe injuries, and filed a product liability suit in Oklahoma state court against several defendants including Seaway and the regional distributor, World-Wide Volkswagen Corp. (“World-Wide”).¹¹³ After the Oklahoma courts rejected World-Wide and Seaway’s jurisdictional challenge, the U.S. Supreme Court granted certiorari and, in another highly splintered opinion, reversed.¹¹⁴

As an initial matter, it was undisputed in *World-Wide Volkswagen* that the defendants had contacts with Oklahoma that gave rise to the plaintiffs’ claim (the Audi purchased by the Robinsons that was involved in the accident in Oklahoma).¹¹⁵ So, in holding that Oklahoma lacked jurisdiction, the majority relied first, on *Hanson*’s purposeful availment requirement and, second, on concepts of fairness.¹¹⁶ With respect to purposeful availment, the Court explained that, even assuming it was foreseeable or likely that the Audi in question would make its way to Oklahoma, that was not enough to support jurisdiction.¹¹⁷ Instead, what matters is if the defendant “delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”¹¹⁸ What is more, the defendant’s conduct and connection with the forum state must be such that it “should reasonably anticipate being haled into court there.”¹¹⁹ Because there was no evidence that World-Wide and Seaway distributed cars outside of New York, New Jersey, and Connecticut, the minimum contacts test was not satisfied.¹²⁰

Turning to the reasonableness prong, what is most notable about *World-Wide Volkswagen* for purposes of this Article is that the Supreme Court announced the “fairness factors” for the first time.¹²¹ The first factor, burden on the defendant, is “always a primary concern,” the Court instructed.¹²² However, other relevant factors to be considered include: “the forum state’s interest in adjudicating the dispute”; “the plaintiff’s interest in obtaining convenient and

¹¹² *Id.* at 288.

¹¹³ *Id.*

¹¹⁴ *Id.* at 289, 291.

¹¹⁵ *Id.* at 288.

¹¹⁶ *Id.* at 292, 294–98.

¹¹⁷ *Id.* at 295, 298.

¹¹⁸ *Id.* at 297–98.

¹¹⁹ *Id.* at 297.

¹²⁰ *Id.* at 298.

¹²¹ *Id.* at 292.

¹²² *Id.*; see also A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 623 (2006) (“The burden on defendants is typically given the most weight, with the plaintiffs’ interests and state interests receiving a fair degree of consideration as well.”).

effective relief”; “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies”; and “the shared interest of the several states in furthering fundamental substantive social policies.”¹²³ These factors help ensure that the exercise of jurisdiction comports with due process first, by “protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum” and, second, by “ensur[ing] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”¹²⁴ The latter explanation led to significant debate after *World-Wide Volkswagen* about the exact role, if any, state sovereignty interests ought to play in the personal jurisdiction analysis.¹²⁵ That debate, along with the fairness analysis more generally, are discussed at length in Part III of this Article, so suffice it to say for now that fairness considerations played a key role in the majority’s decision in *World-Wide Volkswagen*.

In the wake of *World-Wide Volkswagen*, lower courts grappled with the question of when defendants who placed their products into the stream of commerce had purposefully availed themselves of the forum state.¹²⁶ When the Court granted review in *Asahi Metal Industry Co. v. Superior Court of California*,¹²⁷ people hoped the decision would bring much-needed clarity to the issue. In *Asahi*, plaintiff Gary Zurcher was severely injured and his wife was killed in a motorcycle accident on the freeway in California.¹²⁸ Zurcher sued Cheng Shin Rubber Industrial Co., Ltd. (“Cheng Shin”), the Taiwanese manufacturer of the tire tube, in California state court.¹²⁹ Cheng Shin, in turn, brought a cross-complaint for indemnification against Asahi Metal Industry Co., Ltd. (“Asahi”), a Japanese corporation that manufactured the tube’s valve assembly.¹³⁰ Zurcher eventually settled, leaving only Cheng Shin’s indemnification claim against Asahi.¹³¹

¹²³ *World-Wide Volkswagen*, 444 U.S. at 292.

¹²⁴ *Id.*

¹²⁵ See, e.g., Perdue, *supra* note 55, at 730 (“[A]lthough at one time the concept of sovereignty provided an important analytic component of personal jurisdiction analysis, this is largely no longer true.”); Spencer, *supra* note 122, at 623 (“Regarding the relationship between state sovereignty, interstate federalism, and personal jurisdiction doctrine, the Court has vacillated between endorsement and rejection of the relevance of these two concepts, giving varying degrees of weight or no weight to sovereignty and federalism as legitimate underpinnings of the law of personal jurisdiction.”).

¹²⁶ Harrison, *supra* note 75, at 17 (citation omitted).

¹²⁷ 480 U.S. 102 (1987).

¹²⁸ *Id.* at 105.

¹²⁹ *Id.* at 105–06.

¹³⁰ *Id.* at 106.

¹³¹ *Id.*

Asahi challenged personal jurisdiction on the ground that its only contact with California was that its valve assemblies ended up there through the stream of commerce.¹³² Asahi was aware that its valve assemblies, which were sold to Cheng Shin in Taiwan, ended up in California, but argued that it never contemplated that such limited sales could subject it to suit in California.¹³³ Although the California courts rejected Asahi's challenge, the U.S. Supreme Court granted certiorari and reversed in another highly splintered decision.¹³⁴

Similar to *World-Wide Volkswagen*, it was undisputed that Asahi had contacts with California (i.e., its valve assemblies ended up there) and that those contacts gave rise or were related to the plaintiff's claim (i.e., it was the tire assembly that allegedly caused the accident).¹³⁵ The questions, therefore, were (i) whether Asahi's contacts were the *right* type of contacts—meaning were they purposeful—and (ii) whether the exercise of jurisdiction comported with “traditional notions of fair play and substantial justice.”¹³⁶ On the former point, the Justices could not agree. One opinion, authored by Justice Brennan, concluded that the contacts were purposeful because Asahi was aware that Cheng Shin's tire tubes were being sold in California.¹³⁷ Justice O'Connor's opinion, on the other hand, reasoned that the “placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state.”¹³⁸ Instead, the O'Connor group opined, some additional conduct by the defendant was required for purposeful availment, such as advertising in or designing products especially for the forum state.¹³⁹

In the end, the fact that the Justices deadlocked on purposeful availment was of no moment in *Asahi* itself because, as discussed in detail in Part III,¹⁴⁰ they unanimously agreed that subjecting the defendant to jurisdiction in California

¹³² *Id.* at 106–07.

¹³³ *Id.* at 107.

¹³⁴ *Id.* at 107–08.

¹³⁵ Compare *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 288 (1980) (explaining that the plaintiff's Audi automobile purchased from the defendant in New York ended up in Oklahoma and the automobile's defective design allegedly caused the plaintiff's injuries), with *Asahi Metal Indus.*, 480 U.S. at 106–07.

¹³⁶ *Asahi Metal Indus.*, 480 U.S. at 112–13 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹³⁷ *Id.* at 121 (Brennan, J., concurring).

¹³⁸ *Id.* at 112 (majority opinion).

¹³⁹ *Id.* Other examples of “[a]dditional conduct” include “establishing channels for providing regular advice to customers in the forum State” and marketing the product “through a distributor who has agreed to serve as the sales agent in the forum State.” *Id.*

¹⁴⁰ See *infra* Part III.

would be unconstitutionally unfair.¹⁴¹ Nonetheless, the *Asahi* Court's failure to decide when stream of commerce contacts are sufficient to support jurisdiction had significant consequences. For the next two decades, lower courts and litigants struggled to apply the decisions in *Asahi* and *World-Wide Volkswagen* when faced with situations where a defendant's only contact with the forum state was that its products ended up there through the stream of commerce.¹⁴² Circuit courts split on this question, with some adopting Justice Brennan's "awareness" test from *Asahi* while others followed Justice O'Connor's "stream of commerce plus" approach.¹⁴³ Still others found *Asahi*'s fractured opinion unhelpful and disregarded it altogether.¹⁴⁴ In light of this confusion, *J. McIntyre Machinery, Ltd. v. Nicastro*—the first personal jurisdiction case taken up by the Supreme Court in twenty years—was highly anticipated.¹⁴⁵

Plaintiff Robert Nicastro, who lived and worked in New Jersey, severed four fingers on his right hand while using a metal shearing machine on the job.¹⁴⁶ The machine was manufactured in England by J. McIntyre Machinery, Ltd. ("McIntyre"), where the company is incorporated and operates.¹⁴⁷ When Nicastro filed a products liability suit in New Jersey state court, McIntyre challenged jurisdiction.¹⁴⁸ The New Jersey courts held that the defendant must answer to suit in the forum state because the injury occurred there and McIntyre "knew or reasonably should have known" that its products might end up in New Jersey through the stream of commerce.¹⁴⁹ The U.S. Supreme Court then granted certiorari and reversed.¹⁵⁰

Much like *Asahi*, a majority of the *Nicastro* Court agreed on a holding—i.e., that McIntyre was not subject to personal jurisdiction in New Jersey—but no single rationale could garner support from five Justices.¹⁵¹ The plurality opinion, authored by Justice Kennedy, interpreted the purposeful availment requirement similarly to the O'Connor group from *Asahi*, proclaiming that stream of

¹⁴¹ *Asahi Metal Indus.*, 480 U.S. at 115–16.

¹⁴² See *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011) (acknowledging that the *Asahi* decision may have been responsible for condition at the lower courts).

¹⁴³ See Weintraub, *supra* note 92, at 533.

¹⁴⁴ *Id.*

¹⁴⁵ 564 U.S. 873 (2011). Indeed, the Court acknowledged as much in *Nicastro*, saying that "[t]his Court's *Asahi* decision may be responsible in part for [the lower court's] error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity." *Id.* at 879 (plurality opinion).

¹⁴⁶ *Id.* at 878; *id.* at 894–95 (Ginsberg, J., dissenting).

¹⁴⁷ *Id.* at 878 (plurality opinion).

¹⁴⁸ See *id.*

¹⁴⁹ *Id.* at 879.

¹⁵⁰ *Id.* at 887.

¹⁵¹ *Id.*; *id.* (Breyer, J., concurring).

commerce contacts are only enough for jurisdiction when the defendant “target[s]” the forum state, thus “manifest[ing] an intention to submit to the power of a sovereign.”¹⁵² Following that logic, the fact that a defendant like McIntyre “might have predicted that its goods would reach the forum State” generally will not support a finding of purposeful availment.¹⁵³ Kennedy argued that such an approach is consistent with state sovereignty principles—a “central concept” of personal jurisdiction doctrine—which he treated as separate and distinct from “considerations of fairness.”¹⁵⁴ Kennedy rejected the notion that fairness is the “touchstone of jurisdiction,”¹⁵⁵ and instead claimed that the defendant’s purposeful availment to the forum state is what “makes jurisdiction consistent with traditional notions of fair play and substantial justice.”¹⁵⁶

The other two who concurred in the judgment, Justices Breyer and Alito, took a different tack. They believed there was no purposeful availment under *World Wide Volkswagen*, or even Justice Brennan’s test from *Asahi*, because McIntyre did not have a “regular . . . flow” of products ending up in New Jersey, but only a single isolated sale.¹⁵⁷ The concurrence also deemed it unwise to use this case, which involved a traditional stream of commerce scenario, as a vehicle to announce a broadly applicable rule on personal jurisdiction in light of the modern realities of internet-related commerce and communication at issue in so many other cases.¹⁵⁸ Unlike the plurality, however, the concurrence did not diminish the importance of fairness considerations. Quite the opposite, they repeatedly expressed concerns that upholding the decision of the New Jersey courts could lead to “fundamentally unfair” results for defendants in future cases.¹⁵⁹ That said, the concurrence focused exclusively on the first fairness factor¹⁶⁰—burden on the defendant—failing to address other key factors, namely the plaintiff’s and forum state’s interests in having the case proceed in New Jersey.

¹⁵² *Id.* at 882 (plurality opinion).

¹⁵³ *Id.*

¹⁵⁴ *Id.* (positing that Justice Brennan’s opinion in *Asahi* “discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability”).

¹⁵⁵ *Id.* at 882–83.

¹⁵⁶ *Id.* at 880 (internal quotations omitted).

¹⁵⁷ *Id.* at 888–89 (Breyer, J., concurring). Perhaps a more notable difference between *Asahi* and *Nicastro* is that the defendant in *Asahi* was aware its products ended up in the forum state, while there was no evidence that Nicastro knew its machines were sold to customers in New Jersey. *Compare id.*, with *Asahi Metal Ind. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 107 (1987).

¹⁵⁸ *Id.* at 887 (“I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues.”).

¹⁵⁹ *Id.* at 891–92.

¹⁶⁰ *See id.*

Whereas the *Asahi* Court was unanimous in its holding of no jurisdiction, three Justices in *Nicastro* dissented because they believed the New Jersey courts properly subjected McIntyre to suit in their state.¹⁶¹ As a starting point, the dissent posited that modern personal jurisdiction doctrine gives “prime place to reason and fairness,” not state sovereignty.¹⁶² The dissent went on to reason that, by engaging a U.S. distributor to promote and distribute its products throughout the country, McIntyre had purposefully availed itself of New Jersey, the state with the largest scrap metal market in the United States.¹⁶³ Nor, the dissent explained, was there anything unfair about subjecting McIntyre to jurisdiction in New Jersey, where Nicastro lives, works, and was injured.¹⁶⁴ Unlike the defendant in *Asahi*, who was a component-part manufacturer, McIntyre had significant contacts with the United States: it sought out customers, engaged a distributor, attended tradeshows, and maintained a website advertising its products.¹⁶⁵ Accordingly, the dissent concluded, it would be “dead wrong” to hold that *Asahi* controls this case.¹⁶⁶

By failing to resolve the purposeful availment dilemma that litigants and lower courts had struggled with for decades, the *Nicastro* decision was, in simple terms, disappointing.¹⁶⁷ Even worse, the opinion muddied the waters about what role fairness ought to play in the personal jurisdiction analysis, with some of the Justices significantly downplaying its importance. Although *Nicastro* was the Court’s last word on purposeful availment, two more recent cases—*Bristol-Myers* and *Ford*—took on the nexus or connectedness requirement of specific jurisdiction directly, and addressed the fairness question as well, albeit in a less straightforward way.

¹⁶¹ *Id.* at 893, 910 (Ginsberg, J., joined by Sotomayor & Kagan, JJ., dissenting).

¹⁶² *Id.* at 903.

¹⁶³ *Id.* at 902–05.

¹⁶⁴ *Id.* at 899, 906–08.

¹⁶⁵ *Id.* at 908.

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 345 (2012) (opining that *Nicastro* “exacerbated rather than ameliorated the doctrinal confusion” and “demonstrated a disappointing level of judicial competence”); Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 44 (2012) (“For those expecting some clarity regarding the rules and standards for specific jurisdiction, especially regarding the meaning and application of the purposeful availment requirement, *Nicastro* is a disappointment.”); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1307 (2014) (explaining how authors at a symposium on *Nicastro* “bemoaned the outcome”).

b. Nexus Requirement

International Shoe did not create the categories of specific and general jurisdiction, nor did it neatly lay out the elements required for courts to exercise personal jurisdiction over nonresident defendants.¹⁶⁸ That said, our modern jurisdictional framework has been built on that landmark decision. Among other things, *International Shoe* drew a distinction between forum contacts that are related to the plaintiff's claims and those that are not. This has come to be known as the "nexus" or "connectedness" requirement and is a prerequisite to specific jurisdiction.

Not too long after *International Shoe*, the Court decided *McGee v. International Life Insurance Co.*—the first case directly to address the nexus requirement.¹⁶⁹ In *McGee*, the plaintiff's son was a resident of California who purchased a life insurance policy from the Empire Mutual Insurance Company ("Empire"), an Arizona corporation.¹⁷⁰ After it subsequently assumed Empire's insurance obligations, defendant International Life Insurance Company ("International Life"), a Texas company, mailed a reinsurance certificate to plaintiff Lulu McGee's son in California offering to insure him.¹⁷¹ He accepted that offer, named his mother as beneficiary, and mailed his premium payments to International Life's Texas office until he died two years later.¹⁷² When International Life refused to pay, McGee sued in California state court and won by default judgment.¹⁷³ International Life then collaterally attacked that judgment on jurisdictional grounds, and the Texas courts agreed.¹⁷⁴ The U.S. Supreme Court granted certiorari and reversed, concluding that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection" with the forum state.¹⁷⁵ The fact that the contract was International Life's *only* contact with California did not matter—a single contact is sufficient for specific jurisdiction where, as here, it was the basis of the plaintiff's claim.¹⁷⁶

¹⁶⁸ See *supra* note 94.

¹⁶⁹ *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

¹⁷⁰ *Id.* at 221.

¹⁷¹ *Id.* at 221–22.

¹⁷² *Id.*

¹⁷³ *Id.* at 221.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 223.

¹⁷⁶ *Id.*

It took almost three more decades for the Court to articulate the nexus requirement as we know it today.¹⁷⁷ In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, a helicopter owned by petitioner, a Colombian corporation, crashed in Peru killing four U.S. citizens, whose survivors then sued in Texas state court.¹⁷⁸ The decision in *Helicopteros* focused primarily on whether petitioner was subject to general personal jurisdiction in Texas since there was no specific jurisdiction.¹⁷⁹ More precisely, the Court explained, the plaintiffs had conceded that the nexus requirement was not satisfied in light of the fact that their claims “did not ‘arise out of,’ and are not related to,” the defendant’s contacts with Texas.¹⁸⁰

Accordingly, in the wake of *Helicopteros*, courts evaluating specific jurisdiction asked whether a defendant’s contacts with the forum state related or gave rise to the plaintiff’s claim. Naturally, however, the interpretation and application of that test took different forms.¹⁸¹ Some courts relied on tort law causation standards requiring proximate or legal cause for the nexus to be satisfied.¹⁸² Others took a less restrictive approach that focused on fairness, meaning the court evaluated whether jurisdiction was fair based on “the ties between the defendant’s forum contacts and the plaintiff’s claim.”¹⁸³ Finally, some courts used a “sliding scale,” meaning that the more contacts the defendant had with the forum state, the less connected those contacts needed to be with the plaintiff’s claim.¹⁸⁴ For quite some time, lower courts were left to figure out the contours of the nexus requirement on their own as the Supreme Court provided

¹⁷⁷ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417–19 (1984).

¹⁷⁸ *Id.* at 409–12.

¹⁷⁹ *Id.* at 415–16. For further discussion of *Helicopteros* with respect to general jurisdiction, see *infra* Section III.B.

¹⁸⁰ *Id.* at 415. The decision in *Helicopteros* was not unanimous, however. Justice Brennan dissented because he believed that the majority erred, inter alia, by refusing to distinguish between “contacts that are ‘related to’ the underlying cause of action and contacts that ‘give rise’ to the underlying cause of action.” *Id.* at 425 (Brennan, J., dissenting). In his view, the nexus requirement was satisfied in this case as the defendant’s contacts with Texas—the defendant purchased the helicopter involved in the crash in Texas and the pilot was trained there—were “related to” the plaintiffs’ wrongful death claims. *Id.* at 426. As discussed *infra*, it took another thirty years for the Court to finally resolve this. See *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1022 (2021).

¹⁸¹ For a detailed explanation of the different approaches to the nexus requirement, see Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 230–35 (2014).

¹⁸² *Id.* at 232.

¹⁸³ *Id.* at 233.

¹⁸⁴ *Id.*

little guidance.¹⁸⁵ Recently, however, that has changed with the decisions in *Bristol-Myers* and *Ford*.

The *Bristol-Myers* case was a putative class action filed in California state court on behalf of plaintiffs throughout the nation, the majority of whom were not residents of California.¹⁸⁶ The plaintiffs claimed they were injured by Plavix, a drug manufactured by Bristol-Myers Squibb Co. (“BMS”), a Delaware corporation with its principal place of business in New York.¹⁸⁷ BMS’s contacts with California were fairly extensive, having five research facilities, employing over 400 people, maintaining a state-government advocacy office, advertising extensively, and selling more than \$900 million in products between 2006–2012.¹⁸⁸ Consequently, unlike in *Asahi* and *Nicastro*, the question was not whether BMS had purposefully availed itself of the forum state, but whether the nexus was satisfied with respect to the non-California plaintiffs’ claims.¹⁸⁹ In a split decision, the California Supreme Court used the sliding scale approach and held that the nexus was met and BMS was subject to specific jurisdiction due to its extensive activities in California, including “the assertedly misleading marketing and promotion of” Plavix.¹⁹⁰ BMS petitioned for review, which the U.S. Supreme Court granted.¹⁹¹

In an eight-to-one decision, the Court reversed and held that BMS was not subject to specific jurisdiction in California with respect to the non-California plaintiffs’ claims.¹⁹² Concerning the nexus, the Court explained 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.’”¹⁹³ Rejecting the sliding scale approach, the Court went on to say that if there is no such affiliation, “specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State.”¹⁹⁴ Thus, the fact that BMS had

¹⁸⁵ See, e.g., *Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir. 1994) (calling the nexus requirement the “least developed prong” of specific jurisdiction).

¹⁸⁶ *Bristol-Myers Squibb v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1775 (2017).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1786.

¹⁸⁹ *Id.* at 1787 (“Bristol-Myers does not dispute that it has purposefully availed itself of California’s markets . . .”). Nor did BMS argue, perhaps more surprisingly, that the exercise of jurisdiction in California would offend traditional notions of fairness. See *id.*

¹⁹⁰ *Id.* at 1779.

¹⁹¹ *Id.* at 1773.

¹⁹² *Id.* at 1784.

¹⁹³ *Id.* at 1781 (alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). *Goodyear*, to be discussed further *infra*, is concerned primarily with general jurisdiction, and so this description of the nexus requirement from that case is arguably dicta.

¹⁹⁴ *Id.*

brick and mortar facilities and employed hundreds of people in California was of no moment since the company did not develop, manufacture, create a marketing plan, or work on regulatory approval for Plavix in the state.¹⁹⁵ Furthermore, the non-California plaintiffs were not prescribed the drug in California, did not ingest it there, nor did they suffer injury in the state.¹⁹⁶ Without a nexus, the majority reasoned, specific jurisdiction could not lie.¹⁹⁷

The majority relied on the fairness factors to bolster its conclusion. While acknowledging that those factors include the interests of the plaintiff and forum state, the Court stated that the burden on the defendant is the “primary concern.”¹⁹⁸ Echoing the tenor of Justice Kennedy’s opinion in *Nicastro*, the Court went on to explain that assessing this burden not only requires consideration of the practical problems of litigating in a distant forum, but “also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”¹⁹⁹ Simply put, instead of balancing the burden on the defendant against the other four factors (all of which relate to interstate federalism), the Court seemed to conflate the factors and treat them all under the umbrella of “burden on the defendant,” complicating the fairness analysis even further.

Justice Sotomayor, the sole dissenter in *Bristol-Myers*, believed that California could exercise specific jurisdiction over the nonresident plaintiffs’ claims.²⁰⁰ As an initial matter, the dissent concluded that the nexus requirement was, in fact, satisfied because BMS’s contacts with the forum state “relate to”—even if they did not give rise to—the non-California plaintiffs’ claims.²⁰¹ More pointedly, BMS advertised and distributed Plavix throughout the country, including in California, and that nationwide course of conduct is what allegedly injured the plaintiffs.²⁰² This is quite different, Justice Sotomayor explained, than trying to sue BMS in California for negligently maintaining the sidewalk outside its corporate headquarters in New York—a claim where the nexus clearly would not be met.²⁰³ Finally, with respect to fairness, the dissent said

¹⁹⁵ See *id.* (“Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1780 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1979)).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1789 (Sotomayor, J., dissenting).

²⁰¹ *Id.* at 1786.

²⁰² *Id.*

²⁰³ *Id.*

there was “no serious doubt that the exercise of jurisdiction over the nonresidents’ claims is reasonable.”²⁰⁴ BMS was already facing an identical suit by California plaintiffs, so there was no burden to the defendant; on the flip side, forcing the plaintiffs to litigate in several different states would be terribly inconvenient.²⁰⁵ Thus, like the majority, Justice Sotomayor relied on the fairness factors. In doing so, however, she reached the opposite conclusion: BMS *was* subject to specific jurisdiction in California.

Many viewed *Bristol-Myers* as a contraction of personal jurisdiction and predicted that it would pose a significant hurdle to plaintiffs in mass tort and other types of cases. To no surprise, defendants immediately started relying on *Bristol-Myers* to argue that courts lacked jurisdiction because there was an insufficient connection between their contacts with the forum state and the plaintiff’s claims.²⁰⁶ So, when the Supreme Court granted certiorari in *Ford* a few years later, it raised concerns that a bad situation for plaintiffs might get even worse.

Both *Ford* cases involved product liability suits against Ford Motor Co. (“Ford”)—one in Montana and the other in Minnesota—where the plaintiff resided in the forum state and was injured in an accident there that involved one of the defendant’s vehicles.²⁰⁷ It was also undisputed that Ford engaged in substantial business in both Montana and Minnesota, including advertising, selling, and servicing the model of vehicle at issue in both suits.²⁰⁸ Nonetheless, relying on *Bristol-Myers*, Ford argued that the nexus was not satisfied in either case because the specific vehicle in question was not designed, manufactured, or initially sold in the forum state.²⁰⁹ Because its conduct in the forum state did not “give[] rise to the plaintiff’s claim[],” Ford contended, there was no specific jurisdiction.²¹⁰ The Montana and Minnesota state courts disagreed, holding that

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *See, e.g.,* Hinkle v. Cont’l Motors, Inc., 268 F. Supp. 3d 1312, 1323 (M.D. Fla. 2017) (“Plaintiffs do not meet their burden to demonstrate a nexus between the alleged commission of a tortious act, injury to plaintiffs or alleged breach of contract and the Defendants’ business activity in Florida.”); Jordan v. Bayer Corp., No. 4:17-CV-865, 2017 WL 3006993, at *4 (E.D. Mo. July 14, 2017) (holding that there was no personal jurisdiction as to the non-resident plaintiffs’ claims because “there [was] no connection between the forum and the specific claims at issue” (citation and internal quotations omitted)).

²⁰⁷ Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1023 (2021). The vehicle involved in the Montana suit was a 1996 Ford Explorer and the one in the Minnesota suit was a 1994 Crown Victoria. *Id.*

²⁰⁸ *Id.* at 1022–23.

²⁰⁹ *Id.* at 1023.

²¹⁰ *Id.*

Ford was subject to specific jurisdiction in both cases.²¹¹ The U.S. Supreme Court granted review and affirmed.²¹²

Although the Court's holding was unanimous, the Justices in *Ford* once again parted ways as to rationale. The majority opinion, authored by Justice Kagan, explained that for specific jurisdiction to lie, the suit must "arise out of or relate to the defendant's contacts with the forum."²¹³ Stated otherwise, while there must be a connection between a defendant's forum contacts and a plaintiff's claim, that does not necessarily have to be a strict causal relationship. Where, as here, the plaintiffs were residents of the forum states and the allegedly defective products were used and caused injury in the forum states, a sufficient link exists to support the exercise of jurisdiction.²¹⁴ Beyond finding that the nexus requirement was satisfied, the majority reasoned that subjecting Ford to jurisdiction in these cases comported with "underlying values of ensuring fairness and protecting interstate federalism,"²¹⁵ as will be discussed further in Part III of this Article.

Two separate concurrences were also filed in *Ford*: one authored by Justice Alito and the other by Justice Gorsuch, which Justice Thomas joined.²¹⁶ Consistent with the concurrence he joined in *Nicaastro*, Justice Alito was wary about announcing a new rule on personal jurisdiction in *Ford*, given the case did not reflect the realities of the modern business world.²¹⁷ Rather, he believed the *Ford* cases could easily be decided under current precedent "without any alteration or refinement of our case law on specific personal jurisdiction."²¹⁸

Justice Gorsuch's concurrence, on the other hand, raised more fundamental questions about current personal jurisdiction jurisprudence.²¹⁹ What is difficult about personal jurisdiction, Gorsuch opined, is not reaching the right outcome, but making sense of the case law along the way.²²⁰ He pointed out

²¹¹ *Id.*

²¹² *Id.* at 1022.

²¹³ *Id.* at 1026 (quoting *Bristol-Myers Squibb v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017)).

²¹⁴ *Id.* at 1032.

²¹⁵ *Id.* at 1026 n.2.

²¹⁶ *Id.* at 1032 (Alito, J., concurring); *id.* at 1034 (Gorsuch, J., joined by Thomas, J., concurring).

²¹⁷ *See id.* at 1032 (Alito, J., concurring). The new rule or "innovation" Justice Alito identified was the majority's position that it is sufficient for specific jurisdiction if the defendant's contacts relate to the plaintiff's claim, even in the absence of a causal link. *Id.* at 1033. However, Justice Alito failed to explain why this should be considered an "innovation," seeing how that Court first described the nexus requirement in a disjunctive manner (the plaintiff's claims must "arise out of or relate to" the defendant's contacts) almost four decades ago in *Helicopteros*. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (emphasis added).

²¹⁸ *Ford*, 141 S. Ct. at 1032.

²¹⁹ *See id.* at 1034–39 (Gorsuch, J., concurring).

²²⁰ *Id.* at 1039.

inconsistencies with the doctrine—for example, that a global conglomerate is generally only subject to general jurisdiction in one or two states (i.e., where it is incorporated and has its principal place of business) while individual defendants can be sued in any state where they can be found and served under a “tag” jurisdiction theory.²²¹ Justice Gorsuch then wondered if, at the end of the day, the Court’s modern personal jurisdiction cases are simply “trying to assess fairly a corporate defendant’s presence or consent,” which, of course, was the test before *International Shoe*.²²²

While *Ford* was not the death knell for plaintiffs that many feared, it left a lot of questions unanswered. Before addressing how to use the lessons from *Ford* to move toward a more consistent approach to personal jurisdiction doctrine, gaining a full understanding of what has transpired since *International Shoe* with respect to general jurisdiction and the traditional grounds for personal jurisdiction—meaning in rem, tag jurisdiction, and consent—is key.

2. General Jurisdiction

In contrast to specific jurisdiction, where the Supreme Court has weighed in time and again since *International Shoe* as discussed above, the cases on general jurisdiction have been few and far between. In *Perkins v. Benguet Consolidated Mining Co.*, decided less than a decade after *International Shoe*, the plaintiff, who was not a resident of Ohio, filed a suit in Ohio state court against the defendant, a mining company incorporated in the Philippines.²²³ Before the suit, the president of the mining company had returned to his home in Ohio and established an office because operations in the Philippines had completely halted as a result of Japanese occupation during World War II.²²⁴ From Ohio, the president conducted business, corresponded on behalf of the company, and distributed salary checks, among other things.²²⁵ Although it was undisputed that the plaintiff’s claims did not arise from and were not related to those contacts with Ohio, the Supreme Court nevertheless held that the defendant was subject to personal jurisdiction in Ohio because it had “continuous and systematic” contacts with the forum state.²²⁶ Thus, *Perkins* laid the groundwork for the

²²¹ *Id.* at 1038; see also *infra* Section IV.B.

²²² *Ford*, 141 S. Ct at 1039 (Gorsuch, J., concurring). For further discussion of Justice Gorsuch’s concurrence, see Patrick J. Borchers, *Ford Motor Co. v. Montana Eighth Judicial District Court and ‘Corporate Tag Jurisdiction’ in the Pennoyer Era*, 72 CASE W. RESV. L. REV. 45, 51–57 (2021).

²²³ 342 U.S. 437, 447–48 (1952).

²²⁴ *Id.* at 447–48.

²²⁵ *Id.*

²²⁶ *Id.* at 448–49.

general personal jurisdiction doctrine, but failed to provide any guidance other than that the defendant's contacts with the forum state must be continuous and systematic.

Four decades later, the Supreme Court faced the issue of general jurisdiction again in *Helicopteros*. As discussed briefly above, the case involved a lawsuit by four U.S. citizens whose family members were killed in a helicopter crash in Peru.²²⁷ The plaintiffs sued the owner of the helicopter, a Colombian corporation, in Texas state court on a general jurisdiction theory.²²⁸ Although the defendant had no offices in Texas, its CEO went to Houston for a contract negotiation session, it purchased helicopters and other equipment from a Texas company, and it sent personnel to Texas for training.²²⁹ In the end, however, the Supreme Court deemed such contacts insufficient to support a finding of general personal jurisdiction because they were neither continuous nor systematic.²³⁰

Only a few years after *Helicopteros*, the Supreme Court handed down its decision in *Asahi*, which left open the question of whether parties that place their products into the stream of commerce are subject to specific jurisdiction in states where those products are distributed and cause injury.²³¹ This lack of clarity with respect to specific jurisdiction often caused litigants and lower courts to turn to general jurisdiction instead, to hold defendants accountable. More specifically, a theory of "doing-business" jurisdiction emerged whereby companies that engaged in regular business activities in a forum state or whose products ended up in the state through established channels were considered to have continuous and systematic contacts and, therefore, subject to general jurisdiction.²³² Consequently, companies that participated in nationwide business activities could be sued in any state on any claim, even if that claim was wholly unrelated to their contacts with the forum state.

Over time, doing-business jurisdiction became the subject of substantial criticism among scholars who called the doctrine ill-defined, unpredictable, and

²²⁷ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 409–10 (1984).

²²⁸ *Id.* at 415–16.

²²⁹ *Id.* at 416.

²³⁰ *Id.* at 418–19. As discussed earlier, there was a strong argument that the defendant was subject to specific jurisdiction in Texas, but the plaintiffs didn't raise that theory of jurisdiction. *See supra* note 179.

²³¹ *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 116 (1987).

²³² *See, e.g.*, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1352 (2015) ("It was thought that if a corporation was doing business in the forum, in the sense of having continuous and systematic contacts with the forum, it would be subject to general jurisdiction there."); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173 (2001) ("The principle of doing-business jurisdiction seems simple on the surface: the defendant business has such strong ties with the state that it may be sued there on any cause of action.")

overly broad.²³³ Yet, lower courts generally accepted the doctrine and applied it liberally to subject nationwide corporations to jurisdiction in just about any state.²³⁴ So, when the Court decided in 2010 to review the issue of general jurisdiction in *Goodyear*—the same year it granted review in *Nicastro*—it caught many by surprise.²³⁵

The plaintiffs in *Goodyear* were the parents of two thirteen-year-old boys from North Carolina who were killed in a bus accident while on a trip with their soccer team in France.²³⁶ The plaintiffs claimed the accident was caused by defective tires that had been manufactured in Turkey by a foreign subsidiary of The Goodyear Tire and Rubber Company (“Goodyear”), which is incorporated and headquartered in Ohio.²³⁷ The suit was filed in North Carolina state court and the Goodyear subsidiaries moved to dismiss for lack of personal jurisdiction—an argument that was rejected since their products continuously and systematically entered the forum state through the stream of commerce.²³⁸ The U.S. Supreme Court granted certiorari and reversed.²³⁹

The Court began by acknowledging that it had only considered the general jurisdiction doctrine in two prior cases (*Perkins* and *Helicopteros*) since *International Shoe*.²⁴⁰ That lack of guidance caused lower courts—including the North Carolina courts in this case—to lose sight of the distinction between general—or all-purpose—jurisdiction and case-specific jurisdiction.²⁴¹ More to the point, while the flow of products into a forum state may be sufficient for specific jurisdiction, those types of contacts alone are never enough for general jurisdiction.²⁴² Rather, the Court held, defendants are only subject to general jurisdiction in a forum state if their contacts are so continuous and systematic “as to render them essentially at home” there.²⁴³ For individuals, the paradigm forum where they are “at home” is place of domicile, and for corporations that paradigm is place of incorporation and principal place of business.²⁴⁴ Thus, because the Goodyear subsidiaries were not “at home” in North Carolina, they

²³³ See, e.g., Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 129 (2001).

²³⁴ See Monestier, *supra* note 232, at 1352.

²³⁵ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

²³⁶ *Id.* at 918.

²³⁷ *Id.*

²³⁸ *Id.* at 922–23.

²³⁹ *Id.* at 931.

²⁴⁰ *Id.* at 925.

²⁴¹ See *id.* at 927.

²⁴² *Id.*

²⁴³ *Id.* at 919.

²⁴⁴ *Id.* at 924.

were not subject to general jurisdiction and the motion to dismiss should have been granted.²⁴⁵

One might expect *Goodyear* to have effected an immediate shift in personal jurisdiction doctrine. However, because lower courts disagreed on whether the *Goodyear* Court actually intended to announce a new test for general jurisdiction or whether the “at home” language was mere dicta, the weight of the decision was slow to be realized.²⁴⁶ Indeed, in the wake of *Goodyear*, a number of courts continued to subject corporate defendants to jurisdiction in states other than those in which their principal place of business or place of incorporation were located, based on a doing-business theory of general jurisdiction.²⁴⁷ It was not until the Supreme Court decided *Daimler* a few years later that the full impact of *Goodyear* became clear.

The *Daimler* case involved allegations of human rights violations that occurred during Argentina’s “Dirty War” from 1976–1983.²⁴⁸ In 2004, a group of Argentinian residents filed suit in the U.S. District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft (“Daimler”), a German company headquartered in Stuttgart, Germany, that manufactures Mercedes-Benz vehicles.²⁴⁹ Plaintiffs claimed that Daimler’s Argentinian subsidiary, Mercedes-Benz Argentina (“MB Argentina”), worked with government officials during the war to “kidnap, detain, torture, and kill certain MB Argentina workers,” including the plaintiffs and/or their family members.²⁵⁰ The complaint alleged that the defendant was subject to general personal jurisdiction in California based on the continuous and systematic contacts of Daimler’s U.S. subsidiary, Mercedes-Benz USA, LLC (“MB USA”)—a

²⁴⁵ *Id.* at 929.

²⁴⁶ See, e.g., Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 714 (2019) (“Following *Goodyear*, the courts and commentators disagreed on whether the Court had changed the well-accepted tests for general jurisdiction.”).

²⁴⁷ See, e.g., J.B. *ex rel.* Benjamin v. Abbott Labs. Inc., No. 12-CV-385, 2013 WL 452807, at *3 (N.D. Ill. Feb. 6, 2013) (distinguishing *Goodyear* and holding the defendant subject to general jurisdiction based on its “continuous or systematic general business contacts” with the forum state); Waterfall Homeowners Ass’n v. Viega, Inc., No. 2:11-CV-01498-RJ, 2012 WL 5944634, at *3 (D. Nev. Nov. 26, 2012) (refusing to apply *Goodyear* because the defendant was the parent company, not a subsidiary, and therefore subject to general jurisdiction); Ashbury Int’l Grp., Inc. v. Cadex Defence, Inc., No. 3:11CV00079, 2012 WL 4325183, at *6 (W.D. Va. Sept. 20, 2012) (holding that the plaintiff made a prima facie showing of general jurisdiction even though “[t]he record is devoid of many of the factors traditionally associated with a physical presence in the forum state, such as an official agent, employees, a business license, incorporation, or corporate facilities”); McFadden v. Fuyao N. Am. Inc., No. 10-CV-14457, 2012 WL 1230046, at *4 (E.D. Mich. Apr. 12, 2012) (distinguishing *Goodyear* based on the nature of the defendant’s contacts with the forum state).

²⁴⁸ *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

²⁴⁹ *Id.* at 120–21.

²⁵⁰ *Id.* at 121.

Delaware corporation with its principal place of business in New Jersey that distributes Daimler-manufactured vehicles in California.²⁵¹

Daimler filed a motion to dismiss for lack of personal jurisdiction, which the district court granted because (i) Daimler's own contacts with California were insufficient for general jurisdiction, and (ii) MB USA's contacts with California were not attributable to Daimler.²⁵² On appeal, the Ninth Circuit reversed on the ground that MB USA was an agent of Daimler's and, therefore, its contacts could be imputed to the parent company.²⁵³ When Daimler's petition for certiorari was granted, observers expected the U.S. Supreme Court to resolve the question of when a subsidiary's contacts with a forum state will subject a parent company to personal jurisdiction.²⁵⁴ However, the *Daimler* Court managed to sidestep that issue by assuming, for the sake of argument, that MB USA's contacts were attributable to the parent company.²⁵⁵ It went on to hold that even if that were the case, Daimler was not subject to general jurisdiction in California under *Goodyear* because it is not "fairly regarded at home" there.²⁵⁶ Making clear that it had indeed established a new test for general jurisdiction in *Goodyear*, the Court explicitly rejected the doing-business theory calling it "unacceptably grasping."²⁵⁷ It is not enough for the defendant to have "continuous and systematic" contacts with the forum state, the Court explained.²⁵⁸ Instead, those contacts must be so continuous and systematic as to render the defendant "essentially at home."²⁵⁹ Finally, the Court reiterated what it said in *Goodyear*: the "paradigm forum" for corporations like Daimler to be "at home" is the state of incorporation and principal place of business.²⁶⁰ Because neither Daimler nor MB USA was incorporated in California or maintained a principal place of business there, general jurisdiction did not lie and the case was dismissed.²⁶¹

²⁵¹ *Id.*

²⁵² *Id.* at 124.

²⁵³ *Id.*

²⁵⁴ *See id.* at 134–36 (explaining that some courts of appeals have held that a subsidiary's contacts will only be imputed if the subsidiary is the alter ego of the parent, while other courts have used a less demanding test that asks if there is an agency relationship between parent and subsidiary).

²⁵⁵ *Id.* at 136.

²⁵⁶ *Id.* at 136–37 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).

²⁵⁷ *Id.* at 137–38.

²⁵⁸ *Id.* at 138–39.

²⁵⁹ *Id.* (quoting *Goodyear*, 564 U.S. at 919).

²⁶⁰ *Id.* at 137 (quoting *Goodyear*, 564 U.S. at 924). The *Daimler* Court acknowledged that general jurisdiction for corporations is not necessarily limited to where they are incorporated and have their principal place of business, but said that only in "exceptional" circumstances would general jurisdiction extend beyond the paradigm fora. *Id.* at 139 n.19 (citation omitted).

²⁶¹ *Id.* at 139.

Although the *Daimler* Court was unanimous in its holding, Justice Sotomayor would have decided the case on different grounds.²⁶² In her view, the problem was not that *Daimler* lacked sufficient contacts with California for general jurisdiction, but that exercising jurisdiction over a foreign defendant under the circumstances of this case would be unfair.²⁶³ Much like *Asahi*, the plaintiffs in *Daimler* “failed to show that it would be more convenient to litigate in California than in Germany, a sovereign with a far greater interest in resolving the dispute.”²⁶⁴ Because subjecting *Daimler* to general jurisdiction in California would offend traditional notions of fair play and substantial justice, the concurrence reasoned, dismissal was appropriate.²⁶⁵

In relying on the fairness prong, Justice Sotomayor acknowledged that the Court had not yet addressed the question whether the fairness prong applies to general jurisdiction or is relevant only to specific jurisdiction.²⁶⁶ She believed, however, that it was better to leave that question for a later case when it could be appropriately briefed and argued by the parties and considered by the lower courts.²⁶⁷ In the meantime, nothing precluded the Court from deciding the current case on fairness grounds—a safer course of action than announcing a new test for general jurisdiction with broad implications.²⁶⁸ To be sure, the courts of appeals that considered the issue before *Daimler* uniformly held that the reasonableness factors apply to both general and specific jurisdiction.²⁶⁹

The *Daimler* majority dismissed the concurrence’s fairness argument in a footnote at the end of its opinion.²⁷⁰ Although the question was not raised, briefed, or argued below,²⁷¹ the Court concluded that the fairness factors apply only to specific jurisdiction.²⁷² With respect to general jurisdiction, the majority reasoned that “any second-step [reasonableness] inquiry would be superfluous.”²⁷³ Stated otherwise, the *Daimler* majority believed that fairness simply should not be part of the general jurisdiction analysis. Perhaps this aspect of *Daimler* should not have been surprising, since fairness considerations were

²⁶² *Id.* at 142 (Sotomayor, J., concurring).

²⁶³ *Id.* at 143–44.

²⁶⁴ *Id.* at 146.

²⁶⁵ *Id.* at 160.

²⁶⁶ *Id.* at 144–45.

²⁶⁷ *See id.* at 147.

²⁶⁸ *See id.* at 143–44.

²⁶⁹ *Id.* at 144 n.1.

²⁷⁰ *Id.* at 140 n.20 (majority opinion).

²⁷¹ *Id.* at 146–47 (Sotomayor, J., concurring).

²⁷² *Id.* at 140–41 n.20 (majority opinion).

²⁷³ *Id.* at 140 n.20.

relegated to the backwaters by several of the Justices just a few years prior in *Nicastro*. Nevertheless, as discussed Part III, not only was the *Daimler* Court wrong on this point, but because this aspect of the decision was unnecessary to the holding, it is also textbook dictum that is not binding on future courts.²⁷⁴

Any doubt about the implications of *Daimler*—for example, whether it might only limit general jurisdiction over foreign corporations whose primary contacts are through its subsidiary—were quashed just a few years later when the Supreme Court decided *BNSF Railway Co. v. Tyrrell*.²⁷⁵ *Tyrrell* involved two consolidated cases brought in Montana State Court under the Federal Employers’ Liability Act (“FELA”) against the BNSF Railway Company, a Delaware corporation with its principal place of business in Texas.²⁷⁶ The plaintiffs in the cases were not residents of Montana and the alleged injuries occurred elsewhere, so there was no claim of specific jurisdiction.²⁷⁷ However, the Montana courts held that BNSF was subject to general jurisdiction because of its significant contacts with the forum state, including 2,061 miles of railroad track, about 2,100 employees, and a brick-and-mortar facility.²⁷⁸ On review, the Supreme Court reversed holding that defendant was not “at home” in the forum state because Montana was not BNSF’s place of incorporation or principal place of business.²⁷⁹ Nor were there any exceptional circumstances to support general jurisdiction in this case as in *Perkins*.²⁸⁰ Lastly, the Court refused to consider the plaintiffs’ argument that BNSF had consented to jurisdiction in Montana since that issue was not addressed by the court below.²⁸¹

This final part of the *Tyrrell* opinion—touching on the topic of consent—aptly foreshadowed what was to come in personal jurisdiction jurisprudence. As the Supreme Court made it more difficult to establish specific jurisdiction in *Nicastro/BMS* and general jurisdiction in *Goodyear/Daimler*, plaintiffs turned to traditional, *Pennoyer*-era grounds for personal jurisdiction, namely consent, to try to sue corporations other than where they are incorporated or headquartered. This effort

²⁷⁴ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (explaining that the Court is bound only by “those portions of the opinion necessary to that result”); see also Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 LOY. L.A. L. REV. 587, 589 (2021) (“Judicial efficiency dicta are statements made in judicial opinions about issues involved in the case that are likely to present themselves in the future, but these statements are not necessary for the outcome of the particular case before the court.”).

²⁷⁵ 137 S. Ct. 1549, 1554 (2017).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 1559. Justice Sotomayor dissented from this part of the opinion, “continu[ing] to disagree with the path the Court struck in *Daimler*.” *Id.* at 1560 (Sotomayor, J., concurring).

²⁸⁰ *Id.* at 1558 (majority opinion).

²⁸¹ *Id.*

has been met with varying degrees of success with lower courts divided on the question, making Supreme Court intervention likely. Before addressing the consent issue and setting forth a proposal for how that (and all other personal jurisdiction questions should be approached), the next section of this Article briefly discusses post-*International Shoe* Court treatment of in rem and tag jurisdiction, two other traditional bases for personal jurisdiction.

B. *Traditional Grounds for Personal Jurisdiction*

As discussed in Part I, courts relied on various traditional theories of personal jurisdiction before *International Shoe* to force nonresident defendants to answer to suit. At the time of *Pennoyer*, it was well settled that nonresident defendants could consent to jurisdiction in a forum state or be forced to litigate there under an in rem theory of jurisdiction based on property ownership.²⁸² *Pennoyer* also reaffirmed the longstanding rule that nonresident defendants who were served, or tagged, while physically present in the forum state would be subject to personal jurisdiction there.²⁸³ Finally, in the years leading up to *International Shoe*, courts relied on a new theory of constructive presence to subject corporations to suit in states where they conducted substantial business.²⁸⁴ While this presence theory was clearly supplanted by the minimum contacts test announced in *International Shoe*, questions remained about how that decision affected in rem jurisdiction, tag jurisdiction, and consent—i.e., the traditional theories of jurisdiction that existed at the time of *Pennoyer*.

1. *In Rem Jurisdiction*

In rem jurisdiction, which refers to an action “taken directly against the defendant’s property,”²⁸⁵ has a storied history in U.S. jurisprudence. It was in long use before *Pennoyer*,²⁸⁶ and the Court reaffirmed its continuing vitality by noting that the result may have been different if plaintiff had relied on in rem rather than personal jurisdiction, since the defendant owned property in

²⁸² *Pennoyer v. Neff*, 95 U.S. 714, 723–24, 729 (1877).

²⁸³ *Id.* at 733 (“To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.”).

²⁸⁴ *See, e.g., Bank of Am. v. Whitney Cent. Nat’l Bank*, 261 US 171, 173 (1923); *St. Louis Sw. Ry. Co. of Tex. v. Alexander*, 227 US 218, 227 (1913).

²⁸⁵ *In Rem Jurisdiction*, BLACK’S LAW DICTIONARY (6th ed. 1990).

²⁸⁶ *Pennoyer*, 95 U.S. at 722 (citing the “well-established principle[] of public law . . . that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory”).

Oregon.²⁸⁷ More pointedly, the Court explained, had the defendant's property been "brought under control of the court by attachment or some other equivalent act" at the start of the suit instead of at the end to satisfy the judgment, jurisdiction would have been proper.²⁸⁸ For the next century after *Pennoyer*, courts continued to rely on and even expand in rem theories of jurisdiction to exercise power over nonresident defendants so plaintiffs could sue in a more convenient forum.²⁸⁹ Eventually, however, litigants started to question whether the decision in *International Shoe*, which transformed personal jurisdiction doctrine, impacted the in rem jurisdiction analysis too.

The issue ultimately made its way to the Supreme Court in *Shaffer v. Heitner*, a case filed in Delaware state court by a nonresident shareholder of Greyhound Corp., a Delaware company, against officers and directors of the corporation who were not residents of the forum state.²⁹⁰ The plaintiff, who claimed the defendants had breached their fiduciary duties, secured jurisdiction through an in rem procedure under Delaware law that allowed courts to sequester property owned by the defendant located in the forum state.²⁹¹ The property at issue in this case was the defendants' stock in Greyhound, which, per the relevant law, was deemed located in Delaware.²⁹² Defendants responded by arguing, among other things, that jurisdiction was improper since they did not have sufficient contacts with Delaware as required by *International Shoe*.²⁹³ Although the lower courts rejected the defendants' argument, the Supreme Court granted certiorari and reversed.²⁹⁴

As an initial matter, the Court acknowledged the long history in this country of securing jurisdiction based exclusively on the presence of property within the forum state.²⁹⁵ But, the Court went on to explain, jurisdictional practices must

²⁸⁷ *Id.* at 727.

²⁸⁸ *Id.* at 727–28.

²⁸⁹ *See, e.g.,* *Davis v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 217 U.S. 157 (1910) (holding that an Ohio-based defendant that owned property in Iowa could be sued in Iowa over an accident that occurred in Illinois); *Louisville & Nashville R.R. Co., v. F.E. Deer*, 200 U.S. 176 (1906) (holding that a court can exercise quasi in rem jurisdiction over a debt, i.e., intangible property, that travels with the debtor); *Harris v. Balk*, 198 U.S. 215 (1905) (same).

²⁹⁰ 433 U.S. 186 (1977).

²⁹¹ *Id.* at 190–91.

²⁹² *Id.* at 191 & n.9. As Justice Stevens noted in his concurrence, Delaware is the only state that treats place of incorporation as the situs of corporate stock when the owner and custodian reside elsewhere. *Id.* at 218 (Stevens, J., concurring).

²⁹³ *Id.* at 193 (majority opinion).

²⁹⁴ *Id.* at 193, 217.

²⁹⁵ *Id.* at 198–200.

comport with due process²⁹⁶—whether it is a well-established practice such as in rem jurisdiction or a novel jurisdictional practice like the one at issue in *International Shoe*.²⁹⁷ Stated differently, “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny,” meaning the minimum contacts test applies even when the plaintiff relies on an in rem theory of jurisdiction.²⁹⁸ It makes sense to apply the same test, the Court reasoned, because the assertion of jurisdiction over property is really no different than asserting jurisdiction over the owner of that property.²⁹⁹ Applying the *International Shoe* test, the Court held that the nonresident defendants “have simply had nothing to do with the State of Delaware” nor did they “expect to be haled before a Delaware court.”³⁰⁰ Accordingly, the Supreme Court reversed because there was no personal jurisdiction.³⁰¹

Notably, in reaching this decision, the *Shaffer* Court suggested that if Delaware had a strong interest in securing jurisdiction over corporate fiduciaries like the defendants, it could enact a statute “clearly designed to protect that interest.”³⁰² After *Shaffer*, that is precisely what the Delaware legislature did, adopting a statute that treats acceptance of a position as an officer or director in a Delaware corporation as consent to jurisdiction in the state.³⁰³ Although courts have upheld these types of statutes so far, consent to jurisdiction has come under attack in recent years and will likely be addressed by the Supreme Court in the near future. But, before saying more about consent, the next section of this Article explains how the other traditional ground for jurisdiction—transient or tag jurisdiction—has been approached since *International Shoe*.

²⁹⁶ *Id.* at 211–12.

²⁹⁷ See *supra* note 76 and accompanying text (explaining that the relevant statute in *International Shoe* allowed a nonresident defendant to be subjected to jurisdiction by notice through registered mail).

²⁹⁸ *Shaffer*, 433 U.S. at 212.

²⁹⁹ *Id.* (“The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification.”).

³⁰⁰ *Id.* at 216.

³⁰¹ *Id.* at 216–17.

³⁰² *Id.* at 215–16.

³⁰³ DEL. CODE ANN. tit. 10 § 3114 (West 2009); see also Eric A. Chiappinelli, *The Myth of Director Consent: After Shaffer, Beyond Nicastro*, 37 DEL. J. CORP. L. 783, 814–15 (2013) (arguing against the constitutionality of implied consent statutes); Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377 (2020) (proposing a registration-based consent to jurisdiction statute).

2. *Transient or “Tag” Jurisdiction*

Under *Pennoyer*, a nonresident defendant who was served, or tagged, while physically present in the forum state was subject to personal jurisdiction there.³⁰⁴ Yet the Supreme Court’s pronouncement in *Shaffer* that the minimum contacts test applies to in rem jurisdiction gave litigants reason to question whether the same was true for tag jurisdiction. The issue was presented to the Supreme Court in *Burnham v. Superior Court*, a divorce proceeding in which the husband was served while present in California for reasons unrelated to the lawsuit.³⁰⁵ Relying on *Shaffer*, the defendant argued that he was not subject to personal jurisdiction in California because he lacked the requisite contacts under *International Shoe*.³⁰⁶ After the California courts rejected that argument, the Supreme Court granted certiorari.³⁰⁷ Ultimately, the Supreme Court held that the defendant was subject to personal jurisdiction in California, but the Justices could not agree on the rationale.³⁰⁸

There were two primary opinions in *Burnham*—one written by Justice Scalia and the other by Justice Brennan.³⁰⁹ Beginning with Justice Scalia, he acknowledged that *Shaffer* was the defendant’s best argument, but then distinguished that case because the defendants in both *Shaffer* and *International Shoe*—unlike the defendant here—were not physically present in the forum state.³¹⁰ Absent presence, the question became whether the defendant had sufficient contacts with the forum state—that is, did the defendant conduct business there (as in *International Shoe*)? Or did the defendant own property there (as in *Shaffer*)? Because the *Shaffer* Court equated in rem and in personam jurisdiction—both involved an absent defendant’s contacts with the forum state—applying the same due process test to both was reasonable.³¹¹ In Justice Scalia’s view, however, tag jurisdiction was different not only because the defendant was physically present in the forum state but also due to its “pedigree.”³¹² Simply put, the enduring and widespread use of tag jurisdiction

³⁰⁴ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (“To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, *he must be brought within its jurisdiction by service of process within the State*, or his voluntary appearance.” (emphasis added)).

³⁰⁵ 495 U.S. 604 (1990) (plurality opinion).

³⁰⁶ *Id.* at 620.

³⁰⁷ *Id.* at 608.

³⁰⁸ *Id.* at 627.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 620.

³¹¹ *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (explaining that the claim that an “assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property” is a fiction).

³¹² *Burnham*, 495 U.S. at 620.

in and of itself satisfies *International Shoe*'s "traditional notions of fair play and substantial justice" standard.³¹³ As a longstanding American tradition, there was no need to conduct an independent inquiry into the fairness of tag jurisdiction.³¹⁴ That it comports with due process, Scalia claimed, is evident on its face.³¹⁵

Justice Brennan's reasons for upholding jurisdiction in *Burnham* were different, as he disagreed that tag jurisdiction "automatically comports with due process simply by virtue of its 'pedigree.'"³¹⁶ Such an approach, in his opinion, was foreclosed by *International Shoe* and *Shaffer*.³¹⁷ Instead, courts must judge the use of tag jurisdiction in a particular case against "contemporary notions of due process"³¹⁸ by assessing whether there is a sufficient "relationship among the defendant, the forum, and the litigation" to support jurisdiction.³¹⁹ Following that rationale, Justice Brennan then determined that the defendant had purposefully availed himself of the forum state by choosing to visit California where he would benefit from the state's resources and services.³²⁰ Moreover, because tag jurisdiction is a century-old rule, the defendant in *Burnham* was on notice that he would be subject to suit in California if served there.³²¹ Finally, litigating in California would not be particularly burdensome for the defendant since he already traveled there at least one other time.³²² Consequently, Justice Brennan concluded that the use of tag jurisdiction in this case satisfied due process.³²³

In the end, *Burnham* only decided that the exercise of tag jurisdiction in that particular case was appropriate. Nevertheless, in the three decades since *Burnham*, tag jurisdiction has rarely been challenged, suggesting that litigants view the Court's decision as an across-the-board affirmation of this jurisdictional practice.³²⁴ And, in the few instances where tag jurisdiction has

³¹³ *Id.* at 621–22 (quoting *Shaffer*, 433 U.S. at 212); *see also id.* at 628 (White, J., concurring) ("The rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum State, without more, has been and is so widely accepted throughout this country that I could not possibly strike it down, either on its face or as applied in this case, on the ground that it denies due process of law guaranteed by the Fourteenth Amendment.").

³¹⁴ *Id.* at 621–22, 624–25 (plurality opinion).

³¹⁵ *Id.* at 627.

³¹⁶ *Id.* at 629 (Brennan, J., concurring).

³¹⁷ *Id.*

³¹⁸ *Id.* at 630.

³¹⁹ *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

³²⁰ *Burnham*, 495 U.S. at 637–38 (Brennan, J., concurring).

³²¹ *Id.* at 635–37.

³²² *Id.* at 638–39.

³²³ *Id.* at 628.

³²⁴ To be clear, tag jurisdiction has been challenged when plaintiffs have attempted to extend *Burnham*'s holding from individual defendants to corporations. *See, e.g.,* *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1071

been challenged, courts have upheld the practice unanimously,³²⁵ often without explanation and even extending it to the transnational context.³²⁶ So, while the chances of the Supreme Court revisiting *Burnham* anytime soon appear slim,³²⁷ the issue of consent—particularly with respect to corporate defendants—is percolating in the lower courts and will likely make its way to the high court in the near future.

3. *Consent to Jurisdiction*

For as long as courts have litigated questions of personal jurisdiction, they have recognized a nonresident defendant's ability to consent to be sued in a particular forum state. Sometimes this is referred to as "consent,"³²⁸ while other courts talk about the defendant making a "voluntary appearance."³²⁹ Either way, the bottom line is that defendants can agree to be sued outside of where they reside. A forum selection clause in a contract—even one that is non-negotiated—provides the paradigm example of jurisdictional consent.³³⁰ But questions about what other forms of consent are sufficient to subject nonresident defendants to jurisdiction have vexed courts for more than a century.

(9th Cir. 2014); *WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 352 (D. Conn. 2011). The vast majority of lower courts have upheld such challenges refusing to subject corporate defendants to tag jurisdiction. See Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 N.M. L. REV. 1, 26–35 (2016). Because tag jurisdiction over corporations is related to service on a registered agent and consent, it will be discussed further in the next section of the Article.

³²⁵ See *C.S.B. Commodities, Inc. v. Urban Trend LTD*, 626 F. Supp. 2d 837, 846 (N.D. Ill. 2009) ("Since *Burnham* was decided, there does not appear to be a single published opinion in which a court has found jurisdiction lacking where an individual was served in the forum.").

³²⁶ See Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 330–31 (2008) ("State and lower federal courts have . . . [u]nanimously . . . upheld transient jurisdiction over foreign defendants . . . with unadorned citations to *Burnham* without explaining why they believe *Burnham* requires this result in a transnational setting." (footnote omitted)); Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 680 (2012) ("[W]ith no explanation or analysis as to why they were doing this, and despite questions concerning the compliance with international law, lower federal courts and state courts have applied *Burnham* and tag jurisdiction to transnational cases.").

³²⁷ In *Ford*, however, Justices Gorsuch and Thomas acknowledged the inconsistency between subjecting individual defendants to general jurisdiction under *Burnham*, and limiting where global corporations can be sued under the "at home" rule of *Daimler* and *Goodyear*. *Ford Motor Co. v. Mont*, Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., dissenting).

³²⁸ See *Ford*, 141 S. Ct. at 1037; *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011) (discussing consent in the context of *Perkins*).

³²⁹ *Pennoyer v. Neff*, 95 U.S. 714, 726 (1877).

³³⁰ See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (upholding a forum-selection clause even though it was contained in a form contract that was not negotiated); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that forum selection clauses are "prima facie valid"); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court . . .").

Although consent was not at issue in *Pennoyer*, the Court repeatedly made clear that a nonresident defendant who makes a “voluntary appearance” is subject to personal jurisdiction in the forum state.³³¹ But it was not until after *Pennoyer*—with the increase in interstate travel, corporate activity, and technological advances brought on by the industrial revolution—that courts began to expand the doctrine beyond voluntary appearance to a broader concept of consent.³³² Indeed, as the Supreme Court has acknowledged, “[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court.”³³³ For example, to deal with the problem of securing jurisdiction over nonresident motorists who cause injury in states where they do not reside, laws were enacted that automatically appointed a designated state official to receive service of process whenever an out-of-state resident drove in the forum state.³³⁴ In a similar vein, state legislatures passed laws requiring that companies registering to do business appoint in-state agents for service of process.³³⁵ The remainder of this section discusses these corporate registration statutes, the legality of which has been the focus of recent litigation and may very well end up before the Supreme Court soon.

A good place to begin the story about corporate registration and personal jurisdiction is with *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining and Milling Co.*³³⁶ In that case, Pennsylvania Fire Insurance Co. of Philadelphia (“Penn Fire”) issued an insurance policy in Colorado to Gold Issue Mining and Milling Co. (“Gold”), an Arizona corporation, to cover buildings in Colorado.³³⁷ When a dispute arose relating to the policy, Gold filed a lawsuit in Missouri, where Penn Fire was registered to do business.³³⁸ Under Missouri law, for a nonresident company like Penn Fire to get a business license, it was required to file a power of attorney with the superintendent of the insurance department consenting that service of process on the superintendent is deemed personal service on the company.³³⁹ Accordingly, Gold initiated suit by effecting service on the superintendent.³⁴⁰

³³¹ *Pennoyer*, 95 U.S. at 726, 729, 733.

³³² *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977); *Jacobs*, *supra* note 57, at 1596.

³³³ *Ins. Corp. of Ir. v. Compagnie des Bauxites*, 456 U.S. 694, 703 (1982).

³³⁴ See *Shaffer*, 433 U.S. at 202 (discussing these types of statutes); *Hess v. Pawloski*, 237 U.S. 352, 356–57 (1927) (upholding Massachusetts’s motorist statute because the defendant had given implied consent to jurisdiction by driving in the forum state).

³³⁵ *Rhodes & Robertson*, *supra* note 303, at 381.

³³⁶ 243 U.S. 93, 94 (1917).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

Penn Fire responded to Gold's suit by challenging jurisdiction, claiming that the procedure under the Missouri corporate registration statute violated due process given that Gold's claim was unconnected to the forum state.³⁴¹ The Missouri Supreme Court disagreed, interpreting the statute in question as consent to personal jurisdiction in Missouri.³⁴² The U.S. Supreme Court granted certiorari and affirmed.³⁴³ In upholding jurisdiction, the Court explained that Penn Fire had acted voluntarily when it registered to do business in Missouri, and that such registration meant the company was consenting to suit in the forum state.³⁴⁴ While acknowledging that Penn Fire may have been "[aken] . . . by surprise" when it realized it had consented to jurisdiction, such a construction of the Missouri registration statute "did not deprive the defendant of due process of law," especially since analogous laws in other states had been construed similarly.³⁴⁵ For these reasons, the Court held that Missouri's exercise of jurisdiction over Penn Fire was proper.³⁴⁶

Just a few years after *Pennsylvania Fire*, the Supreme Court revisited the consent-by-registration issue in *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*³⁴⁷ and *Missouri Pacific Railroad Co. v. Clarendon Boat Oar Co.*³⁴⁸ In those cases, the Court expressed the view that federal courts should interpret corporate registration statutes narrowly when deciding whether they confer personal jurisdiction.³⁴⁹ More specifically, the Court explained, it should be assumed that such laws only confer jurisdiction over nonresident defendants with respect to business that occurred within the state—i.e., what is now referred to as "specific" jurisdiction—unless the registration statute expressly states that defendant will be subject to broader jurisdiction or the courts of the State had interpreted the statute that way, as was the case in *Pennsylvania Fire*.³⁵⁰

³⁴¹ *Id.* at 94–95.

³⁴² *Id.* at 95.

³⁴³ *Id.* at 97.

³⁴⁴ *Id.* at 96.

³⁴⁵ *Id.* at 95.

³⁴⁶ *Id.* at 97.

³⁴⁷ 257 U.S. 213, 216 (1921).

³⁴⁸ 257 U.S. 533, 535 (1922).

³⁴⁹ *See Selden Breck Constr.*, 257 U.S. at 216; *Mo. Pac. R.R.*, 257 U.S. at 535.

³⁵⁰ *See* cases cited *supra* note 349; *see also* *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 137 (4th Cir. 2020) ("Under the rules set out in *Pennsylvania Fire* and *Robert Mitchell Furniture*, obtaining the necessary certification to conduct business in a given state amounts to consent to general jurisdiction in that state only if that condition is explicit in the statute or the state courts have interpreted the statute as imposing that condition."); Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 511 (2016) (discussing the holding of *Robert Mitchell Furniture*).

Following this spate of activity from the Court in the early 1900s, the question of corporate registration statutes and personal jurisdiction lay largely dormant for the next century. As discussed in Section III.B, as it became more difficult to establish specific jurisdiction post-*International Shoe*, a theory of doing-business jurisdiction emerged whereby companies that engaged in continuous and systematic business in a particular state would be subject to general jurisdiction, meaning they could be sued on any claim.³⁵¹ The more widely accepted this theory became, the less need for plaintiffs to rely on corporate registration statutes to confer personal jurisdiction. That all started to change over the past decade, however, once the Supreme Court rejected doing-business jurisdiction in *Goodyear* and *Daimler*.³⁵²

It became clear after *Daimler* that it was no longer enough for general or all-purpose jurisdiction that a corporate defendant conducted regular business in the forum state where the plaintiff wished to sue. So, if specific jurisdiction was not available, plaintiffs' only choice under the minimum contacts theory was to sue the corporation where it was incorporated or had its principal place of business. For obvious reasons—inconvenience for the plaintiff, “home court” advantage for the defendant, etc.—litigants looked for other options and ultimately turned to consent jurisdiction under state corporate registration statutes. Defendants have responded, in large part, by urging courts not to interpret corporate registration statutes to subject defendants to general jurisdiction because that would contravene the holding of *Daimler*. This issue has been addressed by state and federal courts across the country over the past decade,³⁵³ but this Article will highlight just a handful of those cases for brevity's sake.

³⁵¹ See *supra* Section III.B.

³⁵² Rhodes & Robertson, *supra* note 303, at 429.

³⁵³ See, e.g., *Fidrych*, 952 F.3d at 137–38; *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016); *Stacker v. Intellisource, LLC*, No. 20-2581-JWB, 2021 WL 2646444, at *11–12 (D. Kan. June 28, 2021); *Ruffing v. Wipro Ltd.*, 529 F. Supp. 3d 359, 364 (E.D. Pa. 2021); *McCall v. Cooper Tire & Rubber Co.*, 843 S.E.2d 925, 927 (Ga. Ct. App. 2020), *aff'd*, 863 S.E.2d 81, 90 (Ga. 2021); *Freedom Transp., Inc. v. Navistar Int'l Corp.*, No. 2:18-CV-02602-JAR-KGG, 2019 WL 4689604, at *18–19 (D. Kan. Sept. 26, 2019); *Sullivan v. A.W. Chesterton, Inc.*, 384 F. Supp. 3d 532, 536, 543 (E.D. Pa. 2019); *Aybar v. Aybar*, 93 N.Y.S.3d 159, 166 (App. Div. 2019); *Rodriguez v. Ford Motor Co.*, 458 P.3d 569, 572 (N.M. Ct. App. 2018), *rev'd and remanded sub nom. Chavez v. Bridgestone Am. Tire Operations, LLC*, 503 P.3d 332, 336 (N.M. 2021); *Webb-Benjamin, LLC v. Int'l Rug Grp., LLC*, 192 A.3d 1133, 1139 (Pa. Super. Ct. 2018); *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 8 (Mont. 2018); *Sae Han Sheet Co. v. Eastman Chem. Corp.*, No. 17 Civ. 2734, 2017 WL 4769394, at *6 (S.D.N.Y. Oct. 19, 2017); *Segregated Acct. v. Countrywide Home Loans, Inc.*, 898 N.W.2d 70, 77 (Wis. 2017); *Gulf Coast Bank v. Designed Conveyor Sys., LLC*, No. 16-412-JJB-RLB, 2017 WL 120645, at *20 n.39 (M.D. La. Jan. 12, 2017); *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016); *Otsuka Pharm. Co. v. Mylan Inc.*, 106 F. Supp. 3d 456, 470 (D.N.J. 2015).

Not long after *Daimler*, the consent-by-registration issue arose in two separate patent cases filed in federal court in Delaware against Mylan Pharmaceuticals (“Mylan”): *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*³⁵⁴ and *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.*³⁵⁵ Mylan, which is incorporated and headquartered in West Virginia, had registered to do business in Delaware—an act that constituted consent to general jurisdiction according to the Delaware Supreme Court’s late-1980s decision in *Sternberg v. O’Neil*.³⁵⁶ Thus, the issue in both *AstraZeneca* and *Acorda* was whether *Sternberg* was still good law or whether allowing this type of consent-by-registration jurisdiction post-*Daimler* violated due process.³⁵⁷ The district judges reached opposite conclusions, and the rationale in the two cases is indicative of the competing views that have emerged from the many courts that have weighed in on this question since *Daimler*.³⁵⁸

Starting with *AstraZeneca*, the court held that Mylan’s compliance with the corporate registration statute “cannot constitute consent to jurisdiction, and . . . *Sternberg* can no longer be said to comport with federal due process.”³⁵⁹ Despite the Supreme Court’s decisions in *Pennsylvania Fire* and *Selden*, the *AstraZeneca* court explained that allowing jurisdiction based on registration would be “at odds with *Daimler*” because it would expose companies like Mylan that operate nationwide to jurisdiction in all fifty states.³⁶⁰ Finally, the court reasoned, allowing this type of jurisdiction by consent would lead to perverse incentives because it would place companies that legally register to do business in Delaware at a disadvantage compared to those companies that do not follow the rules and register in the state.³⁶¹

The *Acorda* court, on the other hand, relied on *Pennsylvania Fire* and its progeny to hold that Mylan had consented to general jurisdiction in Delaware by registering to do business there.³⁶² Unlike *AstraZeneca*, the district court concluded that *Daimler* has no bearing on the issue of consent because it was a case about what constitutes general jurisdiction under the minimum contacts

³⁵⁴ 72 F. Supp. 3d 549, 556–57 (D. Del. 2014).

³⁵⁵ 78 F. Supp. 3d 572, 587–88 (D. Del. 2015).

³⁵⁶ 550 A.2d 1105, 1111 (Del. 1988), *abrogated by* *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016).

³⁵⁷ *See AstraZeneca*, 72 F. Supp. 3d at 556–57; *Acorda Therapeutics*, 78 F. Supp. at 587–88.

³⁵⁸ *See cases cited supra* note 357.

³⁵⁹ *AstraZeneca*, 72 F. Supp. 3d at 556.

³⁶⁰ *Id.* at 557.

³⁶¹ *Id.*

³⁶² *See Acorda Therapeutics*, 78 F. Supp. 3d at 591–92.

test.³⁶³ In fact, the court explained, the only time *Daimler* mentioned consent was to draw a distinction between “consensual and non-consensual bases for jurisdiction,” thus indicating that consent remains a separate way of obtaining jurisdiction over nonresident defendants.³⁶⁴ Because compliance with the Delaware registration statute confers general jurisdiction under *Sternberg*, the *Acorda* court denied the motion to dismiss.³⁶⁵

This split in the District of Delaware was ultimately resolved when the Delaware Supreme Court reconsidered *Sternberg* and abrogated it.³⁶⁶ In *Genuine Parts Co. v. Cepec*, the court held that compliance with the Delaware registration statute should no longer be interpreted as consent to general jurisdiction.³⁶⁷ First, the statute says nothing about personal jurisdiction, much less about jurisdictional consent, so *Sternberg*’s interpretation was “just one plausible way to read” it.³⁶⁸ Second, under the law at the time, the defendant in *Sternberg* was subject to general jurisdiction in Delaware under the minimum contacts test anyway, so consent jurisdiction was not central to the holding.³⁶⁹ Finally, the *Cepec* court concluded that *Sternberg* collided with *Daimler*’s “at home” requirement and “subject[s] businesses to capricious litigation treatment as a cost of operating on a national scale.”³⁷⁰

Delaware is not alone in resolving this split over jurisdictional consent through a narrow interpretation of its registration statute. Courts in several other states have addressed the issue similarly, in some instances having to reverse long-standing precedent like the Delaware Supreme Court did in *Cepec*.³⁷¹ In all of these cases, the court held that consent to general jurisdiction should not be implied where the registration statute does not explicitly provide for it; yet each court’s rationale varies slightly. While some courts went so far as to say that

³⁶³ *Id.* at 589.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 587, 599.

³⁶⁶ *See* *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016).

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 127 & n.9.

³⁷¹ *See, e.g.*, *Chavez v. Bridgestone Ams. Tire Operations, LLC*, 503 P.3d 332, 348 (N.M. 2021) (rejecting longstanding precedent that interpreted registration to transact business in New Mexico as consent to general jurisdiction); *Lanham v. BNSF Ry. Co.*, 939 N.W.2d 363, 371 (Neb. 2020), *modified on denial of reh’g*, 944 N.W.2d 514, 515 (Neb. 2020) (overruling precedent that treated registration to do business in Nebraska as implied consent to personal jurisdiction); *Aybar v. Aybar*, 93 N.Y.S.3d 159, 166 (App. Div. 2019) (abrogating a long line of cases holding that a corporation’s compliance with New York’s registration statutes constitutes consent to the general jurisdiction); *DeLeon v. BNSF Ry. Co.*, 426 P.3d 1, 8–9 (Mont. 2018); *Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 898 N.W.2d 70, 77 (Wis. 2017) (refusing to “rewrite the statute to create jurisdiction where the legislature has not”).

Daimler required such a result,³⁷² others said their decision was simply informed by *Daimler*.³⁷³ As the Montana Supreme Court put it, “[r]eading our registration statutes to confer general personal jurisdiction over foreign corporations would swallow the Supreme Court’s due process limitations on the exercise of general personal jurisdiction, and we accordingly refuse to do so.”³⁷⁴ The approach taken by these courts is unsurprising, as it comports with the doctrine of constitutional avoidance, which requires an ambiguous statute to be construed so as to save it from potential unconstitutionality.³⁷⁵ Accordingly, future courts addressing this issue are likely to follow suit as long as the statute in question does not explicitly provide that registration confers personal jurisdiction.³⁷⁶

The more pressing question is what the Supreme Court will do with respect to the statutes in Georgia and Pennsylvania, which explicitly provide that registering to do business subjects nonresident defendants to general jurisdiction.³⁷⁷ Over the past year, the highest courts of those two states grappled with the issue and reached opposite conclusions.³⁷⁸ In *McCall*, the Georgia Court of Appeals upheld its consent-by-registration statute holding rejecting a due process challenge,³⁷⁹ while the Supreme Court of Pennsylvania struck down a similar law as unconstitutional in *Mallory*.³⁸⁰

The *McCall* case arose out of a car accident that occurred in Florida in April 2016. Tyrance McCall, a Florida resident, was the front-seat passenger in a used Ford Expedition that had been purchased just six weeks earlier by Karla Gould, a Georgia resident.³⁸¹ While traveling on a Florida roadway, the tread on the driver’s-side rear tire—a tire manufactured by Cooper Tire & Rubber Company

³⁷² See, e.g., *Lanham*, 939 N.W.2d at 371.

³⁷³ See, e.g., *Countrywide Homes Loans*, 898 N.W.2d at 81.

³⁷⁴ *DeLeon*, 426 P.3d at 9.

³⁷⁵ See, e.g., *Crowell v. Benson*, 285 U.S. 22, 76 (1932) (Brandeis, J., dissenting) (“It is true that where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional, the court will adopt the former construction.” (citations omitted)); *Hooper v. California*, 155 U.S. 648, 657 (1895) (“[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”).

³⁷⁶ In *Chavez*, for example, the Supreme Court of New Mexico took this approach and declined to reach the constitutional challenge because it held, “as a matter of statutory construction, that the [registration statute] does not require a foreign corporation to consent to general personal jurisdiction in New Mexico.” *Chavez*, 503 P.3d at 337.

³⁷⁷ See GA. CODE ANN. § 9-10-91 (West 2011); 42 PA. CONS. STAT. § 5301(a)(2) (1981).

³⁷⁸ Compare *McCall v. Cooper Tire & Rubber Co.*, 843 S.E.2d 925, 927 (Ga. Ct. App. 2020), *aff’d*, 863 S.E.2d 81 (Ga. 2021), with *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 567–68 (Pa. 2021).

³⁷⁹ *McCall*, 843 S.E.2d at 927.

³⁸⁰ *Mallory*, 266 A.3d at 567–68.

³⁸¹ Complaint for Damages and Demand for Jury Trial, *McCall v. Cooper Tire & Rubber Co.*, No. 18-C-02598-S2, 2018 WL 11378238 (Ga. State Ct. Dec. 21, 2018) (No. 18-C-02598-S2), 2018 WL 11379472.

(“Cooper Tire”)—failed and separated from the rest of the tire.³⁸² As a result, Gould lost control of the vehicle, it veered off the road, rolled over, and McCall sustained severe injuries.³⁸³ McCall subsequently filed suit in Georgia state court against Cooper Tire, Gould, and the Georgia dealership that sold her the vehicle.³⁸⁴

Cooper Tire, which is incorporated in Delaware and has its principal place of business in Findlay, Ohio, moved to dismiss on the grounds that it was not subject to personal jurisdiction in Georgia.³⁸⁵ Relying on *Daimler*, Cooper Tire argued that there is no general jurisdiction since it was not incorporated or headquartered in Georgia.³⁸⁶ Nor was it subject to specific jurisdiction, Cooper Tire claimed, because the tire in question was designed in Ohio and manufactured in Arkansas, and thus the nexus was not satisfied.³⁸⁷ Notably, Cooper Tire’s arguments with respect to specific jurisdiction mirrored those advanced in the *Ford* cases that were ultimately rejected by the Supreme Court.³⁸⁸

Rather than focus on the minimum contacts test, McCall responded that personal jurisdiction was satisfied based on the consent-by-registration theory embraced by the Georgia Supreme Court almost three decades earlier in *Allstate Insurance Co. v. Klein*.³⁸⁹ Interpreting the Georgia long-arm statute³⁹⁰ together with a provision of the Georgia Business Corporation Code,³⁹¹ *Klein* held that corporations registered to do business in Georgia are deemed residents of the state for jurisdictional purposes and can be sued there on any claim.³⁹² Specifically, the Georgia long-arm statute provides that *nonresidents* can be subject to specific jurisdiction if they take certain actions within Georgia.³⁹³ It provides, in relevant part, the following:

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ Defendant Cooper Tire & Rubber Company’s Special Appearance Motion to Dismiss for Lack of Personal Jurisdiction, *McCall v. Cooper Tire & Rubber Co.*, No. 18-C-02598-S2, 2018 WL 11378238 (Ga. State Ct. Dec. 21, 2018) (No. 18-C-02598-S2), 2018 WL 11379474.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ See *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1021, 1032 (2021). It is worth mentioning, however, that the accident did not occur in the forum state in *McCall* as it did in the *Ford* cases. Compare Complaint for Damages, *supra* note 381, with *Ford*, 141 S. Ct. at 1023.

³⁸⁹ *Cooper Tire & Rubber Co. v. McCall*, 312 Ga. 422, 422–23 (2021).

³⁹⁰ GA. CODE ANN. § 9-10-91 (West 2011).

³⁹¹ *Id.* § 14-2-1505.

³⁹² *Allstate Ins. Co. v. Klein*, 422 S.E.2d 863, 865 (Ga. 1992).

³⁹³ GA. CODE ANN. § 9-10-90 (West 2011).

A court of this state may exercise personal jurisdiction over any nonresident . . . as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he or she were a resident of this state, if in person or through an agent, he or she (1) [t]ransacts any business within this state; (2) [c]ommits a tortious act or omission within this state[;] . . . [or] (3) [c]ommits a tortious injury in this state . . .³⁹⁴

The long-arm statute goes on to define “nonresident” to include “a corporation which is not organized or existing under the laws of this state *and is not authorized to do or transact business in this state* at the time a claim or cause of action under [this provision] arises.”³⁹⁵ What is more, section 14-2-1505 of the Georgia Business Corporation Code states the following about how companies registered to do business in the state are to be treated:

A foreign corporation with a valid certificate of authority has the same but no greater rights under this chapter and has the same but no greater privileges under this chapter as, and except as otherwise provided by this chapter is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.³⁹⁶

Having considered these statutory provisions, *Klein* held that corporations registered to do business in Georgia had consented to general jurisdiction there.³⁹⁷

The lower courts in *Cooper Tire* agreed with the plaintiff that *Klein* controlled and denied the motion to dismiss for lack of personal jurisdiction.³⁹⁸ They rejected the defendant’s argument that consent by registration was no longer viable after *Goodyear* and *Daimler* first, because those cases involved the minimum contacts test, not consent, and second, because *Pennsylvania Fire* had not been overruled.³⁹⁹ The Supreme Court of Georgia granted certiorari to reconsider *Klein*, but ultimately affirmed in a unanimous decision handed down in fall 2021.⁴⁰⁰

Like the courts below, the Georgia Supreme Court rejected the petitioner’s claim that *Goodyear* and *Daimler*—cases about the minimum contacts test—

³⁹⁴ *Id.* § 9-10-91.

³⁹⁵ *Id.* § 9-10-90 (emphasis added).

³⁹⁶ *Id.* § 14-2-1505(b).

³⁹⁷ *Klein*, 422 S.E.2d at 865 & n.2.

³⁹⁸ *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 84 (Ga. 2021).

³⁹⁹ *Id.* at 89.

⁴⁰⁰ *Id.* at 83.

implicitly overruled *Pennsylvania Fire*.⁴⁰¹ To the contrary, the U.S. Supreme Court “has continued to recognize consent as a proper means of exercising personal jurisdiction over an out-of-state corporation.”⁴⁰² The *McCall* court went on to explain that even though section 14-2-1505 of the Corporations Code alone does not expressly notify out-of-state corporations that they consent to general jurisdiction by registering to do business in Georgia, reading section 14-2-1505 in conjunction with the long-arm statute does.⁴⁰³ More pointedly, the *Klein* decision made the impact of registering to do business in Georgia crystal clear almost two decades ago, thus providing Cooper Tire and other out-of-state corporations with adequate notice.⁴⁰⁴ Accordingly, *McCall* reaffirmed the holding of *Klein* that “corporate registration in Georgia is consent to general jurisdiction in Georgia [and] does not violate federal due process under *Pennsylvania Fire*.”⁴⁰⁵

It is no surprise that Cooper Tire filed a petition for a writ of certiorari, which is currently pending before the U.S. Supreme Court.⁴⁰⁶ The chance of that petition being granted was already high given the importance of the issue and the Court’s interest in personal jurisdiction recently. But the chance increased substantially when the Supreme Court of Pennsylvania handed down its decision in *Mallory* reaching a different conclusion than *McCall*, thereby creating a split on the question whether consent-by-registration jurisdiction is constitutional.

The *Mallory v. Norfolk Southern Railway Co.* case began in September 2017, when Robert Mallory, a resident of Virginia, filed a lawsuit in the Philadelphia Court of Common Pleas against Norfolk Southern Railway, which is incorporated and headquartered in Virginia, under the Federal Employer’s Liability Act (“FELA”).⁴⁰⁷ Mallory alleged that while working for Norfolk from 1988 to 2005 in Ohio and Virginia, he was exposed to asbestos and other harmful chemicals that caused him to develop colon cancer.⁴⁰⁸ Norfolk moved to dismiss for lack of personal jurisdiction, arguing that there was no specific jurisdiction

⁴⁰¹ *Id.* at 89.

⁴⁰² *Id.*

⁴⁰³ *See id.* at 90.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Cooper Tire & Rubber Company v. McCall*, *supra* note 45. To date, the petition has not been granted or denied, but appears to be on hold pending the decision in *Mallory*. *See* text accompanying *infra* note 421, discussing the Supreme Court’s consideration of the *Mallory* case.

⁴⁰⁷ *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 551 (Pa. 2021).

⁴⁰⁸ *Id.* Before moving to Virginia, Mallory lived in Pennsylvania for several years. However, he was not exposed to asbestos in Pennsylvania nor was he diagnosed there. *See* Transcript of Oral Argument at 39, *Mallory v. Norfolk S. Ry. Co.*, No. 21-1168 (Nov. 8, 2022).

since Mallory never worked in Pennsylvania, and no general jurisdiction under *Daimler* given Norfolk was neither incorporated nor headquartered in Pennsylvania.⁴⁰⁹

Mallory responded that Norfolk had consented to jurisdiction by registering to do business in Pennsylvania under 42 PA. CONS. STAT. § 5301(a)(2).⁴¹⁰ Although the plain language of section 5301(a)(2) subjected Norfolk to jurisdiction in Pennsylvania,⁴¹¹ the trial court held the statute unconstitutional “in light of the Supreme Court’s repeated admonishment that the Due Process Clause prohibits a state from claiming general jurisdiction over every corporation doing business within its borders.”⁴¹² Mallory’s appeal was then transferred directly to the Supreme Court of Pennsylvania pursuant to 42 PA. CONS. STAT. § 722(7), which grants Pennsylvania’s high court exclusive jurisdiction in cases where the trial court declares a statute unconstitutional.⁴¹³

On December 22, 2021, the Supreme Court of Pennsylvania handed down its decision affirming the trial court’s order invalidating section 5301(a)(2) as repugnant to federal due process.⁴¹⁴ The court reasoned that “*International Shoe* transformed the personal jurisdiction analysis from the territorial approach applied in *Pennoyer* to a contacts-focused methodology.”⁴¹⁵ What is more, the court declined to follow *Pennsylvania Fire* and other pre-*International Shoe* cases, concluding that they no longer “hold significant precedential weight” in the personal jurisdiction analysis.⁴¹⁶ Simply put, *Mallory* stands for the proposition that *Pennoyer*-era grounds for jurisdiction—e.g., consent, tag jurisdiction, and in rem jurisdiction—must be evaluated in light of *International Shoe* and the minimum contacts test. Finally, the court held that any consent under Pennsylvania’s registration statute was involuntary because nonresident corporations had no choice but to subject themselves to general jurisdiction if they wanted to conduct business there.⁴¹⁷ Not only does this violate the unconstitutional conditions doctrine, the court held, but also contravenes

⁴⁰⁹ *Mallory*, 266 A.3d at 552–53.

⁴¹⁰ *Id.* at 551.

⁴¹¹ Section 5301(a)(2)(i) provides that “qualification as a foreign corporation under the laws of this Commonwealth” is a “sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person.” 42 PA. CONS. STAT. § 5301(a)(2)(i). Pennsylvania law further prohibits foreign corporations from doing “business in this Commonwealth until it registers” with the Department of State of the Commonwealth. 15 PA. CONS. STAT. § 411(a) (1970).

⁴¹² *Mallory*, 266 A.3d at 554.

⁴¹³ *Id.* at 555.

⁴¹⁴ *Id.* at 571.

⁴¹⁵ *Id.* at 565.

⁴¹⁶ *Id.* at 567.

⁴¹⁷ *Id.* at 569.

federalism principles alluded to most recently in *Bristol-Myers*.⁴¹⁸ Accordingly, the court upheld the dismissal of the case for lack of personal jurisdiction.⁴¹⁹

As in *McCall*, a petition for certiorari was filed in *Mallory* too.⁴²⁰ However, unlike *McCall* where the petition is still pending, the Supreme Court granted certiorari in *Mallory*,⁴²¹ and oral arguments were held in November 2022.⁴²² Given how much attention the Roberts Court has paid to personal jurisdiction over the past decade, the decision to weigh in on this issue was not unexpected. To decide the constitutionality of consent by registration, the Court will have to figure out how traditional jurisdictional doctrines fit within *International Shoe*'s bifurcated framework (contacts plus fairness), as it tried to do in *Shaffer* and *Burnham*. Until recently, the Court during this “new era” has been hyper-focused on the contacts portion of that test, leaving little room for reasonableness to play a part in personal jurisdiction decisions.⁴²³ But *Ford* marks a departure from this trend toward a more balanced approach that takes fairness into account.⁴²⁴

The remainder of this Article discusses the evolution of the fair play and substantial justice portion of the *International Shoe* test with particular attention paid to the fairness factors first announced in *World-Wide Volkswagen*. It then urges courts to employ those factors when addressing *all* theories of personal jurisdiction. Applying a uniform methodology to the flexible due process standard will improve the consistency and predictability of personal jurisdiction determinations over time, while still allowing courts to decide these questions on a case-by-case basis.

III. FAIR PLAY AND SUBSTANTIAL JUSTICE: THE “TOUCHSTONE” FOR PERSONAL JURISDICTION

That the exercise of personal jurisdiction over nonresident defendants must comport with due process is noncontroversial. Whether jurisdiction is based on the minimum contacts test or one of the traditional grounds for jurisdiction, the Supreme Court has made clear that it cannot offend “notions of fair play and

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 571.

⁴²⁰ *See supra* note 39.

⁴²¹ *See supra* note 39.

⁴²² Transcript of Oral Argument at 1, *Mallory v. Norfolk S. Ry. Co.*, No. 21-1168 (Nov. 8, 2022).

⁴²³ *See Freer, supra* note 28, at 588 (“[T]he limited scope of personal jurisdiction in the new era results . . . from an obsession with the defendants’ intent to form a tie with the forum state.”).

⁴²⁴ *See Ford Motor v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 n.2 (2021).

substantial justice.”⁴²⁵ Yet questions remain about how courts should go about deciding if jurisdiction is constitutional or not. While personal jurisdiction must be decided on a case-by-case basis,⁴²⁶ lower courts and litigants need more guidance in the decision-making process so that jurisdictional results become more predictable and just. The good news is that we already have a tool that courts could use to this end—the fairness factors from *World-Wide Volkswagen*. Those factors are currently applied only in the context of specific jurisdiction and, even then, they are applied inconsistently, as witnessed in *Nicastro* and *Bristol-Myers*. Contrary to Justice Kennedy’s opinion in *Nicastro* about the diminished role of fairness in specific jurisdiction, and contrary to the *Daimler* Court’s footnote about the inapplicability of the fairness factors to general jurisdiction, fairness should be treated as the touchstone for personal jurisdiction whether specific jurisdiction, general jurisdiction, or one of the traditional theories of jurisdiction is at play.

A. *The Fairness Factors*

The long line of Supreme Court cases from *Pennoyer* to *Ford* instructs that personal jurisdiction over nonresident defendants must comport with fair play and substantial justice. According to *International Shoe*, an “estimate of the inconveniences” for the defendant should be part of this analysis.⁴²⁷ Of course, reasonableness was discussed in early cases like *McGee* and *Hanson*, but it was not until the 1980s that it took center stage in Supreme Court jurisprudence, starting with the announcement of the fairness factors in *World-Wide Volkswagen*. The Court in that case held that while the burden on the defendant remains of “primary concern,” factors relating to state sovereignty should also be considered, including: “the forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”⁴²⁸ These factors help ensure that the exercise of jurisdiction comports with due process first, by “protect[ing] the

⁴²⁵ See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 618 (1990) (citation omitted); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

⁴²⁶ See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (“Mechanical or quantitative evaluations of the defendant’s activities in the forum could not resolve the question of reasonableness . . .”); *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487 (9th Cir. 1993) (“[T]he personal jurisdiction inquiry cannot be answered through the application of a mechanical test but instead must focus on the relationship among the defendant, the forum, and the litigation within the particular factual context of each case.”).

⁴²⁷ *Int’l Shoe*, 326 U.S. at 317 (citation omitted).

⁴²⁸ *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980) (citations omitted).

defendant against the burdens of litigating in a distant or inconvenient forum,” and second, by “ensur[ing] that the States[,] through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”⁴²⁹

Moreover, as the Court explained a few years later in *Burger King*, “[t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required” and vice versa.⁴³⁰ Soon thereafter, the Court put this lesson from *Burger King* into practice in *Asahi*—a case filed in California state court involving only foreign parties.⁴³¹ As discussed earlier, the Justices could not agree whether the defendant, Asahi, had purposefully availed itself of California by placing its products into the stream of commerce.⁴³² However, resolving that question was unnecessary because the Court unanimously agreed that even if the contacts portion of the bifurcated test was satisfied, the reasonableness prong was not.⁴³³ Specifically, the Court held that “[c]onsidering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.”⁴³⁴

Although the fairness factors provided guidance to courts on how to approach the reasonableness analysis, there was nevertheless confusion surrounding them from the start. Most significantly, just two years after *World-Wide Volkswagen*, the Supreme Court questioned the role state sovereignty interests ought to play in the personal jurisdiction inquiry in *Insurance Corp. of Ireland v. Compagnie des Bauxites*:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can

⁴²⁹ *Id.*

⁴³⁰ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

⁴³¹ *Asahi Metal Indust. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987).

⁴³² *See supra* Section III.A.1.

⁴³³ *Asahi Metal Indus.*, 480 U.S. at 114.

⁴³⁴ *Id.* at 116.

subject himself to powers from which he may otherwise be protected.⁴³⁵

For a time, the Court went back and forth about the relevance of state sovereignty interests—a topic scholars have spilled a ton of ink over.⁴³⁶ After a period of dormancy, interstate federalism principles once again reared their head in personal jurisdiction jurisprudence with the Roberts Court.⁴³⁷ As discussed in Part III, state sovereignty interests weighed heavily in both *Nicastro* and *Bristol-Myers* in deciding that the defendants in those cases were not subject to personal jurisdiction in the forum state.⁴³⁸ However, the way the Court talked about sovereignty in those cases was inconsistent and, frankly, confusing, as Wendy Collins Perdue and others have argued.⁴³⁹

At the same time it was elevating state sovereignty principles in *Nicastro* and *Bristol-Myers*, the Court diminished the importance of the other fairness factors, namely the plaintiff's and forum state's interests in having the lawsuit proceed where originally filed.⁴⁴⁰ Although *Bristol-Myers* gave a nod to those other factors, it focused on how “submitting to the coercive power of a State that may have little legitimate interest in the claims in question” would burden the defendant.⁴⁴¹ The Kennedy opinion in *Nicastro* went even further, claiming that “jurisdiction is in the first instance a question of authority rather than fairness,” and fairness considerations should not be considered “the touchstone of jurisdiction.”⁴⁴² And let us not forget that as the Court minimized the importance of fairness considerations in the specific jurisdiction context, it obliterated them

⁴³⁵ *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 n.10 (1982).

⁴³⁶ See *supra* note 125 and accompanying text.

⁴³⁷ Perdue, *supra* note 55, at 739.

⁴³⁸ *Bristol-Myers Squibb Co v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) (explaining that due process “encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question”); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 881 (2011) (“The principal inquiry in cases of this sort is whether the defendant’s activities manifest an intention to submit to the power of the sovereign.”).

⁴³⁹ Perdue, *supra* note 55, at 740–42; see also Jacobs, *supra* note 57, at 1615 (“As many scholars have already observed, the *Nicastro* plurality’s vision of personal jurisdiction eviscerates rather than elevates state sovereignty by considerably weakening the states’ ability to assert personal jurisdiction over out-of-state defendants.”); John T. Parry, *Introduction: Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 841 (2012) (“The most straightforward observation one can make about *Nicastro* is that it compounds the uncertainty that *Asahi* and *Burnham* fostered.”); Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. L. REV. 769, 805 (2016) (“Although Justice Kennedy strongly implies that his limited reading of jurisdiction in stream of commerce cases is compelled by sovereignty concerns, the state of New Jersey had a sovereign interest in the defendant’s conduct.”).

⁴⁴⁰ See Perdue, *supra* note 55, at 734–36.

⁴⁴¹ *Bristol-Myers*, 137 S. Ct. at 1780.

⁴⁴² *Nicastro*, 564 U.S. at 883.

completely in *Daimler* as an afterthought in a footnote despite the issue not being briefed or argued by the parties.⁴⁴³

So, even though lower courts have generally followed the *World-Wide Volkswagen*, *Burger King*, and *Asahi* trilogy and applied the fairness factors,⁴⁴⁴ Supreme Court jurisprudence on this topic, which was always chaotic, has gotten even messier in the new era. Thus, when the Court granted certiorari in *Ford*, scholars expressed serious concerns about what might happen to the personal jurisdiction doctrine if the Court continued along the path established in *Nicastro* and *Bristol-Myers*.⁴⁴⁵ If the petitioner's approach to specific jurisdiction was adopted, they warned, it could "cut[] off inquiry into the factors that the Supreme Court once held to be primary guarantors of 'fair play and substantial justice.'"⁴⁴⁶ More to the point, Ford argued that the fairness factors could defeat specific jurisdiction even where the nexus and purposeful availment requirements are met, but the opposite is not true.⁴⁴⁷ Ford claimed, in other words, that fairness should not even come into play if the plaintiff fails to establish the initial elements of specific jurisdiction.⁴⁴⁸ Such an approach would permit defendants to use the fairness factors as a "one-way ratchet,"⁴⁴⁹ and would contravene *Burger King*'s holding that fairness considerations "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."⁴⁵⁰

To the surprise of many, the *Ford* Court rejected the petitioner's argument and affirmed the lower court's decision.⁴⁵¹ This was the first time that the Roberts Court upheld the exercise of jurisdiction in the forum state since it began to re-engage with the personal jurisdiction doctrine a decade earlier.⁴⁵² In so doing, the Court not only determined that Ford's contacts with the forum state were sufficiently linked to the plaintiff's claim (i.e., that the nexus was satisfied),

⁴⁴³ *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014).

⁴⁴⁴ See, e.g., Linda Sandstrom Simard, Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *Ford's Hidden Fairness Defect*, 106 CORNELL L. REV. ONLINE 45, 48 (2020).

⁴⁴⁵ *Id.* at 46, 50.

⁴⁴⁶ *Id.* at 46.

⁴⁴⁷ *Id.* at 50.

⁴⁴⁸ *Id.* ("Under Ford's preferred test, by contrast, the jurisdictional analysis would end if the defendant's contacts are not the proximate cause of the plaintiff's claim, making the reasonableness check irrelevant.")

⁴⁴⁹ *Id.* at 51.

⁴⁵⁰ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (citations omitted).

⁴⁵¹ *Ford Motor Co. v. Mont. Eighth Jud. Dist. Court*, 141 S. Ct. 1017, 1032 (2021).

⁴⁵² See Scott Dodson, *Personal Jurisdiction, Comparativism, and Ford*, 51 STETSON L. REV. 187, 195 (2022); Charles W. "Rocky" Rhodes, *The Roberts Court's Jurisdictional Revolution Within Ford's Frame*, 51 STETSON L. REV. 157, 158–59 (2022).

but also that fairness considerations bolstered that finding of jurisdiction.⁴⁵³ Scholars like Scott Dodson and Rocky Rhodes have criticized the portion of the *Ford* decision addressing fairness because the Court failed to articulate the bifurcated test, list the fairness factors, or clarify the role that the factors should play in the jurisdictional analysis.⁴⁵⁴ Patrick Borchers, Rich Freer, and Thomas Arthur’s evaluation of *Ford*’s fairness analysis was a bit more positive, but they were nevertheless frustrated with the Court’s “lack of attention to methodology.”⁴⁵⁵ According to these scholars, it is hard to know after *Ford* whether the fairness factors are still good law, what role the Roberts Court is envisioning for the fairness factors in future cases, and whether “the fairness factors are still a separate element of specific jurisdiction.”⁴⁵⁶

While these are valid points, this author remains optimistic that the *Ford* decision says—or, perhaps more accurately, implies—a good deal about the fairness analysis that should guide future courts. For starters, without acknowledging that it was undertaking a fairness analysis, that is exactly what the *Ford* Court did, marking a departure from the approach taken in recent years. The Court began with the first and most important factor—the burden on the defendant—and concluded that there was nothing undue or surprising about Ford being sued in either Minnesota or Montana in light of its extensive business operations in both states.⁴⁵⁷ To the contrary, by regularly marketing its vehicles in those states, the Court explained, Ford “enjoys the benefits and protections of [their] laws,” and had “clear notice” that it would be subject to personal jurisdiction there.⁴⁵⁸

The Court then turned to the other fairness factors, referring to them collectively as “principles of ‘interstate federalism.’”⁴⁵⁹ It is true that the Court did not list out the other four factors—the forum state’s interest in the dispute; the plaintiff’s interest in obtaining convenient and effective relief; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies—as Dodson and Rhodes have pointed

⁴⁵³ See *Ford*, 141 S. Ct. at 1032.

⁴⁵⁴ Dodson, *supra* note 452, at 195; Rhodes, *supra* note 452, at 185.

⁴⁵⁵ Patrick J. Borchers, Richard D. Freer & Thomas C. Arthur, *Ford Motor Company v. Montana Eighth Judicial District Court: Lots of Questions, Some Answers*, 71 EMORY L.J. ONLINE 1, 20 (2021).

⁴⁵⁶ *Id.* at 21; Dodson, *supra* note 452, at 195 (“After *Ford*, it is unclear whether the fairness factors retain their status as a discrete inquiry, what work they do in the test, and whether all of them remain good law.”).

⁴⁵⁷ *Ford*, 141 S. Ct. at 1029–30.

⁴⁵⁸ *Id.* (alteration in original) (citations omitted).

⁴⁵⁹ *Id.* at 1030.

out.⁴⁶⁰ Yet, each of these factors is either mentioned in the discussion explicitly or at the very least alluded to by the Court.⁴⁶¹ With respect to second factor, *Ford* says that Montana and Minnesota “have significant interests at stake,” including providing “a convenient forum for redressing injuries inflicted by out-of-state actors,” and “enforcing their own safety regulations.”⁴⁶² It is in the context of that explanation that the Court first mentions the third factor—the plaintiff’s interest in obtaining a “convenient forum.”⁴⁶³ A little later in the opinion, the Court then applied that factor and concluded that it weighs in favor of jurisdiction because “the plaintiffs brought suit in the most natural State” since they resided in the forum state, used the allegedly defective product there, and suffered injuries there.⁴⁶⁴ Finally, despite the Court never mentioning the last two factors by name, it strongly alluded to them when comparing the interests of the forum states (Montana and Minnesota) to the interests of the states of first sale (Washington and North Dakota).⁴⁶⁵ If the cases were filed in the states of first sale, as Ford urged, the suit would involve “all out-of-state parties, an out-of-state accident, and out-of-state injuries; the suit’s only connection with the State [would be] that a former owner once (many years earlier) bought the car there.”⁴⁶⁶ Allowing the suits to proceed in Montana and Minnesota, on the other hand, made much more sense because of the “relationship among the defendant, the forum, and the litigation.”⁴⁶⁷

In short, *Ford* is an important decision from a fairness perspective for a number of reasons. Despite the Court not citing the bifurcated analysis or listing all five factors by name, *Ford* addressed the factors in a substantially more robust way than any other personal jurisdiction decision from the Roberts Court. According to *Ford*, the reasonableness inquiry clearly encompasses *both* the defendant’s interest and state sovereignty interests—thus resolving any lingering questions from the old era about whether state sovereignty interests should be considered in the personal jurisdiction analysis at all,⁴⁶⁸ as well as questions raised in new era cases like *Nicastro* that overemphasized sovereignty interests. In addition to making clear that all the fairness factors are relevant, the Roberts Court, for the first time, applied those factors to bolster its finding of

⁴⁶⁰ Dodson, *supra* note 452, at 195; Rhodes, *supra* note 452, at 185.

⁴⁶¹ See Dodson, *supra* note 452, at 195 (explaining that the *Ford* Court “obliquely” refers to three of the fairness factors).

⁴⁶² *Ford*, 141 S. Ct. at 1030 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)).

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 1031.

⁴⁶⁵ See *id.* at 1030.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* (citation omitted).

⁴⁶⁸ See, e.g., *Ins. Corp. of Ir. Ltd., v. Compagnie Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1962).

jurisdiction, thus rejecting Ford’s one-way ratchet theory and reaffirming that fairness considerations “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”⁴⁶⁹

Finally, and most importantly, *Ford* shed light on how fairness should be approached in future cases by demarcating the burden on the defendant factor from the other four “interstate federalism” factors.⁴⁷⁰ This is similar to the framework set out in *World-Wide Volkswagen* in that the jurisdictional test performs “two related, but distinguishable, functions”: (1) protecting nonresident defendants from the burdens of inconvenient litigation and (2) ensuring that the states respect interstate federalism principles.⁴⁷¹ What is different about *Ford*, however, is that the Court explained how the five fairness factors map onto those dual functions by indicating that the first function is served exclusively by the first fairness factor, while the second function is served by the remaining four factors, i.e., the “principles of ‘interstate federalism.’”⁴⁷² This provides a clearer—albeit not perfect—roadmap for the fairness analysis, particularly compared to what we saw in *Nicastro*, with its muddled discussion of state sovereignty,⁴⁷³ or *Bristol-Myers*, which suggested that state sovereignty interests fell under the umbrella of “the burden on the defendant” factor.⁴⁷⁴ In an area surrounded by as much confusion and nonuniformity as the personal jurisdiction doctrine, any step toward greater clarity is a step in the right direction.

Going forward, courts deciding specific jurisdiction questions can look to *Ford* for guidance on how to apply the fairness factors. However, as the final Part of this Article argues, the approach to fairness in *Ford* should not be limited to the context of that case but should apply to all theories of personal jurisdiction including specific jurisdiction, general jurisdiction, and traditional theories like consent by registration.

B. Fairness Factors for All Theories of Personal Jurisdiction

Despite the spate of Supreme Court activity with respect to personal jurisdiction over the past decade, many questions remain unanswered. In the

⁴⁶⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

⁴⁷⁰ *See Ford*, 141 S. Ct. at 1030.

⁴⁷¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

⁴⁷² *Ford*, 141 S. Ct. at 1030.

⁴⁷³ *See J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).

⁴⁷⁴ *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017).

near term, courts will have to address matters left open by *Ford* about the nexus requirement (e.g., what if the plaintiff is not a resident of the forum state or the accident did not occur there?), and decide whether consent by registration comports with due process. Longer term, we are likely to see some familiar, yet still-unresolved, personal jurisdiction issues reemerge. For example, does a defendant that places its products into the stream of commerce purposefully avail itself of the forum state where those products injure someone? Should individual nonresident defendants who are tagged while passing through a state be subject to personal jurisdiction there? Finally, litigants are sure to test the boundaries of *Goodyear* and *Daimler* to determine if a corporation can be considered at home in a state other than where it is incorporated or headquartered since the Supreme Court left that possibility open.

In all of these circumstances, the decision to exercise personal jurisdiction should be informed by the fairness factors. In other words, when there is a close call about whether personal jurisdiction lies—no matter what theory the plaintiff relies on—courts should consider the interests of the parties, the interests of the forum state, and the interests of other states to decide which way the jurisdictional scale should tip.⁴⁷⁵ Although the fairness factors were originally articulated in a specific jurisdiction case, they ought to assist courts in making sound jurisdictional decisions beyond that particular context. Let us consider some examples of how the fairness factors could help draw jurisdictional lines in cases down the road.

1. *Specific Jurisdiction after Ford*

Starting with specific jurisdiction, *Ford* left questions open about whether there will be personal jurisdiction in cases where the facts are slightly different. Take *Chavez v. Bridgestone Americas Tire Operations, LLC*, a case recently considered by the New Mexico Supreme Court, for instance.⁴⁷⁶ The decedent, Edgar Chavez, a New Mexico resident, was killed in a car accident while driving a used Ford Explorer in Texas in 2015.⁴⁷⁷ When Chavez's mother purchased the used vehicle from a local dealer in New Mexico in 2001, a Firestone FR480 tire was installed as a spare.⁴⁷⁸ Several years later, a local tire shop installed the

⁴⁷⁵ *Cf. id.* (indicating that the fairness analysis considers the “relationship among the defendant, the forum, and the litigation” (citation omitted)).

⁴⁷⁶ 503 P.3d 332, 337 (N.M. 2021).

⁴⁷⁷ *Chavez v. Bridgestone Americas Tire Operations, LLC*, No. A-1-CA-36442, 2018 WL 7046630, at *1 (N.M. Ct. App. Dec. 21, 2018).

⁴⁷⁸ *Id.*

FR480 as the left rear tire on Chavez's vehicle.⁴⁷⁹ At the time of installation in July 2015, the FR480 was twenty-two years old.⁴⁸⁰ One month later, while Chavez and his brother were driving through Texas on their way home to New Mexico, the tread of the FR480 peeled off, the vehicle rolled, and Chavez was killed.⁴⁸¹

Chavez's survivors, including his brother who was injured in the accident, filed a lawsuit in New Mexico state court against the following defendants: Bridgestone Americas Tire Operations, LLC ("Bridgestone"), the manufacturer of the FR480; Tire Club USA, the El Paso-based shop where the FR480 was installed; and Crecencio Jaramillo, the New Mexico resident who installed the tire on Chavez's vehicle.⁴⁸² Bridgestone moved to dismiss, arguing that it was not subject to general jurisdiction since it was not incorporated or headquartered in New Mexico, and it had not consented to jurisdiction under New Mexico's registration statute.⁴⁸³ Moreover, Bridgestone claimed, there was no specific jurisdiction since the accident occurred in Texas, the tire was manufactured in Ohio, Bridgestone is headquartered in Tennessee, and there was no evidence where the tire in question was originally sold.⁴⁸⁴ Plaintiffs countered that Bridgestone had the requisite contacts with New Mexico because it sold tires there through more than fifty distributors, advertised in the forum state, and warned some tire centers in New Mexico—although not all—of the potential dangers associated with using tires that were more than ten-years old.⁴⁸⁵

About a month before the Supreme Court handed down its decision in *Bristol-Myers Squibb*, the trial judge in *Chavez* denied Bridgestone's motion to dismiss concluding that it was subject to specific jurisdiction in New Mexico.⁴⁸⁶ The intermediate appellate court affirmed but relied on a different ground, namely that Bridgestone had consented to general jurisdiction in the forum state

⁴⁷⁹ *Id.*

⁴⁸⁰ Opposition to Bridgestone's Motion to Dismiss for Lack of Personal Jurisdiction at 2, *Chavez v. Bridgestone Americas Tire Operations, LLC*, No. D-101-CV-2016-02817, 2017 WL 11426505 (N.M. Dist. Ct. May 19, 2017) (No. D-101-CV-2016-02817), 2017 WL 11426895 [hereinafter *Opposition to Motion to Dismiss*].

⁴⁸¹ *Id.* at 4.

⁴⁸² Defendant's Motion to Dismiss for Lack of Personal Jurisdiction at 4–5, *Chavez v. Bridgestone Americas Tire Operations, LLC*, No. D-101-CV-2016-02817, 2017 WL 11426505 (N.M. Dist. Ct. May 19, 2017) (No. D-101-CV-2016-02817), 2017 WL 11426896.

⁴⁸³ *Id.* at 1, 4–5.

⁴⁸⁴ *Id.*

⁴⁸⁵ Opposition to Motion to Dismiss, *supra* note 480, at 17.

⁴⁸⁶ *Chavez v. Bridgestone Americas Tire Operations, LLC*, No. D-101-CV-2016-02817, 2017 WL 11426505, at *1 (N.M. Dist. Ct. May 19, 2017).

by registering to do business there.⁴⁸⁷ After consolidating *Chavez* with several similar cases, the Supreme Court of New Mexico granted certiorari and reversed. In a decision issued in 2021, the court held, “as a matter of statutory construction, that the [registration statute] does not require a foreign corporation to consent to general personal jurisdiction in New Mexico.”⁴⁸⁸ However, because the question whether Bridgestone was subject to specific jurisdiction in New Mexico remained, the court remanded for further proceedings on that issue.⁴⁸⁹

Assuming *Chavez* does not settle, the court of appeals will have to decide if specific jurisdiction lies in New Mexico. Although the facts of *Chavez* are similar to *Ford*, no doubt Bridgestone will try to distinguish the case since the accident did not occur within the forum state. Bridgestone will contend, in other words, that the nexus is not satisfied because its contacts with New Mexico—having distributors there and advertising there—did not give rise or relate to the plaintiffs’ claim, which concerns an accident that occurred in Texas. The plaintiffs, on the other hand, will likely argue that there is a sufficient connection between their underlying claims and Bridgestone’s contacts with New Mexico given defendant sold and advertised tires in the state and issued inadequate warnings in New Mexico about the dangers of old tires like the one installed on *Chavez*’s vehicle.

As in *Ford*, the court of appeals should allow the fairness factors to guide its decision about whether Bridgestone is subject to specific jurisdiction in New Mexico. With respect to the first and most important factor, Bridgestone’s extensive business dealings in New Mexico make clear that litigating there would not be burdensome on the company. The other fairness factors—what the *Ford* Court called interstate federalism principles—likewise support jurisdiction. Although the accident occurred in Texas, New Mexico is still a proper forum given FR480 tires are distributed there, the tire in question was installed there, and the plaintiffs are residents of New Mexico (as was Mr. *Chavez*).⁴⁹⁰ Additionally, New Mexico is the only state where the other defendants in the case—Tire Club USA and Crecencio Jaramillo—were subject to personal jurisdiction, so allowing the case to proceed against Bridgestone there would be efficient and fair.⁴⁹¹

⁴⁸⁷ *Chavez v. Bridgestone Americas Tire Operations, LLC*, No. A-1-CA-36442, 2018 WL 7046630, at *4 (N.M. App. Ct. Dec. 21, 2018).

⁴⁸⁸ *Chavez v. Bridgestone Americas Tire Operations*, 503 P.3d 332, 337 (N.M. 2021).

⁴⁸⁹ *Id.* at 349.

⁴⁹⁰ Defendant’s Motion to Dismiss, *supra* note 482, at 1–2.

⁴⁹¹ Opposition to Motion to Dismiss, *supra* note 480, at 14.

In short, instead of splitting hairs in specific jurisdiction cases when there is a close call as to the nexus or purposeful availment requirement, courts should rely on the fairness factors to ultimately decide whether jurisdiction lies. Although that is precisely what the *Burger King* Court instructed when it said that the fairness considerations “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required,”⁴⁹² that principle has been diminished—and sometimes even ignored—by courts over the past three decades.⁴⁹³ With *Ford*, however, the tide seems to be turning as the fairness factors weighed heavily into that decision, albeit *sub silentio*. Now that we are on the right course with respect to specific jurisdiction, those same fairness considerations should inform decisions when it comes to other grounds for personal jurisdiction, including general jurisdiction and consent-by-registration jurisdiction.

2. General Jurisdiction

As discussed earlier, the Supreme Court revamped general jurisdiction jurisprudence in *Goodyear* and *Daimler* so that corporate defendants are usually only subject to general jurisdiction in the states where they are incorporated and maintain their principal place of business (“PPOB”) because that is where they are deemed at home.⁴⁹⁴ Importantly, however, by saying that state of incorporation/principal place of business is the paradigm of where a corporation is at home, the Court left open a small window for corporate defendants to be at home elsewhere.⁴⁹⁵ There has been much speculation since *Daimler* about when that exception might be triggered. Scholars have hypothesized, for example, that Boeing Corporation, which is incorporated in Delaware and headquartered in Illinois, might still be subject to general jurisdiction in Washington—the state where it used to be incorporated and headquartered and continues to conduct most of its manufacturing operations (e.g., more than half of its employees are still in Washington).⁴⁹⁶ Or what about Amazon? Is it at home in Virginia since that is the location of its second headquarters (HQ2)?⁴⁹⁷

⁴⁹² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (citations omitted).

⁴⁹³ See, e.g., Freer, *supra* note 28, at 603–04 (2019) (explaining that the restricted state of modern personal jurisdiction doctrine is attributable to “the modern obsession with avoiding any assessment of the fairness of jurisdiction” (emphasis omitted)).

⁴⁹⁴ See *supra* Section II.A.1.

⁴⁹⁵ *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 925 (2011).

⁴⁹⁶ See Parry, *supra* note 439, at 829 n.6; John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607, 612 & n.21 (2015).

⁴⁹⁷ See generally D.E. Wagner, *Hertz So Good: Amazon, General Jurisdiction’s Principal Place of Business, and Contacts Plus as the Future of the Exceptional Case*, 104 CORNELL L. REV. 1085, 1089, 1119 n.

The best way to answer these questions is not through a bright-line rule or some sort of new test, but by applying the fairness factors. Yet, as discussed earlier, the majority in *Daimler* concluded (in a footnote) that the reasonableness analysis doesn't apply to general jurisdiction because such an approach would be superfluous—i.e., if a defendant is at home in a forum state then, by definition, the exercise of jurisdiction must comport with fair play and substantial justice.⁴⁹⁸ That decision should not control for a few reasons. First, that issue was never argued or briefed by the parties during the entire eight-year history of the *Daimler* litigation.⁴⁹⁹ This is not at all surprising since every court of appeals to address the question had held that the fairness analysis does in fact apply to general jurisdiction.⁵⁰⁰ Second, this portion of the *Daimler* opinion is dicta because it was not necessary to the outcome of the case.⁵⁰¹ As Justice Sotomayor explained in her concurrence, instead of resolving the case on reasonableness—which would have been non-controversial given the intermediate appellate courts all agreed that the fairness prong applied to general jurisdiction—the Court decided *Daimler* on a different “ground neither argued nor decided below.”⁵⁰²

Finally, and most importantly, the *Daimler* majority's claim that fairness simply should not be part of the general jurisdiction analysis⁵⁰³ is wrong on the merits. General jurisdiction is one strand of the minimum contacts test established by *International Shoe*, and *International Shoe* requires not only that defendant maintain certain contacts with the forum state but that the exercise of jurisdiction comport with “fair play and substantial justice.”⁵⁰⁴ Just like in the specific jurisdiction context where reasonableness considerations can bolster jurisdiction “upon a lesser showing of minimum contacts than would otherwise be required,” and can defeat jurisdiction even when the contacts prong of the test is satisfied,⁵⁰⁵ the fairness factors should be employed by courts when deciding whether the defendant is “at home” in the forum state.

176 (2019) (discussing whether the nerve center test would allow Amazon to build a second headquarters in any state without considering general jurisdiction because it could choose a headquarters irrespective of actual corporate activity).

⁴⁹⁸ *Daimler*, 571 U.S. at 139 n.19.

⁴⁹⁹ *Id.* at 145 (Sotomayor, J., concurring).

⁵⁰⁰ *Id.* at 144 n.1.

⁵⁰¹ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (explaining that the Court is bound only by “those portions of the opinion necessary to [the] result”).

⁵⁰² *Daimler*, 571 U.S. at 144–46 (Sotomayor, J., concurring).

⁵⁰³ *Id.* at 133 n.10–11 (majority opinion).

⁵⁰⁴ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁵⁰⁵ *Burger King v. Rudzewicz*, 471 U.S. 462, 477–78 (1985).

Let us use the Amazon HQ2 example to illustrate how this might play out. Assume Pamela, a Virginia resident, is on vacation in California and forgets to pack her hairdryer. She purchases a hairdryer from Amazon—a Delaware corporation with its PPOB in Washington⁵⁰⁶—and that hairdryer is shipped overnight to the vacation home she is renting in California. The hairdryer malfunctions and severely injures Pamela, who seeks initial medical treatment in California and follow-up treatment in Virginia after returning home. Pamela then files a tort action against Amazon in Virginia. Since the conduct related to the claim occurred outside of Virginia, specific jurisdiction may be impossible to establish. Accordingly, Pamela relies on a theory of general jurisdiction instead arguing that Amazon is at home in Virginia as a result of its HQ2 being located there.

Whether general jurisdiction lies in this hypothetical case should depend on the fairness factors. Starting with the first factor, litigating in Virginia would hardly burden Amazon given its extensive business operations in the state. Amazon has invested \$2.5 billion in its HQ2 and the surrounding area, currently employs thousands of people, and plans to expand substantially over the next decade to employ about 25,000 people.⁵⁰⁷ Like Ford, by conducting so much business in Virginia, Amazon “enjoys the benefits and protection of [its] laws,” making the exercise of jurisdiction reasonable.⁵⁰⁸ Focusing now on the other factors—the “principles of interstate federalism”⁵⁰⁹—the court should consider the plaintiff’s interest in obtaining convenient and effective relief, as well as the forum state’s interest in adjudicating the dispute. Our hypothetical plaintiff, Pamela, lives in Virginia, so she is not forum shopping, but bringing suit in the “most natural state,” in contradistinction to the plaintiffs in *Bristol-Myers*.⁵¹⁰ In terms of the next factor, Virginia would certainly have an interest in providing a convenient forum for its resident and protecting other residents from dangerous products sold by Amazon.⁵¹¹

The last factors to consider focus on the collective interest of the states in resolving controversies in an efficient manner that furthers shared social

⁵⁰⁶ Wagner, *supra* note 497, at 1089.

⁵⁰⁷ John Schoettler, *Amazon Shares New Details on HQ2 Hiring Ahead of Career Day 2021*, AMAZON (Sept. 1, 2021), <https://www.aboutamazon.com/news/amazon-offices/the-next-chapter-for-hq2-sustainable-buildings-surrounded-by-nature>.

⁵⁰⁸ Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1029–30 (2021).

⁵⁰⁹ *Id.* at 1030.

⁵¹⁰ *Id.* at 1031 (“In short, the plaintiffs [in *Bristol-Myers*] were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly . . .”).

⁵¹¹ *Cf. id.* at 1030.

policies.⁵¹² These factors take into account things like where the claim arose, where the witnesses reside, where critical evidence is located, avoidance of piecemeal litigation, which state's law applies, and whether the case involves a foreign or domestic defendant.⁵¹³ Which way these factors lean in the Amazon hypothetical is harder to predict. There will likely be witnesses and other evidence in both Virginia and California since, among other things, Pamela sought medical treatment in both states. And surely Virginia and California would both have a significant interest in ensuring that Amazon complies with relevant product and consumer safety laws in light of its extensive operations and thousands of employees in those states. If California law applied in this case, that would weigh against Virginia exercising jurisdiction and suggest California is the more appropriate forum.⁵¹⁴ On the other hand, if *Pamela v. Amazon* proceeds in California, the case would involve all out-of-state parties, which *Ford* indicated supports a finding of jurisdiction in Virginia.⁵¹⁵

At the end of the day, the purpose of this exercise is not to say conclusively how a court should decide this hypothetical case. Maybe Amazon would be subject to general jurisdiction in Virginia or maybe not—it would depend on the direction the fairness factors point in that particular case based on all the facts in the record. While admitting that applying a reasonableness check of this sort to general jurisdiction has some appeal, Tonya Monestier ultimately rejects such an approach on the grounds that it would “vest courts with a great deal of discretion” and “undermin[e] the predictability that the [*Daimler*] Court sought to foster by adopting a new standard for general jurisdiction.”⁵¹⁶ Yet, the Court rejected bright-line rules for personal jurisdiction long ago, repeatedly embracing a case-by-case approach.⁵¹⁷ Indeed, the *Daimler* decision itself eschews a clear test for general jurisdiction by leaving open the possibility that a corporation might be at home in a third state (i.e., other than the state of incorporation and principal place of business), but provides little to no guidance on that point.⁵¹⁸ So, instead of muddying the waters further, the goal of this Article is to bring greater clarity to personal jurisdiction doctrine by proposing

⁵¹² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁵¹³ See Leslie W. Abramson, *Clarifying “Fair Play and Substantial Justice”: How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 460–68 (1991).

⁵¹⁴ See Abramson, *supra* note 513, at 465 (“If the court determines that the forum state’s substantive law applies to the case, then efficiency is served by proceeding in that forum.”).

⁵¹⁵ *Ford*, 141 S. Ct. at 1030.

⁵¹⁶ Tanya J. Monestier, *Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 264 (2014).

⁵¹⁷ *Shaffer v. Heitner*, 433 U.S. 186, 204, 212 (1977).

⁵¹⁸ *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014).

a uniform approach for courts to take when faced with thorny jurisdictional questions.

3. *Consent-by-Registration Jurisdiction*

Since the Supreme Court handed down its decision in *Daimler* restricting general jurisdiction, courts across the country have faced the issue of whether registration to do business in a forum state amounts to consent to personal jurisdiction there. As discussed earlier, the vast majority of these courts have held that the statute involved does not equate registration with consent,⁵¹⁹ thereby avoiding the constitutional question: Would such a registration statute violate due process? However, in two states—Georgia and Pennsylvania—that simple solution was not available because the statutes explicitly provided for consent by registration, and so courts have had to decide whether the statutes pass constitutional muster. Over the past year, the highest courts of Georgia and Pennsylvania reached opposite conclusions on this question in *McCall* and *Mallory*, respectively, and now the U.S. Supreme Court has granted certiorari to resolve the issue.⁵²⁰

As *International Shoe* was decided more than seventy-five years ago, one would expect the Court to have addressed by now the question whether the reasonableness analysis applies to *Pennoyer*-era theories of personal jurisdiction. Instead, the Court decided in *Shaffer* that fairness applies to in rem jurisdiction,⁵²¹ but then distinguished *Shaffer* two decades later in *Burnham* when the Court failed to reach consensus on whether tag jurisdiction should be analyzed under the test announced in *International Shoe*.⁵²² More than thirty years have now passed since *Burnham*, and it looks like the Court will finally have the opportunity to settle this long-lasting dispute. As with specific and general jurisdiction, the Court should employ the fairness factors when faced with difficult questions of personal jurisdiction based on traditional theories like the consent-by-registration issue. Applying the fairness factors to *McCall* and *Mallory* demonstrates how such an approach would work.

Starting with *McCall*, recall that the dispute in that case arose out of a car accident that occurred in Florida where the driver was a Georgia resident and the passenger, Tyrance McCall, was a Florida resident.⁵²³ The vehicle involved

⁵¹⁹ See *supra* Section II.B.3.

⁵²⁰ See *supra* note 45.

⁵²¹ *Shaffer*, 433 U.S. at 212.

⁵²² *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 620–21 (1990).

⁵²³ *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 83 (2021).

in the accident, which had been purchased in Georgia just a few weeks before the accident, had a tire manufactured by Cooper Tire installed on it.⁵²⁴ The tread of that tire failed, causing the accident in which McCall sustained serious injuries.⁵²⁵ McCall then sued Cooper Tire, the driver, and the Georgia dealership that sold the vehicle in Georgia state court.⁵²⁶ When Cooper Tire challenged personal jurisdiction, the Georgia courts held that the defendant had consented to jurisdiction by registering to do business in the state, and that such a consent-by-registration statute “does not violate federal due process under [*Pennsylvania Fire*].”⁵²⁷

Mallory v. Norfolk Southern Railway Co., on the other hand, involved one Virginia resident, Robert Mallory, suing another, Norfolk Southern Railway, in state court in Pennsylvania over injuries that Mallory suffered as a result of exposure to asbestos and other harmful chemicals while employed by the defendant in Ohio and Virginia.⁵²⁸ Mallory claimed that Norfolk Southern consented to general jurisdiction in Pennsylvania by registering to do business there.⁵²⁹ The Supreme Court of Pennsylvania ultimately rejected that argument and held that the consent-by-registration statute violated federal due process clause and, thus, was invalid.⁵³⁰

It is important to note, as an initial matter, that the *McCall* and *Mallory* courts got the holding correct in both cases: Cooper Tire should be subject to personal jurisdiction in Georgia and Norfolk Southern should not be subject to personal jurisdiction in Pennsylvania. Yet, the reasoning in *McCall* and *Mallory* was flawed and future courts are likely to misapply these cases so as to further complicate personal jurisdiction doctrine. Accordingly, now that the Supreme Court has granted certiorari in *Mallory*, it should take the opportunity to clarify the methodology courts should employ going forward when personal jurisdiction is premised on a consent-by-registration statute.

As a starting point, when faced with a consent-by-registration statute like Georgia’s or Pennsylvania’s, the first question is whether the statute is being challenged on its face, meaning it may not be enforced in any circumstances, or “as applied,” meaning the statute is unconstitutional as applied to this particular

⁵²⁴ Complaint for Damages and Demand for Jury Trial, *McCall v. Cooper Tire & Rubber Co.*, No. 18-C-02598-S2, 2018 WL 11378238 (Ga. State Ct. Dec. 21, 2018) (No. 18-C-02598-S2), 2018 WL 11379472.

⁵²⁵ *Id.*

⁵²⁶ *McCall*, 863 S.E.2d at 83.

⁵²⁷ *Id.*

⁵²⁸ 266 A.3d 542, 551 (Pa. 2021).

⁵²⁹ *Id.* at 551–52.

⁵³⁰ *Id.* at 571.

set of circumstances.⁵³¹ This distinction makes a huge difference in a case like *Mallory* where the consent-by-registration statute was held invalid.⁵³² If *Mallory* involved an “as applied” challenge, the Pennsylvania statute would be invalid only with respect to Norfolk Southern in that specific case, whereas a successful facial challenge would mean that Pennsylvania’s consent-by-registration statute cannot be relied upon to establish jurisdiction over any defendant. Generally speaking, and even more so during the Roberts era, the Supreme Court has expressed disapproval for facial challenges, suggesting they ought to be rare.⁵³³ And with respect to personal jurisdiction specifically, the Supreme Court has made clear that “as applied” challenges are the strongly favored manner for constitutional challenges.⁵³⁴ Thus, in deciding if a consent-by-registration statute passes constitutional muster, the focus should be on whether the application of the statute to the defendant in the case at hand violates due process.

The best way for courts to decide whether the exercise of consent-by-registration jurisdiction is constitutional vis-à-vis a particular defendant is by applying the fairness factors. *McCall* and *Mallory* provide excellent examples. Let us consider the burden-on-defendant factor in *McCall* to begin. Cooper Tire has filed registration-to-do-business documents in Georgia continuously since 1949.⁵³⁵ In addition, it maintains a large distribution center in Albany, Georgia—the sixth-largest warehouse in the entire state—which previously served as a Cooper Tire’s manufacturing facility.⁵³⁶ Cooper Tire distributed approximately 2.5 million tires through this facility between 2013–2017, and sold more than one million tires in Georgia during that same time period.⁵³⁷ Finally, Cooper Tire leases property in Savannah, Georgia, for importing products and components into the United States.⁵³⁸ In light of these extensive operations, it would be difficult for Cooper Tire to show that litigating in Georgia would be burdensome.

⁵³¹ See Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

⁵³² *Mallory*, 266 A.3d at 571.

⁵³³ See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 443, 450–51 (2008); see also Dorf, *supra* note 531, at 236; Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L.J. 1557, 1559 (2010); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 878 (2005).

⁵³⁴ See, e.g., Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1755 (2006) (explaining that “current doctrine . . . plainly points toward as-applied determinations of the constitutionality of exercises of personal jurisdiction”).

⁵³⁵ Brief in Opposition on Petition for Writ of Certiorari at 7, *Cooper Tire & Rubber Co. v. McCall*, No. 21-926 (Feb. 22, 2022).

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ *Id.*

The defendant in *Mallory* likewise had significant activities in the forum state. Norfolk Southern, one of the nation's largest railroads that "serves every major container port in the eastern United States,"⁵³⁹ has been registered to do business in Pennsylvania for many years.⁵⁴⁰ It owns over two thousand miles of railroad track in Pennsylvania and operates eleven rail yards and three locomotive repair shops there.⁵⁴¹ Four of those Pennsylvania rail yards are designated as "major rail classification yards" by Norfolk Southern.⁵⁴² Indeed, during oral argument, Justice Sotomayor noted that Norfolk Southern has "more miles of railroad track and more employees in Pennsylvania than any other state, even Virginia," where it is headquartered.⁵⁴³ Thus, the reach of Norfolk Southern's operations suggest that it would not be burdensome for the company to litigate in Philadelphia, Pennsylvania, which is only about 300 miles from its headquarters in Virginia.

While the first fairness factor, which protects nonresidents defendants from the burdens of inconvenient litigation, tends to support jurisdiction in both *McCall* and *Mallory*, the reasonableness analysis in the two cases diverges after that with the "interstate federalism" factors, as the *Ford* Court called them.⁵⁴⁴ Turning attention first to the "plaintiff's interest in obtaining convenient and effective relief,"⁵⁴⁵ *McCall* resides in Florida and *Mallory* resides in Virginia, so neither are residents of the states where they sued. However, *McCall* sued two defendants other than Cooper Tire, namely the driver and the dealership who sold the car, both of whom are residents of the forum state. Thus, Georgia is a "convenient and effective" forum because that is the only state where all defendants can be named in a single suit. In *Mallory*, by contrast, the only defendant named was Norfolk Southern—a company incorporated and headquartered in Virginia—which is also where plaintiff resides. Thus, the "most natural state"⁵⁴⁶ for *Mallory* to file this lawsuit would have been Virginia, not Pennsylvania.

⁵³⁹ *Corporate Profile*, NORFOLK S., <http://www.nscorp.com/content/nscorp/en/about-ns/corporate-profile.html> (last visited Dec. 13, 2022).

⁵⁴⁰ *Cf.* *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 553 (Pa. 2021).

⁵⁴¹ Petition for a Writ of Certiorari at 3, *Mallory v. Norfolk S. Ry. Co.*, No 21-1168 (Feb. 18, 2022).

⁵⁴² Those four are located in the following cities in Pennsylvania: Allentown, Conway, Enola, and Harrisburg. *See Corporate Profile*, *supra* note 539.

⁵⁴³ Transcript of Oral Argument at 71, *Mallory v. Norfolk S. Ry. Co.*, No. 21-1168 (Nov. 8, 2022).

⁵⁴⁴ *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1030 (2021).

⁵⁴⁵ *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁵⁴⁶ *Ford*, 141 S. Ct. at 1031.

Consideration of the next factor, the “forum state’s interest in the dispute,” also yields different results in *McCall* and *Mallory*.⁵⁴⁷ Georgia has an interest in adjudicating McCall’s claim because it involves two Georgia defendants, the allegedly defective tire was installed on a vehicle sold in Georgia, and those types of tires are distributed widely throughout the forum state.⁵⁴⁸ In *Mallory*, on the other hand, none of the parties resides in Pennsylvania, and the conduct giving rise to the claim occurred outside the forum state in Virginia and Ohio.⁵⁴⁹ Similarly, the final two factors,⁵⁵⁰ which focus on the interest of other states, weigh in favor of jurisdiction in *McCall* but against it in *Mallory*. The other state where *McCall* might have been filed is Florida since that is where the plaintiff lives and where the accident occurred. As noted above, however, Florida is not the most efficient forum for resolving this dispute, because the defendants could not all be sued there.⁵⁵¹ That is in marked distinction to *Mallory*, where allowing the case to proceed in Pennsylvania—a state in which none of the parties resides and none of the conduct underlying the claim occurred—would be far less efficient than Virginia.⁵⁵²

In the end, the *McCall* and *Mallory* courts both reached the correct jurisdictional holding despite coming to the opposite conclusion about whether consent-by-registration jurisdiction comports with due process. Still, the Court has granted certiorari in *Mallory*—notably, the case where the lower court held the defendant was not subject to personal jurisdiction in the forum state. Perhaps this means the Court will conclude that registration-by-consent jurisdiction should be even broader than proposed in this Article. Or maybe the Court is simply motivated to resolve this apparent split in authority created by *McCall* and *Mallory*. Whatever it decides with respect to the holding of these particular

⁵⁴⁷ See *World-Wide Volkswagen*, 444 U.S. at 292.

⁵⁴⁸ Brief in Opposition on Petition for Writ of Certiorari at 7, *Cooper Tire & Rubber Co. v. McCall*, No. 21-926 (Feb. 22, 2022).

⁵⁴⁹ Cf. *Ford*, 141 S. Ct. at 1030 (indicating that jurisdiction is improper when “the suit involves all out-of-state parties, an out-of-state accident, and out-of-state injuries”). Justice Gorsuch’s questions during oral argument make clear that he is considering how these factors might impact consent jurisdiction. Transcript of Oral Argument at 109–10, *Mallory v. Norfolk S. Ry. Co.*, No. 21-1168 (Nov. 8, 2022) (“Let’s suppose . . . Pennsylvania had a resident who had been injured. Would the consent here then have to be analyzed differently?”); *id.* at 110 (“But there would come a point somewhere between everything happening in state and everybody being in state and everything happening out of state and everybody being out of state where consent like this under your theory would be permissible?”).

⁵⁵⁰ Those final two factors include “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies” and “the shared interest of the several States in furthering fundamental substantive social policies.” *World-Wide Volkswagen*, 444 U.S. at 292.

⁵⁵¹ Abramson, *supra* note 513, at 468 (citing cases holding that “the interest of the several states is best served by resolving claims against all defendants in one forum”).

⁵⁵² *Id.* (explaining that the final factor often weighs against jurisdiction when an alternative forum has a greater interest in adjudicating the claim).

cases, it is vital that the Court take the opportunity to continue what it started in *Ford* and return fairness to its proper place in the personal jurisdiction analysis.

CONCLUSION

Personal jurisdiction is one of the most common constitutional questions that courts face.⁵⁵³ Yet, ever since the doctrine took root in American jurisprudence almost 150 years ago,⁵⁵⁴ it has consistently confounded courts. The primary reason for this confusion is that personal jurisdiction, like many other constitutional inquiries,⁵⁵⁵ has to be decided on a case-by-case basis.⁵⁵⁶ When a doctrine like personal jurisdiction is governed by a standard such as “due process,” rather than a bright-line rule, it is important that courts articulate a methodology that will produce a body of law that is more determinate and predictable,⁵⁵⁷ while leaving room for courts “to take into account all relevant factors or the totality of the circumstances.”⁵⁵⁸ Applying the fairness factors to all personal jurisdiction inquiries—whether based on specific jurisdiction, general jurisdiction, or one of the traditional grounds like consent by registration—is exactly the type of methodology that the personal jurisdiction doctrine needs to achieve these objectives.

⁵⁵³ See Hartnett, *supra* note 534, at 1755.

⁵⁵⁴ See generally *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁵⁵⁵ See, e.g., *California v. Carey*, 471 U.S. 386, 400 (Stevens, J., dissenting) (“The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication.”); David L. Abney, *Constitutional Interpretation: Moving Toward a Jurisprudence of Common Sense*, 67 TEMP. L. REV. 931, 941 (1994) (“The Constitution may speak with a ‘majestic simplicity,’ but phrases such as ‘police power,’ ‘unreasonable searches and seizures,’ ‘cruel and unusual punishment,’ ‘due process,’ and ‘equal protection’ can only be defined and understood on a case-by-case basis.” (footnote omitted)).

⁵⁵⁶ See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (“Mechanical or quantitative evaluations of the defendant’s activities in the forum could not resolve the question of reasonableness . . .”).

⁵⁵⁷ Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141, 2151–52 (2016).

⁵⁵⁸ Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992).