

# JURISDICTION

DEFINING STATE COURTS' AUTHORITY



2017 FORUM FOR STATE APPELLATE COURT JUDGES



FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.



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“Really, what we are all striving for is justice.  
Fair play and justice are what that test is about.”

—A judge attending the 2017 Forum

“The touchstone of jurisdiction is due process.”

—Prof. Simona Grossi



“State courts retain considerable leeway in personal  
jurisdiction cases to keep the courthouse doors open,  
even under the Supreme Court’s recent jurisprudence.”

—Prof. Adam Steinman



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# FOREWORD

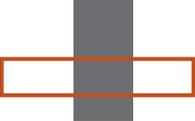
The Pound Civil Justice Institute’s twenty-fifth Forum for State Appellate Court Judges was held on July 22, 2017, in Boston, Massachusetts. As with all of our past forums, it was both enjoyable and thought-provoking. In the Forum setting, judges, practicing attorneys, and legal scholars considered the crucial issue of challenges to courts’ jurisdiction—a recent trend that threatens access to justice.

The Pound Civil Justice Institute recognizes that the state courts have the principal role in the administration of justice in the United States, and that they carry, by far, the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is always fruitful. Our attendees bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Institute’s Fellows. That diversity of viewpoints emerges in our Forum reports.

Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics, ranging from the court funding crisis to the decline of jury trial, to separation of powers, rulemaking, forced arbitration, and judicial transparency. We are proud of our Forums, and are gratified by the increasing attendance we have experienced since their inception, as well as by the very positive comments we have received from judges who have attended in the past. A full listing of the prior Forums and their content is provided in an appendix to this report, and their reports and papers—along with most of our other publications—are available for free download on our Web site: [www.poundinstitute.org](http://www.poundinstitute.org).

The Pound Institute is indebted to many people for the success of the 2017 Forum for State Appellate Court Judges:

- Professor Simona Grossi and Professor Adam Steinman, who wrote the papers that started our discussions;
- Hon. Ralph Gants, Chief Justice of the Massachusetts Supreme Judicial Court, for welcoming us to Boston;
- our lunch speaker, Hon. William Young of the United States District Court, District of Massachusetts, for an inspiring discussion on the importance of civil jury trials in America;
- our panelists—Alani Golanski, Hon. Geraldine Hines, Professor Lonny Hoffman, Toyja Kelley, Linda Morkan, Hon. Jenny Rivera, Matt Wessler, and Professor Margaret Woo;
- the moderators of our small-group discussions—Linda Miller Atkinson, Leslie Bailey, Kathryn Clarke, Caragh Fay, Tom Fay, Wendy Fleishman, Steve Herman, Pat Malone, Andre Mura, Wayne Parsons, Gale Pearson, Alinor Sterling, John Vail, and David Wirtes;
- and the Pound Civil Justice Institute’s dedicated and talented staff—Mary Collishaw, our executive director, and Jim Rooks, our consultant and Forum reporter—for their diligence and professionalism in organizing and administering the 2017 Judges Forum.



It goes without saying that we appreciated the attendance of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other. We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your consideration of matters relating to jurisdiction and access to civil justice.



Ellen Relkin  
President, Pound Civil Justice Institute, 2016-18

# INTRODUCTION

On July 22, 2017 in Boston, Massachusetts, 164 judges, representing 35 states, took part in the Pound Civil Justice Institute’s twenty-fifth annual Forum for State Appellate Court Judges.

The judges examined the topic, “Jurisdiction: Defining State Courts’ Authority.” Their deliberations were based on original papers written for the Forum by Professor Simona Grossi of Loyola Law School, Los Angeles (“Personal Jurisdiction: Origins, Principles, and Practice”), and Professor Adam Steinman of The University of Alabama School of Law (“State Court Jurisdiction in the 21st Century”). The papers were distributed to participants in advance of the meeting, and the authors made less formal oral presentations of their papers to the judges during the plenary sessions. The paper presentations were followed by discussion by panels of distinguished commentators: Alani Golanski, Weitz & Luxenberg; Hon. Geraldine Hines, Massachusetts Supreme Judicial Court; Professor Lonny Hoffman, University of Houston Law Center; Toyja E. Kelley Sr., DRI—The Voice of the Defense Bar; Linda L. Morkan, Robinson & Cole LLP; Hon. Jenny Rivera, New York State Court of Appeals; Matt Wessler, Gupta Wessler; and Professor Margaret Woo, Northeastern University School of Law. All provided incisive comments on the issues based on a wealth of diverse experience in the law. The Forum was moderated by Pound Institute President Ellen Relkin, an appellate attorney with Weitz & Luxenberg in New York City and New Jersey.

The judges also heard a lunch address by Hon. William G. Young, United States District Court for the District of Massachusetts.

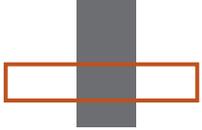
After each plenary session, the judges separated into small groups to discuss the issues, with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded electronically and transcribed by court reporters. Under ground rules set in advance of the discussions, comments by the judges were not made for attribution in this report of the Forum. A representative selection of the judges’ comments appears in this report.

At the concluding plenary session, the Forum Reporter, James E. Rooks, Jr., summarized points of apparent agreement among the judges, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Grossi and Steinman, and on transcripts of the Forum’s plenary sessions and group discussions.



James E. Rooks, Jr.  
Forum Reporter



# WELCOME REMARKS

## **Honorable Ralph D. Gants, Chief Justice of the Massachusetts Supreme Judicial Court**

On behalf of the great Commonwealth of Massachusetts, we welcome you. We know that you are really here to celebrate the 325<sup>th</sup> anniversary of our Supreme Judicial Court, which is to be honored this November. We're the oldest appellate court in continuous existence in the Western Hemisphere, and we operate under the oldest still-functioning written constitution in the world.

In those 325 years, we have had much to be proud of and some that we regret. It is in that spirit that we begin to discuss the matters we are going to be discussing today—to be learning from our mistakes and to take pride in our particular parts of wisdom.

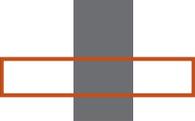
In 1783, the Chief Justice of my court, having seen the new Constitution that John Adams had written for Massachusetts,<sup>1</sup> was adjudicating a case in which a fellow named Quock Walker, a freed slave, had the audacity to challenge his being beaten by a slave master. He claimed that he wasn't a slave anymore, and brought a civil tort action for assault and battery. During the jury instructions in that case, Chief Justice Cushing told the jury, in essence, "Our new Constitution says that all men are born free and equal. That means what it says. And therefore, there can be no slavery in Massachusetts." Sure enough, the 1790 Census showed that there were no slaves in Massachusetts.<sup>2</sup> We're proud of that case, but there are a few others we aren't so proud of.

For instance, in 1849, when a young African American girl named Sarah Roberts wanted to go to the school nearest to her home on Beacon Hill in the City of Boston, she was stymied by the fact that the school nearest to her did not permit blacks to attend. In 1849, my court reviewed that particular case and said in essence that, "Yes, she has equal rights, but we are going to defer to the wisdom of the school committee, which has decided that it is perhaps best that we have equal schools for blacks and whites, but not the same schools."<sup>3</sup> So Sarah was not permitted to go to the school nearest to her. And when the United States Supreme Court decided *Plessy v. Ferguson* in 1896,<sup>4</sup> they cited the Sarah Roberts case favorably in approving the principle of "separate but equal."

So we occasionally make mistakes, but we try not to leave them uncorrected. In 2003, after my court declared that every person, regardless of whether they are straight or gay, has the right to marry,<sup>5</sup> our legislature asked if it would be sufficient to provide a right of "civil union" to same-sex couples, as opposed to the right of traditional marriage. And my court, having learned from its mistake in the Sarah Roberts case, said, in essence, "No. We no longer accept the principle of 'separate but equal.'"<sup>6</sup>

We have made some mistakes, but we have learned from them. We are here now to enjoy the wisdom of our speakers and our panelists, so that we, too, can look back upon our time as appellate judges with more pride than regrets.

Thank you so much for coming to Boston.



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## Notes

<sup>1</sup> Massachusetts Constitution, 1780, <https://malegislature.gov/Laws/Constitution>.

<sup>2</sup> For more about the Quock Walker case, see <http://www.mass.gov/courts/court-info/sjc/edu-res-center/jn-adams/the-quock-walker-case.html>.

<sup>3</sup> Roberts v. City of Boston, 59 Mass. 198, 1849 WL 2756 (1849).

<sup>4</sup> Plessy v. Ferguson, 163 U.S. 537 (1896).

<sup>5</sup> Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

<sup>6</sup> Supreme Judicial Court Advisory Opinion SJC-09163 (Feb. 3, 2004).

## Personal Jurisdiction: Origins, Principles, and Practice

Simona Grossi,<sup>1</sup> Loyola Law School, Los Angeles

### EXECUTIVE SUMMARY

*In Part I of her paper, Professor Grossi prompts us to recall the core principles of personal jurisdiction: fairness and efficiency, tempered by reason. Guided by the Due Process Clause of the Fourteenth Amendment, state courts abide by their constitutional imperative to embody its principles as a matter of enforceable law. Yet the imprecise nature of United State Supreme Court precedent and the sovereignty afforded to states, thanks to dual federalism, provide state courts considerable flexibility in the application of personal jurisdiction law. Professor Grossi introduces the dichotomy in the Supreme Court's approaches to the law of jurisdiction: one that is fluid and fact-based, and another that is doctrinal, mechanical, and heavily shaped by judicial partiality. Here, where judicial decision-making goes awry, state courts are in an ideal position to take the lead.*

*In Part II ("Fundamental Concepts of Due Process and Personal Jurisdiction"), Grossi outlines the foundations of due process and its bearing on personal jurisdiction, beginning with Magna Carta. She selects several cases that left their mark on legal history, demonstrating how lawmakers gradually committed themselves to the principles of the Great Charter—reflective of both substantive and procedural components of established law. Later, the Supreme Court's method of judicial inquiry shifted from its traditional pedigree and began to include more expansive, theoretical approaches. An increasingly integrated national economy arose concomitantly with what might be called a fictional approach to jurisdiction, as evidenced in *Pennoyer v. Neff*. Professor Grossi then traces the development of this trend, analyzing the impact of *International Shoe Co. v. Washington*, which gave rise to a fluid spectrum of possibilities within which lower courts could operate when faced with jurisdictional questions. The Supreme Court carved out novel doctrinal areas to fit into their shifting conception of due process, adding now-commonplace terms to their analysis, such as "continuous and systematic contacts," and "traditional notions of fair play and substantial justice." Grossi goes on to explain how the once-fluid spectrum became constricted with cases that make it extraordinarily difficult to establish jurisdiction, such as *Daimler AG v. Bauman*, *Burger King v. Rudzewicz*, and *J. McIntyre Mach., Ltd. v. Nicastro*. Grossi's framework sketches the seminal cases throughout jurisdiction history, but also touches upon her own persuasions about how the Supreme Court might have alternatively considered issues and how they might soon rule. Having filed an amicus brief with Professor Allan Ides in *Bristol-Myers*, Grossi argues in sum that the line between general and specific jurisdiction ought to be flexible, not artificially constricted.*

*In Part III ("The Role of Discovery in Jurisdictional Disputes"), Professor Grossi expands upon her previously established concepts by outlining the consequences associated with heavily doctrinal approaches to jurisdiction. Because of heightened pleading standards and rigorous jurisdictional disputes, a "front-loading" trend has arisen that poses serious challenges to accessing the civil justice system, requiring plaintiffs to surmount procedural obstacles that are often practically impossible. Grossi explains how this fragmented and mechanical approach to the rules of*

civil procedure, in which “procedure prevails over substance,” stifles the development of substantive law, and often prevents the vindication and enforcement of rights.

In Part IV (“Personal Jurisdiction in State Courts”), Grossi addresses five staple jurisdiction decisions coming out of state courts in recent years. Canvassing the broad, yet constricted, spectrum of jurisdictional possibilities, Grossi touches upon, *inter alia*: *TV Azteca v. Ruiz*, where the Texas Supreme Court authored a long and serpentine discussion of purposeful availment as a universal requirement of the minimum contacts standard; *Tennessee v. NV Sumatra Tobacco Trading Co.*, where the Tennessee Supreme Court discussed the stream of commerce plus doctrine as opposed to a realistic assessment of the facts; and *Riley v. MoneyMutual, LLC*, in which the Minnesota Supreme Court rejected a causal relationship between the defendant’s purposeful contacts (e-mail marketing, television ads, and Google AdWords) and the harm suffered by the plaintiff (liability for loans issued in violation of various state consumer-protection laws) as a basis for jurisdiction.

In her conclusion (Part V), Professor Grossi relates her methodology to Roscoe Pound’s formulation of jurisprudential thinking over time: “fundamental conceptions are worked out from traditional legal principles, and the rules . . . are deduced from these conceptions.” In essence, Grossi has embodied the bipartite analytical framework that Pound postulated, underpinning the relationship between natural law and empirical jurisprudence, and has moved past it: “Rather than trying to fit judicial decision-making into any of Pound’s categories, given our inherent democratic commitment to liberty and equality, I believe that an optimal judicial decision-making process would be one premised on, and truthful to, due process.”

## I. PREMISE

The law of personal jurisdiction should be principled, pragmatic and no more complicated than necessary to measure the constitutional scope of a state’s power to adjudicate cases brought before its courts. From a

constitutional perspective, the law of personal jurisdiction in state courts derives from the Due Process Clause of the Fourteenth Amendment. The core principles of due process are fairness and efficiency tempered by reason. The challenge is how to embody those principles as a matter of enforceable law.

Given our constitutional system, which embraces judicial review and includes a judicial hierarchy in which the U.S. Supreme Court is the ultimate expositor of the law of the Constitution, the law of personal jurisdiction is ultimately the law as envisioned by that Court. Over the

years, the Supreme Court has offered two distinct approaches to the law of jurisdiction: one that is fluid, fact-based, and geared toward fundamental concepts of fairness and efficiency; and one that is heavily doctrinal, mechanical, and geared toward an ever-changing landscape of judicial predilections. This latter approach is fact-based only to the extent that each nuance of fact seems to lead to a new doctrinal path.

While the law of personal jurisdiction is largely framed within the Due Process Clause of the Fourteenth Amendment, which operates as a limit on state power, that clause also presumes and embraces the authority and interest of each state to provide a judicial forum for its citizens and for the agents of the state seeking to vindicate state law and policy. In other words, the Due Process Clause is not simply a limit on state power. It is also an implicit recognition of state power. The law of personal jurisdiction, as instructed by the Due Process Clause,

should tell us what to do when the power of the state collides with the potential limits imposed by the due process of law.

Herein we see the dilemma that faces state courts. State courts exist to serve the legitimate interests of the state and the people of the state. Of course, in so doing, those courts must conform their actions to the U.S. Constitution, and, most significantly, to the Fourteenth Amendment guarantees of due process and equal protection. That translates into a respectful compliance with U.S. Supreme Court precedent. But in so doing, a state court cannot and should not overlook its essential role in the enforcement of state-created rights and in the vindication of legitimate state policy.

State courts exist to serve the legitimate interests of the state and the people of the state.

The question then becomes how to navigate in and around the principles, the doctrines, and the countervailing concerns that face every state court asked to dismiss a case for want of personal jurisdiction over a non-resident defendant. Of course, a state court must comply with the precise doctrines established by the U.S. Supreme Court. But we all know that in many contexts, those doctrines are far from precise. I would begin the jurisdictional analysis with principles: fairness and efficiency tempered by reason. Does it make sense to exercise the power of the state under the circumstances of this case? If so, and unless doctrine demands a different result, I would allow those principles to prevail. In other words, I would not attempt to discover or create more doctrine or to confine my judgment to the contours of doctrine; I would instead attempt to redirect the discussion back to fundamental principles—including those that focus on the interest of the state in providing a forum under the circumstances presented—and leave doctrine construction or deconstruction to the U.S. Supreme Court. The ultimate goal would be to return the law of personal jurisdiction to its fundamental core: fairness and efficiency tempered by reason, and state courts are in the ideal position to do so. It is here that state courts should take the lead.

## II. FUNDAMENTAL CONCEPTS OF DUE PROCESS AND PERSONAL JURISDICTION

### A. Due Process & Personal Jurisdiction: From Magna Carta to *Pennoyer v. Neff*

The idea of due process is an essential aspect of any democratic system of laws. It is premised on the concepts of fairness and efficiency tempered by reasonableness. Its ultimate goal is to serve as a bulwark against the imposition of arbitrary government action, and it operates both substantively and procedurally. My focus here is on the procedural aspect of due process.<sup>2</sup>

A survey of Supreme Court case law helps identify the essentials of procedural due process as requiring at least “minimum procedural safeguards,”<sup>3</sup> “rules...shaped by the risk of error inherent in the truth-finding process,”<sup>4</sup> rules reflective of “those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,”<sup>5</sup> and rules intended to promote an “accurate determination of decisional facts, and informed by unbiased exercises of official discretion.”<sup>6</sup> As the Court has explained, the concept of due process is “flexible and calls for such

Procedural due process doesn't demand exactness. It only demands that the procedure in place, balancing fairness and efficiency concerns, reaches the optimal result.



procedural protections as the particular situation demands.”<sup>7</sup> Procedural due process doesn’t demand exactness.<sup>8</sup> It only demands that the procedure in place, balancing fairness and efficiency concerns, including the opposing interests of the parties and the judicial system as a whole, reaches the optimal result.

The origins of the principle of due process can be traced back to Magna Carta. In *Kerry v. Din*,<sup>9</sup> the U.S. Supreme Court noted that

[t]he Due Process Clause has its origin in Magna Carta. As originally drafted, the Great Charter provided that “[n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or *by the law of the land*.” Magna Carta, ch. 29, in 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 45 (1797) (emphasis added).<sup>10</sup>

In 1354, under Edward III, Chapter 29 of the Magna Carta was revised and a new provision for the first time contained the phrase “due process.”<sup>11</sup> At that time, the phrase was associated with a series of protections inherent in the trial process, like trial by jury,<sup>12</sup> and as the Court later explained, at the time of the Fifth Amendment’s ratification, the words “due process of law” were understood “to convey the same meaning as the words ‘by the law of the land’” in Magna Carta.<sup>13</sup> Of course, since the founding, “the amount and quality of process that our precedents have recognized as ‘due’ under the Clause has changed considerably.”<sup>14</sup>

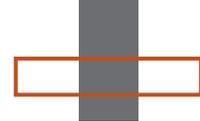
At its inception, Magna Carta’s “law of the land” signified, at the very least, that a person could not be deprived of liberty or property except pursuant to established law. In other words, the “law of the land” imposed a rule of law principle.

The phrase “due process of law” then translated the law-of-the-land standard into a practical formula requiring the use of the appropriate (“due”) writ or form (“process of law”) in any act of potential deprivation. The required “process of law” reflected both the substantive and procedural components of the established law, drawing no distinction between the two. In short, all potential deprivations ought to proceed according to the process that encompassed the substantive standard. The due process standard, therefore, prohibited the King from imposing arbitrary deprivations on his subjects. Logically, it followed, a law that vested the King with arbitrary power would be invalid as inconsistent with the rule-of-law premise of due process. In short, to comply with due process, an action ought to accord with an established, non-arbitrary standard of law.

### ***Murray’s Lessee***

*Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>15</sup> stands as the Supreme Court’s first foray into the law of procedural due process. There the Court noted that “[t]he words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law.”<sup>16</sup> The Court did not elaborate on the meaning of those phrases, and endorsed a mechanical method of analysis that was one large step removed from the principle:

The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due



process... To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>17</sup>

The *Hoboken* Court's method of judicial inquiry—relying exclusively on constitutional text and tradition—suggested that due process required nothing more than a pedigree of past practices. Indeed, the Court upheld the non-judicial issuance of the distress warrant based solely on its view that the Treasury had acted in conformity with a statute (law of the land) and that the statute found its roots in 18<sup>th</sup> century practices by the Crown (due process).<sup>18</sup>

A few years later, in *Hurtado v. California*,<sup>19</sup> a criminal proceeding, the Court seemed to endorse a slightly more expansive (and perhaps more theoretical) approach to due process. There it quoted with approval Justice William Johnson's views:

As to the words from *Magna Charta*...after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.<sup>20</sup>

And those of Thomas Cooley:

The principles, then, upon which the process is based, are to determine whether it is 'due process' or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.<sup>21</sup>

Arguably, the observations of Johnson and Cooley locate the principle of due process in a non-formalistic prescription against arbitrary laws and abjure considerations of mere form. But what the *Hurtado* Court may have given with one hand, it withdrew with another:

The real syllabus of the passage quoted is that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows, that nothing else can be due process of law...But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.<sup>22</sup>

Thus, the Court recognized that novel procedures could be deemed due process, but adhered to the view that established practices remained sufficient.

It was against this background that *Pennoyer v. Neff*,<sup>23</sup> the foundational personal jurisdiction case, was decided. At that time, personal jurisdiction was premised on, and limited by, the idea of territoriality:



The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, [a]n illegitimate assumption of power, and be resisted as mere abuse... The several States of the Union are not, it is true, in every respect independent, many of the right and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, 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 or property without its territory... “Any exertion of authority of this sort beyond this limit,’ says Story, ‘is a mere nullity, and incapable of binding such persons or property in any other tribunals.’<sup>24</sup>

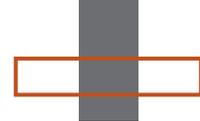
A judgment rendered in violation of the established principle of territoriality<sup>25</sup> would be invalid and, thus, unenforceable:

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of [judgments rendered in the absence of jurisdiction] may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.<sup>26</sup>

But the limits of the territoriality principle to the fair and efficient administration of justice were evident, and so the *Pennoyer* Court felt compelled to force those limits by introducing what might be called a fictional approach to jurisdiction:

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not . . . require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State.<sup>27</sup>

The fictions—e.g., treating conduct in the forum as consent to service on a designated agent—would allow the courts of the states to enforce rights and obligations created in the forum state. And this fictional approach blossomed over the course of the next several decades as courts struggled with the principle of territoriality in the context of an increasingly integrated national economy.<sup>28</sup>



## B. *International Shoe Co. v. Washington*: From Fictions to Realism, and a Fluid Spectrum of Jurisdictional Possibilities

In *International Shoe Co. v. Washington*,<sup>29</sup> the jurisdictional question presented was “whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes.”<sup>30</sup>

The Court answered the question in the affirmative, expanding the reach of personal jurisdiction beyond its traditional and fictional confines:

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”<sup>31</sup>

A “notion” is a conception or an idea about something.<sup>32</sup> Thus, a traditional notion of fair play and substantial justice connotes deeply held conceptions of fairness and justice, and not simply an obeisance to past practices. In approaching due process, therefore, we should also be mindful of “what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke. That tradition is a living thing.”<sup>33</sup>

A traditional notion of fair play and substantial justice connotes deeply held conceptions of fairness and justice, and not simply an obeisance to past practices.

In applying the above standard, the *International Shoe* Court offered a fluid approach to due process with a spectrum of jurisdictional possibilities,<sup>34</sup> and demanded a realistic, qualitative assessment of facts.<sup>35</sup> In so doing, it rejected the fictional approach to jurisdiction:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its “presence” without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far ‘present’ there as to satisfy due process requirements for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms “present” or “presence” are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An “estimate of the inconveniences” which would result to the corporation from a trial away from its “home” or principal place of business is relevant in this connection.<sup>36</sup>

The *International Shoe* Court described a range of potential circumstances that would satisfy due process beyond the traditional categories.

Consistent with the fair-play and substantial-justice standards, the *International Shoe* Court described a range of potential circumstances that would satisfy due process beyond the traditional categories: the commission of a single but substantively relevant act in the forum, the engagement in continuous and systematic activity in the forum giving rise to or related to the claim, and the engagement in continuous and systematic activity in the forum that was “so substantial” as to justify the exercise of jurisdiction over

claims unrelated to that activity. From the foregoing description, we can see an inverse relationship between meaningful contacts and relatedness: as the contacts increase, the relatedness component relaxes, to the point of disappearing entirely once the contacts become “so substantial.” The spectrum is fluid, and it is to be applied from a perspective of reasonableness focused on the specific circumstances of the case.

In the Court’s estimation, the activities of the International Shoe Company in the State of Washington clearly fell within the jurisdictional spectrum, as those activities were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.<sup>37</sup>

The *International Shoe* formula was principled and flexible.

The *International Shoe* formula was principled and flexible. It did not distinguish between general and specific jurisdiction, and it did not contemplate the requirement of purposeful availment or any other doctrinal test.<sup>38</sup> Rather the Court’s approach called for a realistic appraisal of the facts in light of traditional notions of fairness and justice. It balanced the interests of the defendant (being sued in a forum

where it could expect to be sued), the plaintiff (suing in his selected forum), and the forum state and the judicial system as a whole (having lawsuits tried in a convenient forum with legitimate interest in the matter at hand). In short, the Court endorsed an approach to due process that centered on the core ideas of fairness and efficiency.

### **C. Traditional Notions of Fair Play and Substantial Justice Applied and Structured: *McGee v. International Life Insurance Co.* and *Hanson v. Denckla***

Less than a decade later, the Court applied the *International Shoe* formula in *McGee v. International Life Insurance Co.*,<sup>39</sup> a suit brought to enforce the provisions of a life insurance policy. An insurance company from Texas had solicited a reinsurance agreement with a resident of California via mail. The offer was accepted in California, and the insurance premiums were mailed from California to Texas. After the insured died, his mother, the beneficiary under the policy, filed a claim with the insurance company, but the company refused to pay. She then sued the company in a California state court, which upheld the exercise of personal jurisdiction over the insurance company and eventually entered a judgment in the plaintiff’s favor. When the mother sought to enforce that judgment in Texas, however, Texas courts refused to give it full faith and credit on the theory that the California courts lacked jurisdiction over the Texas-based company.<sup>40</sup>



The central issue before the Court was whether a single contact with the forum—the solicitation of one policy—could serve as a proper basis on which to exercise personal jurisdiction.<sup>41</sup> In fact, *International Shoe* had addressed that question and explained that a single act could be “deemed sufficient” to establish jurisdiction depending on the “nature and quality and the circumstances of [its] commission.”<sup>42</sup> And so, applying the *International Shoe* guiding principle, the *McGee* Court upheld jurisdiction<sup>43</sup> over the defendant, given that

[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when the insurers refuse to pay claims.<sup>44</sup>

The *McGee* Court did not distinguish between general or specific jurisdiction, nor did it mention purposeful availment. In other words, the personal jurisdiction formula established in *International Shoe* remained fluid and focused on the realistic assessment of the facts of the case, those “certain minimum contacts” with the forum that made the exercise of jurisdiction “consistent with the traditional notions of fair play and substantive justice.” Thus, the Court’s decision did not articulate any new doctrine. Rather, it applied established principles and reiterated those principles for the guidance of lower courts.

The personal jurisdiction formula established in *International Shoe* remained fluid and focused on the realistic assessment of the facts of the case.

But later in that same term of Court, the jurisdictional inquiry took an abrupt U-turn with the decision in *Hanson v. Denckla*.<sup>45</sup> There the essential issue was whether the courts of Florida could exercise jurisdiction over a Delaware trust company, which was trustee of a trust whose settlor had moved to Florida after the creation of the trust.<sup>46</sup> The trustee continued to administer the trust on behalf of the Florida settlor for the following eight years, and the settlor exercised the power of appointment under the trust while in Florida. Yet, the Court found that the trustee lacked minimum contacts with Florida sufficient to establish personal jurisdiction.<sup>47</sup> This was because the Court read *International Shoe* as requiring that there be “some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits of protections of its laws.”<sup>48</sup>

In so doing, the Court transformed what *International Shoe* had considered a natural consequence of a defendant’s activities in a state—i.e., enjoying the benefits and protections of the laws of that state—into a necessary pre-condition for the exercise of jurisdiction. This is a clear example of the Court falling into a linguistic doctrinal trap.<sup>49</sup> And it may have taken this turn to insure a particular result in the case before it—forcing an equitable distribution of the decedent’s assets.

In applying the new purposeful-availment test, the Court distinguished *McGee* by noting that, unlike the insurance company there, the trustee here had not performed any acts in the forum state that bore the same relationship to the trust as did the solicitation of the insurance contract at issue in *McGee*.<sup>50</sup> In fact, in the Court’s view, the Florida proceeding could not be considered as one initiated to enforce an obligation arising from any privilege the nonresident defendant trustee had exercised in Florida.<sup>51</sup> Thus, according to the Court, the trustee had not “purposefully availed” itself of the benefits and protections of Florida law.<sup>52</sup>

Of course, as noted above, this purposeful-availment requirement was the *Hanson* Court’s own creation and, most importantly, prior to *Hanson*, it had not been treated as an absolute precondition to making the exercise of personal jurisdiction consistent with due process.

It is certainly not true that the trust company lacked meaningful connections with the state. Nor is it necessarily the case that the company could not have reasonably expected to be sued in Florida on a matter related to the trust. After all, the company was aware that the settlor had moved to Florida and continued to act as the trustee over the trust and to communicate with her in Florida with respect to trust business.

In his dissenting opinion, Justice Black—the author of *McGee*—found that Florida had personal jurisdiction over the Delaware trustee.<sup>53</sup> He observed that the object of the controversy was whether the settlor had properly exercised her power to appoint beneficiaries under the precise trust being administered by the trustee. In fact, the litigation arose when the legatees, under the settlor’s will, brought an action in the Florida courts seeking a determination as to whether this appointment was valid.<sup>54</sup> This disposition of her property had very close and substantial connections with Florida, since the settlor had appointed the beneficiaries in Florida and all the beneficiaries lived there. Thus, Florida had an interest in exercising jurisdiction and applying Florida law to determine whether the appointment was indeed valid.

The connections between the appointment, the transaction, and the State of Florida were thus evident and, of course, the trustee was necessarily implicated in this action.

Therefore, in Justice Black’s view, Florida courts should have the power to adjudicate a controversy arising out of transactions that were so connected to the state, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend “traditional notions of fair play and substantial justice.”<sup>55</sup>

But, according to Justice Black, that was not the case, since the trustee “chose to maintain business relations with [the settlor] in that State for eight years, regularly communicating with her with respect to the business of the trust including the very appointment in question.”<sup>56</sup> Moreover, the trustee’s burden of participating as a formal (and collateral) party to this dispute over the appointment would have been minimal at best.

While Justice Black’s analysis was truthful to *International Shoe* and the basic idea behind the due process formula, the majority opinion shifted away from *International Shoe*’s fundamental principles toward a more technical and mechanistic approach to the details of doctrine.<sup>57</sup> With *Hanson*, the minimum contacts test began to lose its inherent coherence and strength.

#### **D. Adding Layers to the Structure and Constricting the Spectrum: General and Specific Jurisdiction, Purposeful Availment, Reasonableness Factors**

The modern law of personal jurisdiction has reduced *International Shoe*’s fluid jurisdictional spectrum to a mechanical, bright-line distinction between “specific” jurisdiction and “general” jurisdiction.

The modern law of personal jurisdiction has reduced *International Shoe*’s fluid jurisdictional spectrum to a mechanical, bright-line distinction between “specific” jurisdiction, which embraces the first two *International Shoe* categories, and “general” jurisdiction, which embraces the third.<sup>58</sup> Both specific jurisdiction and general jurisdiction require that the non-resident defendant have engaged in purposeful activity in or

directed toward the forum state. Specific jurisdiction also imposes a relatedness requirement that is often (but not exclusively) described as being premised on some type of causal link between the purposeful contacts and the claim, ranging from a but-for to a proximate-cause standard, though the phrase “related to” would seem to



suggest a less rigid formula.<sup>59</sup> General jurisdiction imposes no such relatedness requirement. In determining whether general jurisdiction may be exercised, the Court has reduced *International Shoe*'s "so substantial" standard to a bright-line "at home" metaphor that mirrors the traditional domicile basis of jurisdiction.<sup>60</sup> The at-home standard has made it extraordinarily difficult to establish general jurisdiction, even where considerations of fairness and efficiency would overwhelmingly support its exercise.

More specifically, as to general jurisdiction, the category can be traced to *Perkins v. Benguet Consol. Mining Co.*<sup>61</sup> There, the President of Benguet, a corporation from the Philippines, moved to Ohio and carried out all of the corporation's activities there during World War II.<sup>62</sup> The Court held that due process did not prevent the Ohio court from exercising jurisdiction over Benguet, because the activities of Benguet in Ohio were continuous, substantial, and systematic, and Benguet could have reasonably expected to be haled into court there on any cause of action, even if it were unrelated to the corporation's contacts with the forum state.

The opinion, truthful to *International Shoe* and the realistic assessment there demanded,<sup>63</sup> found jurisdiction because the corporate operations with the forum State were "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."<sup>64</sup> The *Perkins* Court did not use phrases like "purposeful availment," or "general jurisdiction." It was evident, after carefully assessing the facts that significantly connected the foreign corporation to the forum, that the exercise of jurisdiction over that defendant on any cause of action—including those unrelated to those contacts—would be reasonable under the circumstances presented, that is, that the exercise of jurisdiction would comply with the traditional notions of fair play and substantial justice.

Years later, the idea of personal jurisdiction over causes of action unrelated to the nonresident defendant's contacts with the forum was revisited. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,<sup>65</sup> the parents of two 13-year-old boys from North Carolina killed in a bus accident outside Paris, sued The Goodyear Tire and Rubber Company (Goodyear USA) and several other foreign subsidiaries attributing the accident to a defective tire manufactured in Turkey at the plant of a foreign subsidiary of Goodyear USA.<sup>66</sup>

In framing the question of jurisdiction, the Court described it in terms of "general jurisdiction"<sup>67</sup> over a foreign corporation when its activities within the forum "are so 'continuous and systematic' as to render them essentially at home in the forum State."<sup>68</sup> The Court held that the North Carolina court did not have personal jurisdiction over the foreign defendants:

Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy... [and a] connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction.<sup>69</sup>

The result in *Goodyear* might at first glance seem correct. If we accept the proposition that a nonresident defendant must be "at home" to satisfy the standards of general jurisdiction, it is clear that those standards were not satisfied under the facts presented. One could hardly have concluded that the slim contacts with the forum were sufficient to make the non-resident corporations at home there. But if we step back and assess the facts of the case in view of the opposing conflicting interests involved, we see how injured parties are deprived of an opportunity to sue in their chosen forum to redress injuries that they have suffered as a consequence of the defendants' business. We also see an imbalance between the injured plaintiffs and the enriched defendants, so

much so that it feels unjust and unfair to conclude that the plaintiffs will have to travel to foreign countries to have their injuries redressed. This is because the personal jurisdiction assessment mechanically stopped at the “contacts” requirements. The nonresident defendants’ contacts were not sufficiently connected to the plaintiffs’ claim for purposes of general jurisdiction, and they were not sufficient to rise to the fictional “at home” standard for purposes of general jurisdiction. But what if in between these two categories of contacts there was a third or a fourth one, where one could still argue that it would be reasonable to exercise jurisdiction under the specific circumstances of the case? Would this possibility be inconsistent with the *International Shoe* formula and with its underlying concept of due process? And isn’t it true that such “considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required?”<sup>70</sup>

Consider a slightly different approach to jurisdiction. Suppose instead of beginning with an examination of “purposeful contacts,” we began with an inquiry into the interest of the forum state in the controversy. The critical question would be whether the forum state has a legitimate interest in providing a forum for the resolution of the particular controversy. In answering that question, we would consider all relevant connections with the forum state. If our answer were in the negative, jurisdiction would not be permitted, its exercise being arbitrary and therefore in violation of due process. If our answer were in the affirmative, however, we would proceed to consider whether the exercise of jurisdiction would be unfair to the defendant or inconsistent with principles of efficiency.

The consequence of the rigid doctrinal approach has been to create a jurisdictional lacuna between specific and general jurisdiction.

The consequence of the rigid doctrinal approach has been to create a jurisdictional lacuna between specific and general jurisdiction where the purposeful contacts may be truly substantial but nonetheless inadequate to satisfy either standard, due either to a lack of a causal relatedness or to a failure to satisfy the at-home metaphor. But denying jurisdiction under such circumstances might be to stamp as unconstitutional a practice that readily comports with fair play and substantial justice as recognized by this Court

in *International Shoe*.<sup>71</sup> Indeed, the notion that there should be a jurisdictional lacuna in the *International Shoe* spectrum runs against the grain of a flexible, fluid, and sensible law of due process. To value the doctrinal categories over the foundational principles on which they rest is to elevate an arid formalism over a realistic appraisal of the facts, while at the same time demeaning the pragmatic balancing of interests required by the due process of law. Where the non-resident’s activities are “continuous and systematic,” the relationship requirement must be understood as serving the conception of “fair play and substantial justice,” rather than as imposing an artificial “causation” or “at home” barrier to the efficient resolution of controversies that implicate significant state interests.

To value the doctrinal categories over the foundational principles on which they rest is to elevate an arid formalism over a realistic appraisal of the facts.

Also, the addition of the “at home” layer to the general jurisdiction formula collapsed one of the modern bases of personal jurisdiction with a traditional one—domicile—essentially constricting the modern *International Shoe* spectrum to specific jurisdiction.

This constriction became even more evident with *Daimler AG v. Bauman*.<sup>72</sup> There twenty-two Argentinian residents filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company that manufactures Mercedes-Benz vehicles in Germany, alleging that during Argentina’s 1976-1983 “Dirty War,” Daimler’s Argentinian



subsidiary, Mercedes-Benz Argentina, collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers.<sup>73</sup> Setting the analytical stage to address the case at hand, the Court indicated that there were “two categories of personal jurisdiction,”<sup>74</sup> one, specific jurisdiction, that had “become the centerpiece of modern jurisdiction theory,” one that “will come into sharper relief and form a considerably more significant part of the scene,”<sup>75</sup> and the other, general jurisdiction, that played a “reduced role.”<sup>76</sup> The Court recited the *Goodyear* decision’s general jurisdiction substantial-continuous-systematic-at-home formula,<sup>77</sup> explaining that for an individual, “the paradigm forum” of general jurisdiction would be the individual’s domicile,<sup>78</sup> and for corporations the place of incorporation and their principal place of business.<sup>79</sup> But the Court added that “[w]e do not foreclose the possibility that in an exceptional case, see, e.g., *Perkins*... a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.”<sup>80</sup>

General jurisdiction calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide.

The *Daimler* Court further clarified that “the general jurisdiction inquiry does not ‘focu[s] solely on the magnitude of the defendant’s in-state contacts.’ General jurisdiction instead calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing

business’ tests framed before specific jurisdiction evolved in the United States... Nothing in *International Shoe* and its progeny suggests that ‘a particular quantum of local activity’ should give a State authority over a ‘far larger quantum of... activity’ having no connection to any in-state activity.”<sup>81</sup> And it added that “Justice Sotomayor’s proposal to import... [a] ‘reasonableness’ check into the general jurisdiction determination... would indeed compound the jurisdictional inquiry... Imposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of the litigation.”<sup>82</sup>

Applying the structured framework, the Court found no jurisdiction as “Daimler’s slim contacts with the State hardly render[ed] it at home there.”<sup>83</sup>

Specific jurisdiction has been significantly limited by doctrinal requirements, none of which were part of the original *International Shoe* formula.

Contrary to the Court’s observation in *Daimler* that “general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*,”<sup>84</sup> the opposite seems to be true. Both categories suffer from the imposition of relatively inflexible doctrine. As is now true of general jurisdiction, specific jurisdiction has been significantly limited by doctrinal requirements, none of which were part of the original *International Shoe* formula.

### ***Burger King v. Rudzewicz***

In 1985, when *Burger King v. Rudzewicz*<sup>85</sup> was decided, the law of personal jurisdiction had been settled as a two-part test, for the two categories of general and specific jurisdiction, with the additional layer of “purposeful direction”<sup>86</sup> for the specific jurisdiction category.

The question presented in *Burger King* was whether a federal court sitting in Florida could exercise jurisdiction over a nonresident franchisee that had entered into a long-term franchise agreement with the plaintiff, a corporate resident of the state. The bulk of the Court’s opinion focused on the purposeful availment requirement, but the



Court added a potential “exit” to the jurisdictional analysis under which a strong presumption of jurisdiction established by the connecting factors and the reasonable expectation arising from those factors could be rebutted under “compelling” circumstances.<sup>87</sup> In describing this presumption-rebutting standard, the Court suggested that it would apply only when the defendant established “the unconstitutionality of” the exercise of jurisdiction by showing a severe impairment of the defendant’s ability to defend or assert a counterclaim.<sup>88</sup> The Court’s application of this additional consideration essentially replicated *forum non conveniens* analysis, strongly suggesting doctrinal redundancy.<sup>89</sup> The Court concluded, however, that the heavy presumption in favor of jurisdiction was not rebutted in the case before it.<sup>90</sup>

Although the *Burger King* analysis was truthful to *International Shoe*, the additional and unnecessary doctrinal layers added to Justice Stone’s jurisdictional formula paved the way for a marked departure from the opinion’s foundational, due process, principled approach.

### ***J. McIntyre Mach., Ltd. v. Nicastro***

*J. McIntyre Mach., Ltd. v. Nicastro*<sup>91</sup> provides an apt example. In *McIntyre*, Nicastro, a resident of New Jersey, was severely injured while using a three-ton metal shearing machine manufactured by the British manufacturer McIntyre UK.<sup>92</sup> McIntyre UK had not directly shipped the machine to the forum—its exclusive distributor, McIntyre Machinery America, Ltd., had. But, despite the similar names, McIntyre UK and McIntyre America were separate and independent entities.<sup>93</sup> And since McIntyre UK “had no office in New Jersey; it [neither paid] taxes nor owned property there; and it [did not] advertise[] in, nor [send] any employees to, the State... [and did not] ‘have a single contact with New Jersey short of the machine in question ending up in this state[,]’... [t]hese facts... do not show that J. McIntyre purposefully availed itself of the New Jersey market.”<sup>94</sup> Hence, the New Jersey court had no personal jurisdiction over McIntyre UK.

The realistic appraisal of the facts, that is, of the defendant’s contacts with the forum, is confined to the few paragraphs in Part I of the plurality opinion,<sup>95</sup> authored by Justice Kennedy. Justice Ginsburg offers a more accurate and comprehensive assessment of those facts in her dissenting opinion.<sup>96</sup> It is only there that we learn that Nicastro had severed four fingers of his right hand while using the machine;<sup>97</sup> that the price of one machine was \$ 24,900;<sup>98</sup> that the machine ended up in New Jersey as a direct consequence of the successful marketing efforts of the defendant,<sup>99</sup> and in the regular course of the defendant’s business;<sup>100</sup> and that McIntyre UK had instructed its exclusive American distributor to sell the machines “anywhere in the U.S.”<sup>101</sup> with no fear of successful litigation against McIntyre in the U.S. as “the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there’s something wrong with the machine,”<sup>102</sup> and, in any event, “the manufacturer had products liability insurance coverage.”<sup>103</sup> As Justice Ginsburg observed, the above realistic assessment of the facts coupled with a respect for tradition, should have led to a finding of jurisdiction:

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?



Under this Court's pathmarking precedent in *International Shoe Co. v. Washington*, and subsequent decisions, one would expect the answer to be unequivocally, No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it."<sup>104</sup>

And, Ginsburg wrote, the opposite conclusion reached by the plurality and Justice Breyer's concurring opinion<sup>105</sup> took "a giant step away from the 'notions of fair play and substantial justice' underlying *International Shoe*."<sup>106</sup>

The opposite conclusion reached by the plurality and Justice Breyer's concurring opinion [in *International Shoe*] took "a giant step away from the 'notions of fair play and substantial justice.'"

The opinion in *McIntyre* also failed to balance the interest of the defendant against the interest of the plaintiff and the judicial system as a whole. Of course the defendant would be better off if sued in its own country, but what about the plaintiff, the individual who was injured in his forum while using the machine that the defendant has sold there, making a profit from it? And would the judicial system as a whole benefit from a denial of jurisdiction in the place of injury? Essentially denying access to justice to a citizen of the forum, asking him to submit to a foreign jurisdiction, and most likely to foreign law, to be compensated for the wrongful, and yet profitable, activity engaged in by the foreign corporation in the plaintiff's own state? Doesn't this result defy logic, common sense, and the fundamental principles of liberty and justice?

If the answers to the above questions suggest that the opinion in *McIntyre* was not consistent with due process, then why did the Court reach that result? We may make an hypotheses and build assumptions. The Court may have been motivated by concerns for international relations.<sup>107</sup> Or perhaps the Court just thought it was properly interpreting and applying the precedents—*International Shoe*, *Hanson v. Denckla*,<sup>108</sup> *World-Wide Volkswagen Corp. v. Woodson*,<sup>109</sup> *Asahi Metal Industry Co., Ltd. v. Superior Court*,<sup>110</sup> *Burnham v. Superior Court*.<sup>111</sup> And it was some of the precedents that might have determined the outcome of the case, more specifically, *Hanson* and *Burnham*:

The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avail[ ] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>112</sup>

And:

The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* "conducted no independent inquiry into the desirability or fairness" of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant.<sup>113</sup>

But the realistic appraisal demanded by *International Shoe* did not make purposeful availment a determinative factor of the jurisdictional inquiry. If you think about it, purposeful availment—or the defendant's intent to

Purposeful availment... might be hard, and at times very hard, to determine.

enjoy, avail itself of “the benefits and protection of the laws of the state,”<sup>114</sup> or “target,”<sup>115</sup> using Justice Kennedy’s word—might be hard, and at times very hard, to determine. And the *International Shoe* Court’s innovative contribution to the law of personal jurisdiction was to make clear that fictions—like the defendant’s voluntary submission to the authority of the sovereign—should be abandoned in favor of a realistic approach.<sup>116</sup>

## E. The latest developments: *Bristol-Myers Squibb v. Superior Court*

*Bristol-Myers Squibb v. Superior Court*, No. 16-466 (2017), is currently pending before the Supreme Court. The Court heard oral arguments on April 25, 2017. The suit filed against Bristol-Myers involves two sets of plaintiffs, those who are residents of California and those who are not. The resident plaintiffs’ claims are centered on activity undertaken by Bristol-Myers in California. The claims of the non-resident plaintiffs, however, are the product of related activity undertaken by Bristol-Myers in states other than California. The question is whether the courts of California may exercise personal jurisdiction over Bristol-Myers with respect to those non-resident claims. The California Supreme Court answered that question in the affirmative.

The California Supreme Court based its finding of relatedness on the non-causal, factual relationship between the claims asserted by the resident plaintiffs and those asserted by the non-resident plaintiffs. Both sets of claims involved essentially identical allegations of the manufacture of a dangerous and defective drug—Plavix—and a unified nationwide marketing and distribution scheme targeting consumers—television, magazine, and internet advertising—that falsely and fraudulently promoted the sale of that drug.<sup>117</sup> There was no suggestion that either the drug or the marketing plan varied from state to state. Hence, the only difference between the claims of the resident plaintiffs and those of the non-resident plaintiffs was the location of the sale and use of the drug. In short, both sets of claims arose from the common core of the defendant’s manufacture of Plavix and the nationwide marketing and distribution scheme used to promote its sale. That commonality was sufficient, in the California Supreme Court’s estimation, to establish a “substantial connection” between Bristol-Myers’ purposeful marketing and sales activities in the state (giving rise to the resident claims) and the virtually identical claims asserted against Bristol-Myers by the non-resident plaintiffs.

Once it determined that the non-resident plaintiffs satisfied the contacts and relatedness requirements of the minimum contacts test, the California Supreme Court turned to the question of reasonableness. The state high court examined reasonableness from the perspective of the defendant, the plaintiffs, the forum state, and the interstate judicial system’s interest in obtaining an efficient resolution of the case.<sup>118</sup> It prefaced this discussion by noting that Bristol-Myers did not contend that the exercise of jurisdiction over it in California would be “fundamentally unfair.”<sup>119</sup> It then discussed and balanced each of the four relevant interests and concluded that Bristol-Myers had “failed to carry its burden of showing that the exercise of personal jurisdiction over it in this matter is unreasonable.”<sup>120</sup>

In seeking review in the Supreme Court, Bristol-Myers couched the question presented as:

Whether a plaintiff’s claims arise out of or relate to a defendant’s forum activities when there is no causal link between the defendant’s forum contacts and the plaintiff’s claims—that is, where the plaintiff’s claims would be exactly the same even if the defendant *had no forum contacts*.<sup>121</sup>



The last clause of this statement ignores the critical fact that the defendant had *substantial forum contacts*, contacts that concededly gave rise to the virtually identical claims of the resident plaintiffs. Thus, the true question before the Court seems to be whether, under the circumstances presented, the exercise of jurisdiction over Bristol-Myers with respect to the *additional*—but essentially identical—claims of the non-resident plaintiffs is fair, just, and reasonable. Essentially, Bristol-Myers is asking the Court to fit the case into a narrow doctrinal category, rather than try to fit the principle to the case, as justice would instead demand.<sup>122</sup> The doctrine trumps the realistic assessment of the facts and, ultimately, due process.

Professor Allan Ides and I have filed an amicus brief in *Bristol-Myers* and there explained why we believe that the California Supreme Court is correct and should be affirmed.<sup>123</sup> There we argue that given Bristol-Myers' significant and purposeful contacts with California, the state high court's substantial-connection rationale comports with *International Shoe's* fluid spectrum of jurisdiction in which the requirement of relatedness varies in intensity with the quality and quantity of the contacts. Specifically, the endorsement of non-causal relatedness when the non-resident's contacts are continuous, systematic and substantial fills the jurisdictional lacuna between cause-bound specific jurisdiction and at-home general jurisdiction. Instead of dissolving jurisdiction into an empty space, as is true with the cause-bound standard, the substantial connection standard permits a form of relatedness that moves seamlessly from specific to general jurisdiction. In short, we argued that the line between specific and general jurisdiction should be blurred instead of artificially constricted.<sup>124</sup>

## The Supplemental Jurisdiction Doctrine

Furthermore, the doctrine of supplemental jurisdiction provides an instructive perspective from which to assess the California Supreme Court's application of the relatedness standard. As is evident, the California Supreme Court's approach to relatedness operates much like the federal doctrine of supplemental jurisdiction. Under that doctrine, a federal court may exercise subject matter jurisdiction over an entire case, including claims over which there is no independent basis of subject matter jurisdiction, so long as that claim arises out of a "common nucleus of operative facts" with a claim over which there is an independent basis of jurisdiction.<sup>125</sup>

The ultimate determination of supplemental jurisdiction includes both a fact-based and efficiency-driven component of power and a reason-based component of discretion,<sup>126</sup> which is to say that the law of supplemental jurisdiction is a product of fairness and efficiency tempered by reasonableness. More generally, the doctrine is built on a common-sense accommodation of litigational convenience and jurisdictional principle that strikes a due process balance among the relevant interests at stake. Thus although supplemental jurisdiction is not technically a doctrine of due process, it is in fact consistent with and conducive to due process.

The flexible model of supplemental jurisdiction translates nicely into the question presented in *Bristol-Myers*. The courts of California undoubtedly have jurisdiction over the claims of the resident plaintiffs, and it is equally clear that the claims of the resident and non-resident plaintiffs arise out of a common nucleus of operative facts—the manufacture and nationwide marketing scheme for the drug Plavix. In addition, the consolidated litigation of the resident and non-resident claims will unquestionably promote judicial economy and litigational

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convenience. Furthermore, as noted, the California Supreme Court carefully surveyed the question of reasonableness from all relevant perspectives and concluded that Bristol-Myers, in addition to having made no claim of fundamental unfairness, failed to show that the exercise of jurisdiction over the non-resident claims would be unreasonable. Petitioner has raised no challenge to those findings. In short, the California Supreme Court’s analysis was a product of fairness, efficiency, and reasonableness.

## Pendent Personal Jurisdiction

The applicability of supplemental-jurisdiction-type principles to the law of personal jurisdiction is now recognized in the emerging common law doctrine of “pendent personal jurisdiction.”<sup>127</sup> That doctrine vests federal district courts with the power to exercise personal jurisdiction over a non-resident defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as that claim “arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction.”<sup>128</sup> The policy behind this doctrine is expressly premised on due process concerns. As the Ninth Circuit explained in *Action Embroidery v. Atlantic Embroidery, Inc.*,

We believe that judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by adopting this doctrine.<sup>129</sup>

In accord with those principles and much like supplemental jurisdiction, a court may likewise decline to exercise pendent personal jurisdiction “where ‘considerations of judicial economy, convenience and fairness to litigants’ so dictate.”<sup>130</sup> Every circuit that has expressly considered the doctrine of pendent personal jurisdiction has endorsed it.<sup>131</sup>

The due process principles on which [pendent personal jurisdiction] rests—judicial economy, convenience, and fairness—are fully applicable to a state court’s exercise of personal jurisdiction.

As noted, pendent personal jurisdiction is technically a federal common law doctrine. Yet the due process principles on which it rests—judicial economy, convenience, and fairness—are fully applicable to a state court’s exercise of personal jurisdiction. While the California Supreme Court did not purport to apply the doctrine of pendent personal jurisdiction, that court’s approach to relatedness and its overall reasoning—as described above—bears a striking resemblance in both theory and practice. As such, the decision is consistent with and conducive to due process. The critical point here is not that this Court should now endorse pendent personal jurisdiction, but that the California Supreme Court’s application of relatedness is fully consistent with the due process principles reflected in the recognized parallel doctrine of pendent personal jurisdiction.

The principles of fairness and reasonableness at the heart of due process require, in the context of the minimum contacts test, a showing that the non-resident defendant has engaged in purposeful activity directed at the forum state. The substantial activities of Bristol-Myers in California surely satisfy that standard. Such purposefulness is the necessary first step in assuring that a state will not exercise its judicial power in an arbitrary manner, *i.e.*, in a manner that extends beyond its sovereign prerogative. The doctrinal categories of specific and general jurisdiction, both of which depend on this premise of purposeful contacts, help map out the circumstances where the exercise of that power will presumptively comport with “traditional notions of fair play and substantial justice.” But those doctrines are simply shorthand tools for advancing the underlying

principles. The California Supreme Court's approach to relatedness bridges the gap between the doctrinally rigid categories of specific and general jurisdiction and, in so doing, honors the fluid concept of due process as applied in the context of personal jurisdiction. Whether one reads the state high court's decision as extending relatedness into the jurisdictional lacuna between specific and general jurisdiction or as implicitly reflecting the doctrine of pendent personal jurisdiction, there is no doubt that the California court's decision comports with the due process standards of fairness, reasonableness, and a balanced approach to the competing interests at stake.

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### III. THE ROLE OF DISCOVERY IN JURISDICTIONAL DISPUTES

A careful assessment of facts is essential to litigation and to a judicial decision-making that is truthful to due process. This is also true for personal jurisdiction purposes, and especially so when you consider that a decision dismissing an action for lack of personal jurisdiction might be the death knell to the case. That the determination of jurisdiction takes place at the outset of the case makes sense, as personal jurisdiction is a procedural condition of the action. Without personal jurisdiction, the court would not have power to hear the case and render a valid and binding judgment, entitled to full faith and credit. But the fact that the inquiry takes place at the outset should not come at the expense of a realistic assessment of the facts, and certainly should not lead to front-loading the merits analysis.

The fact that [a personal jurisdiction] inquiry takes place at the outset [of a case] should not come at the expense of a realistic assessment of the facts, and certainly should not lead to front-loading the merits analysis.

I have elsewhere addressed the front-loading trend and its dangers in procedural analysis.<sup>132</sup> There, I have explained how the procedural front-loading trend requires the plaintiff to establish all or part of her claim at the outset or to surmount procedural obstacles that make vindication of that claim pragmatically impossible.<sup>133</sup> This trend calls for an extensive analysis of the reasons why the court should not take the case, rather than a search for the fair and efficient methods and means of managing it. Under this scenario, the merits either play an essential role in the resolution of a pre-merits procedural issue, or the procedural rules ensure the demise of the merits in service of some other non-merits value. This front-loading trend also conflates the claim and the remedy, pulling the assessment of the remedy further and further into the procedural forefront.<sup>134</sup> The front-loading trend is the result of several intervening forces: the self-interested lobbies trying to affect the rulemaking process;<sup>135</sup> a fragmented and mechanical approach to the rules by their revisers and interpreters, both lacking a necessary holistic vision to comprehend the procedural design and make it effectively operate;<sup>136</sup> and the modern tension between judicial case-management and docket-clearing, with settlements in service of the first, the second, or both, taking cases farther and farther away from courts.<sup>137</sup> These forces have sometimes succeeded in shifting the analysis of the merits of the case from the post-discovery/pre-trial phase, to the very outset of the litigation, often before discovery has even started. When the front-loading trend succeeds, procedure prevails over substance, thus preventing the vindication and enforcement of rights and the development of substantive law.

Personal jurisdiction analysis runs the risk of front-loading the merits, and especially so in the context of specific jurisdiction.

Personal jurisdiction analysis runs the risk of front-loading the merits, and especially so in the context of specific jurisdiction. Since the jurisdictional inquiry is premised on the meaningful connections between the defendant, the state, and the claim, the overlap with the merits is almost inevitable. But even in the context of general jurisdiction, the front-loading phenomenon may be at play, since a dismissal could operate as the death knell to the litigation, the supposed “alternate forum” being unavailable as a matter of practical reality (as in cases involving torture or human rights violations in a foreign nation).

As to specific jurisdiction, in *Burger King v. Rudzewicz*, the Court noted how

[o]nce it has been decided that defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with “fair play and substantial justice.” Thus courts in “appropriate case[s] may evaluate “the burden on the defendant,” “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.” These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.<sup>138</sup>

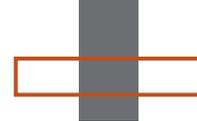
Lower federal courts have interpreted the above passage as placing a prima-facie burden of proof of the existence of the minimum contacts on the plaintiff. Typically, under that standard, the plaintiff must show facts that, if true, would support personal jurisdiction over the defendant.<sup>139</sup> Once that burden is met, the burden shifts to the defendant<sup>140</sup> who, by showing the existence of the factors above, may establish the existence of a compelling case, or a case of “constitutional magnitude.”<sup>141</sup> The burden of proving personal jurisdiction is treated as a sliding scale: the stronger the showing of the minimum contacts made by the plaintiff, the stronger the showing of “unreasonableness” that must be made by the defendant.<sup>142</sup>

At times the prima facie showing of minimum contacts can be complex and resource-consuming.

At times the prima facie showing of minimum contacts can be complex and resource-consuming. For example, in general jurisdiction cases, the new proportionality test endorsed by the *Daimler* Court might indeed, as Justice Sotomayor pointed out in her concurring opinion,

lead to greater unpredictability by radically expanding the scope of jurisdictional discovery. Rather than ascertaining the extent of a corporate defendant’s forum-state contacts alone, courts will now have to identify the extent of a company’s contacts in every other forum where it does business in order to compare them against the company’s in-state contacts. That considerable burden runs headlong into the majority’s recitation of the familiar principle that “[s]imple jurisdictional rules...promote greater predictability.”<sup>143</sup>

The majority’s response to that concern was almost a non-response:



Justice Sotomayor fears that our holding will “lead to greater unpredictability by radically expanding the scope of jurisdictional discovery.” But it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home.<sup>144</sup>

It is hard to see how the newly endorsed proportionality test won’t lead to complex and expensive discovery. But to properly apply the *Goodyear* “at home” test, the inquiry that that test demands seems almost inevitable, necessary to a realistic and careful assessment of the facts of the case that would make the exercise of jurisdiction over a claim unrelated to the nonresident defendant’s contacts with the forum consistent with due process. And still truthful to that idea and *International Shoe*, the *Daimler* Court explained that

[a] corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, “at home” would be synonymous with “doing business” tests framed before specific jurisdiction evolved in the United States. Nothing in *International Shoe* and its progeny suggests that “a particular quantum of local activity” should give a State authority over a “far larger quantum of...activity” having no connection to any in-state activity.<sup>145</sup>

It is hard to see how the newly endorsed proportionality test won’t lead to complex and expensive discovery.

In other words, establishing jurisdiction would demand a careful, qualitative assessment of the facts of the case, that is, the defendant’s contacts with the forum. This naturally leads to the need of discovery limited to the facts relevant to establish jurisdiction.

State courts adopt different approaches to the discovery of jurisdictional facts. Some courts allow such discovery only when the motion to dismiss for lack of personal jurisdiction articulates and proves, by way of affidavits and other evidence, facts outside the pleading.<sup>146</sup>

Along the same lines, and in order to conserve judicial resources, some courts have held that

[j]urisdictional discovery generally is permitted before a court rules on a motion to dismiss for lack of personal jurisdiction. Such discovery is not mandated, however, and is unnecessary where the discovery is unlikely to lead to facts establishing jurisdiction. As with other discovery issues, the court has broad discretion in granting jurisdictional discovery.<sup>147</sup>

Other courts demand that “the plaintiff must carry the initial burden of demonstrating facts by a preponderance of evidence justifying the exercise of jurisdiction,”<sup>148</sup> of which she cannot be relieved by asking the court to draw inferences of liability from her allegations in the complaint,<sup>149</sup> even when doing so “would effectively require [the plaintiff] to prove the merits of [her] case at the outset of litigation.”<sup>150</sup> And “when personal jurisdiction is asserted on the basis of a nonresident defendant’s alleged activities in this state, facts relevant to jurisdiction may also bear on the merits of the complaint.<sup>151</sup>...Plaintiff must more than merely allege jurisdiction facts. It must present evidence sufficient to justify a finding that California may properly exercise jurisdiction over the defendant. The plaintiff must provide affidavits and other authenticated documents in order to demonstrate competent evidence of jurisdictional facts. Allegations in an unverified complaint are insufficient to satisfy this burden of proof. Declarations cannot be mere vague assertions of ultimate facts, but must offer specific evidentiary facts permitting a court to form an independent conclusion on the issue of jurisdiction.”<sup>152</sup>

## IV. PERSONAL JURISDICTION IN STATE COURTS

As I have shown, the Supreme Court has, over time, endorsed two strikingly different approaches to resolving jurisdictional disputes: one that is attentive to the specific facts of the case and to a proper balancing of the

The Supreme Court has, over time, endorsed two strikingly different approaches to resolving jurisdictional disputes.

conflicting interests at stake—*International Shoe v. Washington* being a prime example—and one that values doctrinal tests as a substitute for core due process principles—*Daimler AG v. Bauman* and *J. McIntyre Mach., Ltd. v. Nicastro* being apt examples. Given the constitutionally mandated judicial hierarchy, state courts face the dilemma of accommodating these two incompatible strands of jurisprudence. Of course, state courts must also take seriously the obligation of each state to protect its citizens and to provide a forum for a vindication of their rights. In what follows, I will examine five relatively recent decisions by state high courts that reflect the tensions between principle, doctrine, and obligation, and which show the different ways state courts have attempted to navigate these sometimes murky waters.

Let's begin with doctrine. Clearly, given the judicial hierarchy, state courts recognize that they must grapple with the personal jurisdiction doctrines developed by the Supreme Court. Some state high courts see doctrinal adherence as a practical necessity, others see it as an opportunity to emulate the lead of the U.S. Supreme Court by taking doctrine to increasingly refined levels of nuance and intricacy.

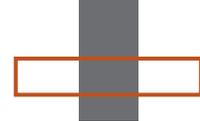
### *TV Azteca v. Ruiz*

A recent opinion by the Texas Supreme Court, *TV Azteca v. Ruiz*,<sup>153</sup> provides an illuminating example of the latter approach. The plaintiff in *Azteca* was a Mexican recording artist living in Texas at the time of the events giving rise to the lawsuit. She sued two Mexican broadcasting companies, as well as the news anchor for one of them, in a Texas state court, alleging that the defendants had defamed her in broadcasts that emanated from Mexico but that had also aired in Texas due largely to across-the-border broadcast spillover. The defendants filed a special appearance in which they challenged the trial court's jurisdiction. The trial court upheld jurisdiction and the court of appeals affirmed.

The essential question presented to the Texas Supreme Court was whether the airing of the defamatory broadcasts in Texas established a sufficiently meaningful connection with the state to sustain the exercise of jurisdiction over the plaintiff's defamation claim. The state high court eventually upheld the exercise of jurisdiction, but only after a lengthy discussion and application of jurisdictional doctrine. That discussion begins with a standard and sensible description of jurisdictional standards—minimum contacts measured by traditional notions of fair play and substantial justice<sup>154</sup>—but then melts into a highly detailed explication and application of doctrine and sub-doctrinal tests.

*International Shoe* demolished the fictional approach to personal jurisdiction by insisting on a realistic appraisal of the facts.

As to doctrine, the *Azteca* Court treated purposeful availment as a universal requirement of the minimum contacts standard. It also described that standard as designed to establish the fiction of implied consent.<sup>155</sup> There are two problems here. Sensibly understood, the so-called "effects test," which would be the applicable doctrinal standard in the given context, is premised on the effect of tortious conduct, not on the benefits received from that conduct. The language of the Restatement of Conflict of Laws is instructive:



A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

THE RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37. The U.S. Supreme Court applied this principle in *Calder v. Jones*, and there made no reference to purposeful availment.<sup>156</sup> This makes sense. The question in a case falling within the ambit of the described standard is not whether the tortfeasor benefitted from the tort, but whether under the facts presented the tortfeasor should be subjected to suit in the forum. That question requires a careful assessment of the facts, not an extension of doctrine. By embracing purposeful availment in this context, the Texas high court adopts a “worst-case” approach to state-court jurisdiction under which the U.S. Supreme Court's case law is given an interpretation most restrictive of state power.

As to the *Azteca* court's reference to implied consent, *International Shoe* demolished the fictional approach to personal jurisdiction by insisting on a realistic appraisal of the facts.<sup>157</sup> More specifically, reliance on implied consent as a benchmark for and assessment of purposeful availment narrows the range of the due process inquiry from a search for meaningful connections to a search for only those connections indicative of a submission to the sovereignty. Again, the Texas high court has adopted the most restrictive interpretation of doctrine.

To advance its quest to find purposeful availment/implied consent, the *Azteca* court applied a palette of sub-doctrinal tests and formulas: directing a tort at the plaintiff (in the forum);<sup>158</sup> broadcasting defamatory statements in the forum;<sup>159</sup> knowingly broadcasting defamatory statements in the forum;<sup>160</sup> and targeting the market in the forum.<sup>161</sup> As to the latter, two further tests were applied: a subject-and-sources test<sup>162</sup> and an intent-to-serve-the-forum-market test.<sup>163</sup> A less structured and more fluid approach might simply have examined the facts to see if they presented circumstances under which suit in the forum would be foreseeable and fair given the connections with the state.

Consider a simple hypothetical. Suppose a Mexican company operated a quarry just south of Mexico's border with Texas. In the course of its excavations, the company used explosives to loosen the rock from its bed. Some of the loosened rocks flew over the border (in a foreseeable way) and caused significant injury to persons and property in Texas. In suits filed against the company in Texas by injured parties, should jurisdiction over the company be limited by whether it had sought the benefits of Texas law or Texas infrastructure? Should it be premised on whether the Mexican company had impliedly consented to suit in Texas? Should we develop a specialized jurisdictional law of quarry-excavation torts? Or, alternatively to the above options, might we simply examine the facts and circumstances to see if they fell within the due process spectrum of jurisdictional possibilities described in *International Shoe*? Would it offend traditional notions of fair play and substantial justice to subject the Mexican company to jurisdiction in Texas over suits arising out of the foreseeable and proximate tortious consequences of the company's acts?

Ultimately, the *Azteca* court upheld the exercise of jurisdiction based on a narrow set of facts—defendants' efforts to exploit the Texas market—and a generous approach to non-causal relatedness. Perhaps the court's long and serpentine discourse on purposeful availment was meant as a shield to protect this precise ruling, but I would think that a more direct explanation of its reasoning would have been better suited to the project of due process.

## *Tennessee v. NV Sumatra Tobacco Trading Company*

A similar doctrinal approach, with a less satisfying outcome, is found in the Tennessee Supreme Court's decision in *Tennessee v. NV Sumatra Tobacco Trading Company*.<sup>164</sup> At issue in *Sumatra* was whether the State of Tennessee could rely on the courts of its state to impose a statutory marketing penalty on a foreign tobacco company that had sold 11 million cigarettes in the state between 2000 and 2002. The penalty was designed to compensate the state for the reduction in payments it would receive from competitor tobacco companies pursuant to a nationwide settlement of claims filed by states against those companies. The defendant in *Sumatra* was not a party to that settlement and, hence, could sell its cigarettes at lower prices than the companies that were subject to the settlement agreement. Those companies, in turn, could reduce their obligations to the state as a set-off to their competitive disadvantage.

Like the opinion of the Texas Supreme Court in *Azteca*, the opinion in *Sumatra* includes a lengthy, treatise-like dissertation on the law of personal jurisdiction, beginning with *International Shoe* and including descriptions and discussions of key U.S. Supreme Court decisions up through and including the plurality, concurring, and dissenting opinions in *J. McIntyre*.<sup>165</sup> It closes its survey with a revealing observation:

The foregoing survey of United States Supreme Court's [sic] decisions reveals a pattern of key phrases and concepts that serve as guideposts marking the constitutional boundaries of specific personal jurisdiction. Although "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State," certain other phrases appear again and again. These include "meaningful contacts, ties, or relations," "actions by the defendant himself that create a substantial connection," "fair warning," "clear notice," "purposeful availment," "targeting" the forum, "not random, fortuitous, or attenuated contacts," not the "unilateral activity of another party or a third person," "predictability to the legal system that allows potential defendants to structure their primary conduct" to know where they will be liable to suit, and "foreseeability," meaning that the defendant "should reasonably anticipate being haled into court" in the forum state. Jurisdiction can be established by "purposefully direct[ing]" activities at residents of the forum, "deliver[ing] products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state," "purposefully deriv[ing] benefit" from the forum state, "deliberately" engaging in "significant activities" within the forum state, creating "continuing obligations" with residents of the forum state, and invoking the "benefits and protections" of the forum state's laws. Also, it is perfectly clear that placing a product into the stream of commerce, "without more," is not an act "purposefully directed" at the forum state, and "awareness" of where a product will end up is not purposeful direction. All of these guideposts remain standing after the United States Supreme Court's *J. McIntyre Machinery* decision.<sup>166</sup>

It is as if a thick fog of words and phrases has beclouded the otherwise elegant inquiry into traditional notions of fair play and substantial justice. In essence, doctrine, reduced to "key phrases and concepts," takes precedence over a realistic assessment of the facts and a fundamental inquiry into the principles of due process.

A core aspect of the Tennessee Supreme Court's decision involved a detailed exegesis of the opinions in *J. McIntyre*.<sup>167</sup> The central question for the *Sumatra* Court was whether those opinions embraced some version of Justice O'Connor's stream of commerce plus standard.<sup>168</sup> Ultimately, the state high court concluded that the

trio of *J. McIntyre* opinions was ambiguous from a doctrinal perspective, but by inference and careful reading not inconsistent with the “plus” standard; hence, the state court concluded, Tennessee courts remained free to impose that standard, though no particular rationale is offered for that choice other than that it represented “the approach traditionally employed by Tennessee’s courts.”<sup>169</sup> What the Tennessee Supreme Court failed to see was that the central conflict on the *J. McIntyre* Court was not over this or that doctrinal nuance, but over whether the inquiry should be driven by such nuances, as opposed to being driven by a realistic appraisal of the facts (à la Justice Ginsburg’s opinion). By way of contrast, the dissent in the 3-to-2 *Sumatra* decision, while attentive to the doctrine, focused on the facts, which, in the dissent’s view, told a story that supported the fundamental fairness of exercising jurisdiction over the foreign manufacturer.<sup>170</sup>

It is as if a thick fog of words and phrases has beclouded the otherwise elegant inquiry into traditional notions of fair play and substantial justice. Doctrine, reduced to “key phrases and concepts,” takes precedence over a realistic assessment of the facts and a fundamental inquiry into the principles of due process.

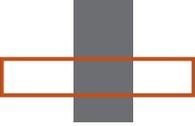
### ***Book v. Doublestar Dongfeng Tyre Co., Ltd.***

In stark contrast to the majority opinion in *Sumatra* is the opinion of the Iowa Supreme Court in *Book v. Doublestar Dongfeng Tyre Co., Ltd.*<sup>171</sup> In that case a tire manufactured by Doublestar exploded while being inflated. The explosion seriously injured a teenager who was working in his father’s auto repair shop in Iowa at the time of the accident. His mother sued Doublestar (among others) in an Iowa state court on her own behalf and on behalf of her son. Doublestar challenged the exercise of personal jurisdiction over it.

The jurisdictional facts established that Doublestar manufactured tires in China and that hundreds of thousands of those tires were shipped to the United States in the year preceding the accident. Two independent U.S. distributors were responsible for the domestic sales of those tires. The tire at issue was shipped to one of those distributors in Tennessee and later sold by that distributor to a retailer in Iowa. In addition, Doublestar, at the instruction and choice of its Tennessee distributor, sometimes shipped tires directly into Iowa, but not of the specific type involved in the explosion. Relying on a combination of the stream of commerce sales and the direct shipments, the Iowa Supreme Court upheld the exercise of jurisdiction over Doublestar. In so ruling, the state high court assessed the impact of the decision in *J. McIntyre*.

Like the Tennessee Supreme Court, the *Doublestar* Court offered a detailed survey of the law of personal jurisdiction and, also like the Tennessee high court, concluded that the scope of *J. McIntyre* was controlled by Justice Breyer’s concurrence.<sup>172</sup> Unlike the Tennessee Supreme Court, however, the Iowa Supreme Court did not search for clues in Justice Breyer’s opinion (or in Justice Ginsburg’s dissent) that would support or require adherence to a stream-of-commerce-plus (or targeting) standard. Rather, the Iowa Supreme Court read Breyer’s opinion as literally endorsing no change in the law—“Justice Breyer’s concurrence expressly relies on existing precedent and disclaims any new stream-of-commerce test.”<sup>173</sup> Hence, Justice Brennan’s more nuanced approach to stream-of-commerce analysis remained an acceptable due process option,<sup>174</sup> and the Iowa Supreme Court chose to adhere to that option. In so doing, the Iowa Supreme Court relied in part on Iowa precedent, but tellingly observed:

We decline to overrule our precedents to impose a more restrictive test that would limit access to justice in Iowa courts for residents of our state injured by allegedly defective products purchased



here. Stare decisis alone dictates continued adherence to our precedent absent a compelling reason to change the law. Moreover, sound policy reasons cut against a more stringent test for jurisdiction over high-volume manufacturers in products-liability cases.

“Fairness is the crux of the minimum-contacts analysis.” Is it unfair to compel a manufacturer selling thousands of products nationwide to defend its allegedly unsafe design in a state where its product was sold and injured a resident using it? We think not.<sup>175</sup>

### ***Russell v. SNFA***

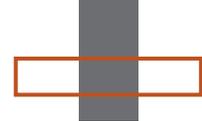
In *Russell v. SNFA*,<sup>176</sup> the Illinois Supreme Court engaged in a similar detailed analysis of the *J. McIntyre* opinions and arrived at a similar conclusion to that of the *Doublestar* court, specifically that the holding in *J. McIntyre* was a narrow one that did not require state courts to adhere to a “plus” standard beyond the context of a single sale in the forum: “Thus, going forward, specific jurisdiction should *not* be exercised based on a single sale in a forum, even when a manufacturer or producer ‘knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.’”<sup>177</sup>

Of course, keeping in mind the decision in *Sumatra*, it is not surprising that the courts of one state would interpret the scope of a Supreme Court precedent differently, but it is somewhat surprising that a state court would favor a submit-to-sovereignty or targeting rationale (when not required to do so), as did the Tennessee Supreme Court in *Sumatra*. If the exercise of jurisdiction is both fair and consistent with U.S. Supreme Court precedent, one would think that a state court would favor providing its citizens or its government with a forum in which to redress grievances against foreign manufacturers whose products or actions cause injury to the state or its citizens.

### ***Rilley v. MoneyMutual, LLC***

The Minnesota Supreme Court’s decision in *Rilley v. MoneyMutual, LLC* was also decided in the wake of *J. McIntyre*.<sup>178</sup> At issue in *Rilley* was whether the courts of Minnesota could exercise personal jurisdiction over MoneyMutual, a non-resident defendant that operated a website that matched consumers with payday lenders who allegedly issued loans in violation of various Minnesota consumer-protection laws. MoneyMutual’s contacts with Minnesota fell into three categories: emails to Minnesota residents, a televised national advertising campaign, and online advertising through a Google AdWords campaign.

MoneyMutual argued that its emails to Minnesota consumers, which numbered in the thousands, could not, as a matter of law, be counted as purposeful contacts with the state. The essential argument was that emails, unlike regular mail, do not require an address that identifies the recipients’ location. The *Rilley* Court described three potential approaches to that question: emails could never be used as purposeful contacts, emails could only be used in addition to other purposeful contacts, or emails could only be used if “the sender knew or had reason to know that the recipient was located, and would receive the email within, a certain forum.”<sup>179</sup> The Minnesota high court very sensibly held that the third approach was most consistent with the standards of due process and that no special doctrine was needed to establish whether emails constituted a sufficiently substantial connection with the state.<sup>180</sup> On the facts presented, the Court found that the emails at issue satisfied that standard.



The *Rilley* court next addressed whether the plaintiffs could rely on MoneyMutual’s televised national ad campaign, some of whose messages aired in Minnesota but none of which specifically *targeted* Minnesota. Here the Court turned to a brief consideration of *J. McIntyre* and arrived at a somewhat surprising and mechanical conclusion:

Most significantly, relying on purely national marketing activity to support minimum contacts appears to be in tension with the United States Supreme Court’s holding in *J. McIntyre* ... (plurality opinion) (holding that national “marketing and sales efforts” did not support personal jurisdiction; although it “may reveal an intent to serve the U.S. market,” “it is petitioner’s purposeful contacts with New Jersey, not with the United States, that alone are relevant”). *Nicastro* may be distinguishable here because the “marketing efforts” in that case consisted solely of attending several national trade shows outside of New Jersey, rather than advertising content that actually appeared in the forum state. *Id.* Ultimately, however, *Nicastro* provides a guiding principle that efforts to target the national market of the United States do not equate to contacts with a particular state simply because that state is a part of the national market. *Id.*<sup>181</sup>

The Court then held that the national ad campaign could not be considered as part of the minimum contacts analysis.<sup>182</sup> Given the recognized ambiguity of the *J. McIntyre* decision, the Minnesota Supreme Court’s holding here is a bit surprising, and even more so since the Court recognized that the case before it was readily distinguishable from the facts of *J. McIntyre*. The fact that the ads aired in Minnesota is surely not irrelevant. Those ads were likely part of the chain that led some Minnesota consumers to access MoneyMutual’s website. Yet, the Court for some inexplicable reason found it necessary to excise those ads from the minimum contacts equation.

The Court returned to a more realistic appraisal of the facts with respect to MoneyMutual’s Google AdWord campaign. Since that campaign was “specifically designed and calibrated to target potential Minnesota customers,” the Court found that contacts with Minnesota generated by those ads constituted purposeful contacts with the state.<sup>183</sup> The Court then concluded that the combination of the emails and the Google contacts were sufficient to satisfy the standards of due process under the circumstances presented.<sup>184</sup>

Four of the five state high court decisions here referenced upheld the exercise of personal jurisdiction over a non-resident defendant. They share another common characteristic. Each of them endorsed a relaxed, non-causal approach to relatedness, not unlike the approach endorsed and applied by the California Supreme Court in *Bristol-Myers*. In *Azteca*, for example, the contacts that satisfied purposeful availment were not relevant to the plaintiff’s defamation claim.<sup>185</sup> Yet, the Texas Supreme Court deemed them jurisdictionally significant since they were conceptually related to the operative facts of the claim, which themselves were not deemed purposeful.<sup>186</sup> In *Doublestar*, the Iowa Supreme Court upheld the exercise of jurisdiction based in part on the non-resident defendant’s direct shipment of tire models other than of the specific type at issue in that case.<sup>187</sup> Similarly, the Minnesota Supreme Court in *Rilley* rejected the non-resident defendant’s argument that the plaintiff was required to show a causal relationship between the defendant’s purposeful contacts and the harm suffered by the plaintiff.<sup>188</sup> And finally, in *Russell v. SNFA*, the Illinois Supreme Court endorsed and applied a non-causal

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“lenient” and “relaxed” standard of relatedness.<sup>189</sup> To me, this pattern suggests that, in jurisdictional areas where the U.S. Supreme Court has yet to impose doctrine at the micro level, state courts retained the flexibility to mold the doctrine to the underlying due process principles of fairness and efficiency. And this is precisely what they do. Of course, as of this writing, we await the U.S. Supreme Court’s decision in *Bristol-Myers*.

## A Final Thought on Discovery

The scope of jurisdictional discovery should conform to the relevant forum’s law of personal jurisdiction. I would think that in those jurisdictions that impose a relatively strict doctrinal approach, the scope of discovery would be more generous. Whereas in those states that focus more on the fundamentals of fairness and efficiency, the scope of discovery might be more circumscribed. For example, a state court that insists on causal relatedness should give the plaintiff a generous opportunity to discover the facts pertaining to causation. On the other hand, a state court that endorsed non-causal relatedness might be less inclined to require intrusive discovery on that point. If I am correct here, it would seem that the rigid doctrinal approach might be both unfair to the extent that it front-loads the merits and inefficient in that it requires additional resources to assess a pre-merits proposition.

The scope of jurisdictional discovery should conform to the relevant forum’s law of personal jurisdiction.

## V. CONCLUSION

Roscoe Pound described the jurisprudential thinking over time in terms of a jurisprudence of conceptions, a jurisprudence of premises, and an empirical jurisprudence.<sup>190</sup> Under the jurisprudence of conceptions “[c]ertain fundamental conceptions are worked out from traditional legal principles, and the rules for the cause in hand are deduced from these conceptions by a purely logical process.”<sup>191</sup> The jurisprudence of premises takes “the rules of a traditional system...as premises and...develop[s] these premises in accordance with some theory of the ends to be met or of the relation which they should bear, when applied, to the social condition of the time being.”<sup>192</sup> Here, pure logic is tempered by consideration of the consequences, but still the analysis is cabined within the abstract legal standards and categories. Finally, an empirical jurisprudence begins with the facts and operates through a “process of inclusion and exclusion” and a method of “trial-hypothesis and confirmation” to discover the law.<sup>193</sup>

An optimal judicial decision-making process would be one premised on, and truthful to, due process.

Pound thought that the first two categories of jurisprudence—conceptions and premises—were inadequate, as both were premised to some extent on the perceived immutability of established legal standards. If not based on natural law itself, they operated on the natural-law understanding that law can be perfectly established and, once so established, can serve as a sufficient tool for solving present claims and controversies, even those that were unanticipated by the law maker. Pound thought that the empirical jurisprudence was problematic too: the law would develop too slowly through the case-by-case approach, and courts were “over-ambitio[us]” when “lay[ing] down universal rules,” turning the empirical jurisprudence into a jurisprudence of conceptions.<sup>194</sup> Pound still considered the empirical jurisprudence to be the best of the alternatives, despite its flaws.

Rather than trying to fit judicial decision-making into any of Pound’s categories, given our inherent democratic commitment to liberty and equality, I believe that an optimal judicial decision-making process would be one premised on, and truthful to, due process.



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## Notes

<sup>1</sup> Professor of Law & Theodore Bruinsma Fellow, Loyola Law School Los Angeles; Senior Research Scholar in Law, Yale Law School, Fall 2016; Visiting Professor of Law, USC Gould, School of Law, Fall 2015; J.S.D., UC Berkeley; LL.M., UC Berkeley; J.D., L.U.I.S.S. University, Rome, Italy.

<sup>2</sup> See Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. \_\_ (2017).

<sup>3</sup> Mitchell v. W.T. Grant Co., 416 U.S. 600, 623-624 (1974) (Powell, J. concurring).

<sup>4</sup> Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 321 (1985).

<sup>5</sup> De Jonge v. State of Oregon, 299 U.S. 353, 364 (1937).

<sup>6</sup> O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 797 (1980).

<sup>7</sup> Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 53 (1991).

<sup>8</sup> Consider, for example, the standards of “more likely than not”, “clear and convincing evidence,”—applicable in civil cases—and “beyond reasonable doubt”—applicable in criminal cases. None of these standards requires exactness or certainty. But they are all intended to achieve the optimal balance between the various conflicting interests and needs of the parties involved, of the judicial system, and society, as well as the needs of logic, efficiency, fairness, and democracy.

<sup>9</sup> 135 S. Ct. 2128 (2015).

<sup>10</sup> *Id.* at 2132.

<sup>11</sup> LEONARD W. LEVY & KENNETH L. KARST, *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, Vol. II, at 828 (2002) (“A 1354 act of Parliament reconfirming MAGNA CARTA paraphrased its chapter 29 as follows: “That no man . . . shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of Law.” This was the first reference to due process in English legal history. Chapter 29 of the 1225 issue of Magna Carta originally concluded with the phrase “by the LAW OF THE LAND.”” *Id.* (emphasis in original).

<sup>12</sup> Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1048 (1984) (“Well before our Constitution was drafted, British jurists had definitively associated this phrase with a variety of protections inherent in the trial process, most notably trial by jury. The framers of the Fifth Amendment could not have doubted that the due process concept included such protections, whatever they may have thought about its effect on substantive legislation. The framers of the Fourteenth Amendment were certainly of the same view. The extent to which the Fourteenth Amendment’s due process clause was intended to incorporate the Bill of Rights may be disputed, but it was at least intended to incorporate the due process clause of the Fifth Amendment. And no subsequent interpretation of either provision has seriously called its applicability to judicial trials into question.”)

<sup>13</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 276, 15 L.Ed. 372 (1856); see also JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION*, 663 (1833) (“Lord Coke says, that these latter words, *per legem terrae* (by the law of the land,) mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law.”) It is true that the phrase “due process of law” technically referred to writs and forms of the law (process), but writs and forms defined the content of the law of the land. Cf. RODNEY L. MOTT, *DUE PROCESS OF LAW* 87-95 (1973) (emphasizing the “process” aspect of the phrase, but failing to see the relationship between process and substantive law).

<sup>14</sup> *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28-36 (1991) (Scalia, J. concurring in judgment).

<sup>15</sup> 59 U.S. (18 How.) 272 (1856).

<sup>16</sup> *Id.* at 276. This was also the view endorsed by Justice Joseph Story in his influential treatise on the Constitution. STORY, *COMMENTARIES*, *supra* note 12, at 663.

<sup>17</sup> *Id.* at 276-277.

<sup>18</sup> *Id.* at 276-279. See also *Walker v. Sauvinet*, 92 U.S. 90, 93 (1876) (“[d]ue process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land. . . . Art. 6 Const. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.”)

<sup>19</sup> 110 U.S. 516 (1884).

<sup>20</sup> *Id.* at 527 (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 234, 244 (1819)).

<sup>21</sup> *Id.* at 527-529.

<sup>22</sup> *Id.*

<sup>23</sup> 95 U.S. 714 (1878).

<sup>24</sup> *Id.* at 720, 722-723.

<sup>25</sup> *Id.* at 724.

<sup>26</sup> *Id.* at 733.

<sup>27</sup> *Id.* at 734-735.

<sup>28</sup> See ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, *CIVIL PROCEDURE: CASES AND PROBLEMS* 135-137 (5th ed. 2016); see also *Hess v. Pawloski*, 274 U.S. 352 (1927) (fiction of implied consent).

<sup>29</sup> 326 U.S. 310 (1945).

<sup>30</sup> *Id.* at 311.

<sup>31</sup> *Id.* at 316 (internal citations omitted).

<sup>32</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1545 (1993).

<sup>33</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

<sup>34</sup> *International Shoe*, 326 U.S. at 318 (internal citations omitted) (“While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.”)

<sup>35</sup> *Id.* at 319 (“It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.”)

<sup>36</sup> *Id.* at 316-317.

<sup>37</sup> *Id.* at 320.

<sup>38</sup> Allan Ides and I have shown how purposeful availment was not part of the *International Shoe* personal jurisdiction formula in Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, 7 FED. CTS L. REV. 118 (2013).

<sup>39</sup> 355 U.S. 220 (1957).

<sup>40</sup> *Id.* at 221.

<sup>41</sup> *Id.* at 223.

<sup>42</sup> *International Shoe*, 326 U.S. at 318 (citing *Kane v. New Jersey*, 242 U.S. 160 (1916); *Hess v. Pawloski*, 274 U.S. 352 (1927)).

<sup>43</sup> *McGee*, 355 U.S. at 223.

<sup>44</sup> *Id.*

<sup>45</sup> 357 U.S. 235 (1958).

<sup>46</sup> *Id.* at 243-244.

<sup>47</sup> *Id.* at 251.

<sup>48</sup> *Id.* at 253 (emphasis added).

<sup>49</sup> See Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, note 37, *supra*.

<sup>50</sup> *Hanson*, 357 U.S. at 251-252.

<sup>51</sup> *Id.* at 252.

<sup>52</sup> *Id.* at 253.

<sup>53</sup> *Id.* at 256 (Black, J., dissenting).

<sup>54</sup> *Id.* at 258.

<sup>55</sup> *Id.* at 259.

<sup>56</sup> *Hanson*, 357 U.S. at 258-259.

<sup>57</sup> *Id.* at 253.

<sup>58</sup> See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (describing specific jurisdiction as embracing two separate scenarios: single-act and continuous-and-systematic); *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (same).

<sup>59</sup> The Court has not yet defined the scope of the relatedness requirement and has certainly not endorsed any specific causation standard. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (“arises out of or relates to”) (emphasis supplied). Lower federal courts have recognized the lack of instruction from the Court and have recognized a range of relatedness possibilities that typically operates within a causative chain between the contacts and the claim. That range begins with a minimal cause-in-fact requirement—a but-for test—and extends to a more rigorous legal-cause requirement—proximate cause or substantive relevance. See, e.g., *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements, Ltd.*, 328 F.3d 1122, 1131-32 (9th Cir. 2003) (endorsing but-for standard); *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 506-06 (6th Cir. 2014) (endorsing a proximate-cause standard). Between these endpoints is a middle-ground standard, in which the contacts satisfy the but-for standard but are not substantively relevant to the claim. As to this middle ground, the due-process adequacy of the contacts depends on whether those contacts render suit in the forum fair or reasonable. The measure is sometimes stated in terms of foreseeability of suit in the forum and sometimes as a product of the reciprocal benefits and burdens of doing business there. See, e.g., *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 321-24 (3rd Cir. 2007) (endorsing middle-ground approach premised on reciprocal benefits and burdens); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996) (endorsing a middle-ground approach based on foreseeability of suit in the forum), *cert. denied*, 520 U.S. 1155 (1997). State courts, on the other hand, have sometimes found relatedness outside of the causal chain. See, e.g., *Al Rushaid v. Pictet & Cie*, 68 N.E.3d 1, 11 (2016) (a “relatively permissive” standard that “does not require causation” in context of state long-arm statute). Some state courts as well as some lower federal courts have also adopted an approach to relatedness that is outside the chain of causation. See Part IV, *infra*.

<sup>60</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

<sup>61</sup> 342 U.S. 437 (1952).

<sup>62</sup> *Id.* at 447.

<sup>63</sup> *Id.* at 446 (“This conforms to the realistic reasoning in *International Shoe Co. v. Washington*.”)

<sup>64</sup> *Id.*

<sup>65</sup> 564 U.S. 915 (2011).

<sup>66</sup> *Id.* at 918.

<sup>67</sup> *Id.* at 919.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 919-920.



<sup>70</sup> *Burger King v. Rudzewicz*, 471 U.S. 462, 477 (1985).

<sup>71</sup> The lacuna can be seen as a product of treating both aspects of specific jurisdiction—single-act and continuous-and-systematic—as raising identical due process concerns. That approach, however, fails to account for the context-specific principle of due process. Nor is it consistent with the oft-used phrase, “arise out of or relate to,” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985), quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984), which appears to recognize a broader spectrum of relatedness that ranges beyond causation.

<sup>72</sup> 134 S. Ct. 746 (2014).

<sup>73</sup> *Id.* at 751.

<sup>74</sup> *Id.* at 754.

<sup>75</sup> *Id.* at 755.

<sup>76</sup> *Id.* at 754; 758 (“As this Court has increasingly trained on the ‘relationship among the defendant, the forum, and the litigation,’ *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.”)

<sup>77</sup> *Id.* at 754.

<sup>78</sup> *Id.* at 760.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 761, n. 19.

<sup>81</sup> *Id.* at 762, n. 20.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 760.

<sup>84</sup> *Id.* at 757.

<sup>85</sup> 471 U.S. 462 (1985).

<sup>86</sup> *Id.* at 472 (“Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this ‘fair warning’ requirement is satisfied if the defendant has ‘purposefully directed’ his activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.”)

<sup>87</sup> *Id.* at 477.

<sup>88</sup> *Id.* at 482-484 (a case of “constitutional magnitude”).

<sup>89</sup> *Id.* at 482-486.

<sup>90</sup> *Id.*

<sup>91</sup> 131 S. Ct. 2780 (2011).

<sup>92</sup> *Id.* at 894 (Ginsburg, J., dissenting).

<sup>93</sup> *Id.* at 896–897.

<sup>94</sup> *Id.* at 886.

<sup>95</sup> *Id.* at 878–879.

<sup>96</sup> *Id.* at 893–898.

<sup>97</sup> *Id.* at 894.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 895 (Frank Curcio, Nicastro’s employer, “first heard of [McIntyre UK’s] machine while attending an Institute of Scrap Metal Industries [ (ISRI) ] convention in Las Vegas in 1994 or 1995, where [McIntyre UK] was an exhibitor.”).

<sup>100</sup> *Id.* at 896 (“McIntyre UK representatives attended every ISRI convention from 1990 through 2005.”)

<sup>101</sup> *Id.* at 898.

<sup>102</sup> *Id.* at 897.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 893–894. (internal citations omitted).

<sup>105</sup> *Id.* at 887–93 (Breyer, J., concurring).

<sup>106</sup> *Id.* at 910 (Ginsburg, J., dissenting).

<sup>107</sup> *See, e.g., Daimler AG v. Bauman*, 134 S.Ct. 746, 763 (2014) (“the Solicitor General informs us, in this regard, that ‘foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.”).

<sup>108</sup> 357 U.S. 235 (1958).

<sup>109</sup> 444 U.S. 286 (1980).

<sup>110</sup> 480 U.S. 102 (1987).

<sup>111</sup> 495 U.S. 604 (1990).

<sup>112</sup> *McIntyre*, 564 U.S. at 882 (quoting *Hanson*).

<sup>113</sup> *Id.* at 883.

<sup>114</sup> *International Shoe*, 326 U.S. at 319.

<sup>115</sup> *See, e.g., McIntyre*, 564 U.S. at 877.

<sup>116</sup> Along these lines, see Justice Ginsburg's dissenting opinion in *McIntyre* ("Finally, in *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded, for they conceal the actual bases on which jurisdiction rests."). *Id.* at 900. (Ginsburg, J., dissenting).

<sup>117</sup> *Id.* at 652-53.

<sup>118</sup> *Id.* at 656-60.

<sup>119</sup> *Id.* at 656.

<sup>120</sup> *Id.* at 660.

<sup>121</sup> Petition for Certiorari, at (i) (emphasis supplied).

<sup>122</sup> Roscoe Pound, *Courts and Legislation*, 7 Am. Pol. Sci. Rev. 361, 365 (1913).

<sup>123</sup> See Simona Grossi, Allan Ides, *Amicus Brief*, available here: [http://www.scotusblog.com/wp-content/uploads/2017/04/16-466\\_amicus\\_resp\\_professors\\_of\\_civil\\_procedure.pdf](http://www.scotusblog.com/wp-content/uploads/2017/04/16-466_amicus_resp_professors_of_civil_procedure.pdf)

<sup>124</sup> See *Bristol-Myers Squibb v. Superior Court*, Brief of Petitioner, at 32-37.

<sup>125</sup> *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

<sup>126</sup> 28 U.S.C. § 1367(a) & (c).

<sup>127</sup> For a lucid discussion of pendent personal jurisdiction and its essential role in the modern law of jurisdiction, see Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C.D. L. Rev. 207, 243-52 (2014).

<sup>128</sup> *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004).

<sup>129</sup> *Id.* at 1181.

<sup>130</sup> *Oetiker v. Werke*, 556 F.2d 1, 5 (D.C. Cir. 1977) (citing *United Mine Workers v. Gibbs*, 383 U.S. at 726).

<sup>131</sup> See, e.g., *Avocent Huntsville Corp. v. Aten Intern. Co., Ltd.*, 552 F.3d 1324, 1339-1340 (Fed. Cir. 2008), *cert. denied*, 557 U.S. 904 (2009); *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d at 1180-1181 (9th Cir. 2004); *United States v. Botefuhr*, 309 F.3d 1263, 1272-1275 (10th Cir. 2002); *Robinson Engineering Co., Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 449-450 (7th Cir. 2000); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 628-629 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998) *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056-1057 (2d Cir. 1993), *cert. denied*, 513 U.S. 822 (1994); *Oetiker v. Werke*, 556 F.2d at 5 (D.C. Cir. 1977); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555-556 (3d Cir. 1973).

<sup>132</sup> See Simona Grossi, *Frontloading, Class Actions, and a Proposal for a New Rule 23*, \_\_ LEWIS & CLARK L. REV. \_\_ (2017).

<sup>133</sup> See, e.g., Arthur R. Miller, *Inaugural University Professorship Lecture: Are They Closing the Courthouse Doors?* (March 19, 2012) ([www.law.nyu.edu/news/ECM\\_PRO\\_072088](http://www.law.nyu.edu/news/ECM_PRO_072088)) ("The judiciary has shifted the procedural system dramatically against plaintiffs by moving the specter of case termination forward in time . . . converting screening motions into merit resolving dispositive motions.") *Id.* at 16.

<sup>134</sup> The risk of conflation of causes and remedies was a problem preceding the adoption of the Federal Rules of Civil Procedure. In 1937, the Fifth Circuit had warned that "[c]auses of action should be distinguished from remedies. One precedes and gives rise to the other, but they are separate and distinct. The cause of action is not only different from the remedy but also from the relief sought. At common law, an 'action' is defined by Lord Coke as a legal demand of one's right. Our Supreme Court says a cause of action comprises what a plaintiff must prove to obtain judgment." *United States v. Smelser*, 87 F.2d 799 (5th Cir. 1937).

<sup>135</sup> For a critical assessment of Rule 23, the amendment process, and the political forces at stake, see Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 145 (2011). *But see also* Arthur R. Miller, *Are They Closing the Courthouse Doors?*, *supra* note 132, at 16-17 ("Could it be that it's now the defense bar that has been empowered to extort settlements that are artificially low by subjecting plaintiffs to the costs, delays, and risks of running afoul of the various procedural stop signs that dot the pretrial landscape? Maybe that is the real extortion phenomenon—not contingent fee plaintiffs extorting settlements from defendants. Or maybe the fault lies on both sides? Or maybe extortion really is a nonissue—a rhetorical illusion?... Yet despite this vacuum of knowledge, dramatic procedural shifts have occurred based on unsubstantiated assertions and assumptions.") *Id.*

<sup>136</sup> The mechanical, fragmented, and hyper-technical nature of the current rules is probably a result of a profound distrust of the judges and juries. But as the drafters of the 1938 Federal Rules of Civil Procedure warned, there will never be a procedural reform if the reformers don't trust and give power to the judges. As Edmund Morgan, one of the members of the Advisory Committee, noted at the November 15, 1935 meeting, [a]s long as you have no confidence in your trial judges, you will never get any procedural reform. You do not care what kind of fellows they are, because you will not give them any power. And then you say you cannot give them any power, because they cannot be trusted. And there you are, in a continuous circle. That strikes every reform for procedure, evidence and pleading—that you will not trust your trial judges. It was found that all the way through all the uncertainty in regard to the right of the court to comment on the evidence, that there were floods of telegrams, and they said, 'If we had good judges we would be willing, but God help us, we do not have good judges;' and then you do not have good judges because they do not have any power. You must break that continuous circle in some place. Charles E. Clark Papers, Box 94, Folder 2, at 506.

<sup>137</sup> See, e.g., Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action*, 162 U. PA. L. REV. 1525, 1526-1527 (2014) ("Even as we have more terminations, our current system seems to give us fewer determinations. In 2013, only slightly over one percent of more than 250,000 civil terminations in the federal courts over the previous twelve consecutive months occurred after reaching trial. As Owen Fiss recognized three decades ago, such statistics call into question whether settlement is invariably a good thing, and whether, in too many cases, a fixation on achieving settlement has prioritized clearing dockets over doing justice.")

<sup>138</sup> *Burger King*, 471 U.S. at 476-77 (internal citations omitted).

<sup>139</sup> See *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); see also *Porina v. Marward Shipping Co., Ltd.*, 521 F.3d 122, 126 (2d Cir. 2008) ("a 'plaintiff[] need only make a prima facie showing of personal jurisdiction over the defendant[,] [and] . . . we construe the pleadings and affidavits in the light most favorable to plaintiffs, resolving all doubts in their favor"). When "substantial discovery" has been allowed, the burden on the plaintiff might change: see, e.g., *Burns & Russell Co. of Baltimore v. Oldcastle, Inc.*, 198 F. Supp. 2d 687 (D. Md. 2002) ("Nevertheless, as I have allowed plaintiffs to conduct extensive jurisdictional discovery, plaintiffs must do more than merely establish personal jurisdiction by the prima facie standard. Rather, plaintiffs must overcome, by substantial evidence based on the discovery that was permitted, OI's compelling showing that it lacks the requisite minimum contacts with Maryland to justify the court's exercise of personal jurisdiction over the defendant."). See also *We're Talkin' Mardi Gras, LLC v. Davis*, 192 F. Supp. 2d 635 (E.D. La. 2002) ("Where the alleged facts are disputed and the Court's jurisdiction is placed at issue, the party who seeks to invoke the jurisdiction of the district



court bears the burden of establishing it. Consequently, in this case the burden is on the plaintiff. Where the district court rules on a motion to dismiss for lack of jurisdiction without conducting an evidentiary hearing, the plaintiff may carry his burden by presenting a prima facie case of jurisdiction. If the trial court holds an evidentiary hearing or the case proceeds to trial, the burden on the plaintiff shifts to a preponderance of the evidence.”(internal citations omitted).

<sup>140</sup> See CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN 4 FED. PRAC. & PROC. CIV. §1067.6 (4d ed. 2016).

<sup>141</sup> *Burger King*, 471 U.S. at 484.

<sup>142</sup> *Id.* at 477.

<sup>143</sup> *Daimler*, 134 S.Ct. at 770-71 (Sotomayor, J., concurring).

<sup>144</sup> *Id.* at 762, note 20.

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., *Geo-Culture, Inc. v. Siam Inv. Management S.A.*, 147 Or. App. 536, 544 (1997) (“Because plaintiff’s operative amended complaint failed to allege a *prima facie* basis for asserting jurisdiction over [the defendant], the court did not err in . . . limiting discovery pursuant to ORCP 21 A.”)

<sup>147</sup> See *Behm v. John Nuveen & Co., Inc.*, 555 N.W. 2d 301, \*305 (Ct. App. Minn.). See also *Goehring v. Superior Court* 62 Cal.App.4th 894, \* 911 (1998) (The trial court should be given the opportunity to rule on this issue. A plaintiff is generally entitled to conduct discovery with regard to a jurisdictional issue before a court rules on a motion to quash. The granting of a discovery request “lies in the discretion of the trial court, whose ruling will not be disturbed in the absence of manifest abuse.” Under the circumstances, the trial court should be provided the opportunity to exercise its discretion to determine whether jurisdictional discovery pertaining to petitioners would be appropriate in this case) (internal citations omitted).

<sup>148</sup> See *In re Automobile Antitrust Cases I and II*, 135 Cal.App.4th 100, \*110 (2005).

<sup>149</sup> *Id.* at 112.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 110.

<sup>152</sup> *Id.*

<sup>153</sup> 490 S.W.3d 29 (Tex. 2016).

<sup>154</sup> *Id.* at 36.

<sup>155</sup> *Id.* at 37-38.

<sup>156</sup> 465 U.S. 783 (1984). Several courts have followed *Calder*’s lead and substituted the phrase “purposeful direction” in place of purposeful availment as the appropriate standard in tort cases. See, e.g., *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

<sup>157</sup> *International Shoe*, 326 U.S., at 318 (“True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.”) (internal citations omitted).

<sup>158</sup> *Id.* at 43.

<sup>159</sup> *Id.* at 44-5.

<sup>160</sup> *Id.* at 45-7.

<sup>161</sup> *Id.* at 47-52.

<sup>162</sup> *Id.* at 47-8.

<sup>163</sup> *Id.* at 48-52.

<sup>164</sup> 403 S.W.3d 726 (Tenn. 2013).

<sup>165</sup> *Id.* at 741-751, 755-759.

<sup>166</sup> *Id.* at 750-751 (internal citation omitted).

<sup>167</sup> *Id.* at 755-759.

<sup>168</sup> *Asahi*, 480 U.S., at 108-113 (plurality).

<sup>169</sup> 403 S.W.3d, at 755.

<sup>170</sup> *Id.*, at 766-781 (Wade, C.J., dissenting).

<sup>171</sup> 860 N.W. 2d 576 (S. Ct. Iowa 2015).

<sup>172</sup> *Id.* at 592.

<sup>173</sup> *Id.*

<sup>174</sup> The Brennan model endorsed by the Iowa Supreme Court was not one of mere foreseeability (as described by Justice Kennedy in *J. McIntyre*). In Justice Brennan’s words: The stream of commerce refers not to unpredictable currents or eddies, *but to the regular and anticipated flow of products from manufacture to distribution to retail sale*. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. *Asahi*, 480 U.S., at 117 (Brennan, J., concurring). See Allan Ides, *Forward: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 Loy. L.A. L. Rev. 341, 361-366 (2012) (criticizing Justice Kennedy’s flawed description of Justice Brennan’s stream-of-commerce standard).

<sup>175</sup> *Id.* at 594-595.

<sup>176</sup> 987 N.E. 2d 778 (S. Ct. Ill. 2013).

<sup>177</sup> *Id.* at 793 (emphasis in original).

<sup>178</sup> 884 N.W. 2d 321 (S. Ct. Minn. 2016).

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- <sup>179</sup> *Id.* at 331.  
<sup>180</sup> *Id.* at 332.  
<sup>181</sup> *Id.* at 334.  
<sup>182</sup> *Id.*  
<sup>183</sup> *Id.* at 337.  
<sup>184</sup> *Id.* at 338.  
<sup>185</sup> *Azteca*, 490 S.W. 3d, at 52-55.  
<sup>186</sup> *Id.* at 53.  
<sup>187</sup> *Doublestar*, 860 N.W. 2d, at 598-597.  
<sup>188</sup> *Rilley*, 884 N.W. 2d, at 336-337.  
<sup>189</sup> *Russell*, 987 N.E. 2d, at 796-797.  
<sup>190</sup> Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361 (1913).  
<sup>191</sup> *Id.* at 371.  
<sup>192</sup> *Id.*  
<sup>193</sup> *Id.*  
<sup>194</sup> *Id.* at 372.

## Oral Remarks of Professor Grossi

Personal jurisdiction is one of my favorite topics. It is hard to believe how complicated it has become thanks to the latest Supreme Court opinions, but actually the situation got complicated long ago.

Let me start the same way I started with my paper. I want to start with due process. My paper was supposed to give you a refresher course on the topic. I start with due process because due process is in fact what should inform our analysis. Of course, due process informs every litigation analysis, but we tend to forget that what we are doing, when we do personal jurisdiction analysis, is due process analysis.

When I talk about due process, I talk about a balance of conflicting interests—the interest of the plaintiff, the interest of the defendant, the interest of the court, and the interest of the judicial system as a whole.

Now, due process plays an important role in personal jurisdiction analysis. If you think about *International Shoe*,<sup>1</sup> the case decided by Chief Justice Stone in 1945, due process appeared in the formula. Remember, Chief Justice Stone expanded the territoriality approach to personal jurisdiction by holding that, whenever the defendant is not physically present within the state, he may still have certain minimum contacts with the forum so that the exercise of jurisdiction will be consistent with the traditional notions of fair play and substantial justice. That was due process: the “traditional notions of fair play and substantial justice.”

Due process involves a balance of conflicting interests—the interest of the plaintiff, the interest of the defendant, the interest of the court, and the interest of the judicial system as a whole.

This is the formula that we get from *International Shoe*, the personal jurisdiction formula. If the defendant is not present within the forum, but has certain minimum contacts with it so that the exercise of jurisdiction will be consistent with the traditional notions of fair play and substantial justice, then the exercise of jurisdiction will be okay. Stated like this, the formula seems very open-ended, but it wasn't all Chief Justice Stone gave us. There was more to it.

The assessment of jurisdiction should proceed through a realistic assessment of the facts, abandoning legal fictions.

Chief Justice Stone said that the assessment of jurisdiction should proceed through a realistic assessment of the facts, abandoning legal fictions. It should be a qualitative assessment, not a quantitative one. Purposeful availment was not part of the formula. Purposeful availment was more like an afterthought to *International Shoe*.<sup>2</sup>

The Court observed that, because the International Shoe company was doing business in the forum, it was availing itself of the privilege and benefit of the laws of the forum. It could not claim unfair surprise. In other words, it was fair to exercise jurisdiction over International Shoe. It was not a requirement. It cannot be a requirement of personal jurisdiction. Purposeful availment cannot be a requirement. It is not a requirement in the Restatement Second of Conflict of Laws. It is not a requirement in *Calder v. Jones*.<sup>3</sup>

In the intentional tort cases, where an out-of-state defendant is committing a tort that has an effect in the state, it is not benefitting from the laws of the state. It is violating those laws. So purposeful availment is not a requirement. It was not meant to be a requirement.

There was more in *International Shoe*, not just a general formula. There was a spectrum of possibilities. The Supreme Court gave us a series of possibilities where personal jurisdiction might be found. When the out-of-state defendant has continued, systematic contacts with the forum, it would not be unfair to exercise jurisdiction over the defendant on any claim, even those unrelated to the contacts. When the out-of-state defendant has less pervasive contacts with the forum that are related to the plaintiff's claim, it could not claim unfair surprise. Of course, it would be fair to exercise jurisdiction over the defendant. Likewise, a single contact with the forum related to the plaintiff's claim will be enough. So we are not looking at the quantity, but at the quality.

Notice that there is no mention of general or specific jurisdiction. The spectrum is not supposed to be the only container of personal jurisdiction. How do I know? I was not there. How am I so confident? Chief Justice Stone indicated that those were *examples*. The focus is on due process. It must be fair.

*International Shoe* contained in itself everything we need to carry out the personal jurisdiction analysis. Everything that came afterward was unnecessary, and it has complicated the analysis in a way that is problematic.

This is the principal approach to personal jurisdiction of *International Shoe*. I do believe that *International Shoe* contained in itself everything we need to carry out the personal jurisdiction analysis. Everything that came afterward was unnecessary, and it has complicated the analysis in a way that is problematic.

Now you are going to tell me that the situation has dramatically changed since 1945. We did not have the Internet. Back then, we did not have the complicated transactions that we have right now. I believe that *International Shoe* and the principles and the formula and the guidelines set out in that opinion would be able to solve anything.

Now what happened after *International Shoe*? Well, after *International Shoe*, we have the two “boxes” of specific jurisdiction and general jurisdiction. Right after *International Shoe*, *Hanson v. Denckla*<sup>4</sup> took the purposeful availment requirement out of the context of *International Shoe* and made it a requirement of personal jurisdiction. Now purposeful availment is a requirement.

On specific jurisdiction, *Burger King*,<sup>5</sup> a contract case, gave us those factors that a defendant should prove to rebut the presumption of reasonableness of jurisdiction. Those factors are supposed to comprise the due process analysis of personal jurisdiction. Remember, we did not need those factors. *International Shoe* told us that due process was a component, of course, of the personal jurisdiction analysis.

*Burger King* made the due process component into a separate prong of what now looks like a test. Now, there are five factors to consider in determining whether the exercise of personal jurisdiction is consistent with due process: the interest of the defendant; the interest of the plaintiff; the interest of the forum state; and the interest of the system as a whole, including “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.”<sup>6</sup>

Did we need that? Isn't that due process? Balancing conflicting interest? You see how the formula now becomes more fragmented, more mechanical.

And then we have *Asahi Metal Industry*,<sup>7</sup> introducing and solidifying the stream of commerce. One way of satisfying purposeful availment. And it is not just stream of commerce. Is stream of commerce pure? Stream of commerce plus?



And then in *McIntyre*,<sup>8</sup> there is even more. That opinion was supposed to resolve the confusion on stream of commerce. But it didn't, and it added further layers to the analysis. But under the plurality's approach, targeting the forum state became a requirement of the analysis, as well as the submission to the sovereignty of the forum.

And then, of course, as to specific jurisdiction, we have the "effects test," from *Calder v. Jones* and *Walden v. Fiore*.<sup>9</sup>

That is just specific jurisdiction, but then we have general jurisdiction. *International Shoe* just said that when the defendant's contacts with the forum are so pervasive and systematic, it would be fair to sue the defendant on any claim, even those that are unrelated to those contacts.

But then for general jurisdiction, under *Goodyear*,<sup>10</sup> the defendant has to be "at home." The nonresident defendant must be at home for us to exercise jurisdiction. And then in *Daimler*,<sup>11</sup> the general jurisdiction assessment became even more complicated. Yes, the paradigm is domicile for an individual. For corporations, it is the principal place of business and the state of incorporation. But it can also be somewhere else. It can be another place where the defendant's contacts with the forum are so pervasive that we could consider the defendant at home there as well. How are we going to determine that? With the proportionality test. We are going to compare what the defendant does in this forum with what the defendant does elsewhere.

We started with *International Shoe*, with this very principled, elegant opinion that gave us everything we needed. And now we come to a situation where we have several layers for specific jurisdiction, and several layers for general jurisdiction.

This is where we are right now. Compare it to where we started. We started with *International Shoe*, with this very principled, elegant opinion that gave us everything we needed. And now we come to a situation where we have several layers for specific jurisdiction, and several layers for general jurisdiction. Are the different categories of general jurisdiction and specific jurisdiction constitutionally significant? I have doubts.

## Four Questions

We are left with questions. Here are the questions that I want to discuss with you. I do not have answers to those questions. I hope they will generate more debate.

**1. The "lacuna."** What about the cases that do not fit into any of the boxes that we have right now? They do not fit into the specific jurisdiction box, they do not fit into the general jurisdiction box—like *Bristol-Myers*,<sup>12</sup> for instance. Professor Steinman will talk about it this afternoon. That case or other cases like that do not fit into the specific jurisdiction *or* the general jurisdiction box. And yet it seems fair to exercise jurisdiction over the defendant. But we stop. We stop at the first prong of the personal jurisdiction analysis. We do not get to due process, and yet due process should inform all analysis. It should not come at the end. If it makes sense to try this case, then we should try it. We should look at the contacts in view of due process. Procedure is just the handmaid of justice. We are not litigating about litigating. We want to get to those cases.

**2. Federalism.** Is it really a necessary component of the personal jurisdiction analysis? There is supposed to be a limit on the federal government not to intrude into the sovereignty of the states. But isn't the federal government, through the Supreme Court, for example in *Bristol-Myers*, imposing now a limit on the decision of

the state to actually exercise jurisdiction over the defendant, saying, “No, you should not. Why did you do that?” The state court says, “I wanted to. It was fair.” If federalism is a component of personal jurisdiction, can the defendant waive personal jurisdiction? The defendant can waive the objection of lack of personal jurisdiction. But by doing that, isn’t the defendant “waiving” the right of another state to exercise jurisdiction? We should probably treat personal jurisdiction as subject matter jurisdiction—as not waivable.

There is supposed to be a limit on the federal government not to intrude into the sovereignty of the states.

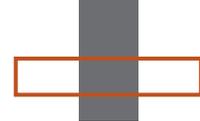
**3. Causation.** This is where you judges will have a role. The Supreme Court in *Bristol-Myers* did not say exactly what type of causation will satisfy the personal jurisdiction threshold. My hope is that judges will not come up with a mechanical formula that will restrict their own authority and make it more complicated to exercise jurisdiction when jurisdiction must be exercised.

**4. Discovery.** Now that personal jurisdiction is so complicated (remember all the layers for specific jurisdiction; all the layers for general jurisdiction, i.e., “at home,” the proportionality test, etc.), how much discovery do we give to the plaintiff? Of course, we are dealing with a procedural condition of the action. We should not delay the proceedings too much. But doesn’t the plaintiff have a right to show that the court has jurisdiction? Why should the resolution of the case be determined at the very forefront of the litigation?

It seems to me that the Supreme Court has developed a distrust of judges.

It seems to me that the Supreme Court has developed a distrust of judges. It does not have confidence that judges can do this work, can assess within their own discretion whether the contacts are meaningful enough to find personal jurisdiction. This is, to me, in stark contrast with the approach in *International Shoe*. And my sincere hope is that we will recover some sanity here. The jurisdiction analysis does not need to be complicated.

Thank you.



## Comments by Panelists

### PROFESSOR MARGARET WOO

I want to thank the Pound Institute for organizing such a timely panel, and for Professor Grossi's very thoughtful paper. It is a very detailed analysis of the history of personal jurisdiction and the importance of due process in the consideration of personal jurisdiction. She also then went forward to outline the recent line of cases that have circumscribed the rights of plaintiffs to sue in a fair and convenient forum. Generally speaking, in general jurisdiction, the *Daimler* case now limits jurisdiction against corporations to essentially two places: the corporation's place of incorporation and the corporation's principle place of business.

In *Bristol-Myers*, the Supreme Court has circumscribed specific jurisdiction more tightly to the relatedness requirements, such that now each joint plaintiff has to demonstrate that his claim arose out of the defendant's contacts with the forum state.

What this all means seems to be that this series of cases essentially limits mass torts to a defendant's home state, or in aggregate cases to the individual plaintiff's home state where the injury occurred, or to federal court.

Now, Professor Grossi sees this being problematic and wants us to return to a consideration of personal jurisdiction and its fundamental core, that is, its fairness and efficiency, tempered by reason. I certainly agree with her on that, but I wanted to raise three themes about this line of Supreme Court cases, dealing with personal jurisdiction, and then to think a little bit about what that may mean as a practical matter in terms of your work as state court judges.

These three themes are essentially (1) jurisdiction and federalism, (2) jurisdiction and collective action, and (3) jurisdiction in the international context. There's no question that personal jurisdiction is very much tied to the Due Process Clause. But *Bristol-Myers* also reminds us that there is a revival of the Supreme Court's consideration of sovereignty. It is an 8-to-1 decision with Justice Sotomayor filing the sole dissent.

This series of cases essentially limits mass torts to a defendant's home state, or in aggregate cases to the individual plaintiff's home state where the injury occurred, or to federal court.

It does raise questions. There seems to be a movement towards a curb on forum-shopping by plaintiffs and a curb on one single state other than the home state of the defendant to issue judgments with national implications. It really is a view of the state's regulatory interest as limited to protecting its own citizens and providing its own citizens redress.

### Three Questions

**(1) Jurisdiction and Federalism.** The question I have for you as state court judges is, "Is this fair? Is this good? Is this the wave of the future? And is, in fact, interstate federalism really going to fall apart if a California state court is going to adjudicate and issue a judgment against Massachusetts citizens for activities conducted outside of California?"

I do not really have the answers to that. My suspicion is no, federalism is not going to fall apart. But I do think the prediction is that you are going to see a lot more cases coming before your courts that are going to litigate the relatedness prong of the personal jurisdiction / specific jurisdiction requirement. In the past, it has been very much focused on purposeful availment, but now it is going to be purposeful availment and "relatedness."

(2) **Jurisdiction and Collective Action.** One thing about, at least, *Bristol-Myers* is that it is supposed to be okay to render a judgment against the Bristol-Myers company in California, even though the plaintiff is outside of California, because it is joined to an action where there are multiple California plaintiffs. But the Supreme Court did not find that to be sufficient contact with California.

I am just wondering if, in fact, the Supreme Court is using jurisdiction as a rebuttal to collective actions and the role of collective actions to change corporate conduct. In recent years we have seen a retrenchment against collective action, class actions. The *Walmart* case,<sup>13</sup> of course, required greater commonality. We know that the proposed Fairness in Class Action Litigation Act of 2017<sup>14</sup> is now trying to push further restrictions on class certification.

Is the Supreme Court using jurisdiction as a rebuttal to collective actions and the role of collective actions to change corporate conduct?

Then the question that I have really is (and it is Justice Sotomayor's concern), "Will this particular Constitutional rule of relatedness also cast a shadow over a commonplace procedural device such as class action and multi-district litigation?"

And the practical question, yet again for you all as state court judges, is, Are we going to see plaintiffs starting to steer cases more into federal court collective actions rather than keeping them in state courts? Are we going to see plaintiffs really have more class-wide specific classes and more informal coordination with plaintiffs across state lines who are barred? That will certainly be an interesting development.

Finally, (3) **Jurisdiction and International Contacts.** It is interesting that the majority opinion of *Bristol-Myers* was joined in by Justices Breyer and Ginsburg, both of whom are very much geared toward comparative studies.

The American long-arm statute, with its minimum contacts test, is an outlier in the world of personal jurisdiction. And even the most recent UNIDROIT American Law Institute Principles of Transnational Civil Procedure<sup>15</sup> limit personal jurisdiction to substantial connection between the forum state and the transactional contacts in disputes. These Principles also go very much towards the relatedness requirement that is consistent with the rest of the world.

Again, are we seeing an effort by the Supreme Court to move the U.S. into more convergence with the rest of the world? Here is the \$1,000 question: Are we seeing the Supreme Court actually moving cases involving international corporations more into federal courts because federal courts do have a rule for nationwide service of process that will actually allow more aggregation of contacts, particularly if there is no one particular state where a defendant can be brought in under the traditional minimum contacts analysis?

All of these cases are really interesting. They raise questions of sovereignty. They raise questions of international contacts. They raise questions of joint and collective action, which you will all see play out in your individual litigation.

## HONORABLE GERALDINE S. HINES

In the time that I have available to me, I would like to respond to Professor Grossi's compelling charge to the state courts to rescue personal jurisdiction from the doctrinal morass that has taken it away from the common sense and fairness approach to due process that emerged in *International Shoe*.



I heartily endorse her challenge to state court judges to not overlook our essential role in the enforcement of state-created rights and in the vindication of legitimate state policy. We should, she argues, do what we can to bring personal jurisdiction back to its due process roots, which she has described as “fairness and efficiency, tempered by reason.”

She appropriately characterizes the current state of personal jurisdiction jurisprudence as an access-to-justice issue. I recognize this as a more fundamental problem, and so do other judges in this room who have been immersed in a different kind of access-to-justice concern, where we work to ensure that our courts are fully and equally open to poor people who are unable to afford legal representation for their claims. It’s more fundamental because, even with an attorney, the litigant may never have the opportunity to prosecute her claim.

Under the Supreme Court’s personal jurisdiction cases, litigants may be unfairly deprived of the opportunity to sue in their chosen forum to redress injuries.

I agree with Professor Grossi’s assessment that, under the Supreme Court’s personal jurisdiction cases, litigants may be unfairly deprived of the opportunity to sue in their chosen forum to redress injuries they have suffered as a consequence of a defendant’s business.

Professor Grossi challenges judges to focus on the interest of the state in providing a forum under the circumstances presented and to leave doctrine construction and deconstruction to the Supreme Court. She asks whether we can just begin with the question of whether the forum state has a legitimate interest in providing a forum for the resolution of the particular controversy instead of talking about purposeful contacts and then moving on to wherever that inquiry leads.

She suggests that we could approach the analysis by simply asking whether it makes sense to exercise the power of the state in the circumstances of the case unless prevented by doctrine from doing so. Professor Grossi suggests that we should ask whether this will work.

I like this idea, but I have some concerns. The approach may be much more subtle in how it bypasses the doctrinal barriers to using common sense and basic fairness principles in deciding personal jurisdiction cases than I am capable of understanding. But I am just not convinced that state court judges have all that much leeway anymore.

Due process should involve the balancing of interests.

Looking at *McIntyre* and the other cases, I worry that personal jurisdiction jurisprudence has been skewed too much toward protecting corporate interests. Justice Ginsburg, in her *McIntyre* dissent, did not attribute the plurality’s decision to the fact that the corporate defendant’s interests were weighed more heavily in the due process calculus. Her lament that the Court’s decision was a giant step away from notions of fair play and substantial justice is an apt description of what appears to have happened there. You wonder if due process, which ultimately is about fairness to both parties, is the guiding principle when Mr. Nicastro loses four fingers, using a machine introduced into the stream of commerce by the defendant, but his interest in seeking redress for that injury is subordinated to the defendant’s interest in avoiding a lawsuit in New Jersey.



In my humble opinion, due process should involve the balancing of interests. I am just not sure that under the Supreme Court’s personal jurisdiction cases, state court judges will be allowed to do that in a way that keeps the courthouse door open for litigants who want to sue corporate defendants.

I wonder also if the Court’s general jurisdiction cases holding fast to the idea that a corporation cannot be at home everywhere are sufficiently cognizant of the nature of corporate identity. Corporations *are* everywhere. There is no beginning and there is no end.

I look with some hope at Justice Sotomayor’s dissent in *Bristol-Myers Squibb*. I think it is telling about where the law of personal jurisdiction is going. She warns that the Court’s decision will curtail, and in some cases will *eliminate*, plaintiffs’ ability to hold corporations fully accountable for their nationwide conduct. I worry about that too.

These are just my thoughts on the personal jurisdiction issue. Unfortunately, we have not had an opportunity in our court yet to grapple with what appears to be a very difficult issue, so I am less well prepared to talk about the intricacies of it. But I hope that the discussion today will allow us to talk about ways that we can get past what may appear to be roadblocks, and to take on Professor Grossi’s challenge.

I look forward to the discussion today to hear what the academy has to say to the judiciary. We talk across each other many times and we love the solutions academics offer, but they are not always practical.

## LINDA MORKAN

Good morning. May it please the various courts, I want to thank the Pound Institute for inviting me to be on this panel and to offer a slightly different point of view as one from the defense side. I also want to congratulate Professor Grossi on that paper, which I thought was an excellent piece of scholarship. It was easy to read, and I think it provides a wonderful launch pad for our discussion today. That said, there are things that I disagree with, which is not a surprise to anyone.

There is a very pointed focus for the fairness and efficiency question—fairness and efficiency for the defendant, and just for the defendant.

Professor Grossi starts with the idea that the question is one of fairness and efficiency and a balance of reason, I believe. I do not disagree with that statement, but I would suggest that there is a very pointed focus for that fairness and efficiency. That is that it is fairness and efficiency for the defendant, and just for the defendant, when you are talking about personal jurisdiction.

Professor Grossi is not alone in her assertion that we should be looking at bigger ideas. I was just reading an article where they said that the touchstone of personal jurisdiction is fairness. Is it fair to hale a multinational corporation like

General Motors into any court where it does business? That is the question. It is about fairness, but it is about fairness to the defendant.

I would suggest that when we look at these cases, we use a slightly different focus—that we are not talking about a balancing of interests as we often are in other due process concerns. This is not a question of what is in the best interest of the plaintiff versus the defendant versus the court or state where that court is located. This is a little microcosm dispute, if you will, between the court and the defendant. It is a court trying to assert the sovereign power of its state over a defendant and that defendant is pushing back and saying, “You don’t have the right to direct my conduct or to influence my property.”



When you look at it in terms of the state's ability to assert itself over this adjudication and you look at it in terms of the truly awesome power that a state, through its judicial arm, brings to a dispute, you will see that what the Supreme Court was attempting to do as far back as *Pennoyer v. Neff*<sup>6</sup> is to limit the state's authority territorially to disputes that, if they do not arise in the state, then at least they involve the state's citizens or have some connection which would justify the assertion of jurisdiction by the state.

### “What Did This Defendant Do?”

What I would suggest here is that this really is a defendant-centric question. It is all about the defendant's conduct. What did this defendant do to subject itself, to make itself vulnerable to the exercise of power by the state? “What did this defendant do?” I am emphasizing “this defendant” because you will see in the cases that our Supreme Court continues to say it is not what other defendants do. This is *personal* jurisdiction. The examination is what did *this* defendant do to subject itself to the jurisdiction of the court. WDTDD: **What Did This Defendant Do?**

This really is a defendant-centric question. It is all about the defendant's conduct.

Under that umbrella, we know we have two categories. We have *general* jurisdiction, which of course we have if this defendant set up shop in a state. It made that state its home or it created a principal place of business. We know what that defendant did. It voluntarily went to a state, enjoyed the benefits of that state, and in doing so, has now made itself vulnerable to the judicial arm of that state.

On the other side, we have *specific* jurisdiction, which is looking at what the defendant did in the conduct of its business that gave rise to the litigation that is now before the court. It is under that arm of the decision tree that we have to deal with minimum contacts. What did that defendant do? What actions did it engage in—even minimal actions—that would expose it to the power of the court?

Again, on that decision tree, under specific jurisdiction, under minimum contacts, then there is a reasonableness inquiry. And that, I would suggest, *does* involve balancing, when you are down that far on the decision tree and you are saying that there is specific jurisdiction. There have been minimum contacts. But does it still make sense to have *this* defendant in *this* court? I think it was in the *Asahi*<sup>17</sup> case that the Supreme Court said “No, it still does not make sense, even though there are minimum contacts. In the overall scheme of this case, it does not make sense and we are not going to assert jurisdiction.”

Again, my proposition is that the plaintiff's interest in this decision tree really does not play a part—or if it does, it is a very small part.

### The Defendant's Point of View

I would also suggest that all of our SCOTUS precedents on these questions can be explained if you take the point of view of the defendant. There is a common thread, from *Pennoyer* all the way up to *Bristol-Myers* and *BNSF*,<sup>18</sup> which are our most recent decisions, which makes sense if you say, “I am examining the conduct of the defendant and what the defendant did to subject itself to the jurisdiction of the state court.” It may be imperfectly consistent, but I suggest that, in fact, it is consistent.

There is one other point that I want to make, and that is that it is very easy, I think, in the question of personal jurisdiction, to blur the edges. I see personal jurisdiction as a very narrow test. It is very focused on the conduct

I see personal jurisdiction as a very narrow test. It is very focused on the conduct of a defendant.

of a defendant. There are other similar doctrines, however, *forum non conveniens*, or conflict of laws, where you have perhaps a plaintiff from one state, a defendant from another state, an injury that took place in yet a third state and perhaps even the application of state law from a fourth state.

When you are talking about conflict of laws, that is a blurrier test. That does involve a balancing of interests and which forum's law makes the most sense under the application of these particular facts. But I would suggest to you that that test is limited to considerations of convenience under *forum non conveniens* or conflict of laws.

But personal jurisdiction is a much more pure test, much more focused. And the question should be, “*What did this defendant do to subject itself to the authority of the state court?*”

Thank you.

## ALANI GOLANSKI

Consider a situation in which a corporation acts recklessly, injures thousands and thousands of working people in the country, and then attempts to defeat claims brought against it through personal jurisdiction analysis. The plaintiffs' claims are split. In order to receive full recovery, they have to litigate in many states, many forums, under the more restrictive defendant-centric analysis that Linda was alluding to.

Due process does include an efficiency analysis, as Professor Grossi says. Efficiency concerns general welfare. Due process concerns general welfare as well as considerations of fairness to the defendant.

In the holistic analysis that has to be undertaken, the interests of efficiency and the interests of the plaintiffs do come into consideration.

I open by disagreeing that the due process analysis is almost exclusively defendant-centric. I think that, in the holistic analysis that has to be undertaken, the interests of efficiency and the interests of the plaintiffs do come into consideration.

I found Professor Grossi's paper to be really compelling, really interesting reading. I was so interested in it that I looked back on some of her previous writing and saw that previously, for instance, she had written about the interrelationship between *forum non conveniens* and personal jurisdiction.<sup>19</sup>

Back then when she was writing, she saw *forum non conveniens* as a safeguard against what might be exorbitant exercises of personal jurisdiction.

Now the pendulum has swung, with certain restrictive jurisdictional decisions—*Daimler*, *Bristol-Myers*, and *Goodyear*—perhaps brought on facts that perhaps lent themselves to restrictive outcomes. And given that the pendulum has swung, I would suggest that the balancing considerations in the *forum non conveniens* analysis might also benefit from a shift. Although jurisdiction does include, I believe, a holistic analysis of the interests of the plaintiff as well as of the defendant, it does prioritize fair notice and the burden on the defendant. The forum analysis prioritizes the plaintiff's choice of the forum. I think in these days, the *forum non conveniens* analysis prioritizing the plaintiff's choice should be even more heavily weighted.

*Bristol-Myers* itself suggests implicitly that the forum analysis should be loosened up a bit. When the Court responds to Justice Sotomayor's notion of the parade of horrors that might result from restrictive decision-

making, the majority states that the plaintiffs will be able to join together in states that have general jurisdiction. The plaintiffs could sue in their home states. All of that supersedes the forum analysis, in which a plaintiff who is suing in his or her home state, or more particularly a plaintiff who is suing in a corporate home state, might otherwise have been dismissed for forum reasons.

I wanted to say a few things about Professor Grossi's standard. Her standard is basically announced in the middle of the paper. It is, first, does the state have a legitimate interest, not an arbitrary interest, in providing a forum for the particular controversy? Second, would jurisdiction be unfair to the defendant or inefficient? As I was saying, I think the efficiency idea is a really critical factor in jurisdictional analysis. When we are dealing with mass tort litigation, which is what I am often concerned with, we might have the smaller tightly-wrapped group of defendants and many hundreds, or even thousands, of plaintiffs.

The pendulum has swung, with certain restrictive jurisdictional decisions—*Daimler*, *Bristol-Myers*, and *Goodyear*—perhaps brought on facts that perhaps lent themselves to restrictive outcomes.

The other scenario is a bit different in the mass tort context. There you might have many plaintiffs similarly harmed by scores of defendants who have acted similarly with regard to a toxic component or substance. And in those instances, claims under a restrictive jurisdictional analysis might potentially be split around the country, with an injured plaintiff having to bring claims here and there. So, under an efficiency analysis, the distance involved in litigating, which is the traditional consideration, is these days a wash. I think these days, in these complex litigations, the question is more where do you have experienced counsel and, more importantly, where do you have experienced courts, experienced jurisdictions that have developed complex and sophisticated case management orders, for instance. Cases brought in those jurisdictions lend themselves to extremely efficient resolution, even for scores of cases.

Now Professor Grossi would like to transcend the general jurisdiction/specific jurisdiction split that has developed. There are good reasons for doing so. However, as a practical matter, it does not appear that that would work. For instance, consider a corporate defendant that reaps hundreds of millions of dollars in revenue from a particular state, but is not technically, under the Supreme Court's analysis, "at home" in that state. The case arises from out-of-state activities that are the same sort of activities that the defendant conducts in the state, but are otherwise unrelated to the plaintiff's claims. It's sort of a *Bristol-Meyers* analysis.

Under Professor Grossi's standard, there would be a legitimate interest for the state in handling that case, and it would not necessarily be unfair or inefficient. Those are the points that Professor Grossi makes. But in the real world, because general jurisdiction would not be allowed in that state pursuant to *Daimler* and *Goodyear*, the pull in a legitimate-state-interest analysis would be to tighten the legitimate-interest standard such that the legitimate interest would have to involve a substantive relevance of the factors arising in the case to the contacts created by the defendant's activities.

The due process analysis does not require such a causal connection. All it requires is a non-causal relatedness.

The substantive relevance standard that was developed by Professor Lea Brilmayer<sup>20</sup> detrimentally would require a causal connection therefore. I think that the result that I am talking about, and engendered by Professor Grossi's focus on the legitimate state interest, will ultimately lead to the need for a causal connection between the defendant's in-state activities and the plaintiff's claims.

However, the due process analysis does not require such a causal connection. All it requires is a non-causal relatedness. I would suggest the standard is whether there is a non-causal relatedness such that the defendant has sufficient notice that it may be subject to jurisdiction in the forum state. I believe, in other words, that, as a practical matter, Professor Brilmayer's and Professor Grossi's suggested legitimate interest standard could paradoxically work in the opposite direction from what Professor Grossi, at least, envisions.

### ***Licci v. Lebanese Canadian Bank***

I want to talk about one decision of the New York Court of Appeals (our highest state court) involving a non-causal finding of personal jurisdiction. The case is called *Licci v. Lebanese Canadian Bank*,<sup>21</sup> and it was decided on questions certified from the Second Circuit. That case was brought in New York by numerous non-New York plaintiffs, some being citizens of Canada and some of Israel, along with some U.S. citizens. The underlying tort involved a rocket attack by Hizballah in Lebanon. The Lebanese Bank was based in Beirut, I believe, and had no affiliation, really, with New York State. However, it did have one bank account, an American Express correspondent banking account through which it wired funds to an affiliate of Hizballah—not Hizballah itself, but an affiliate.

Theoretically, those funds might have been used to facilitate or finance rocket attacks or terrorism in the Middle East. On the other hand, Hizballah does other things than terrorism. Court decisions have stated, for instance, that Hizballah has certain charitable activities, certainly other non-terrorist-related activities. So, there was no causal connection between the rocket attacks and the wiring of funds to this affiliate of Hizballah.

But the New York Court of Appeals said that a causal relation is not required for the personal jurisdiction analysis. By use of the in-state financial account, the Lebanese bank was placed on sufficient notice, and had sufficient notice, a fair warning that it might be subject to jurisdiction because it was taking advantage of the benefits and protections afforded by the state.

### **Consent by Registration**

I want to say as one final matter that I think a cutting-edge issue that has not yet arisen, that is on the horizon, and that Professor Grossi perhaps alluded to, is the idea of consent by registration. I think that is the big issue on the horizon. In New York, for instance, a corporation's registration and appointment of an agent for service of process, a voluntary appointment (not required under the statute), is sufficient to impose general jurisdiction on that corporation or on that defendant as an implied consent to general jurisdiction. That is the traditional notion associated with registration, at least in New York State. I know that the case law has been split on that depending on the state and its corporation law. I think the better view, as announced by certain Supreme Court decisions and certain state court decisions, is that, if a state has a tradition of imposing general jurisdiction based on registration, then by registering itself the corporation is on fair notice. That is the meaning of the registration.

Consent by registration is the big issue on the horizon.

The opposing argument will be that we don't want general jurisdiction to be obtained, and *Daimler* circumvented, by the back door. Corporations often register in many states. But I think that the very idea that there is consent takes it out of the *Daimler* analysis. Consent, waiver, is a path to jurisdiction regardless of *Daimler*, and it is not a *Daimler* issue.

## Response by Professor Grossi

Thank you all for the wonderful comments. I will start with Professor Woo. I completely agree with you. The themes that you raised are in fact very important. The theme of federalism, as you say, is not going to go away. I still believe that it is an inconsistency. It is not meant to be part of the personal jurisdiction analysis. In fact, it does not work at all with the personal jurisdiction analysis. But, since we have two opinions now by the Supreme Court that suggest that in fact federalism *is* part of the personal jurisdiction analysis, it seems that it is.

As far as the international approach to personal jurisdiction is concerned, you are right to mention the fact that, for instance, European countries have a far more generous approach than we have. Ironically, what is happening in the U.S. is that general jurisdiction is shrinking and specific jurisdiction is also shrinking. The possibilities of securing personal jurisdiction over an out-of-state defendant are diminishing—a tendency that is absolutely not in line with what is happening in the rest of the world. This is problematic as well.

In the U.S. the possibilities of securing personal jurisdiction over an out-of-state defendant are diminishing—a tendency that is absolutely not in line with what is happening in the rest of the world.

As far as collective actions are concerned, as I explained in my paper, I agree with you. The *Bristol-Myers* decision is problematic. It gives the defendant an advantage over the plaintiff, and in fact it frustrates the same operation of the collective action mechanism.

That leads me to Linda Morkan's comments. I must agree with Alani on the idea that jurisdiction is not just about the defendant. The touchstone of jurisdiction is due process. It is true that we may be dragging an out-of-state defendant into a forum that might be inconvenient for the defendant. But we do take care of that by assessing the contacts that the defendant has with the forum. We want to make sure that those contacts and affiliations are meaningful. The burden of showing that the affiliations are meaningful is on the plaintiff. But once the plaintiff meets that burden, there is a presumption of reasonableness that the defendant may rebut by showing the existence of a compelling case of Constitutional significance that, in fact, under the circumstances of the case, the exercise of jurisdiction is unreasonable. That analysis, that comes at the end because this is now treated as a test, is taking into account the interest of the plaintiff, the interest of the forum state, and the interest of the judicial system as a whole because that is what due process would demand.

Jurisdiction is not just about the defendant. The touchstone of jurisdiction is due process.

Now, in *International Shoe* (and I keep going back to that decision as I do consider that our mantra), Chief Justice Stone said the defendant must have certain minimum contacts with the forum so that the exercise of jurisdiction will be consistent with the traditional notions of fair play and substantial justice. Read: due process. This was not a test. It was a formula. Look at the contacts. When you assess the contacts, make sure that they give the defendant reasonable notice, but the exercise of jurisdiction is in the best interest of everyone, not just the defendant. Personal jurisdiction is not just about the defendant.

Justice Hines, you gave me a lot of ideas. This is a great opportunity because this is where I get to talk with those who actually deal with cases and are on the front line. They know better than everyone else what the problems are. You say that it might be difficult to implement my ideas; that it might not be practical. Here are a few ideas on how to navigate the Supreme Court's jurisprudence:

First of all, there are a lot of inconsistencies in the Supreme Court's jurisprudence. Take *Calder v. Jones*, the "effects test" case. In that case, the Court did not present purposeful availment as a requirement of personal jurisdiction analysis. It was not even considered. So we must assume that it is *not* a requirement, because there was no purposeful availment in the case—there could not have been. The out-of-state defendant was violating the laws of the forum, so purposeful availment could not have been a requirement. So there are inconsistencies. You can navigate those and try to do an analysis that is consistent with *International Shoe*.

There are a lot of inconsistencies in the Supreme Court's jurisprudence.

Causation has not been defined by the Supreme Court yet. Of course, there must be a causal link between the plaintiff's claim and the defendant's contacts with the forum, but we do not know exactly what the causal link must be. You have an option. You can use a very fragmented, mechanical test, or you can take an approach that is fluid and consistent with *International Shoe*. Sometimes lower courts have in fact added additional layers to the Supreme Court test. This is certainly something that we do not want.

And of course, I am not suggesting that we should get rid of the general jurisdiction versus specific jurisdiction categories. I wish we could. We cannot. But an approach that would be consistent with *International Shoe* would allow us, in fact, to be consistent with the Supreme Court opinion without making decisions that are in conflict with *International Shoe*. I do have a practical example here of a decision that does just that, and does it wonderfully. I mentioned it in my paper on page 36. It is the Iowa Supreme Court's decision on *Book v. Doublestar*.<sup>22</sup> That is like *McIntyre*, except that the Iowa Supreme Court found jurisdiction in that case. How is it possible if we have *McIntyre*? That opinion was perfectly consistent with due process, with *International Shoe*, and with a sensible method of analysis. So I take the *Book* opinion as a great example of how we can deal with the Supreme Court's recent jurisprudence without violating the foundational principles of *International Shoe*.

Alani Golanski, great comments from you as well. I want to make sure that it is clear that I do not want to give a test for personal jurisdiction. I do not have a test to propose. I do not want a test. I just try to encourage the courts to go back to *International Shoe* and solve cases in view of that opinion and those principles. I know that we cannot get rid of the general *versus* specific jurisdiction distinction. I am just suggesting a more sensible approach.

## Fictional Consent

Consent by registration is a fiction, and it is an impermissible fiction.

It is interesting what you are mentioning about consent by registration. You are right that I did not raise that issue. To me, that is a fiction, and it is an impermissible fiction, because *International Shoe*, in fact, wanted to get rid of fictions and that would be the perfect example of a fiction that goes beyond the realistic assessment of facts. It troubles me, and it troubles me more than as an approach that violates *Daimler*. It's an approach that violates *International Shoe*.

This is something that I did not mention before. It seems to me that we are reverting to a fictional approach to personal jurisdiction. Justice Ginsburg has suggested that in her dissenting opinion in *McIntyre*, when commenting on the plurality opinion and its endorsement of "federalism."<sup>23</sup> The submission to the sovereignty of the state is a requirement of personal jurisdiction. She rightly said, it seems to me, that we are going back to a fictional approach, an approach that proceeds by fictions to personal jurisdiction, which is not what we were supposed to do.

Thank you so much for these great comments. This is not a complicated area. Unfortunately, it has become complicated. We need to navigate the complexities that we have, in the best way we can. I look forward to more comments and debate.

## Questions and Comments from the Floor

**Honorable Debra Stephens, Washington State Supreme Court:** I have a question for Professor Grossi. As to your last point about implied consent by corporate registration, I am really not sure I understand why that would violate *International Shoe*. In so many areas, we rely on the doctrine of implied consent, and I am not sure why that would implicate a forced jurisdiction analysis under the Due Process Clause at all.

**Professor Grossi:** My point is that if you consider an act of registration as the implied consent of the defendant to the exercise of jurisdiction, you are really not looking at the contacts the defendant has with the forum. I am not saying with absolute certainty that this would violate *International Shoe*. I am saying that it is a little problematic because it introduces an element of fiction. It does not look at the contacts of the defendant with the state. By registering, you are implicitly consenting? That might be problematic.

If you consider an act of registration as the implied consent of the defendant to the exercise of jurisdiction, you are really not looking at the contacts the defendant has with the forum.

I think that probably Alani knows more about this because he mentioned that there is a split of jurisprudence on whether it is okay. Alani, could you tell us more about this? What are the courts saying about implied consent?

**Alani Golanski:** To call it a fiction I think depends on whether the defendant understands, or the corporation understands, that it is consenting to general jurisdiction when it registers. If it does not understand that, and if there is some sort of a mechanism that works against it, then perhaps it is a fiction in that situation. What the cases have traditionally stated is that the case law can be *made* clear either by the text of the registration statutes or by the interpretation and gloss placed on the registration statutes by the courts.

If, in either respect, the state law has made it clear that, “You have to register if you want to do business here. If you want the protections of our statutes and you want to register and appoint an agent and come into our state, then you are subject to general jurisdiction.” In that circumstance, I find it hard to call that a fiction.

Now in terms of this issue coming up in the post-*Daimler* world, cases have gone both ways. We have New York State court cases, which say that “we are going to adhere to ‘traditional notions of fair play and substantial justice,’ and if you register and voluntarily appoint an agent then you are subject to general jurisdiction.” That is so far what the state judges have said, but not at the appellate level—the issue has not gone up yet. In other parts of the country, some decisions have gone the other way, and that is to be expected.

**Professor Woo:** It is interesting because I have always thought that you are only going to need minimum contacts absent consent. Consent and physicality is the traditional basis for jurisdiction. My issue with seeing consent popping up as being a possible area of litigation is really when it bumps up against the second prong, the second policy of personal jurisdiction, which is sovereignty. Then the question is whether you can make somebody consent to something that essentially disrupts the interstate sovereign kind of balance that personal jurisdiction is supposed to protect. In that scenario, then, consent might be problematic—just as you cannot

consent to subject-matter jurisdiction. But other than that, I really do not see these registration statutes to be an issue, because, in fact, consent is the traditional basis, just like “tag” jurisdiction in *Burnham*.<sup>24</sup> Physicality is the traditional basis for assertions of personal jurisdiction.

**Linda Morkan:** I echo Professor Woo’s assertion. This is my prediction: I do not think a simple registration statute will be determined to be consent. Reading *Daimler* and *Bristol-Myers* and *BNSF*, I think those decisions would be fundamentally inconsistent with a holding that if there is a state law that says you have to register, that is enough for a defendant to have subjected himself to jurisdiction. It is like the state twisting your arm and saying, “But you said it was okay.” Well, it is because they were twisting their arm. I think that getting back to the idea of due process and minimum contacts, you are looking for conduct by the defendants that subjected themselves to the power of the state, not the state exerting its power over the defendant and then saying, “But you agreed.” Different point of view.

**Alani Golanski:** The idea of the registration statute of a state being coercive is an issue. In New York State, for instance, you have the registration idea. I am not sure that that is requisite to doing business in the state necessarily, but appointing an agent for service is not coerced. It is not necessary. It is voluntary. You otherwise authorize the Secretary of State to receive service. If you are going to place somebody in the state and call them your agent, then that is the most traditional basis for jurisdiction—physical presence in the state, somebody to receive service of process.

**Professor Grossi:** I agree. It is a statute-specific analysis. Of course, appointing an agent for service of process would be a traditional basis of jurisdiction. It really depends on the statute.

I think that the law schools are not really differentiating among the different types of jurisdiction.

**Honorable Alexander White, Cook County, Illinois:** I try to educate law students, two or three at a time, on the concept of jurisdiction, explaining that there are many types of jurisdiction. You just cannot come up with a cookie cutter approach. You have to differentiate between them. I think that the law schools are not really differentiating among the different types of jurisdiction.

**Honorable Judy Cates, Fifth District of Southern Illinois:** I’m from the other Illinois, not the “Cook County” Illinois. For Ms. Morkan, I think I agree with you that due process right now looks to the defendant, but I am having trouble with the notion that due process and fundamental fairness should *only* apply to one party. I think that our jurisprudence indicates that fundamental fairness and due process should apply to both. Why should we restrict it, in jurisdiction questions, to only the defendant? That is my first question. The second question is, if Justice Ginsburg truly believed what she wrote in her dissent in *McIntyre*, then how can we wrap our heads around the fact that she did not dissent with Justice Sotomayor in *Bristol-Myers*?

Our jurisprudence indicates that fundamental fairness and due process should apply to both parties.

**Linda Morkan:** I am not suggesting that due process in the case overall is focused only on the defendant, but only in addressing the question of personal jurisdiction. All that matters is whether the state, through its judicial arm, has the power to tell this defendant what it should do. In order to make that determination, I think it is, by definition, defendant-specific. Is it fair to bring *this* defendant into *this* court? When you go back and look at *Pennoyer v. Neff*, which I was required to study thirty years ago in law school, now



I see it in a very different light. In *Pennoyer*, what they are saying is that the focus is whether a court can exert its power over this defendant. Is it fair to issue a judgment against a foreign defendant—foreign in terms of country or foreign in terms of state? The idea of due process in that context is whether it is fair to exert your jurisdiction over the defendant.

The reason that we know it does not involve the interest of the plaintiff is because, when a court decides cases like *Bristol-Myers* and *BNSF*, its focus is not on what is best for everyone, what is the most efficient outcome in this case, where might we consolidate these claims and have them resolved together. That is simply not the test. The test is what did this defendant do in this jurisdiction? In *Bristol-Myers* you had the Court asking, “What did the defendant do in California that subjects it to claims by these 600 out-of-state plaintiffs?” It certainly would have been more efficient, and maybe fairer for everyone, perhaps even the defendant, to have the claim centralized and decided at one time, but that is not the test. That is not what the courts are looking for.

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## Notes

<sup>1</sup> *International Shoe Co v. Washington*, 326 U.S. 310 (1945).

<sup>2</sup> See generally Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, 7 Fed. Cts. L. Rev 118 (2013).

<sup>3</sup> 465 U.S. 783 (1984).

<sup>4</sup> 357 U.S. 235 (1958).

<sup>5</sup> *Burger King v. Rudzewicz*, 471 U.S. 462 (1985).

<sup>6</sup> *Burger King*, 471 U.S. at 477, citing *World-Wide Volkswagen*.

<sup>7</sup> *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

<sup>8</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

<sup>9</sup> *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

<sup>10</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

<sup>11</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>12</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

<sup>13</sup> *Wal-Mart v. Dukes*, 564 U.S. 338 (2011).

<sup>14</sup> H.R.985 — 115th Congress (2017-2018) (passed House but not Senate).

<sup>15</sup> See <https://www.ali.org/publications/show/transnational-civil-procedure>.

<sup>16</sup> 95 U.S. 714 (1878).

<sup>17</sup> *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

<sup>18</sup> *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

<sup>19</sup> Simona Grossi, *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. Pitt. L. Rev. 1 (2013).

<sup>20</sup> Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CR. REV. 77 (arguing that a case “arises out of” contacts with the forum only if those contacts are of substantive relevance to the cause of action).

<sup>21</sup> *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 984 N.E.2d 893 (N.Y. 2012)

<sup>22</sup> *Book v. Doublestar Dongfeng Tyre Co., Ltd.*, 860 N.W. 2d 576 (S. Ct. Iowa 2015).

<sup>23</sup> 564 U.S. at 900-01.

<sup>24</sup> *Burnham v. Superior Court*, 495 U.S. 604 (1990).



# LUNCHEON ADDRESS

## Juries Make a Difference

### Honorable William G. Young, United State District Court, District of Massachusetts

We hold these truths to be self-evident, that all persons are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among us, deriving their just powers from the consent of the governed.

That is about as close to an American Creed as there is.

Talking to a group of judges, the great Judge Richard Arnold from Arkansas said, “There has to be a safe place, and we have to be it.” I come before you with a great deal of diffidence this afternoon. Many of you are appellate judges. I am only a trial judge. I know, and I mean this with utmost sincerity, that you are giving your lives to make the words of the Founders a living reality for our people in this day. So, what might I say that could be any help to you in discharging the responsibilities of judicial office?

There has to be a safe place,  
and we [judges] have to be it.

I have three things to say, and I will say them briefly: I want to try to give you an altered or new concept of the American jury; I want to say just a word about the consequences that we already perceive from the marginalization of the jury; and I want to end by saying why it makes a difference.

## I. A NEW CONCEPT OF THE JURY

Let me come down out of the clouds now and tell you a jury story. My colleagues and I on the federal court for Massachusetts are bound by the rules of ethics of the Massachusetts courts. I hope there is a statute of limitations for violations of the rules. This story takes place before there were cell phones. (There actually was a civilization before there were cell phones and we were back in that civilization.)

We were trying a small case, not a big case, a three- or four-day case. A juror was coming in to Boston on our Southeast Expressway. “Expressway” is a misnomer. It is creep and crawl. It is rainy. It is raw. The juror’s fuel pump quits on her. She gets her car over to the side of the road. There’s a big social safety net in Massachusetts. Nobody stops. Everyone goes by. She is there on the side of the road. Back at the courthouse, we are ready to go. I do not know where the juror is. I am fussing in court.

Eventually, a Massachusetts state trooper, flashing lights going, sees her, pulls over into the breakdown lane. This is absolutely true. The driver gets out of the car, walks back to the cruiser and says, “I am a juror in federal court. Take me to the courthouse!” And wonder of wonders, the trooper does! He puts her in the car, turns on his blue lights, and they start barreling up the expressway. There are no cell phones, but he has a radio. He patches into the marshals. The marshals give me this news: “The juror is on her way in a squad car!”

She is a heroine! This is just what we want. I am looking out the window. We were in the old courthouse then. Into Post Office Square, the trooper was barreling along. He comes to a screeching halt. She gets out. This is a great juror! How did we inspire this lady? She gets into one of the very slow elevators in the old courthouse. I am waiting. She is coming up. Eventually, she gets to our floor and she comes out and she is literally running. I just about get down on my knees! She is something! She says, “I have to call to get my car towed.”

Finally, there’s something I can do, because I have a phone in the lobby. I do not want to talk to jurors any more than I have to. I just sort of gesture and she goes in to the phone and you can guess what happens. The tow company will not tow her car. They tell her she has to be with the car. They are afraid of liability. I said, “Give me that phone.” This is where I violate judicial ethics. (I see you over there, Chief Justice Gants!) I said, “Do you know who this is? I’m the Chief Judge of the United States District Court. You get out there and tow that lady’s car, or I will cite you for contempt of court.” That violates at least three of the ethics canons. I hope there is a statute of limitations for that. There is the vision and the reality.

Really, the guts of what I tell you today are a variation on that story. I am the judge in our court who welcomes the jurors, and I am going to give you the “welcome jurors” speech. I will spice it up a little bit because of course you are judges, but in essence, I am talking at the level of our citizenry and anyone can understand this, but all of it is true.

Here in New England, we still have towns that have direct town meetings. A direct town meeting for us means that everyone who is a citizen of the town can go and vote. They vote on whether to raise the teachers’ salaries, close a town dump, buy another fire engine. That is direct democracy, and all of you folks understand this in your several municipalities and towns where you live.

We have representative democracy. We did not invent it, but it is here in our country that it has come into full flower.

My town does it differently. In our town, I can go to the town meeting. If the moderator will call on me, I can say what I think we ought to do in our town, but I cannot vote. I have already voted for my town meeting representatives. That is representative democracy and all of us are familiar with representative democracy. We vote for the people who hold public office, but they do the governing. We do not.

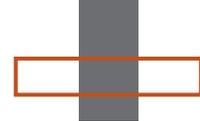
Here in the United States of America we have representative democracy. We did not invent it, but it is here in our country that it has come into full flower—and the most robust expression of direct democracy in the history of the world is the American jury. Ninety percent of the jury trials on the planet take place in the United States of America. Not that many take place in the federal courts. Most of them are in your courts, and I honor you all for that.

## Jurors as Constitutional Officers

I want you, I ask you, I beg you to think of these jurors as Constitutional officers, because in the courts of the nation, it is unmistakable that they are. They are Constitutional officers.

I beg you to think of these jurors as Constitutional officers.

(I am using the federal Constitution as my template here. I recognize that state constitutions vary, but you are all familiar with the federal Constitution, and that brings us together to make the points I want to make.)



Only six types of Constitutional officers are named in the original United States Constitution. Each branch gets two. It is remarkably symmetrical. (These are not original insights, but think about it.) We have three branches of government. Our Congress, our legislature makes the laws, and there are two types of Constitutional officers there: representatives and senators.

Our executive branch enforces the laws and defends the nation. Under our Constitution, it is designed that we have a very strong chief executive, the President of the United States. Given the frailties of the human condition, we also have a Vice President of the United States.

The third branch of government is where the laws are applied to discrete disputes. I can quote the first sentence of Article III. I cannot go much beyond that. “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>1</sup> And then there is a sentence that talks about judges: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>2</sup> I am humbly proud to be a judge. I am a trial judge, a judge of the United States. Now we are up to five Constitutional officers.

And then, in Section 2 of Article III, one other type of Constitutional officer is identified. It says this: “The trial of all Crimes, except in Cases of impeachment, shall be by jury. . . .”<sup>3</sup> And the interesting thing, of course, is that people would not leave it at that. They would not accept the Constitution of the United States until it had the first ten Amendments.

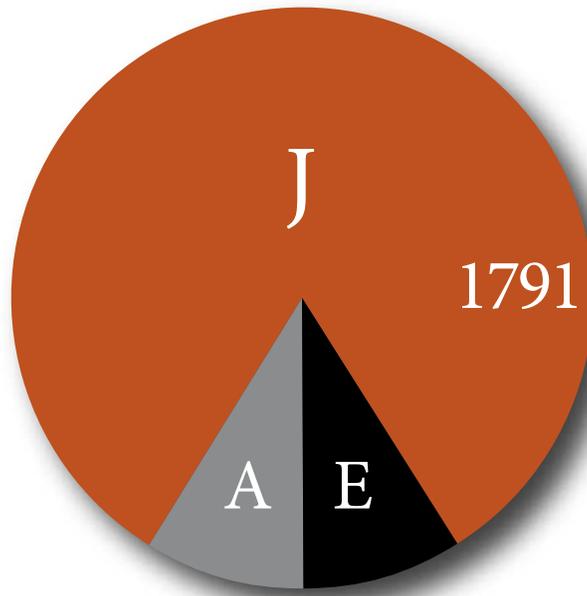
## The Seventh Amendment

I am going to talk about the Seventh Amendment,<sup>4</sup> on the right to jury trial in civil cases. Interestingly, it is the one right in the Bill of Rights that the Supreme Court has not incorporated into the Due Process Clause of the 14<sup>th</sup> Amendment, and it does not apply to your several states, so you are on your own.

The 7<sup>th</sup> Amendment...is one place in the Constitution where, by the language itself, it is originalist.

But, just as an example, I do want to give you a Constitutional overview of the 7<sup>th</sup> Amendment. Now, the 7<sup>th</sup> Amendment is very interesting because by its very language, it is originalist. It is one place in the Constitution where, by the language itself, it is originalist. I am being very glib here, but I am accurate. The 7<sup>th</sup> Amendment says, in essence: “You know these cases that we try to juries in 1791? We will always try them to juries as long as the Republic stands.”

Let me give the Constitutional underpinnings, then and now, of the 7<sup>th</sup> Amendment, as illustrated by two diagrams.



**Figure 1**

**A—Wholly Admiralty**

**E—Wholly Equity**

**J—Jury Trial if claimed by either party**

As we can see in the first diagram, not all cases, even in 1791, were tried to jurors. There were admiralty cases, which are shown in red. There was admiralty law well before we were a country. There were equity cases, tried in courts of equity. Equity cases never had a jury trial. Everything else was tried to jurors.

Some scholars today say, “That is not informative for us today, because our modern cases are so *complex*—our cases are so *different*.” Well, that is an elitist, modernist fallacy. Daniel Coquillette, the great Massachusetts author, scholar, and former dean of Boston College Law School, could tell you about this in much more detail than I can.

We did not invent credit swaps in order to have the crash of 2008. When ships took the better part of a month to get across the Atlantic, they had credit swaps dealing with seed tobacco and the pledging of tobacco crops, years before the seed was even in the ground. How do you think the mercantile system worked? And when there were disputes, they were tried to juries.

What is different now is *not* the complexity of the case. It is the fact that your state courts have been influenced by the Federal Rules of Civil Procedure.

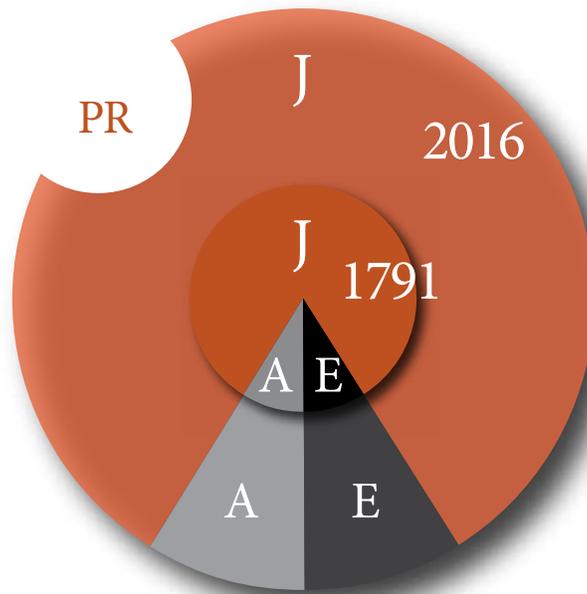
What is different now is *not* the complexity of the case. It is the fact that your state courts have been influenced by the Federal Rules of Civil Procedure. The federal rules really are a great contribution. (I see my friend and colleague John Greaney here. He served on the Massachusetts Appeals Court with Ben Kaplan, who was the Reporter for the federal Advisory Committee on Civil Rules while he was teaching at Harvard Law School.) When the original federal rules were written, they collapsed law and equity into one form of civil action. The rights were separate, but they joined their

provisions into one form of action. That's why the cases are different. No one suggests these cases should not go to jury trials.

Now, logically, all of the new causes of action which are not admiralty actions or equity actions should be jury actions—all of them. That is a position I urge on you. This is, I would urge, argue, beg, the appropriate analysis of our 7<sup>th</sup> Amendment. But the Supreme Court is not clear on this.

Logically, all of the new causes of action which are not admiralty actions or equity actions should be jury actions—all of them.

Let's look at the next diagram, which shows the current situation. Notice that little bite out of the pie.



**Figure 2**

**A—Wholly Admiralty**

**E—Wholly Equity**

**J—Jury Trial if claimed by either party**

**PR—Public Rights Enforcement (Solely Equitable Remedies)**

As the administrative state arose around the time of the Great Depression, with the creation of numerous administrative agencies, they had the power to enforce their regulations. If you were trading stock, and the Securities and Exchange Commission was after you, you did not get a jury trial. The SEC could simply stop you from trading stock. Of course they could. No problem with that. But of course there is administrative creep. They also have the power to fine you, and they do fine you. They make awards of cash money against you. I am not just singling out the SEC. I am talking about all the vast government agencies. Those ought to be jury cases. There is a very real question whether they have exceeded the bounds of that little cutout on the diagram, and have gone into an area that is rightly reserved for the jury.

## The Constitutional Rights of Jurors

Juries are Constitutional officers. Let me talk a little bit about their Constitutional rights. There are at least four rights.

First, every juror has ***the right to an equal chance to sit on the nation's juries***. We call it the “fair cross section” requirement. There has to be an equal chance to be on the jury. Whoever you are, if you are an American citizen, you have an equal chance to sit on the nation's juries. That is the American citizen's Constitutional right.

Second, every juror has ***the right to know that she is selected in a process that is free of bias based on gender, race, or ethnic heritage***. The Ninth Circuit has added sexual orientation as an extra criterion.

Every juror has the right to an equal chance to sit on the nation's juries.

The third right is ***the right to be properly instructed on the law, to be told whether or not statutes are Constitutional***. (One of my lines with my jurors when I have a trial is, “You have to take the law from me. If you want to make up your own law, run for Congress. That is not what we do here.”)

Most important for all of us in the federal judiciary, if not to you in the state courts, is the fact that the independence of the federal judiciary, below the Supreme Court level, *depends* upon the jury. Make no mistake—it depends upon the jury.

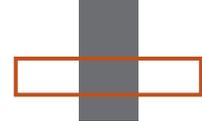
This was made clear in an 1808 maritime forfeiture action against a ship called *The William*.<sup>5</sup> It is out of the District of Massachusetts. The judge, John Davis, said, in essence, “I have to decide whether President Jefferson's Embargo Act<sup>6</sup> is Constitutional.” *Marbury v. Madison*,<sup>7</sup> which had been decided in 1803, appeared only as dictum in Judge Davis's opinion, in a footnote, but it was the most important dictum of any case. He said what he said because, you see, he had to explain the Embargo Act to a jury. He said that “the system simply will not work if I have to refer every Constitutional question to the Constitutional court in Washington.” Think about that. Judge Davis concluded (contrary to considerable local political sentiment) that the Embargo Act was Constitutional, but at the conclusion of the trial the jury acquitted the ship's owners.

The reason I have the authority, very rarely used, to decide on the Constitutionality of regulations and statutes is because a jury needs to be properly instructed as to the law.

I am impaneling a jury on Monday, dealing with fishing regulations. No one has challenged the Constitutionality of the regulations, but suppose they do? I cannot say, “I am not sure about this. I will report it to the Supreme Court. Come back in about three and a half years and then we will try this case.” That won't work.

The reason I have the authority, very rarely used, to decide on the Constitutionality of regulations and statutes is because a jury needs to be properly instructed as to the law. But in equity cases, where there is no jury, Congress Constitutionally has altered the judicial power. Consider the Anti-Terrorism and Effective Death Penalty Act<sup>8</sup> (talk about names of statutes!), which was passed after the Oklahoma City Federal Building bombing. You are not wrestling with this, but I have to. One of the law's provisions is that

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—



(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States...

So the message from Congress to the federal judiciary was, essentially, “unless the Supreme Court has decided this, buddy, you cannot touch it.” Whatever I think about the sweep of the Constitution, under this statute I have nothing to say unless there’s a Supreme Court precedent right on point.

The fourth and last Constitutional right of jurors is ***the right to hear cases***. See all those green cases in the second diagram? A jury has the *right* to hear those cases. Once those cases are ripe for trial, they *must* go to trial before a jury. There is no delaying them. I am just talking about the federal courts, not the state courts. I am familiar with situations where jury trials have been suspended in state courts in bad budget times. But the federal courts cannot do that.

I was a judge in 2013 when the federal judiciary said they had run out of money. They sent out a bulletin and said, “Figure out who your essential employees are.” I remember sitting down with my colleagues. We said, “Jurors are all essential. We do not care whether we have the money to pay them or not. We are going to keep summoning juries, because if you can delay the right of these people to come in and adjudicate cases because of money, then you have extinguished that right.” That is correct.

Jurors are all essential.  
We do not care whether we have the money to pay them or not.

## II. THE MARGINALIZATION OF THE JURY

Now let me very quickly tell you what we know. Let me start by saying that the system of trial by jury is dying.<sup>9</sup> You know it. It is dying faster in the federal courts than in the state courts. It is dying faster on the civil side than on the criminal side, but it’s dying.

Here are some of the *known* results. Further outlying results are yet to be known. There are three things we know. (Again, I am talking about the federal courts, but take us as your distant early warning system.)

First, you have ***a reduction in common law judging***. Make no mistake—you do. In common law judging we obey the higher courts, but you have to look at their decisions and see not just what the rule is, you have to see how they apply it to craft decisions in unclear factual areas. If you are trying jury cases, you do that. You have to do it, because you have to write jury instructions.

A famous story is told about Chief Justice Rehnquist. I say this with enormous respect. I knew him and I praise him for his willingness to do this. Chief Justice Rehnquist said, “We ought to see what goes on in trial courts. We will try a case.” He went to Virginia, got a simple jury case, and was trying it. As the story was told to me, he thinks it is going pretty well. It is not too hard. He is making rulings. (This was before he put the gold stuff on his sleeves, but he was fine. He was a brilliant person.) Then they got to the end and the parties gave him the request for jury instructions. Well, he was a little unclear on the concept of requests for instructions. He read the plaintiff’s requests, then he read the defendant’s requests. He read them both to the jury. Then he sent the jury out. And the Fourth Circuit promptly reversed him.<sup>10</sup> Common law judging is going.

Second, ***the federal system is getting more vertical***, more like the European civil law system. If the high court is simply making rules, and those rules are not mellowing or marinating in intermediate and lower courts, if it is just *rules*, and the rules are simply applied, that is a different system.

Lastly, *plaintiffs are winning fewer cases*. This is new news. In a brilliant recent article by my friend Alexandra Lahav and Peter Siegelman,<sup>11</sup> they demonstrate that the win rate for plaintiffs in federal courts has fallen 70 percent from 1985 to 2009. We have a very good data set for the federal courts. One reason is that, in federal court, we have largely abandoned any role as a trial court. We are taught to promote administrative dispute resolution, whatever that is supposed to mean. That is a different skill set. Any lawyer will tell you that.

Plaintiffs are winning fewer cases. This is new news.

To make the point, I give you this hypothetical. Any lawyer can distinguish between the administrative judge and the trial judge. The lawyers go before a trial judge for a hearing. They come out and, as lawyers will, they talk about the judge before whom they have just appeared. If they've been before an "administrative" judge, one says to the other, "He is thinking of how to get rid of this case."

Same hearing now, but it's before a real trial judge. They go out in the hall. One says to the other, "She is wondering what the verdict slip is going to look like." That is a different skill set.

### III. WHY IT MAKES A DIFFERENCE

Here is why it makes a difference. It is a very personal thing, a transcendent thing. Go back four years, on a Monday in April. I am in chambers. It's April 15. Not much is going on because it is a state holiday here. It is called Patriot's Day. We do not get a federal holiday that day, but it is a state holiday. The state workers are not working. We do not call jurors in on that day because the road net is all jammed up. Why? Because they are running the Boston Marathon. But because it is not a holiday, I go to work. I am not doing anything. I am in my chambers. I am writing or thinking great thoughts or something. Then of course within a block and a half of where you are sitting now, the bombs go off. April 15, 2013. Like you, I watched those video clips over and over again. Amid the cries and the chaos, what I saw was people running *into* the smoke and ripping down the barricades to get at the people who were blown apart and bleeding. That was when the second bomb went off and everybody knew it was no accident.

In Newtown, Connecticut, it took five minutes to kill those children, to shoot them down. That was a school, an elementary school. That is a lot of windows, doors. Not one teacher ran away from the kids and out of the school. They put their bodies in front of the kids they came to teach.

September 11, 2001. Everybody who could get out of the World Trade Center got out. Hundreds of firefighters rushed in.

The next day after the bombings in Boston, on April 16, I went down and greeted the jurors. Of course, there they are. Teachers and firefighters and ordinary Americans. I am here to tell you that I believe absolutely that they have the right to rule.

I want to end this with the same words with which I end my welcome to the jurors after telling them some of this: "Every single jury trial, every one—state and federal—is both a test and a celebration of a free people governing themselves. Go now. Do justice."

Every single jury trial, every one—state and federal—is both a test and a celebration of a free people governing themselves.



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## Notes

<sup>1</sup> U.S. Const. art. III, § 1, <https://www.archives.gov/founding-docs/constitution-transcript>.

<sup>2</sup> Id.

<sup>3</sup> U.S. Const. art. III, § 2, <https://www.archives.gov/founding-docs/constitution-transcript>.

<sup>4</sup> “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII, <https://www.archives.gov/founding-docs/bill-of-rights-transcript>.

<sup>5</sup> *United States v. The William*, 28 F.Cas. 614, 620 (D.Mass.1808). See Hon. William G. Young, *Of Iron Men and Wooden Ships Who Went to Sea With Sails: Famous Admiralty Cases in the Federal District Court in Massachusetts*, in LEGAL CHOWDER: LAWYERING AND JUDGING IN MASSACHUSETTS 186 (Hon. Rudolph Kass, ed. 2002). I also discussed Judge Davis’s decision in *The William* in my opinion in *United States v. Luisi*, 568 F.Supp.2d 106 (D. Mass. 2008), in which a juror challenged the Constitutionality of a criminal statute.

<sup>6</sup> 2 Stat. 451 (1807).

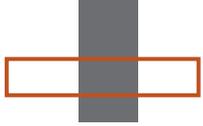
<sup>7</sup> *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803).

<sup>8</sup> The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

<sup>9</sup> See generally William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*,” 40 SUFFOLK U. L. REV. 67 (2006).

<sup>10</sup> *Heislup v. Town of Colonial Beach*, 1986 WL 18609 (4th Cir. 1986).

<sup>11</sup> Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2993423](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993423) (2017).



## State Court Jurisdiction in the 21<sup>st</sup> Century

Adam N. Steinman,<sup>1</sup> The University of Alabama School of Law

### EXECUTIVE SUMMARY

*In Part I, Professor Steinman spells out the essentials of personal jurisdiction, introducing the 20<sup>th</sup> century paradigm shift that occurred in International Shoe v. Washington. The minimum contacts standard prevailed, and the ensuing case law distilled insights reflective of the Supreme Court’s attempt to respond to new social realities. The distinction between general and specific jurisdiction went beyond the traditional notion of jurisdiction, which focused on the defendant’s presence in the territory of the state.*

*In Part II, Steinman details the contours of specific jurisdiction, noting that the 2011 stream-of-commerce case McIntyre Machinery, Ltd. v. Nicastro “prompted the greatest concern about the availability of specific jurisdiction.” McIntyre raised questions because a fractured Court rejected personal jurisdiction in the state where the manufacturer’s product was ultimately purchased and caused injury. Professor Steinman argues, however, that McIntyre does not undermine the general principle—supported by prior cases such as Volkswagen Corp. v. Woodson, and Asahi Metal Industry Co. v. Superior Court—that a defendant is subject to personal jurisdiction when it seeks to serve, directly or indirectly, the market in the forum state. Moreover, “a defendant necessarily seeks to serve the forum state when it seeks to serve a territorial area that includes the forum state—the whole cannot possibly be less than the sum of its parts.” McIntyre need not be read to allow defendants to escape jurisdiction “simply by developing a distribution scheme that seeks out the U.S. market as a whole rather than each individual state.”*

*In Part III, Professor Steinman discusses the “shakier ground” of general jurisdiction. The Court in Goodyear Dunlop Tires Operations, S.A. v. Brown unanimously found that stream of commerce cannot be the sole basis of general jurisdiction—something more is required. After Goodyear, the Court left open a question regarding the exercise of general jurisdiction that was not limited to the paradigmatic place of incorporation and principal place of business: where else might a corporation be “essentially at home?” Daimler AG v. Bauman, which denied the exercise of general jurisdiction, supports the notion that a corporation is not “at home” merely because of the magnitude of its in-state contacts. Steinman identifies, and responds to, four questions about the Court’s concept of general jurisdiction:*

- 1. In which place beyond the principal place of business or state of incorporation might a corporation be subject to general jurisdiction?;*
- 2. Are the Goodyear and Daimler decisions limited to international litigation involving foreign defendants?;*
- 3. How to deal with corporations that appoint an in-state agent for service of process?; and*
- 4. How to determine whether a sufficient affiliation exists between the forum and the underlying controversy to move away from general jurisdiction, and to justify specific jurisdiction?*

His answer to this final question includes an analysis of the Court's recent ruling in *Bristol-Myers Squibb Co. v. Superior Court*, denying specific jurisdiction. Steinman argues that one "unfortunate consequence" of this decision is that "it will compel an inefficient splitting of related claims and a needless waste of judicial resources." (The Court's decision leaves unclear whether the majority's reasoning will apply to class actions.)

In his Conclusion, Professor Steinman reminds us of the importance of jurisdiction for an injured or otherwise wronged party wishing to obtain meaningful access to justice. While the recent jurisprudence surrounding this issue leaves behind many open questions, the onus falls on State courts to ensure that the courthouse doors remain open.

## INTRODUCTION

Since 2011, the Supreme Court of the United States has shown a renewed interest in personal jurisdiction. After more than two decades of silence on the subject, the Court has heard six personal jurisdiction cases in a six-year period.<sup>2</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>3</sup> and *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>4</sup> were decided in 2011. *Daimler AG v. Bauman*<sup>5</sup> and *Walden v. Fiore*<sup>6</sup> were decided in 2014. And *BNSF Railway Co. v. Tyrrell*<sup>7</sup> and *Bristol-Myers Squibb Co. v. Superior Court*<sup>8</sup> were decided in 2017.

After more than two decades of silence on the subject, the Court has heard six personal jurisdiction cases in a six-year period.

The key issue in all these cases is the constitutionality of state courts exercising personal jurisdiction over out-of-state defendants.<sup>9</sup> At a very general level, one could argue that these decisions reflect a restrictive attitude toward the jurisdictional reach of state courts. In every decided case, the Court reversed the lower courts' exercise of personal jurisdiction.

This Article surveys the new jurisdictional landscape, with an eye toward examining the kinds of situations where the arguments in favor of personal jurisdiction are the strongest. Part I briefly summarizes the Supreme Court's overarching doctrinal framework and the crucial difference between general jurisdiction and specific jurisdiction in the Court's case law. Part II explains why, notwithstanding an apparent anti-jurisdiction attitude in the Supreme Court's recent decisions, there are still strong arguments for jurisdiction when plaintiffs sue in the state where they were injured or incurred damages. Part III describes the new jurisdictional obstacles that exist when a plaintiff seeks to sue in a state other than the one where the plaintiff's injuries occurred.

### I. Specific vs. General Jurisdiction

The Supreme Court's 1945 decision in *International Shoe v. Washington*<sup>10</sup> was a paradigm shift in the Court's approach to personal jurisdiction. In the decades prior to that decision, courts and legislatures struggled

*International Shoe* articulated a new constitutional standard that even if a defendant is not present in the forum state, due process is satisfied as long as the defendant has "certain minimum contacts with [the state]."

to fit new social realities—such as "the nation's increasingly industrialized economy, the advent of high speed transportation and communication, and the mobility of the population"<sup>11</sup>—into prevailing notions of jurisdiction that fixated on the defendant's "presence" in the territory of the state seeking to assert jurisdiction,<sup>12</sup> or the defendant's "consent" to the jurisdiction of that state.<sup>13</sup>

Responsive to these concerns, *International Shoe* articulated a new constitutional standard. Chief Justice Stone declared that even



if a defendant is not present in the forum state, due process is satisfied as long as the defendant has “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>14</sup> Even in this seminal decision, the Court recognized that the assessment of a defendant’s “contacts” with the forum state might vary depending on whether the lawsuit itself was related to those contacts. For example, the Court contrasted the situation where a lawsuit is based on “dealings entirely distinct from” the defendant’s activities in a state,<sup>15</sup> with the situation where the lawsuit is based on “obligations” that “arise out of or are connected with the activities within the state.”<sup>16</sup>

In the wake of *International Shoe*... specific jurisdiction requires “an affiliation between the forum and the underlying controversy.”

In the wake of *International Shoe*—and with a big assist from Professors Arthur von Mehren and Donald Trautman—the Supreme Court’s case law distilled this insight into a distinction between “general jurisdiction” and “specific jurisdiction.”<sup>17</sup> Specific jurisdiction requires “an affiliation between the forum and the underlying controversy”<sup>18</sup>—such as “when the suit arises

out of or relates to the defendant’s contacts with the forum”<sup>19</sup> or when there is “activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”<sup>20</sup> General jurisdiction allows a court to hear “any and all claims” against a defendant,<sup>21</sup> regardless of whether the claim has any connection to the forum state.

Not surprisingly, general jurisdiction imposes a “substantially higher threshold than is required in specific jurisdiction cases.”<sup>22</sup> The defendant’s contacts must be “so continuous and systematic as to render [it] essentially at home in the forum State.”<sup>23</sup> Specific jurisdiction does not require such “continuous and systematic” contacts, but it does require purposeful activity by the defendant directed at the forum—a notion that sometimes goes by the label “purposeful availment.”<sup>24</sup> Even when a defendant has established those minimum contacts with the forum state, specific jurisdiction requires an inquiry into whether jurisdiction would be “reasonable” and comport with “fair play and substantial justice.” Factors relevant to this reasonableness inquiry include the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, and the interstate judicial system’s interest in obtaining the most efficient resolution of controversies.<sup>25</sup> The Supreme Court recently clarified that no separate inquiry into these reasonableness factors is necessary where a defendant’s contacts are sufficient for general jurisdiction.<sup>26</sup>

Notwithstanding an apparently restrictive attitude in the Supreme Court’s recent decisions, there are still strong arguments for jurisdiction when plaintiffs sue in the state where they were injured or suffered damages—even when the defendant is located out of state or out of the country.

## II. More Solid Footing: Specific Jurisdiction

Notwithstanding an apparently restrictive attitude in the Supreme Court’s recent decisions, there are still strong arguments for jurisdiction when plaintiffs sue in the state where they were injured or suffered damages—even when the defendant is located out of state or out of the country. Such cases are quintessential specific jurisdiction cases, so there is no need to satisfy the high threshold required for general jurisdiction.

The Supreme Court decision that has prompted the greatest concern about the availability of specific jurisdiction is the 2011 decision in *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>27</sup> *McIntyre* presented the scenario

that is often referred to as the “stream of commerce.” And the decision has raised questions because a fractured Court—with no majority opinion—found that personal jurisdiction was not proper in the state where the manufacturer’s product was ultimately purchased and caused injury. As explained below, however, *McIntyre* need not be read as a fatal obstacle to personal jurisdiction when plaintiffs bring claims in the state where they were injured or suffered damages.

### A. *Pre-McIntyre Case Law*

In 1980, the Court decided *World-Wide Volkswagen Corp. v. Woodson*,<sup>28</sup> a case involving plaintiffs who were injured in Oklahoma while driving an automobile they had purchased from a dealership in New York.<sup>29</sup> They filed a lawsuit in Oklahoma against several defendants, including the New York car dealership and a New York distributor that served dealers in New York, New Jersey, and Connecticut.<sup>30</sup> These two defendants argued that personal jurisdiction was improper in Oklahoma.<sup>31</sup>

The Court recognized...that it would be entirely appropriate for a state to “assert[] personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”

The Supreme Court held that exercising jurisdiction over these defendants in Oklahoma violated the Due Process Clause.<sup>32</sup> The Court recognized, however, that it would be entirely appropriate for a state to “assert[] personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”<sup>33</sup> More specifically, the Court stated that “if the sale of a product of a manufacturer or distributor...arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its

allegedly defective merchandise has there been the source of injury to its owner or to others.”<sup>34</sup> Jurisdiction was ultimately denied in *World-Wide Volkswagen* because the two New York defendants had not sought to serve, either directly or indirectly, the market for their product in the forum state of Oklahoma—the local dealer and the regional distributor served the markets in New York and surrounding states.<sup>35</sup>

The Supreme Court’s next stream-of-commerce case was *Asahi Metal Industry Co. v. Superior Court*.<sup>36</sup> In this case a California plaintiff was injured and his wife killed while riding a motorcycle in California.<sup>37</sup> The plaintiff filed a lawsuit in California state court against several defendants, including the Taiwanese company (Cheng Shin) that manufactured the motorcycle’s tire tube.<sup>38</sup> Cheng Shin then filed a claim seeking indemnification from the Japanese company (Asahi) that manufactured the tube’s valve assembly but had not been named as a defendant.<sup>39</sup> After the plaintiff’s claims settled, the only claim remaining in the case was Cheng Shin’s indemnity action against Asahi.<sup>40</sup>

The Supreme Court concluded that California lacked personal jurisdiction over Cheng Shin’s indemnity action against Asahi, but there was a majority opinion only as to one point—that jurisdiction was foreclosed by the second-prong “reasonableness” factors that apply in specific-jurisdiction cases.<sup>41</sup> This holding, however, was premised on *Asahi*’s fairly unique posture, particularly the fact that the original plaintiff—who had indeed been injured in the forum state—had settled his claims and was not seeking any relief from Asahi.<sup>42</sup> The more significant question going forward, therefore, was whether a defendant in *Asahi*’s position had established minimum contacts with the forum state. On that issue, the Court generated no majority opinion.



Four Justices, led by Justice Brennan, concluded that Asahi had established minimum contacts with California.<sup>43</sup> Quoting *World-Wide Volkswagen*, Justice Brennan reasoned that “[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”<sup>44</sup> Four Justices, led by Justice O’Connor, concluded that Asahi had not established minimum contacts with California.<sup>45</sup> Justice O’Connor wrote that “placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”<sup>46</sup> Rather, she would require “[a]dditional conduct” that would “indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”<sup>47</sup> Justice Stevens joined neither of the four-Justice coalitions in *Asahi*. Given the conclusion “that California’s exercise of jurisdiction over Asahi in this case would be ‘unreasonable and unfair,’” he saw “no reason” to endorse any particular “test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.”<sup>48</sup> Justice Stevens did, however, note that he was “inclined to conclude” that Asahi’s contacts were sufficient given “the volume, the value, and the hazardous character of the components.”<sup>49</sup>

### B. *J. McIntyre Machinery v. Nicaastro*

The four-four Brennan-O’Connor split remained the Supreme Court’s last word on this subject for two decades, until the 2011 decision in *McIntyre*.<sup>50</sup> The plaintiff in *McIntyre*, Robert Nicaastro, suffered serious injuries to his hand while operating a metal-shearing machine at Curcio Scrap Metal, the New Jersey company for which he worked.<sup>51</sup> Mr. Nicaastro filed a lawsuit in a New Jersey state court against J. McIntyre Machinery, the British corporation that manufactured the shearing machine.<sup>52</sup> J. McIntyre had entered into an agreement with an Ohio-based company, McIntyre Machinery of America, to sell J. McIntyre’s machines to customers in the United States.<sup>53</sup> J. McIntyre also helped to facilitate sales of its machines in the United States by sending its officials to U.S. trade shows in “such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco.”<sup>54</sup>

Justice Kennedy’s plurality opinion [in *McIntyre*] ranged from the sensible and unexceptional to the deeply troubling and misguided.

Why was it not the case that a manufacturer who sought to serve the U.S. market as a whole necessarily sought to serve the states that comprise the United States?

While *McIntyre* seemed to present an opportunity to clarify personal jurisdiction in the stream-of-commerce context,<sup>55</sup> it was not to be. The Court split four-to-two-to-three.<sup>56</sup> Justice Kennedy wrote a plurality opinion rejecting jurisdiction on behalf of himself, Chief Justice Roberts, and Justices Scalia and Thomas.<sup>57</sup> Justice Ginsburg wrote a dissenting opinion that would

have upheld jurisdiction on behalf of herself and Justices Sotomayor and Kagan.<sup>58</sup> Justices Breyer and Alito tip the scale by providing two more votes against jurisdiction, but their concurring opinion, written by Justice Breyer, rejects the reasoning used by the Kennedy plurality.<sup>59</sup> As explained below, the legal principles on which Justices Breyer and Alito relied are generally consistent with Justice Ginsburg’s approach, but they voted against jurisdiction based on a narrow view of the factual record in *McIntyre*.

Justice Kennedy's plurality opinion ranged from the sensible and unexceptional to the deeply troubling and misguided. In the former category, Justice Kennedy made clear that the transmission of goods into the forum state can be sufficient to establish jurisdiction. The requirement that a defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State," he explained, can be met by a defendant "sending its goods rather than its agents."<sup>60</sup> Thus, Justice Kennedy recognized that jurisdiction is appropriate over a manufacturer or distributor who "seek[s] to serve' a given State's market."<sup>61</sup> Justice Kennedy did clarify that "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum."<sup>62</sup> While this was admittedly a new gloss on how to assess jurisdiction in the stream-of-commerce scenario,<sup>63</sup> whether it represented a significant change would ultimately hinge on what it means to "target[] the forum."

A defendant necessarily seeks to serve the forum state when it seeks to serve a territorial area that includes the forum state—the whole cannot possibly be less than the sum of its parts.

On this point, the plurality opinion failed to explain coherently *why* these principles supported the conclusion that J. McIntyre had not targeted or sought to serve the New Jersey market.<sup>64</sup> Why was it not the case that a manufacturer who sought to serve the U.S. market as a whole necessarily sought to serve the states that comprise the United States? Justice Kennedy's observations that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," and that "the United States is a distinct

sovereign" from New Jersey and each of the 50 states,<sup>65</sup> missed the point. A defendant necessarily seeks to serve the forum state when it seeks to serve a territorial area that includes the forum state—the whole cannot possibly be less than the sum of its parts.

The plurality opinion contained numerous other fundamental flaws, including (1) a long-rejected attempt to frame the propriety of personal jurisdiction as whether the defendant "manifest[s] an intention to submit to the power of a sovereign,"<sup>66</sup> and (2) flawed discussions of Justice Brennan's and Justice O'Connor's competing opinions in *Asahi*.<sup>67</sup> These and other aspects of Justice Kennedy's opinion have been critiqued elsewhere.<sup>68</sup> For purposes of this paper, the crucial point is that the plurality opinion did not garner the support of five Justices. Moreover, as explained below, the two concurring Justices explicitly disavowed the more troubling aspects of the plurality opinion.

Justice Ginsburg's dissenting opinion in *McIntyre* did not disagree with the basic premise that a defendant must "purposefully avail[] itself" of the forum state in order to be subject to jurisdiction there.<sup>69</sup> Unlike Justice Kennedy, however, Justice Ginsburg cogently applied this general principle to the reality of the British manufacturer's commercial activity: "Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicastró's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim."<sup>70</sup> She continued:

The crucial point is that the plurality opinion [in *McIntyre*] did not garner the support of five Justices. Moreover, the two concurring Justices explicitly disavowed the more troubling aspects of the plurality opinion.

The machine arrived in Nicastró's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged... McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, 'purposefully availed itself' of the United States market nationwide, not a market in a single State or a discrete collection of States.<sup>71</sup>

Justices Breyer and Alito joined neither Justice Kennedy’s plurality opinion nor Justice Ginsburg’s dissenting opinion in *McIntyre*. Although they concurred in the ultimate result reached by the plurality,<sup>72</sup> they explicitly rejected the reasoning put forward by Justice Kennedy. In particular, Justice Breyer’s opinion challenged Justice Kennedy’s use of “strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’”<sup>73</sup> Rather, Justice Breyer recognized (quoting *World-Wide Volkswagen*) that jurisdiction would have been proper if J. McIntyre had “delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.”<sup>74</sup>

“McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, ‘purposefully availed itself’ of the United States market nationwide, not a market in a single State or a discrete collection of States.”

—Justice Ruth Bader Ginsberg

While Justice Breyer’s tie-breaking concurring opinion disagreed explicitly with the plurality’s legal reasoning, its only point of departure with Justice Ginsburg and the dissenters is over the factual record. Justice Breyer proceeded on the assumption that the only facts offered in support of jurisdiction were these:

- (1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro’s employer, Mr. Curcio;
- (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and
- (3) representatives of the British Manufacturer attended trade shows in “such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco.”<sup>75</sup>

This narrow understanding of the facts excised completely J. McIntyre’s overarching purpose of accessing the entire U.S. market for its products.

This narrow understanding of the facts excised completely J. McIntyre’s overarching purpose of accessing the entire U.S. market for its products. Whereas Justice Ginsburg saw a defendant who “engaged” a U.S. distributor in order “to promote and sell its machines in the United States,”<sup>76</sup> and who took “purposeful step[s] to reach customers for its products anywhere

in the United States,”<sup>77</sup> Justice Breyer saw a defendant who passively “permitted” and “wanted” such sales to occur.<sup>78</sup> With the record framed as Justice Breyer does, it is hard to see how a jurisdictional standard that hinges on a defendant’s “purpose[.]”<sup>79</sup> could ever be satisfied.

Justice Breyer’s blinkered view of the factual record also explains how he was able to reach the conclusion that J. McIntyre had not even “delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.”<sup>80</sup> Indeed, Justice Breyer indicated that a different result could be justified if the record had contained a “list of potential New Jersey customers who might...have regularly attended [the] trade shows” that J. McIntyre officials attended;<sup>81</sup> if the record had contained evidence of “the size and scope of New Jersey’s scrap-metal business”;<sup>82</sup> or if the record revealed more than a single sale to a single New Jersey customer.<sup>83</sup>

In recognizing that these facts could tip the scale in favor of jurisdiction, Justice Breyer’s opinion fits easily with Justice Ginsburg’s idea that minimum contacts are established when a defendant “seek[s] to exploit a multistate or global market” that includes the forum state.<sup>84</sup> Justice Breyer’s logic would merely require a showing that potential customers were likely to exist in the forum state. If the *McIntyre* record had contained (in Justice

Breyer’s words) a “list of potential New Jersey customers who might...have regularly attended [the] trade shows” that J. McIntyre officials attended,<sup>85</sup> or evidence of “the size and scope of New Jersey’s scrap-metal business,”<sup>86</sup> then that could create an expectation of purchases by New Jersey consumers. Either fact would confirm—even

Once an “expectation” of purchases by New Jersey users exists, the act of “delivering its goods in the stream of commerce” could be sufficient to establish minimum contacts if its goods are then purchased in New Jersey and cause injury there.

before any sales were made—that there was a potential market for J. McIntyre’s products in New Jersey. Even without such facts, however, the consummation of an actual sale to a New Jersey customer would create that expectation going forward.<sup>87</sup> At that point, J. McIntyre either would know or should know of the potential New Jersey market for its machines. Once an “expectation” of purchases by New Jersey users exists, the act of “delivering its goods in the stream of commerce” could be sufficient to establish minimum contacts if its goods are then purchased in New Jersey and cause injury there.<sup>88</sup>

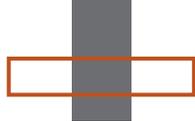
For Justice Breyer, however, no such expectation is created when (1) there is only a single sale of the defendant’s product to a customer in the forum state, and (2) there is no other evidence in the record suggesting potential customers in the forum state.

One can envision situations where some facts of the sort Justice Breyer identified would be necessary to create a true expectation of purchases by customers in the forum state. For example, a defendant may seek to access the U.S. market as a whole but, as a practical matter, the market for the defendant’s products exists only in some states (and not others). A manufacturer of grapefruit-harvesting equipment might engage a distributor to access the entire U.S. market, but that would not necessarily create an expectation of purchases by users in Alaska, North Dakota, or other states where grapefruit are not harvested. A manufacturer of cross-country skis might engage a distributor to access the entire U.S. market, but that would not necessarily create an expectation of purchases by users in Florida, Hawaii, or other states where cross-country skiing does not take place.

This is not to say that the machinery at issue in *McIntyre* presented such a scenario. But if one accepts the premise that the plaintiff bears the burden of establishing personal jurisdiction over the defendant,<sup>89</sup> it might have to provide evidence to confirm that a potential market exists in the particular state within the United States that seeks to exercise jurisdiction—in order to show that the defendant delivered its goods in the stream of commerce with the expectation that they will be purchased by customers in the forum state.

If one accepts the premise that the plaintiff bears the burden of establishing personal jurisdiction over the defendant, it might have to provide evidence to confirm that a potential market exists in the particular state that seeks to exercise jurisdiction.

This sort of approach is not fundamentally inconsistent with the approach outlined by Justice Ginsburg in her dissent. It would simply require the plaintiff to develop a slightly more robust factual record than Justice Breyer was willing to recognize in *McIntyre*. Most importantly, this understanding would not allow distant manufacturers who profit from sales in the forum state to escape jurisdiction in those states when their products cause damage there. And it certainly would not give manufacturers a free pass to avoid jurisdiction in states where their products are sold simply by developing a distribution scheme that seeks out the U.S. market as a whole rather than each individual state.<sup>90</sup> Although there remains a fair amount of inconsistency in how lower courts have treated stream-of-commerce cases in the wake of *McIntyre*,<sup>91</sup> there are numerous examples of decisions that illustrate the more sensible reading described above.<sup>92</sup>



### III. Shakier Ground: General Jurisdiction

One area where the Supreme Court’s recent case law has pushed personal jurisdiction in a more restrictive direction is general jurisdiction. The contours of current doctrine have not fully developed, however. The Court’s two 2017 decisions have provided some guidance, but many important open questions remain.

#### A. General Jurisdiction in the 21st Century

Before *Goodyear* and *Daimler*, companies with significant sales or activity within a state were often found to be subject to general jurisdiction there—even in cases where the injury did not occur in that state.<sup>93</sup> The Supreme Court’s more recent decisions, however, have undermined this understanding of general jurisdiction.

Before *Goodyear* and *Daimler*, companies with significant sales or activity within a state were often found to be subject to general jurisdiction there.

The 2011 *Goodyear* decision involved a lawsuit brought by parents of two North Carolina teenagers who were killed in a bus accident in Paris, France.<sup>94</sup> They sued three foreign Goodyear subsidiaries, who had been involved in manufacturing and distributing the tires on the bus, in North Carolina state court.<sup>95</sup> Although the defendants (based in Luxembourg, France, and Turkey) made tires primarily for sale in Europe and Asia, a small percentage of their tires were distributed in North Carolina.<sup>96</sup>

The Supreme Court unanimously found that general jurisdiction could not be based solely on sales to the forum state through the stream of commerce.<sup>97</sup> In reaching this conclusion, Justice Ginsburg wrote that general jurisdiction requires that the defendant’s “affiliations with the State” must be “so continuous and systematic as to render them essentially at home” there.<sup>98</sup> The Court noted: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”<sup>99</sup>

“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”  
—Justice Ruth Bader Ginsberg

*Goodyear* recognized a corporation’s place of incorporation and principal place of business as “paradigm bases for the exercise of general jurisdiction,”<sup>100</sup> but it did not address where else a corporation might be deemed to be “essentially at home.” Insofar as the (rejected) basis for general jurisdiction in *Goodyear* was merely the fact that the defendant’s products reached the forum state through the stream of commerce, *Goodyear* seemed to leave open the possibility that a defendant with significant physical operations in the forum

state could be deemed to be “essentially at home” there—and hence subject to general jurisdiction. The Court’s 2014 *Daimler* decision, however, rejected an attempt to assert general jurisdiction over a foreign defendant, even where a defendant has fairly significant physical operations in the forum state.

The plaintiffs in *Daimler* had brought claims against Daimler AG, a German company headquartered in Stuttgart, for human rights and other violations committed by Daimler’s Argentinian subsidiary during the “dirty war” of the 1970s and 1980s.<sup>101</sup> The Ninth Circuit had held that Daimler was subject to general personal jurisdiction in California based on the activities of its American subsidiary, MBUSA. Writing for the Court once again, Justice Ginsburg first rejected the Ninth Circuit’s conclusion that MBUSA’s contacts could be attributed to Daimler for jurisdictional purposes.<sup>102</sup> More significantly, however, Justice Ginsburg then concluded that

general jurisdiction would not be proper in California even if MBUSA's contacts were attributable to Daimler. Even with that assumption, California would not be one of the paradigm fora for general jurisdiction (place of incorporation or principal place of business).<sup>103</sup> The *Daimler* Court acknowledged that a corporation could be subject to general jurisdiction in places other than these two “exemplar bases *Goodyear* identified.”<sup>104</sup> But a corporation was not necessarily subject to general jurisdiction “in every State in which a corporation engages in a substantial, continuous, and systematic course of business.”<sup>105</sup> General jurisdiction does not exist simply because of “the magnitude of the defendant’s in-state contacts.”<sup>106</sup> Rather, a court must appraise the defendant’s activities “in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them.”<sup>107</sup>

## B. Open Questions Regarding General Jurisdiction

Four important questions remain in the wake of the Court’s *Goodyear* and *Daimler* decisions. The first is: in which places *beyond* a corporate defendant’s principal place of business or state of incorporation might a corporation be subject to general jurisdiction? At this point, there are very few examples of lower courts finding general jurisdiction outside these “exemplar” locations, and many of those decisions have been called into question by subsequent decisions. In *Tyrrell v. BNSF Railway Co.*,<sup>108</sup> the Montana Supreme Court found general jurisdiction based on BNSF having over 2,000 miles of railroad track, employing more than 2,000 workers, maintaining facilities, having a telephone listing, and doing direct advertising in Montana. But the U.S. Supreme Court recently reversed the Montana court’s assertion of jurisdiction, concluding that BNSF was not “so heavily engaged in activity in Montana as to render it essentially at home in that State.”<sup>109</sup> In *Aspen American Insurance Co. v. Interstate Warehousing, Inc.*, an Illinois appellate court based general jurisdiction on the defendant having two warehouses in Illinois and being authorized to do business in Illinois since 1988.<sup>110</sup> But the Illinois Supreme Court reversed, finding that the defendant could not be subject to general jurisdiction under *Daimler*.<sup>111</sup>

A second question is whether the Court’s *Goodyear* and *Daimler* decisions might be limited to international litigation involving foreign defendants. *Daimler*, certainly, was a remarkable case—neither the litigants nor

It is worth considering...whether the narrow view of general jurisdiction expressed by the Supreme Court in these decisions should apply with equal force to domestic defendants where jurisdiction is sought in a U.S. state on a general jurisdiction theory.

the facts giving rise to the claims bore any connection to the United States. *Goodyear*, at least, involved plaintiffs from North Carolina, although the accident and the defendant’s relevant conduct all occurred abroad. It is worth considering, however, whether the narrow view of general jurisdiction expressed by the Supreme Court in these decisions should apply with equal force to *domestic* defendants where jurisdiction is sought in a U.S. state on a general jurisdiction theory. There are some lower court

decisions suggesting that domestic defendants might be treated differently in this regard,<sup>112</sup> although one of these is the Montana Supreme Court’s decision in the *BNSF* case—which the U.S. Supreme Court recently reversed.<sup>113</sup> There is language in the U.S. Supreme Court’s *BNSF* decision suggesting that the *Goodyear/Daimler* approach to general jurisdiction applies across the board,<sup>114</sup> although the Court did not directly address any potential distinction between foreign and domestic defendants.

A third issue regarding general jurisdiction involves corporations that register to do business in the forum state and appoint an in-state agent for service of process. There is a line of authority providing that such



defendants consent to general jurisdiction in that state.<sup>115</sup> As a threshold matter, the viability of this jurisdictional theory seems to depend on the particulars of state law. Indeed, there have been several recent decisions finding that the relevant state law registration statutes do not authorize general jurisdiction over registered corporations.<sup>116</sup> In states where such registration does purport to create general jurisdiction, it remains to be seen whether the Court’s recent case law on general jurisdiction will be interpreted to forbid the practice on constitutional grounds.<sup>117</sup>

A final question relating to general jurisdiction is how to determine whether there is a sufficient “affiliation between the forum and the underlying controversy” to justify *specific* jurisdiction<sup>118</sup>—and thereby to avoid the stringent requirements for general jurisdiction indicated by *Goodyear*, *Daimler* and *BNSF*. This issue was at the heart of the Supreme Court’s recent *Bristol-Myers* decision,<sup>119</sup> which involved a group of nearly 700 plaintiffs from 34 states who sued Bristol-Myers Squibb (BMS) in California state court for injuries relating to its blood-thinning drug Plavix. Although only 86 of these were from California, all plaintiffs asserted identical theories of liability.<sup>120</sup> The California Supreme Court found that even the non-California plaintiffs’ claims “related to” BMS’s contacts with California, because of “BMS’s extensive contacts with California as part of Plavix’s nationwide marketing, its sales of Plavix in this state, and its maintenance of research and development facilities here.”<sup>121</sup> It also endorsed “a sliding scale approach to specific jurisdiction,” under which “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.”<sup>122</sup>

By an 8-1 vote, the Supreme Court concluded that “the California courts cannot claim specific jurisdiction” with respect to the non-California plaintiffs.<sup>123</sup> Justice Alito’s majority opinion rejected the California Supreme Court’s “sliding scale” approach, which he called “a loose and spurious form of general jurisdiction.”<sup>124</sup> Regarding the presence of California plaintiffs in the Plavix litigation, Justice Alito wrote that “[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims.”<sup>125</sup> He explained: “[A] defendant’s relationship with a third party, standing alone, is an insufficient basis for jurisdiction. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents.”<sup>126</sup> It was also irrelevant “that BMS conducted research in California on matters unrelated to Plavix” because “[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”<sup>127</sup> Here,

“[W]hat is needed—and what is missing [in *Bristol-Myers*]—is a connection between the forum and the specific claims at issue.”  
—Justice Samuel Alito

One unfortunate consequence of the *Bristol-Myers* decision is that, in many cases, it will compel an inefficient splitting of related claims and a needless waste of judicial resources.

“the relevant plaintiffs are not California residents and do not claim to have suffered harm in that State,” and “all the conduct giving rise to the nonresidents’ claims occurred elsewhere.”<sup>128</sup>

One unfortunate consequence of the *Bristol-Myers* decision is that, in many cases, it will compel an inefficient splitting of related claims and a needless waste of judicial resources. As Justice Sotomayor observed in her dissenting

opinion, the majority’s approach “will make it profoundly difficult for plaintiffs who are injured in different States by a defendant’s nationwide course of conduct to sue that defendant in a single, consolidated action,”<sup>129</sup> and “may make it impossible to bring certain mass actions at all.”<sup>130</sup> While a nationwide group of plaintiffs might still bring

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—Justice Ruth Bader Ginsberg

a consolidated lawsuit in a state court where the corporate defendant is incorporated or has its principal place of business,<sup>131</sup> this option would not be available for foreign defendants,<sup>132</sup> or in cases brought against multiple domestic defendants who do not share a principal place of business or state of incorporation.<sup>133</sup>

That said, *Bristol-Myers* did not impose "a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim."<sup>134</sup> Thus, it still seems to be the case that where the plaintiff suffered injury or damages in the forum state, the defendant's contacts would

be assessed as a matter of specific jurisdiction rather than general jurisdiction. Also, it remains unclear whether the majority's reasoning in *Bristol-Myers* would apply with equal force to class actions, for which—as Justice Sotomayor observed—" [n]onnamed class members may be parties for some purposes and not for others."<sup>135</sup>

## CONCLUSION

Establishing personal jurisdiction over a defendant is a crucial first step for injured parties wishing to obtain meaningful access to justice. Although the Supreme Court's recent case law on personal jurisdiction imposes some new obstacles to personal jurisdiction in certain kinds of situations, there remain strong arguments for the exercise of personal jurisdiction in cases where injured plaintiffs sue in the forum where they were injured or otherwise suffered damages. State courts retain considerable leeway in such cases to keep the courthouse doors open, even under the Supreme Court's recent jurisprudence.

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## Notes

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<sup>2</sup> See generally 4 THE LATE CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE & PROCEDURE § 1067.1 (4th ed. 2015 & Supp. 2017). It is perhaps more than a coincidence that this new batch of cases began immediately after Justice Stevens retired from the Court. In two notable cases decided by the early Rehnquist Court, Justice Stevens declined to join either side of competing four-Justice coalitions, leaving important aspects of jurisdictional doctrine unresolved. See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Burnham v. Superior Court*, 495 U.S. 604 (1990). It turned out, however, that Justice Stevens was not wholly to blame for these inconclusive decisions. The Supreme Court's first decision in this more recent batch of cases also failed to generate a majority opinion. See *infra* notes 54-58 and accompanying text (discussing the *McIntyre* case).

<sup>3</sup> 564 U.S. 873 (2011).

<sup>4</sup> 564 U.S. 915 (2011).

<sup>5</sup> 134 S. Ct. 746 (2014).

<sup>6</sup> 134 S. Ct. 1115 (2014).

<sup>7</sup> 137 S. Ct. 1549 (2017).

<sup>8</sup> 137 S. Ct. 1773 (2017).

<sup>9</sup> Although two of these cases—*Daimler* and *Walden*—involved personal jurisdiction in federal district courts, personal jurisdiction was based on Federal Rule of Civil Procedure 4(k)(1)(A), which allows a federal court to exercise personal jurisdiction as long as a state court in the state where the federal district court is located could do so. See FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."). Thus the Supreme Court examined whether it would be constitutional for California courts (in *Daimler*) and Nevada courts (in *Walden*) to exercise personal jurisdiction. See *Daimler*, 134 S. Ct. at 753; *Walden*, 134 S. Ct. at 1121.

<sup>10</sup> 326 U.S. 310 (1945).

<sup>11</sup> See 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1067.

<sup>12</sup> See *International Shoe*, 326 U.S. at 316-17.

<sup>13</sup> See *id.* at 318-19.



<sup>14</sup> *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>15</sup> *Id.* at 318 (“While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” (citations omitted)).

<sup>16</sup> *Id.* at 319 (“[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”).

<sup>17</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8 & 9. (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966)).

<sup>18</sup> *Goodyear*, 564 U.S. at 919 (quoting von Mehren & Trautman, *supra* note 16, at 1136 (internal quotation marks omitted)).

<sup>19</sup> *Id.* at 923-24 (quoting *Helicopteros*, 466 U.S. at 414 n.8 (internal quotation marks omitted)).

<sup>20</sup> *Id.* at 919.

<sup>21</sup> *Id.*

<sup>22</sup> 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1067.5.

<sup>23</sup> *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919).

<sup>24</sup> *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958))).

<sup>25</sup> *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>26</sup> *Daimler*, 134 S. Ct. at 762 n.20 (“True, a multipronged reasonableness check was articulated in *Asahi*, but not as a free-floating test. Instead, the check was to be essayed when specific jurisdiction is at issue...When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous.”).

<sup>27</sup> 564 U.S. 873 (2011).

<sup>28</sup> 444 U.S. 286 (1980).

<sup>29</sup> *Id.* at 288.

<sup>30</sup> *Id.* at 288-89.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 295-99.

<sup>33</sup> *Id.* at 298.

<sup>34</sup> *Id.* at 297 (emphasis added).

<sup>35</sup> *Id.* at 298.

<sup>36</sup> 480 U.S. 102 (1987).

<sup>37</sup> *Id.* at 105.

<sup>38</sup> *Id.* at 105-06.

<sup>39</sup> *Id.* at 106.

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 113-14 (“We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors...A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over *Asahi*, even apart from the question of the placement of goods in the stream of commerce.”). Justice Scalia was the only Justice in *Asahi* who did not join the Court’s opinion with respect to the reasonableness factors. *See id.* at 105.

<sup>42</sup> *See id.* at 114 (“[T]he interests of the plaintiff and the forum in California’s assertion of jurisdiction over *Asahi* are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against *Asahi*...Because the plaintiff is not a California resident, California’s legitimate interests in the dispute have considerably diminished.”); *see also* 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1067.1 (“[T]he Court refused to exercise personal jurisdiction over *Asahi* because the particular circumstances of the case made jurisdiction unreasonable.”).

<sup>43</sup> *Id.* at 121 (Brennan, J., concurring).

<sup>44</sup> *Id.* at 119-20 (Brennan, J., concurring) (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98) (internal quotation marks omitted).

<sup>45</sup> *See id.* 112-13 (O’Connor, J.).

<sup>46</sup> *Id.* at 112.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 121-22 (Stevens, J., concurring) (quoting *id.* at 116).

<sup>49</sup> *Id.* at 122.

<sup>50</sup> 564 U.S. 873 (2011).

<sup>51</sup> *Id.* at 878 (plurality opinion); *id.* at 895 (Ginsburg, J., dissenting) (“Nicastro operated the [machine] in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey.”).

<sup>52</sup> *Id.* at 878 (plurality opinion); *id.* at 894 (Ginsburg, J., dissenting).

<sup>53</sup> *Id.* at 878 (plurality opinion) (“[A]n independent company agreed to sell J. McIntyre’s machines in the United States.”); *id.* at 887 (Breyer, J., concurring) (“J. McIntyre Machinery, Ltd. [is] a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States.”); *id.* at 896 (Ginsburg, J., dissenting) (“From at least 1995 until 2001, McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd . . . as its exclusive distributor for the entire United States.”).

<sup>54</sup> *Id.* at 888 (Breyer, J., concurring) (quoting *Nicastro*, 987 A.2d at 578-79); *see also id.* at 2786 (plurality opinion) (“J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre’s machines alongside the distributor. The conventions took place in various States, but never in New Jersey.”).

<sup>55</sup> *See id.* at 877, 879 (noting that the case “presents an opportunity to provide greater clarity” in light of the “decades-old questions left open in *Asahi*”).

<sup>56</sup> *See generally* Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 481, 488-91 (2012).

<sup>57</sup> *Id.* at 877 (plurality opinion).

<sup>58</sup> *Id.* at 893 (Ginsburg, J., dissenting).

<sup>59</sup> *Id.* at 887 (Breyer, J., concurring).

<sup>60</sup> *Id.* at 882 (plurality opinion) (alteration in original) (quotations omitted).

<sup>61</sup> *Id.* (“[A] defendant may in an appropriate case be subject to jurisdiction without entering the forum—itsself an unexceptional proposition—as where manufacturers or distributors ‘seek to serve’ a given State’s market.” (quoting *World-Wide Volkswagen*, 444 U.S. at 295)).

<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> In his concurrence, Justice Breyer referred to this aspect of Justice Kennedy’s opinion as a “strict no-jurisdiction rule.” *Id.* at 890 (Breyer, J., concurring).

<sup>64</sup> *Id.* at 886 (plurality opinion) (“Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey.”).

<sup>65</sup> *Id.* at 884.

<sup>66</sup> *Id.* at 882.

<sup>67</sup> *See* Steinman, *supra* note 55, at 498-502.

<sup>68</sup> *See, e.g., id.* at 496-504.

<sup>69</sup> *McIntyre*, 564 U.S. at 905 (Ginsburg, J., dissenting).

<sup>70</sup> *Id.* at 898.

<sup>71</sup> *Id.* at 898, 905.

<sup>72</sup> *Id.* at 887-88 (Breyer, J., concurring) (“Based on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer), a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.”).

<sup>73</sup> *Id.* at 890 (quoting *id.* at 882 (plurality opinion)).

<sup>74</sup> *Id.* at 889 (rejecting jurisdiction because Nicastro “has not otherwise shown that the British Manufacturer ‘purposefully avail[ed] itself of the privilege of conducting activities’ within New Jersey, or that it delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users” (alteration in original) (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98)).

<sup>75</sup> *Id.* at 888 (quoting *Nicastro*, 987 A.2d at 578-79).

<sup>76</sup> *Id.* at 905 (Ginsburg, J., dissenting).

<sup>77</sup> *Id.* at 898.

<sup>78</sup> *Id.* at 888 (Breyer, J., concurring).

<sup>79</sup> *Id.* at 891 (noting the “constitutional demand for ‘minimum contacts’ and ‘purposeful[ly] avail[ment]’” (alterations in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 291, 297)).

<sup>80</sup> *Id.* at 889 (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

<sup>81</sup> *Id.* (“He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows.”); *cf. id.* at 895 n.1 (Ginsburg, J., dissenting) (citing a 2011 member directory listing nearly 100 New Jersey businesses as belonging to the industry group that sponsored the trade shows).

<sup>82</sup> *Id.* at 889 (Breyer, J., concurring) (noting these as “other facts that Mr. Nicastro could have demonstrated in support of jurisdiction”); *cf. id.* at 895 (Ginsburg, J., dissenting) (using 2008 data on scrap metal recycling in New Jersey, indicating that New Jersey facilities processed over two million tons of scrap metal in 2008, which was the largest of all the states by a substantial margin).

<sup>83</sup> *Id.* at 888-89 (Breyer, J., concurring).

<sup>84</sup> *Id.* at 910 (Ginsburg, J., dissenting).

<sup>85</sup> *Id.* at 889 (Breyer, J., concurring).

<sup>86</sup> *Id.*

<sup>87</sup> Although Justice Breyer notes that “the relevant facts found by the New Jersey Supreme Court show ‘no regular . . . flow’ or ‘regular course’ of sales in New Jersey,” *id.* he does not state that such a “regular flow” is required for jurisdiction to be proper. A regular flow or course of sales in New Jersey would have been sufficient for jurisdiction, *see id.*, but Justice Breyer makes clear that Mr. Nicastro might also have “otherwise shown that the British Manufacturer . . . delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.” *Id.* (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).



<sup>88</sup> See *id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

<sup>89</sup> See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982) (noting the plaintiff's "burden of proof" with respect to personal jurisdiction). *But see* John Vail, *Six Questions in Light of J. McIntyre Machinery, Ltd. v. Nicasastro*, 63 S.C. L. REV. 517 (2012) (arguing that the defendant should bear the burden of proving that a state court's assertion of jurisdiction is unconstitutional).

<sup>90</sup> One other recent Supreme Court decision involving specific jurisdiction was *Walden v. Fiore*, 134 S. Ct. 1115 (2014). *Walden* was a lawsuit against a Georgia police officer who had been acting as a deputized DEA agent at the Atlanta airport, arising from his interaction with two Nevada residents changing planes en route from Puerto Rico to Nevada. *Id.* at 1119. The encounter led to the seizure of \$97,000 in cash, and the plaintiffs sued in a Nevada federal court alleging that the officer had helped draft a false affidavit that delayed the return of their funds. *Id.* at 1119-20. Although the Court unanimously concluded that the officer was not subject to personal jurisdiction in Nevada, the case's unusual facts and the Court's narrow reasoning make it unlikely to compel a more restrictive approach to personal jurisdiction in most scenarios. The plaintiffs in *Walden* did, in some sense, suffer damages in Nevada (where they resided and hence were affected by the delay in returning their funds). But the individual officer was not in any sense seeking to serve individuals in Nevada; nor had he otherwise reached out to Nevada through his activities. Importantly, *Walden* explicitly left in place an earlier Supreme Court decision—*Calder v. Jones*, 465 U.S. 783 (1984)—where the Court upheld jurisdiction in California in a defamation action by a plaintiff who resided and worked in California and, therefore, incurred damages as a result of the defendants' defamatory story. See *Walden*, 134 S. Ct. at 1123-24 (discussing *Calder* approvingly).

<sup>91</sup> See 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1067.4.

<sup>92</sup> See *Ainsworth v. Moffett Engineering, Ltd.*, 716 F.3d 174 (5th Cir. 2013); *Book v. Doublestar Dongfeng Tyre Co., Ltd.*, 860 N.W.2d 576 (Iowa 2015); *Gerk v. CL Medical SARL*, 175 F. Supp. 3d 1074 (C.D. Ill. 2016); *Hilsinger Co. v. FBW Investments*, 109 F. Supp. 3d 409 (D. Mass. 2015); *Butler v. JLA Indus. Equip., Inc.*, 845 N.W.2d 834 (Minn. App. 2014); *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18 (N.M. App. 2012). One state court opinion that rejected personal jurisdiction based on a needlessly restrictive view of personal jurisdiction in the stream-of-commerce context was *Hinrichs v. General Motors of Canada, Ltd.*, 222 So.3d 1114 (Ala. 2016). The U.S. Supreme Court recently denied certiorari. See 137 S. Ct. 2291 (2017).

<sup>93</sup> See generally 4A WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1069.2.

<sup>94</sup> *Goodyear*, 564 U.S. at 918.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 920-21.

<sup>97</sup> See *Goodyear*, 564 U.S. at 930 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

<sup>98</sup> *Id.* at 919.

<sup>99</sup> *Id.* at 924.

<sup>100</sup> *Id.* (citing Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

<sup>101</sup> *Daimler*, 134 S. Ct. at 750-51. The *Daimler* case was brought under the Alien Tort Statute, see *id.* at 751 (discussing 28 U.S.C. § 1350), which has been the jurisdictional basis for a variety of claims based on international human rights obligations. See, e.g., *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Krishanti v. Rajaratnam*, 2014 WL 1669873 (D.N.J. 2014).

<sup>102</sup> See *Daimler*, 134 S. Ct. at 759.

<sup>103</sup> See *id.* at 760 ("With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction." (citations and internal quotation marks omitted)).

<sup>104</sup> *Id.* ("Goodyear did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.").

<sup>105</sup> *Id.* at 761 ("That formulation, we hold, is unacceptably grasping.").

<sup>106</sup> *Id.* at 762 n.20.

<sup>107</sup> *Id.*

<sup>108</sup> 373 P.3d 1 (Mont. 2016).

<sup>109</sup> *BNSF*, 137 S. Ct. at 1559. The *BNSF* decision also found that § 56 of the Federal Employers Liability Act (FELA) did not create an independent basis for personal jurisdiction in any state where an employer is "doing business." See *id.* at 1553 ("We hold that § 56 does not address personal jurisdiction over railroads."). Had this statutory issue come out the other way, the constitutional analysis might have been more friendly toward allowing personal jurisdiction, because arguably any constitutional constraints would flow from the Fifth Amendment rather than the Fourteenth Amendment. See *BNSF Respondents' Brief* at 36 ("[A]ny due process limitations that apply to congress's jurisdictional choices stem not from the Fourteenth Amendment, but from the Fifth Amendment as it applies to exercises of federal authority."). Under the Fifth Amendment due process analysis, it is the defendant's contacts with the United States as a whole—rather than particular states—that are relevant. See, e.g., *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997); 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1068.1.

<sup>110</sup> 57 N.E.3d 656, 667 (Ill. App. 2016).

<sup>111</sup> \_\_\_ N.E.3d \_\_\_, 2017 IL 121281 (Ill. 2017). Another example is *Barriere v. Juluca*, 2014 WL 652831 (S.D. Fla. 2014), which found an Anguillan corporation subject to general jurisdiction in Florida based on the fact that it maintained a sales office in Florida, had its assets managed by a Florida based agent, and had contracted with an American business with sales offices in Florida to promote its properties and to provide reservation services. This decision seems in tension, however, with a more recent Eleventh Circuit decision, *Carmouche v. Tamborlee Management, Inc.*, 789 F.3d 1201 (2015), which found in a very similar factual situation that the Supreme Court's *Daimler* decision foreclosed general jurisdiction.

<sup>112</sup> See *Tyrrell*, 373 P.3d at 6 (emphasizing that "*Daimler* addressed 'the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.');" *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319 (W. Va. 2016) ("*Daimler* involved an unusual fact setting with no connection whatsoever to the United States...Notably, *Daimler*, *Goodyear*, and *Helicopteros* all involved international considerations...In the instant matter, we are not confronted with issues of international rapport, friction, or comity.>").

<sup>113</sup> See *supra* note 108.

<sup>114</sup> See *BNSF*, 137 S. Ct. at 1559 ("*Daimler*, however, applies to all state-court assertions of general jurisdiction over nonresident defendants; the

constraint does not vary with the type of claim asserted or business enterprise sued.”).

<sup>115</sup> See, e.g., *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990) (applying Minnesota law); *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991) (applying Pennsylvania law); *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 438 (D.N.J. 2015); *Rich Products Corp. v. Bluemke*, 2013 WL 2105953 (W.D.N.Y. 2013).

<sup>116</sup> See, e.g., *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570 (9th Cir. 2011) (interpreting Montana law); *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992) (interpreting Texas law); *WorldCare Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 356 (D. Conn. 2011); *Genuine Parts Company v. Cepec*, 137 A.3d 123, 139 (Del. 2016).

<sup>117</sup> See, e.g., *Acorda Therapeutics Inc. v. Mylan Pharmaceuticals Inc.*, 817 F.3d 755, 770 (Fed. Cir. 2016) (O’Malley, J., concurring) (arguing that the constitution permits general jurisdiction via corporate registration); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 637 (2d Cir. 2016) (arguing that *Goodyear* and *Daimler* “suggest[] that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate ‘consent’—perhaps unwitting—to the exercise of general jurisdiction by state courts, particularly in circumstances where the state’s interests seem limited.”); *Genuine Parts Company v. Cepec*, 137 A.3d 123, 127 (Del. 2016) (finding that the Delaware Supreme Court’s earlier decision that Delaware’s registration law authorized general jurisdiction “collides directly with the U.S. Supreme Court’s holding in *Daimler*”); *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428 (D.N.J. 2015) (“*Daimler* did not discuss in-state service and there was no indication in *Daimler* that the defendant had registered to do business in the state or been served with process there... The Court therefore does not find *Daimler* instructive in the present situation, which principally concerns establishing jurisdiction through consent to service.”).

<sup>118</sup> See *supra* notes 17-19 and accompanying text.

<sup>119</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

<sup>120</sup> See 377 P.3d 874, 877-78 (Cal. 2016).

<sup>121</sup> *Id.* at 890-91.

<sup>122</sup> *Id.* at 889 (citation and internal quotation marks omitted).

<sup>123</sup> *Bristol-Myers*, 137 S. Ct. at 1782.

<sup>124</sup> *Id.* at 1781.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (quoting *Walden*, 134 S. Ct. at 1123) (internal ellipses omitted).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1782. A case that appeared to present issues similar to those addressed in *Bristol-Myers* is *M.M. ex rel. Meyers v. GlaxoSmithKline LLC*, 61 N.E.3d 1026 (Ill. App. 2016), where the state appellate court upheld personal jurisdiction in Illinois even as to non-Illinois plaintiffs. The Illinois Supreme Court denied review, see *M.M. v. GlaxoSmithKline LLC*, 65 N.E.3d 842 (Ill. 2016), and the defendants filed a U.S. Supreme Court petition for certiorari prior to the Court’s *Bristol-Myers* decision. The U.S. Supreme Court ultimately denied certiorari, leaving the lower court’s decision in place notwithstanding *Bristol Myers*. See *GlaxoSmithKline LLC v. M.M. ex rel. Meyers*, \_\_\_ S. Ct. \_\_\_, No. 16-1171, 2017 WL 1153625 (U.S. 2017) (denying petition for certiorari).

<sup>129</sup> *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

<sup>130</sup> *Id.*

<sup>131</sup> See *id.* at 1783 (majority opinion) (“Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware.”).

<sup>132</sup> *Id.* at 1789 (Sotomayor, J., dissenting) (“What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States?”).

<sup>133</sup> *Id.* (“[I]t is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are ‘at home,’ and so no State in which the suit can proceed.”).

<sup>134</sup> *Id.* at 1788.

<sup>135</sup> *Id.* at 1789 n.4 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002)) (“The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”).

## Oral Remarks of Professor Steinman

Thanks to the Pound Institute for inviting me to come and participate in this Forum. I am really thrilled to be up here with this terrific group of panelists. And of course, it is fantastic to have a whole day to talk about personal jurisdiction.

Now, obviously, one reason that we are talking about personal jurisdiction is because it has been getting a lot more attention from the U.S. Supreme Court. This harkens back to an earlier period of very heavy traffic from the Supreme Court back in the late '70s, throughout the 1980s. The Court was issuing multiple decisions per year on personal jurisdiction. You had justices so riled up that they were writing dissents from denials of cert petitions. And then in 1990, they just stopped. For more than 20 years there was nothing from the Supreme Court on personal jurisdiction.

One theory for why this happened is that there were two cases, *Asahi* in 1987<sup>1</sup> and *Burnham* in 1990,<sup>2</sup> where Justice Stevens declined to join competing four-Justice coalitions on some important broader issues, leaving the Court without a majority opinion. This theory finds some support in the fact that, during the very first term after Justice Kagan replaced Justice Stevens, the Court granted cert in two personal jurisdiction cases. Those were, of course, *Goodyear*<sup>3</sup> and *McIntyre*.<sup>4</sup>

Now, personal jurisdiction is back. It's so hot right now. The Supreme Court has decided six cases over the last six years, including the two cases decided just at the end of this most recent term.<sup>5</sup> All six of these cases rejected personal jurisdiction. But it is important to look carefully at the reasoning in these cases. I think what we will see is that there are some areas where arguments in favor of personal jurisdiction are on much more solid footing and others where it is going to be on much shakier ground. The way recent case law is unfolding, a lot rides on the distinction between specific jurisdiction and general jurisdiction.

Personal jurisdiction is back.  
It's so hot right now.

A lot rides on the distinction between  
specific jurisdiction and general jurisdiction.

With specific jurisdiction, there has to be an affiliation between the forum and the underlying controversy. That can include where the suit arises out of or relates to the defendant's contacts with the forum state or there is relevant activity that takes place in the forum state.

General jurisdiction, though, allows a court to hear any and all claims against a defendant. But as we will be discussing, the defendant's contacts have to be much more pervasive.

### SPECIFIC JURISDICTION

Let's talk about specific jurisdiction first. I think the most important case in this recent batch that involves specific jurisdiction was the very first one decided by the Supreme Court in this new wave—the 2011 decision in *J. McIntyre v. Nicastro*. The plaintiff here was a New Jersey plaintiff who lost several fingers courtesy of a metal shearing machine. He sued the British manufacturer of that machine, J. McIntyre Machinery Limited, in a New Jersey State Court. J. McIntyre had contracted with an Ohio distributor to sell its machines throughout the U.S. and the British manufacturer had sent representatives to trade shows in various U.S. cities—but not, as it happened, in New Jersey.

It turned out that only one machine was sold to a New Jersey customer, which of course was Mr. Nicaastro's employer.

The basis for jurisdiction in a case like this is sometimes called a "stream of commerce" theory, because the defendant is not selling directly to the forum state. Rather, the product reaches the forum state through the so-called stream of commerce. There is support for this theory in some of the Court's older case law. A 1980 decision, *World-Wide Volkswagen*,<sup>6</sup> that you all are probably familiar with, observed that, "if the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other States, it is not unreasonable to subject it to suit in one of those States" if the defective merchandise causes injury there.<sup>7</sup>

When the injury that is the basis for the claim occurs in the forum state, that is surely an affiliation between the forum and the underlying controversy.

The Supreme Court, in many ways, has struggled to provide clarity on how to approach these stream-of-commerce cases, but there is no question that these cases would go into "specific jurisdiction" basket. That's because, when the injury that is the basis for the claim occurs in the forum state, that is surely an affiliation between the forum and the underlying controversy. So what we are really debating is whether we have the minimum contacts with New Jersey through the stream of commerce.

What happens in *McIntyre*? The Supreme Court decides by a 6-to-3 vote that there is not jurisdiction in New Jersey, but there is no majority opinion. The Court splits 4 to 2 to 3. This odd breakdown does suggest that maybe it was not really fair to blame Justice Stevens for some of the inconclusive decisions of the late '80s and early '90s. Our current Supreme Court justices failed to get a majority opinion when they took a crack at these issues two decades later.

What we have in *McIntyre* is a four-justice plurality led by Justice Kennedy. Then we have a three-justice dissent authored by Justice Ginsburg. And then Justices Breyer and Alito tipped the scale by providing two more votes against jurisdiction.

How does this all break down? Kennedy's plurality opinion recognizes that a defendant can establish minimum contacts with the forum state through the transmission of goods, but only, in his words, "where the defendant can be said to have targeted the forum."<sup>8</sup>

This requires, according to Kennedy, a forum-by-forum or sovereign-by-sovereign analysis. He ends up concluding that J. McIntyre had targeted the U.S. as a whole, but not the particular sovereign of New Jersey.

J. McIntyre was purposefully availing itself of the entire U.S. market, not just a single state or some discrete collection of states.

Ginsburg, in dissent, looks at this very differently. She says the machine arrived at the New Jersey workplace, not randomly or fortuitously, but as a result of the U.S. connections and distribution system that the British manufacturer deliberately arranged. J. McIntyre was purposefully availing itself of the entire U.S. market, not just a single state or some discrete collection of states.

To paraphrase the dissent's view: We all know that sometimes the whole can be greater than the sum of its parts, but it surely cannot be *less* than the sum of its parts! If you are purposefully seeking to serve the market for the entire United States, you are necessarily seeking to serve the states that comprise the United States, which, the last time I checked, includes New Jersey.



That gets us to the tie-breaking concurring opinion in *McIntyre*. Even though Breyer and Alito agree with the result reached by the plurality, they specifically rejected several aspects of Kennedy’s opinion, including what they called Kennedy’s “strict rule” forbidding jurisdiction where a defendant cannot be said to have targeted the forum.

What I think is really interesting is that the concurring justices did not take issue with any aspect of Ginsburg’s legal reasoning. The disagreement was really about the factual record. The Ginsburg dissent considered, for example, a list of New Jersey businesses who would attend these trade shows that the British manufacturer would come to in the United States. The dissent also noted that New Jersey had more scrap metal processing activity than any state in the United States.

Justice Breyer recognized that, if that information had been in the record, perhaps a different result would have been reached. But the concurring opinion thought it was not proper to consider that information, and therefore it couldn’t be said that the British manufacturer had delivered its goods in the stream of commerce with the expectation that they will be purchased by New Jersey users.

There has yet to be a fundamental shift in the Court’s approach to minimum contacts in this stream of commerce context.

The upshot is that there has yet to be a fundamental shift in the Court’s approach to minimum contacts in this stream of commerce context. Kennedy’s seemingly more restrictive approach does not get five votes. And the tie-breaking concurrence leaves open the possibility that a slightly more robust record about the market in the forum state could have made a difference—perhaps even when only one product ended up in the forum state.

## GENERAL JURISDICTION

It is the Supreme Court’s approach to general jurisdiction that I think has undergone some important changes. Until these recent cases, it was generally assumed that if the defendant was a big company and they were doing business throughout the United States, they would probably be subject to general jurisdiction in just about every single state in the Union. This was sometimes known as “doing business” jurisdiction.

The Court has now articulated what appears to be a more restrictive test.

But the Court has now articulated what appears to be a more restrictive test, as we discussed in the morning panel. The contacts have to be such that the defendant is essentially “at home” in the forum state. While the Court has recognized the paradigm fora for general jurisdiction as (1) the corporation’s principal place of business, (2) its state of incorporation and (3) an individual’s domicile, it has also said that those are not necessarily exclusive. There might hypothetically be some other place where a defendant would be subject to general jurisdiction, but at this point we do not really know where that is. In every case that the Supreme Court has taken on this issue, it has rejected general jurisdiction.

Let’s look quickly at these more recent cases. The first one was *Goodyear*. What was interesting about *Goodyear*, of course, is that the contacts that were invoked to justify general jurisdiction were these “stream of commerce” type contacts. The Court unanimously said that that is not enough to justify general jurisdiction. And one of the lines that Justice Ginsburg writes is that “even regularly occurring sales of a product in a state will not justify the exercise of jurisdiction over a claim unrelated to those sales.”<sup>9</sup>

The interesting question after *Goodyear* was: what if the contacts of the defendant are more robust than that? What if the defendant actually has some physical operations in the forum state? Would that be enough to be essentially ‘at home’ there?

That question got some attention in the 2014 *Daimler*<sup>10</sup> decision, but ultimately the result was the same. This was a little bit more complicated because Daimler AG’s presence in the United States was through its subsidiary, Mercedes Benz USA. The Court had some fairly unsympathetic things to say about the way the Ninth Court attributed Mercedes Benz USA’s contacts to Daimler. But Ginsburg goes on to conclude that even if we assume that all of those contacts would be attributable to Daimler AG, it would not be enough for general jurisdiction.

And of course, Justice Ginsburg’s key observation here was that, even though we are dealing with a pretty enormous amount of activity (\$4.6 billion in sales as well as numerous physical operations in California), it is not enough just to look at the magnitude of the defendant’s contacts. You have to look at their activities in their entirety. She says a corporation that operates in many places can scarcely be deemed “at home” in all of them.

Justice Ginsburg’s key observation was that it is not enough just to look at the magnitude of the defendant’s contacts. You have to look at their activities in their entirety.

It is on this issue where Justice Sotomayor starts to push back. She has a fantastic line in her *Daimler* concurrence that I want to mention. She says, “[i]n recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly ‘too big to fail’; today the Court deems Daimler ‘too big for general jurisdiction.’”<sup>11</sup>

“In recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly ‘too big to fail’; today the Court deems Daimler ‘too big for general jurisdiction.’”

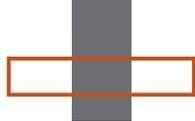
—Justice Sonia Sotomayor

Too big for general jurisdiction! That’s a fair critique. Given the way the majority looks at this, the problem was not that Daimler’s California contacts were too small. The problem was that its other contacts were too big. Sotomayor’s view is that whether a defendant is at home in the forum should depend on the extensiveness of its contacts *with that forum*. A case for general jurisdiction should not be weaker simply because the defendant has extensive contacts in other states or even in other countries.

Let’s move on to the 2017 cases. I am not going to spend too much time on *BNSF*.<sup>12</sup> It is very much a reapplication of *Daimler* with a similar result, finding that general jurisdiction is not appropriate.

I think what may be the more important decision going forward is *Bristol-Myers Squibb*.<sup>13</sup> *Bristol-Myers* begins to tackle an issue that is especially important given everything we have talked about so far. Right now, general jurisdiction is nearly impossible to obtain outside these paradigm fora that the Supreme Court has suggested: So getting personal jurisdiction is often going to hinge on fitting your case into the specific jurisdiction box.

What happened in *Bristol-Myers Squibb* was that nearly 700 plaintiffs from 34 states sued for injuries related to Plavix medication in a California court. Only 86 of these plaintiffs were from California, but all of the plaintiffs were pursuing identical theories of liability. Of course, there was no dispute that California would have specific jurisdiction with respect to the California plaintiffs. The issue was: what about the non-California plaintiffs? Again, by an 8-to-1 vote, the Court, and again with Justice Sotomayor’s lone dissent, concluded that, as to the



non-California plaintiffs, this case had to be looked at as a general jurisdiction case. Justice Alito observes that the mere fact that some plaintiffs were prescribed, and obtained, and ingested Plavix in California does not allow the state to assert specific jurisdiction over the non-residents' claims.

This is particularly bad news, I think, for attempts to aggregate nationwide groups of plaintiffs in a single forum. Justice Sotomayor spells this out very clearly in her dissent, although she does make an interesting point that the majority does not foreclose treating a class action differently. That is, if you have an in-state plaintiff as the named plaintiff in a class action suing on behalf of a nationwide class, there is at least an argument that no separate jurisdictional inquiry would be required for the absent members of that class.

*Bristol-Myers* is particularly bad news for attempts to aggregate nationwide groups of plaintiffs in a single forum.

But it should be emphasized that the *Bristol-Myers* decision does not necessarily mean bad news for plaintiffs who do want to sue in the state where they live and the state where they were injured. The *Bristol-Myers* majority emphasized that non-California plaintiffs had not claimed to have suffered any harm in the forum state.

I think if you look at *Bristol-Myers* in connection with a case like *McIntyre*, and you combine that with an understanding that even *McIntyre* can allow for specific jurisdiction in cases where there is a market for the defendant's products in the forum state, and the defendant is taking steps to profit from that market in that forum state, you can assemble an argument for a specific jurisdiction in most cases where the plaintiff suffers injury in that forum state. That in-state injury should be enough of an affiliation with the forum to justify specific jurisdiction even if the defendant's conduct occurred elsewhere.

I will close by emphasizing one other interesting gray area that was flagged in some of the morning panel discussion—the idea that a defendant might consent to jurisdiction by, for example, registering to do business in a particular jurisdiction. That is very much an open question. Many lower court decisions hinge on the specific state laws at issue and whether those laws should even be interpreted to authorize general jurisdiction over a defendant who has registered to do business in that state. Those interpretive questions are theoretically distinct from the new constitutional inquiry for general jurisdiction, although some state courts have noted that constitutional concerns counsel in favor of interpreting those state laws narrowly.

## Comments by Panelists

### PROFESSOR LONNY HOFFMAN

I am delighted to be here to comment on Professor Steinman's paper. Adam and I have known each other for many years. He is truly one of the clearest thinkers that we have. His paper on personal jurisdiction, I think you will agree with me, is no exception. It really is hard to find a more concise and penetrating look at the cases than what Professor Steinman gives you.

I want to add to his paper and to his remarks today by focusing my own remarks on comments that are likely to be less diplomatic. But perhaps in my willingness to step out a bit, there may be a couple of pieces of advice worth passing along.

Before I get to these two pieces of advice, it is probably helpful to say that I am deriving them from several of the Supreme Court cases that Professor Steinman has been talking about—to be more precise, I am deriving them based on the lower court decisions that the Supreme Court reversed in these cases. To put it bluntly, I think that these lower court decisions are really wonderful examples of exactly what a lower court should *not* do in its judicial analysis.

I will begin with the *Goodyear* case. The opinion that the Supreme Court reversed was a decision by the North Carolina Court of Appeals that, as Adam suggested, terribly confused specific and general jurisdiction. Really, it just mangled these two doctrines. If this were a law school exam, I think it is fair to say the student might have flunked.

The lower court took a theory of specific jurisdiction in trying to answer a particular question that stream-of-commerce phrase is meant to get at, which is what to do when you have a foreign, distant manufacturer or distributor whose product ends up causing harm in some other place. How do we set the limits? How far is jurisdiction going to reach?

The lower court ended up using that test to decide the very different question, as the Supreme Court has told us for many years, as to whether there is general jurisdiction—or, as Justice Ginsburg now calls it, all-purpose jurisdiction—over the defendant. That conflating of theories of specific and general jurisdiction was really a big problem in *Goodyear*, and it was no surprise that the U.S. Supreme Court came out the way it did.

#### First Piece of Advice

The *Goodyear* case, I think, helps me to introduce my first piece of really simple, but I think helpful, advice, which is that you have to stick to the basics and know them well. Of course, there are going to be plenty of unresolved questions still out there to answer. Professor Steinman has talked about a number of them, from registration statutes to all sorts of questions relating to the relationship between a claim and the context, for specific jurisdiction purposes. Absolutely.

You have to stick to the basics and know them well.

But it is important to remember, I think, that these sorts of cases are the exception. There is a good deal of ground that the Supreme Court has settled, and that is especially true today of general jurisdiction.



As we have been saying, the Court has made it pretty darn clear today that you can get general jurisdiction over a domestic corporation in only two places: the place of incorporation, and the principal place where they do business. Now, it is true that they have left open some narrow potential categories of extraordinary cases where we might also extend jurisdiction.

But in truth, it is likely that, if it is not a null set, it is at least almost certainly limited to foreign corporations who do the bulk of their business outside of the United States. And even there, you are going to have to have a very heavy showing to be able to establish general jurisdiction in that case.

Indeed, the Supreme Court's most recent general jurisdiction case, the *BNSF v. Tyrrell* case, I think is another example of what I am talking about. It was certainly nothing like the lower court opinion in the *Goodyear* case. But I must say that it was not very hard to predict, it seemed to me, that the Court was going to be reversing the Montana Supreme Court in this case.

With an accident that did not occur in Montana, to a plaintiff who did not reside there, brought against a domestic defendant who was not incorporated there and did not have its principal place of business there, the Supreme Court just was not going to find jurisdiction, and it certainly was not going to find general jurisdiction—which, I should add, was the only basis that went forward. The Court acknowledged that specific jurisdiction was unavailable after its decisions in the *Goodyear* and *Daimler* cases.

## Second Piece of Advice

On to my second piece of advice, which is equally simple: Watch out for lawyers who urge you to push the boundaries of the law too far. *Goodyear*, again, is a great example of this, because of another argument that the plaintiff's lawyers made below that did not get much play in the Supreme Court: they asked the lower court to perform a kind of reverse veil-piercing, to attribute the forum contacts of the parent company to its foreign subsidiaries.

Borrowing corporate law doctrines for jurisdictional purposes is controversial enough. I have written before that if you are going to do it, it is almost certainly the case that it should be limited to specific jurisdiction applications, not general jurisdiction matter. Although we neither have time nor space to talk today about why that is, one does not need to get deeply into the intricacies of jurisdictional law to realize that this kind of reverse veil-piercing argument that the lawyers were urging in *Goodyear* was very unusual, and very hard to defend. This was, in other words, a bridge a little too far, that the plaintiff's lawyers never should have asked the Court to go out on.

Watch out for lawyers who urge you to push the boundaries of the law too far. *Goodyear* is a great example of this.

In case, by the way, you think that I am just picking on state court judges and lawyers, consider the *Daimler v. Bauman* case, where the plaintiff's lawyers, to my mind, made equally wacky arguments. And the Ninth Circuit judges even went along with them. In *Daimler*, the lawyers were urging a kind of double dose of attribution. They layered their substantive theory of liability. They argued that the parent company should be liable for the acts of one of its subsidiaries, a subsidiary that it had in Argentina for acts that it did in the 1970s. They wanted to layer that on top of their jurisdictional agency theory, by which they wanted to attribute to the parent the acts of another totally different subsidiary, Mercedes Benz of USA in California. There was just no way, with the current composition of the Supreme Court, that that kind of intricate dance was ever going to fly.

I am going to end by saying I am certainly not arguing against creativity. And Lord knows, there is a lot of play in the joints when it comes to due process limits. And I will add, on top of that, that I definitely agree that we have over-Constitutionalized this entire area of the law. It is absurd to suggest that the burdens of litigating in distant fora are the same today as they were when *International Shoe* was decided in 1945, let alone from when the Court first introduced due process into this conversation back in 1878 in the *Pennoyer* case.

We have over-Constitutionalized this entire area of the law.

When I say you should watch out for lawyers who make extravagant arguments to you, I am talking about lawyers on both sides of the aisle. But with so many worthwhile places where creative lawyers and thoughtful judges should be pushing the law, we pay a heavy price when arguments go too far.

I cannot ever help but smile because when I think of lawyers and judges who come up with preposterous positions, I always think of one of my teachers, the great Russell Weintraub, and what he would say. He passed away a couple of years ago, but I can still remember him vividly. He would just give you a wonderful exasperated look, and sigh, and invariably he would quote Carl Sandburg's memorable question:

Singers of songs and dreamers of plays  
Build a house no wind blows over.  
The lawyers—tell me why a hearse horse snickers hauling a lawyer's bones.<sup>15</sup>

Thank you.

## HONORABLE JENNY RIVERA

Before turning to my comments on the paper, I am honored to recognize my colleague, Judge Sheila Abdus-Salaam, who passed away recently. It has been a tremendous loss to the entire legal community in the State of New York and to the members of the Court of Appeals with whom she worked so closely.

### In Honor of Judge Sheila Abdus-Salaam

If Judge Abdus-Salaam were here, she would be asking what the core values are that are represented by the Due Process Clause, and what is the ultimate goal of *International Shoe*.

Judge Abdus-Salaam was a regular participant in the Pound Forums. I know that she enjoyed these opportunities to read the papers, hear the presentations, and candidly discuss the topics with other jurists. I remember when I would see her here, she always had a big smile on and was very gracious to everyone. Having served with her on our Court, I can say that she was intellectually gifted and a true colleague, always prepared to engage in our discussions of complex legal issues. She focused both on the doctrine and on what would constitute a fair outcome. She considered

the practical impact of our decisions on litigants and the broader population. I know that, if she were here, she would be asking what the core values are that are represented by the Due Process Clause, and what is the ultimate goal of *International Shoe*.

I thank the Pound Institute for inviting me to briefly recognize my all-too-wonderful former colleague. In memory of her spirit, I now turn to the paper and the panel discussion.



I first want to thank Professor Steinman. I very much enjoyed reading the paper. I am in a unique position, in that I am a former academic who actually taught civil procedure for many years. It was quite enjoyable to jump back into a former role of thinking about these issues like a law professor.

However, my comments are limited given my current position as a member of our State's high court. Many of the questions that Professor Steinman poses in the paper are ones I cannot answer because, they may be the same questions presented in a case that comes before me. To the extent I can comment I hope to bridge this morning's discussion with the issues and concerns we are addressing this afternoon.

## Does a Corporation have a “Home”?

I would start, if I may, with my own questions, and I hope Professor Steinman and all of you will indulge me, because it appears to me that the Supreme Court has now determined that, in terms of personal jurisdiction, it will treat a corporate defendant the same as a natural person. I find that a very difficult analogy to accept and understand. I hope that, during the response you will comment on this approach because, of course, corporations are not natural persons. Corporations are a legal fiction. As such, they are subject to whatever legal limits we place on them that we think are appropriate to ensure, first, that people are treated fairly, and second, but that corporations are able accomplish their profit-making goal within our corporate and capitalist structure. Corporations exist based on what the law says, and they should reflect our values and our thoughts of how this corporate fiction benefits our economy and system of government.

How can a corporation be “at home”? Only a natural person really has a home.

In that sense, I pose the question back. How can a corporation be “at home”? Only a natural person really has a home. You could say, of course, that a corporation has a place where one might easily be able to identify some type of functions that the corporation has—whether it be its headquarters, a principal place of business or a plant factory. Or, if we continue to indulge a legal fiction, we might say that the business is incorporated where it has been “born” meaning where it was created. While this approach gives us some sense of what is a corporate identity, I still find the idea that a corporation is at “home” to be challenging concept. I would welcome your response and thoughts on that, especially given that corporations and humans do not share a common purpose defining their respective existence.

That is to say, a corporation's sole purpose is making profits for their shareholders and increasing the value of the corporate entity. While individuals may seek to accumulate resources for a better life, that is not equivalent to the corporate goal. At least I do not think the law has ever seen it that way. And how, indeed, does that fit within this personal jurisdiction framework, if at all? Does it really matter?

The other point I want to focus on is the idea that Justice Sotomayor raises in several of the dissents that have been mentioned, and in her concurrence, and which Justice Ginsburg raises in her dissent. They both point out that the more diffuse these contacts are (it is sort of the national contacts, the federal contacts), the more expansive is the impact that the corporate presence has on the economy and on individuals. If that is the case, isn't it counterintuitive to say, then, that after a corporation has made efforts to be much more expansive, there are

The corporate philosophy is to expansively pierce the marketplace. Get your product everywhere.

fewer places in which the corporation should be subject to a lawsuit? Aren't we encouraging this diffuseness of contacts, and, indeed, undermining the majority's analysis in these cases. The majority view is that there are really but so many places where you can say a corporation is at home—whether based on the proportionality test, or incorporation, or principal place of business. There are really only just so many places. We could not possibly try to impose jurisdiction on a corporation in 50 states or the territories or anywhere else because a corporation is really only at home or really only visible in these limited places. Aren't we really encouraging corporations to be bigger than they already are, or at least ignoring the reality that someone mentioned this morning that *of course* corporations are everywhere? Indeed, that is their corporate philosophy—to expansively pierce the marketplace. Get your product everywhere. It strikes me that there is a tension between what the Court is identifying as the way to think of a corporation while also encouraging what I think is the opposite.

From the state perspective, how should a court interpret its state's long-arm statute that has previously been treated as not co-extensive with the federal approach? How will these long-arm statutes now be construed if the judiciary has interpreted the laws as reaching a smaller pool of defendants than those that could be reached under the Supreme Court's 14<sup>th</sup> Amendment jurisprudence? Will state courts be presented with challenges to reconsider a long-arm statute, in the wake of these Supreme Court cases, and interpret the state law as permitting the exercise of personal jurisdiction over more non-domiciliary corporations than had previously been the case?

How far does the plaintiff have to go? To what extent is this an access to justice problem?

I want to return to a comment that was made by a panelist this morning, that I found to be a recurring theme in several of the discussion group rooms. What, if any, concerns should we have about access to justice? In her opinions, Justice Sotomayor has expressed her concern about how the majority decisions impact plaintiffs. How is this, not merely about the defendant's interests versus the plaintiff's interests, but also about an interest of our system in access to justice for those who have been harmed and who have limited resources? Whether we call them poor, or low-income, or just consider those who do not have the resources to travel to a far-flung forum, what does this mean for our modern-day thinking about minimum contacts and due process? Not only how far does the defendant have to go, but also the reverse? How far does the plaintiff have to go? To what extent is this an access to justice problem?

It seems that the dissenters in these cases and the authors of both these papers are correct: there are fewer jurisdictions in which to sue non-resident defendants. That does have an impact, of course, on the plaintiff. We should not ignore if that means there is no place for a plaintiff to go. We can recognize the law and we can say this is a problem and then try to figure it out for ourselves. Does that influence the analysis?

Does the distinction between general jurisdiction and specific jurisdiction really matter, or does it distill to a question of what is fair and what is reasonable?

I am going to turn it back to other panelists if they wish to address that, but certainly also to Professor Steinman to see if he has some thoughts on this access issue he would like to share.

My last point is about the extent to which general jurisdiction and specific jurisdiction have been framed differently. Does the distinction really matter? I know this is in part not necessarily what is so obvious from your paper, but it was raised before. Does the distinction really matter, or does it distill to a question of what is fair and what is reasonable? We are looking for, as the Supreme Court said in *International Shoe*, just minimum



contacts, not ideal contacts, not some number of maximum contacts. That seems to be the direction of some of the language in the Court's decisions. What, if any, meaning does that connection have? Should it really matter whether we are discussing specific jurisdiction versus general jurisdiction?

I look forward to the response.

## TOYJA E. KELLEY

Whenever I speak to a group that I am not familiar with or at least not familiar with me, I like to give a little bit of background on the perspective I come from. Even though I am here as a representative of the defense bar, my practice involves a fair amount of commercial litigation, which puts me on both sides of the "V". I think my views on the issue of personal jurisdiction are really informed by the fact that sometimes I have to think about that issue from the perspective of the plaintiff.

Professor Hoffman raised an issue that really resonates with me. Because I often wear two hats, I am really sensitive to taking a position, or to courts taking a position, that really is detriment to all of my clients, not just my defense clients.

The discussion that we have had today about personal jurisdiction is a good one. There have been a lot of good and interesting issues and points raised. When my defense colleague, Linda Morkan, was talking this morning, I had to rip up a bunch of my papers because she covered a lot of what I had planned to address with you. I will go back for just a second and revisit something that she said because I think it really drives home the perspective from which I come.

This morning there was a lot of discussion about due process. I think Linda drove the point home that it is really, fundamentally about a court versus the defendant. I understand that there is a role and a place for the plaintiff in the analysis, and where the plaintiff has chosen to bring his or her case. But fundamentally, what we are talking about is a court's ability to exercise authority and control over a particular defendant. From my perspective, we should be fine with that. That is the real, fundamental issue here.

Fundamentally, what we are talking about is the court's ability to exercise authority and control over a particular defendant.

I also want to share with you some of my general comments. This issue has come up about access to justice, to the justice system. And personally, I am sensitive to that. I think there is a place in the discussion for what that means. But my view is that this really is not a zero-sum game. I think that when you think about the totality of the personal jurisdiction cases that the courts in this country face, in most of them there clearly is jurisdiction or there clearly is not.

Most plaintiffs will have somewhere to go. There is going to be some forum in which that they can bring their case and resolve their issues.

What we are talking about, and what Professor Steinman's paper focused on, is that subset of cases that I think are a little more difficult for us. But it is not a zero-sum game. Most plaintiffs will have somewhere to go. There is going to be some forum in which that they can bring their case and resolve their issues.

Putting on my plaintiff's lawyer hat for a second, I do not see a problem with putting some burden on a plaintiff (who gets to choose, by and large, the forum in which they bring their cases) to think about jurisdiction and be cognizant of the risk in choosing one jurisdiction versus another jurisdiction in which they could bring their case.

For me, that really would be my response to this question about access to justice. The cases that we are talking about are not such that by and large the plaintiff is not going to have a place to bring them. There are federal courts. There are courts in other jurisdictions. I think Professor Steinman made a comment at the beginning about the jurisprudence in this. Bringing a case in another state is not the same level of difficulty today as it used to be.

In the remaining time that I have, I really want to focus on Professor Steinman's paper. It is a really well-done paper. From our perspective, it succinctly and clearly and simply addresses where we stand today and where we may be heading on the issue of personal jurisdiction.

Professor Steinman suggests in his paper that recent Supreme Court decisions reflect a policy of restricting personal jurisdiction. I am not so sure that that is problematic. Again, particularly if you keep it in the context of the cases that are really the ones that rise to the level of Supreme Court decisions—that's a fairly small subset of this issue. I do not have a problem with restricting jurisdiction.

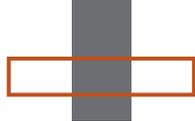
Professor Steinman raises a couple of questions. In the remaining time, I want to focus on those particularly. He raised the question of where, beyond the principle place of business or the state of incorporation, can a defendant be sued. I think that is a really good question. I think that when we are talking about the difficult cases, limiting personal jurisdiction to forums where the injury complained of occurred resonates with this concept of due process that we were talking about earlier this morning. From my perspective, if you are looking for places where you can bring your cases, you should bring it where the injury occurred and where there is a closer connection to the forum state.

I predict that you are going to see more and more states expressly indicate that when a corporation does business in their state, that means they are subjecting the corporation to personal jurisdiction in that state.

And then the last thing Professor Steinman raised is one that until I started reading the papers, I hadn't really thought a lot about. Could a corporate defendant be sued in a state where it is registered to do business, or where it has a resident agent? Admittedly, I am not as familiar with the case law in this particular issue. I predict that you are going to see more and more states expressly indicate that when a corporation does business in their state, that means they are subjecting the corporation to personal jurisdiction in that state. It

does raise a lot of questions, and we talked about it in some of the breakout groups. But I think that that is where we are heading. As the Supreme Court has signaled an indication to be more restrictive, I think you are going to see that. Again, I wear two hats in my practice. I am a trial lawyer, but I spend a fair amount of time advising my clients on corporate formation issues and transactional issues, and analyzing the risk of transactions that they may be in. I do not have a problem saying, "Listen, client. If you register to do business, you are probably going to get sued there." My clients tend to want to control risk and be aware of their risks. If they register to do business in a state and that state has indicated to them on the front end (not the back end when some dispute arises, but on the front end) that by registering to do business here, you are going to be subject to litigation here. I can live with that from my perspective. To that extent that those are some of the things that you are thinking about in your cases, that is where I would come out.

I look forward to further discussion.



## MATT WESSLER

It is also an honor for me to be here. When I clerked for a district judge, I remember asking him within the first week what key materials I should read to better understand what I was going to face. He gave me what felt at the time like an 85-page law review article on jurisdiction. I never actually ended up reading it, because it just felt too long and too much of a hurdle. I can think of no better compliment on Professor Steinman's paper than to say that I think you could all go and give your law clerks or your interns this paper, which is discrete, and concise, and one of the clearest explanations of these complicated cases, and allow them to get up to speed on these issues. I certainly would encourage all of you to think about doing that because it is an eminently readable digestion of what has been a long-running and complex area of law.

I am just going to start with a short anecdote. There is actually an old story about when Chief Justice Roberts was a lawyer. For many years, he was an appellate lawyer and he argued many cases in the Supreme Court. I think some 40 arguments. He was regarded as one of the best advocates of his generation. One, he had a fantastic win-loss record in the Court. But as all lawyers will tell you who argue there, and frankly anywhere, you lose some. He was certainly on the wrong end of some of the decisions.

There is a story about one case that he lost up at the Supreme Court, unanimously. He got back to his office that day after hearing about the decision. He called up the client and conveyed the news. "I am sorry. We lost. It was a hard-pitched battle. Sometimes this happens." The client was irate. How could this have happened? I thought we had a chance. You thought we had a chance. We did the moots. It seemed like the moot justices were on our side. He could not understand and was sort of haranguing John Roberts the lawyer for longer, probably, than he had expected. At some point, finally the client said, "I can understand losing, but why did we lose nine-nothing?" The chief responded, "Because there were only nine of them."

I say this because my comments today are largely about what impact I think this last case, *Bristol-Myers*, really has on the landscape of specific jurisdiction. It is worth noting that it was an 8-1 decision. It was not unanimous. It is not 9-0. Justice Sotomayor, as she has in earlier decisions, has been the lone dissenter with a substantially divergent view of how these issues should play out.

It is significant, I think, and worth pausing to note, that every other justice on the Supreme Court had no difficulty signing on to this opinion by Justice Alito. One might wonder why. I would submit to everybody in this room that the answer is that it really did not break any new ground. It was, in fact, nothing more than, as Justice Alito said in his own opinion, "straightforward application in this case of settled principles of personal jurisdiction."<sup>16</sup>

I think that there is a tendency, in the immediate aftermath of Supreme Court decisions, for the winning side to take the decision and fan out across the country and waive it around and say that "There was a major decision issued by the Supreme Court last week, or last month, or last year. This is the first time that you, your honors, are going to be addressing this issue in the context of that opinion. When the Supreme Court decides to take a case and issue a decision, it erects a new rule, and you have to think about this in a different light."

A close and faithful reading of the *Bristol-Myers* decision reveals actually that this is really nothing more than exactly what Alito said—the application of settled law to a specific situation that arose within California.

I think in this context, that is certainly the truth in many cases. The Court does do something that meaningfully changes the law. But I think that in this particular case, a close and faithful reading of the *Bristol-Myers* decision reveals actually that this is really nothing more than exactly what Alito said: The application of settled law to a specific situation that arose within California.

To be fair, did it change the law? Yes—in California. And I note that there are three California judges in the audience. I am sorry to say that, for you three, this *does* matter, and it matters significantly, because the Supreme Court clearly reversed and overruled the sliding scale test that California long ago adopted and had long applied in the context of specific jurisdiction.

But the reasons the Supreme Court gave for doing that, I think, are really quite mundane. In other words, what the Court said in *Bristol-Myers* is that, essentially, this sliding scale test that California has embraced for years as a way to determine whether specific jurisdiction has been met is nothing more than a basic category error, in much the same way that the Court reversed the North Carolina court in *Goodyear*. When it went there, it held that the North Carolina court had applied a specific jurisdiction principle to a question of general jurisdiction. What the Supreme Court in *Bristol-Meyers* said was that the California court applied basically—this is a direct quote—“a loose and spurious form of general jurisdiction to a specific jurisdiction question.”

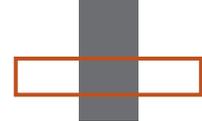
But that principle, that premise, that reason why California’s sliding scale test violates the due process clause simply has very little application outside the boundaries of California. Why is that? It is because almost no other state in this country has adopted the sliding scale test for specific jurisdiction.

Almost no other state in this country has adopted the sliding scale test for specific jurisdiction.

Now, there are some states, and I am sure many of you actually know this quite well, that have dabbled on the edges of the sliding scale test, Missouri being one of them. And you can read some law review articles that suggest that a handful of other states, the District of Columbia in particular, have also perhaps suggested that they approach questions of specific jurisdiction in similar ways. But you can go onto Westlaw, or send your law clerk to do it, and ask them to look and see if your jurisdiction actually has adopted this approach. I would hazard a guess to say that the answer is “No.” By and large, most jurisdictions have before *Bristol-Myers*, and will continue after *Bristol-Myers*, to apply a perfectly legitimate constitutional understanding of specific jurisdiction. It takes different forms.

The Supreme Court has never provided any actual definition of that phrase, “arising out of or relating to.”

Some jurisdictions have applied what they call a “proximate cause” test for specific jurisdictions. Others apply what they call a “but for” test. For the vast majority of jurisdictions, states apply the “substantial connection” test, which again builds off of and turns on the Supreme Court’s own explanation, its description of specific jurisdiction, as requiring a connection—that the conduct or contacts of a defendant and a claim arise out of or are connected to each other. The Supreme Court, just to be clear, has never provided any actual definition of that phrase, “arising out of or relating to.” I think that is quite significant. In *Bristol-Myers Squibb*, the Court again declined, refrained from actually defining those terms. It has, in essence, allowed you all, in your own states, to decide and determine what approach, what standard, what test you apply when it comes to questions of personal jurisdiction, so long as that test, that standard, meets or rises above what is the irreducible constitutional floor.



And all the majority in *Bristol-Myers*, I think, holds is that California's approach, which relaxes the substantial connection, essentially says a defendant can have quite a lot of contact and conduct within the state. But the more that it has, the less connection you need to have with the actual claim up to even a vanishingly small point where that connection is essentially severed. That does not meet Article III's floor. But beyond that, you all are free to continue to apply the tests that have governed in your jurisdictions for decades without fear or concern that you will somehow be flouting or otherwise failing to follow controlling Supreme Court law.

And I think that this point to me is clear. I am on the plaintiff side. We do a lot of work. We have several cases where we have seen the kind of cautionary tale that we have heard up here from the panel of lawyers, coming into court on both sides and attempting to really push the boundaries of what these cases hold.

I think in the wake of *Bristol-Myers*, many of you can expect to see defendants in particular citing this case as somehow changing the law, reversing the course of your own state's approach to specific jurisdiction.

In the wake of *Bristol-Myers*, many of you can expect to see defendants in particular citing this case as somehow changing the law, reversing the course of your own state's approach to specific jurisdiction.

I will leave you with this: when you see a brief or a motion asking for reconsideration on the basis of *Bristol-Myers*, and arguing that there is no personal jurisdiction to hale this defendant into court, based on some attempt to expand or push the scope or nature or language or text of what Justice Alito wrote in *Bristol-Myers*, the immediate response should be to go back to the decision itself and to carefully read the language, the approach that the Court took there and compare it to the approach and the standard that has applied in your own jurisdictions. I think if you do that faithfully, and if you approach *Bristol-Myers* as I think everyone should, with the kind of modest effort to read the decision, not as expansively possible, not in such a way that there are actually elephants hiding in the mouse holes of that opinion, but instead based on the clear language that the Court used, you will see that by and large across most of this country, the law has not changed. The kinds of cases that would satisfy personal jurisdiction and specific jurisdiction, in particular, before *Bristol-Myers* will still be constitutional, and should be allowed to survive even after it.

## Response by Professor Steinman

I really appreciate all those comments and questions. This has given me a lot to think about and I think it has been a great set of exchanges and ideas.

I will start with a few words in response to Lonny’s observation. I think it is definitely true that the kinds of cases that get the U.S. Supreme Court’s attention are the ones that are written in a particular way. One other example that I thought of might be *McIntyre*. I do not have the exact language in front of me, but I believe the New Jersey Supreme Court’s decision in *McIntyre* that went up to the U.S. Supreme Court had some language to the effect that, “as long as this is a stream-of-commerce case, we do not need to have minimum contacts.”<sup>16</sup> That is a huge red flag. That is not right. But it does not mean the New Jersey Supreme Court’s ultimate decision was not right. The correct way to think of this is that when a defendant is seeking to serve the market in the forum state and the products reach the forum state and cause injury there, that is the contact by the defendant that satisfies the constitution. How the opinion gets written, I think, is really important.

In response to some of Judge Rivera’s observations and questions, the notion that we treat corporate defendants like natural individuals is an interesting and controversial point. One aspect of the current doctrine that is fascinating is that in many ways, corporations are treated *more* favorably than natural persons. The point came up in the morning session that, under *Burnham v. Superior Court*,<sup>17</sup> if I am an individual and I travel here to Boston, Massachusetts and I get served with process while I am here, I am subject to general jurisdiction here. The lawsuit can have nothing to do with my activities in Massachusetts. A corporation does not have that. They can conduct activities throughout the country and, under the current doctrine, they are only subject to general jurisdiction in their principal place of business and their state of incorporation.

How the opinion gets written, I think, is really important.

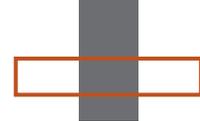
This is one way, I think, to conceptualize favorably the idea that corporate registration can be deemed a basis for general jurisdiction. It is the corporation saying, “I want to be physically present here, doing stuff analogous to a natural person who physically travels to a state,” and thereby expose itself to general jurisdiction.

One of the struggles here—and this gets to some of Toyja’s observations as well—is the question of whether there is another forum where general jurisdiction would be appropriate. It is so hard to answer that, because none of these recent opinions really give a theory for what general jurisdiction is doing, or what the purpose is. I think that, in a lot of ways, Justice Sotomayor has it right. If you have such pervasive activities in the forum, it should not matter that you also have lots of pervasive activities in other fora. You are essentially at home there because of the quantity of your activities. But that is obviously not the answer that the majority of the

Personal jurisdiction is not about finding the best forum. There can be many fora that satisfy the Constitutional test.

Supreme Court is giving us. We have instead what Justice Sotomayor calls the “comparative contacts” approach suggested in *Daimler*. It is not clear, though. Is 30 percent of your activity enough? Is 40 percent of your activity enough? Does it have to be 75 percent? We don’t know.

It is absolutely correct, though, that personal jurisdiction is not about finding the best forum. There can be many fora that satisfy the Constitutional test. But one of the things that I think folks have criticized about decisions like *McIntyre v. Nicastro* is, if you read it too narrowly, you seem to be taking away jurisdiction in what clearly would be the best forum. New Jersey is the best forum to adjudicate a claim about an injury that happened in New Jersey caused by a product sold to a



customer in New Jersey. If you take Kennedy’s approach to its full extent, you would have to go to Ohio to sue the British manufacturer, just because the distributor happened to be in Ohio. That does not make any sense. In my mind, that is one more reason to read some of these cases in a way that is more susceptible to finding jurisdiction in the place where the injury actually occurs.

Getting back to some of Toyja’s comments (and some of this echoes Linda’s comments from earlier in the day), I am not sure the debate is about whether we focus on the defendant or focus on the plaintiff. I am not sure that is really what is dispositive in these cases. Justice Ginsburg’s dissent in *McIntyre* was not “I don’t care about the defendant’s contacts. I only care that the plaintiff is in New Jersey and that is what’s fair.” Her argument was that that defendant made purposeful contacts with New Jersey when it set up a distribution mechanism that accessed the entire U.S. market. That is an argument based on the defendant’s contacts, and it is a perfectly plausible argument—provided, perhaps, that we have a stronger record of the market in New Jersey.

One example I give in another article I have written<sup>18</sup> is that every time you are a defendant that targets the U.S. market, it does not necessarily mean that you are going to be subjected to jurisdiction in all 50 states. We may need to have some information about the market in the forum state. If I am a foreign manufacturer of grapefruit harvesting equipment, and I get a distributor to target the whole United States, I am still not expecting sales to North Dakota where they do not grow grapefruit. But if I am a scrap metal machine manufacturer, and I am targeting the whole United States market, of course there are going to be customers, and there is going to be a market, in New Jersey. That is not a surprise. That is not random. That is not fortuitous. That should be sufficient under the stream-of-commerce theory.

Another point that Toyja made that I think is worth addressing: I think he is right that in most cases, there are going to be other fora where a plaintiff can sue. One of the fascinating aspects of personal jurisdiction doctrine, though, is that it does not really care whether or not there are other fora. This Constitutional test, if you take these opinions seriously, has to be satisfied. And even if it could be shown that there is nowhere else that that plaintiff could sue, the Constitution would still act as an obstacle to jurisdiction.

One of the fascinating aspects of personal jurisdiction doctrine is that it does not really care whether or not there are other fora. This Constitutional test, if you take these opinions seriously, has to be satisfied.

I think one way to mitigate problems in those kinds of cases would be to take a more lenient view of what sort of contacts are sufficient to satisfy that Constitutional minimum, and then allow the second prong of the jurisdictional analysis, which is often called the “reasonableness” or “fairness” inquiry, to do the work of protecting a defendant from a particular inconvenient forum. I think that is what that prong is designed to do. I think that is a good way to vindicate many of the values we see in *International Shoe*, while still adhering to what seems to be a defendant-focused inquiry at the minimum contacts phase. And of course, doctrines like *forum non conveniens* can also operate in this space to avoid problematic results.

Finally, on some of Matt’s points. I endorse his suggestion that you give my paper to your clerks. I can speak for myself in saying that I will not insist on any royalties, and I suspect the Pound Institute would not insist on any royalties either.

I think Matt’s observations about the *Bristol-Myers* decision are very well taken. Certainly that decision should not be read as saying that you cannot have any more nationwide class actions. Obviously, with respect

to domestic defendants, those class actions can and should be able to proceed in that defendant's home state, in their state of incorporation or the location of their principal place of business.

*Bristol-Myers* should not be read as saying that you cannot have any more nationwide class actions.

I think it does get interesting, as Justice Sotomayor suggested, if you have a foreign defendant. Where you do not have a fallback paradigm location for general jurisdiction, where could a nationwide class action be brought if a foreign defendant truly is seeking to serve the entire U.S. market with a dangerous product or a fraudulent product and it causes injuries or damages throughout the country?

In a situation like that, I think the thing to be looking for is whether there is some other contact that really can be said to relate to all of the plaintiff's claims. One possibility would be if you imagine a hypothetical nationwide class action against J. McIntyre for thousands of allegedly defective shearing machines that were distributed throughout the United States. Maybe in that case, the location of that U.S. distributor in Ohio would be a purposeful contact with a particular state that relates to everyone's claims insofar as it is that contact that leads to those shearing machines being distributed throughout the United States. That may be a viable option going forward, even after *Bristol-Myers*, in a way that can deal with some of the concerns that were raised earlier—that if we cannot have aggregation, especially in low-value claims, are those claims even economically viable?



## Questions and Comments From the Floor

**Professor Grossi:** I just wanted to make a very quick comment on *Bristol-Myers*. The Supreme Court said that the California Supreme Court had adopted the sliding-scale approach to specific jurisdictions. The more intense the contacts, the less relationship there needs to be between the plaintiff's claim and the defendant's contacts. That approach was rejected. The Court said "it is difficult to square with our precedents." Matt commented on that. But in fact this approach comes from *International Shoe*. It squares perfectly with the precedents. You can find it at pages 316-319 of the opinion.

**Honorable Robert Neal Hunter, North Carolina Court of Appeals:** Given your review of the North Carolina appeals court decision in the *Goodyear* tire cases, where would you have sent the parents of the decedent in that case to receive justice? What state would they have gone to, where jurisdiction could have been obtained?

**Professor Hoffman:** I think that question may have been directed to me. For those who do not know, this was an accident that happened on the way to Charles de Gaulle Airport in Paris. It was a tire made by one of Goodyear's foreign subsidiaries. I do not remember if it was the French or the Turkish or the Luxemburg subsidiary, but it was one of those three. They were all named as defendants in the case. It was a terrible accident, and kids died. The families brought suit in North Carolina, which was where they were from. The question, of course, is a good and important one, but the fact is they were never going to get specific jurisdiction in North Carolina. There are no tires that have anything to do with this accident that were sold in North Carolina. We do not even have the *World-Wide Volkswagen* fact that the accident happened in the forum and the Court said no jurisdiction there in the '80s. They were never going to get specific jurisdiction in North Carolina over any of the defendants, including Goodyear USA. The only option they had was to argue for general jurisdiction.

In *Goodyear* they were never going to get specific jurisdiction in North Carolina over any of the defendants. The only option they had was to argue for general jurisdiction.

But the problem was that, while they had general jurisdiction, at least probably had it under the current law then (and indeed Goodyear USA, the parent company, did not even file an objection to jurisdiction), they did not have jurisdiction over the subsidiaries—and of course that is what the Supreme Court ultimately held. Normally, we do not care about suing the subsidiaries because we have the deep pocket of the parent company. That is a whole other story why they wanted to sue the subsidiaries.

If you wanted to sue the subsidiaries, you were going to have to go overseas. Again, that limits the plaintiff's options considerably, but that has been a function of the jurisdictional law for a long time. I suspect even the most ardent supporters of jurisdiction would agree with that—and by the way, I rarely find myself in a room that I am not on the farthest left-hand side of the spectrum. That is pretty much a universal in my life. I am a Jewish law professor in Houston. I am always on the left. And yet I agree that that is just a function of the law that has been in existence for a long time. I think that is the answer.

**Honorable Terry Jennings, First District Court of Appeals, Texas:** I am a former prosecutor and our intermediate court of appeals has jurisdiction over criminal and civil cases. The question I am about to ask is going to be an oversimplification, and I understand that. But since we are focused on due process and the state's sovereignty, has anybody here ever thought of the concept of the comparison with criminal law? If a

Massachusetts resident takes off and drives in their car and just drives aimlessly throughout the United States and they stop in Texas and they do not even know they are in Texas, they took a wrong turn somewhere, and they commit a crime, they have committed a crime against the peace and dignity of the State of Texas. The State of Texas and the district attorney there is not going to care about the fact that it is inconvenient for this defendant to come defend themselves in Texas. I understand that is a gross oversimplification.

But Professor Hoffman, I'm thinking of the *Azteca v. Ruiz* case.<sup>19</sup> Let's say I have a radio station in New Mexico, and I broadcast defamatory comments about a Texas resident. Why don't those same kind of concepts apply? Why not say that it is against the peace and dignity of the State of Texas? What difference does it really make that it is a civil wrong and not a criminal wrong?

**Professor Steinman:** Just one quick thought on that. In the criminal context, you have to actually get the person into your state to go forward with the prosecution. In many ways, the way the state law is written, you sort of satisfy the constitutional test by virtue of the fact that you have them present there.

You might look at the trend of Supreme Court cases and say, "Maybe *Azteca* is the next case where they are going to cut back on jurisdiction." But it is not quite as simple as that.

I get what you are saying. And obviously in the *Azteca* case, if I remember correctly, jurisdiction was approved, and cert was denied. That is a good example of Lonny's earlier point that it is important how you write the opinion. That was an opinion that, in my mind, was quite well written. So you might look at the trend of Supreme Court cases and say, "Maybe *Azteca* is the next case where they are going to cut back on jurisdiction." But it is not

quite as simple as that. The Court is taking cases that often have red flags in terms of how they are written, but the Court is not necessarily, with the exception of general jurisdiction, signaling a kind of earthquake shift here. It is going to be very case-specific and very fact-specific.

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## Notes

<sup>1</sup> *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

<sup>2</sup> *Burnham v. Superior Court*, 495 U.S. 604 (1990).

<sup>3</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

<sup>4</sup> *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

<sup>5</sup> *Goodyear* (2011); *McIntyre* (2011); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

<sup>6</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>7</sup> 444 U.S. at 297.

<sup>8</sup> 564 U.S. at 881.

<sup>9</sup> 564 U.S. at 930.

<sup>10</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>11</sup> 134 S. Ct. at 764.

<sup>12</sup> *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

<sup>13</sup> *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

<sup>14</sup> Carl Sandburg, "The Lawyers Know Too Much," available at <http://www.bartleby.com/273/91.html> (last visited Dec. 29, 2017).

<sup>15</sup> *Bristol-Myers*, 137 S. Ct. 1773, 1781.

<sup>16</sup> *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 582 (N.J. 2010) (writing that "[w]e do not find that J. McIntyre had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case" but concluding that jurisdiction was proper under "the stream-of-commerce theory of jurisdiction").

<sup>17</sup> 495 U.S. 604 (1990).

<sup>18</sup> Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 481, 512 (2012).

<sup>19</sup> *TV Azteca, S.A.B. De C.V., v. Ruiz*, 490 S.W.3d 29 (Tex. 2016).

## CLOSING PLENARY

**Professor Steinman:** I thank everyone for just a fantastic forum and a great experience. It was so nice to meet all of you and to hear your thoughts on these issues.

My parting word is to suggest that, when you see these decisions from the U.S. Supreme Court, do not over-read them to require you to do things that they do not actually require you to do. Bring your independent judgment to bear on all these issues, because there are difficult questions that will be presented. They are not always squarely answered by these opinions from the nine justices in Washington.

**Professor Grossi:** I have to join Adam in what he said. It was a terrific experience. I tremendously enjoyed talking to you. I never had an opportunity before to interact with so many of you and learn from you.

We do have now an area where you will be experimenting, most likely in the causation part of the analysis. We are sure that you will do a terrific job in keeping it simple. I think Professor Hoffman today gave us a great word of advice when he said we should remember to stick to the basics and to the foundational principles.

Thank you.



## THE JUDGES' COMMENTS

In each of the discussion groups, the judges were invited to consider identical pre-ordained questions relating to the papers and oral remarks. The judges devoted more time to some questions than to others, and they raised other interesting topics.

Remarks made by judges during the discussions are excerpted below, arranged according to the discussion questions. These remarks have been edited for clarity only, and the Forum Reporter did not intentionally alter the substance or apparent intent of any comments. Conversational exchanges among judges are indicated with dashes (—).

The excerpts are individual remarks, not statements of consensus. For general points of convergence that arose out of the discussion groups, please see page 133 of this report. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but we have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

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### How often do you encounter disputes over jurisdiction? Do you see a conflict between the Supreme Court's due process decisions on one hand and state sovereignty on the other hand?

I am on the trial court in my midwestern state, been on the bench for 11 years, and I never had a jurisdictional issue.

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Products liability law is based upon state law. There's no federal products liability law, it's based on state law, even in federal courts. So where you come from, where the defendant is, determines which law applies.

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We changed the rules on joinder more than jurisdiction, because if the whole idea is the principal place of business, what is that? Where do you avail yourself? What are those traditional notions of fair play and justice? And the Supreme Court has kind of changed it, somewhat.

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The Supreme Court itself has suggested that this should be a cutting-edge issue. It is being litigated. The cases are being dismissed in some instances in which there are registration statutes. That is what the plaintiff is basing their briefing on.

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*Bristol-Myers Squibb* was a sit-up-straight kind of reaction where I work. When we saw that, we were trying to figure out what does this all mean. If it is an electronic product, Costco will sell it. If it is a computer, Microsoft will program it. Is everybody else getting off the hook? Then we have empty chair doctrines in my north Pacific state. What happens to that? All of this in the last couple of months has been entertaining to try to figure out where we end up.

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I am from a northwestern state. We are on this again and again and again. I think we've had three cases in the last two years, all of which have turned on trying to carefully interpret *McIntyre* or *Daimler*. As to the sovereignty-versus-due process issue, I guess I find that question a little artificial, because at least my take on the due process analysis is that it is also very much about an individual right. State sovereignty can't wholly answer the question of an individual state's right to hale a non-resident into court under due process analysis.

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It seems to me the law ought to be uniform, first of all. We are the United States and this is a federal Constitutional issue. I don't feel, as a southwestern state government official, that my sovereignty has been stepped on by being told I can't entertain cases that have no connection to my state.

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- Having these issues come up is not a run-of-the-mill, every-day thing. It's unusual enough that when it comes up, I think most judges on my court stop and think, because they can't just say, "Oh, I've done this a million times." But it comes up enough so that, with 14 or 15 judges on our court, there's always at any given time several judges who have a lot of experience in hearing it.
  - It comes up occasionally, but it's not an every-day thing and every time it comes up you have to go back to law school.
  - And review the principles, like *International Shoe*. I haven't encountered any cases with the sort of exotic fact patterns, or fact patterns that as one of the speakers said today lends itself to restrictive applications. You don't get that. It's pretty cut and dry.
- 

All of a sudden the United States Supreme Court is going back, as I think some say, to a 1920s jurisprudence in the face of a modern economy. This is just odd. We have to follow the U.S. Supreme Court. I don't know how you get around the cases, but it's there. And the judicial hierarchy, we're stuck with it.

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- Even when you have a long-arm statute, you have to do your due process analysis. So, we are still impacted by what's happening outside of the statute.
  - As a practitioner and a lawyer, I think that's always what it came down to, is the due process analysis.
  - In our state, even though they meet the minimum contacts test, it still comes down to due process.
- 

I think the Supreme Court's big point was, "What is California doing adopting a state-specific test about the U.S. Constitution if that law is uniform?" So they went out of their way to strike that down. But the states really have to follow the same test when it comes to the federal Constitution. You can't vary from one another.

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## What jurisdictional analysis do you employ in your state? Do you consider "purposeful availment" a universal requirement of the minimum contacts standard? Do you recognize "stream of commerce plus"?

It seems like today, with everything we've done online, that any business that is doing any business is doing business everywhere. That wasn't really discussed in the presentation this morning, but it seemed like that's to me the overriding concern.

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Looking at it from a personal availment perspective, if you hold yourself out to be doing business on the Internet, aren't you purposefully availing yourself of doing business in every state in the union?

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In terms of computers, my goodness. They're all over the place now. What does it mean to purposely avail yourself via computer?

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People talk to a balancing of the interests. I think it's a tough row to hoe to do it under the state constitution, because if you're expanding it to one party's interest, you're lessening it to the other.

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What harm is it for Bristol-Myers to defend against non-California plaintiffs in California when they are defending a whole bunch of claims from California plaintiffs there? What's the harm in keeping everyone together? It's really to make things more difficult for the plaintiffs, to say that the non-California plaintiffs don't have jurisdiction.... I thought that was wrong, because now you're going to make each of these plaintiffs go in different states.

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I guess that's the issue that's going to be pending before the Supreme Court: You inject yourself into all these different markets, advertising drugs, insurance, and other things. Then, when a claimant is injured, then all of a sudden you want to say, "Well, I didn't have minimum contacts; I just advertised there. I didn't intend for people to come for me to have to litigate this in every state."

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—I don't think that putting jurisdictions into boxes of "stream of commerce" or "stream of commerce plus" is a productive enterprise. What we're talking about, fundamentally, is federal Constitutional law, and we should all be following the same federal Constitutional law; it shouldn't vary from state to state.

—Should be following it, and are following it...

—I understand; life isn't perfect, but I wouldn't want to legitimize the imperfection by applying categories.

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Prof. Grossi describes two approaches to personal jurisdiction, one that is fact-based, and another that she considers doctrinal and mechanical. Do you agree? Without regard to the approach your state takes, what do you think are the advantages and disadvantages of the two approaches?

Seems ironic, doesn't it? That you're asking the trial court to fact-match, to find cases—appellate cases—that match their facts rather than focusing on the facts that are presented by the litigants.

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I think what is going on in the individual states and what has come down with the Supreme Court, it is more mechanical. If you've got this, then boom. You make a decision that way, as opposed to going back to an *International Shoe* approach where you would be more flexible.

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—There is a certain appeal to a mechanical test, but you always wanted to know what the facts are.

—I agree.

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- “Mechanical” has sort of a negative connotation. I think on the other side of the scale we saw predictability. That is a more neutral term, and one that we have realized has some value. I don’t think any of us were warming right up to “mechanical.” Its close cousin, “predictability,” does seem to be an appropriate goal. I think we had some consensus about that, although immediately tempered with, “Yeah, but the facts really do matter.” You have got to have predictability, but you can’t ignore the individual facts.
- Really well said. You should be a judge.
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My court doesn’t perceive itself as having the leeway to be creative. We probably really strictly follow the law as we best understand it and apply it to a particular set of facts. It is very fact-driven.

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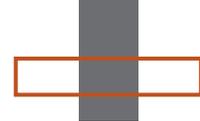
- When I hear words like “fact-based” or “holistic,” what I hear is that any judge can decide on any day, “Well, we are going to talk about purposeful availment today,” or “We are going to talk about stream of commerce today,” or “We are going to talk about stream of commerce plus today;” “Minimum contacts today.” We can kind of do whatever we want to do.
- But if you are mechanical, you can’t do that. It is a little harder to wing it. I see the benefit of that. If you can be holistic and you can be fact-based, you take each case on its own merit. However, we say those things, you can pretty much come up with whatever you want to do that day as opposed to doing what the law would require you to do.
- I think the hope for the mechanical approach is that you would have more predictability and, perhaps, consistency. I think perhaps the downsides from that, though, are the individual facts within a particular case, under certain circumstances, may be overridden by that more mechanical approach. I am not sure that I am a fan of the mechanical approach if it, in fact, limits the ability of courts to sufficiently consider the individual circumstances.
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- I think it is interesting we are talking about being fact-specific, but listening to the panel this morning, I ask: facts related to what, and whom? If you go with defense counsel, she would say, “Well, the facts that are relevant are those that specifically are defendant-centric. That is really all you have to focus on.” Whereas others were saying, “No, you need to look more broadly and balance the interest of the state and the plaintiff.” Even though we all agree the facts matter, we may disagree as to facts relevant to what.
- Yes. I agree.
- That is a really good point. In doing your jurisdictional analysis, at what point do you look beyond what the defendant has done or is doing? Do you start with that? If so, perhaps you get to the end of it and that has decided it. If it doesn’t decide it, then where do you go from there? What do you consider in trying to reach that decision?
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I think we now have a mechanical approach. I think we now have a mechanical approach, coming out of the Supreme Court. And, personally, I think it’s very sad that we do have that. Since when does due process only apply to the defendants?

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- If you want to impose some degree of certainty, some degree of predictability, then you opt for what seems mechanical, mechanistic, but it has its virtues.



—Do you think though that the doctrinal approach favors a defendant? A corporation? I mean, there is predictability, but is it so slanted?

—Well, I don't think it necessarily does. Again, I wish the world were different, but we live in a world where decisions are made by entities like the U.S. Supreme Court, and those decisions will vary from era to era with the composition of the court. That's the design of the system, and you sort of have to live with that. I don't know that there is anything inherent in that system to produce an outcome that's always going to favor corporate defendants. It just so happens, at this particular point in our Constitutional history, because of who's on the court.

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## Following the Supreme Court's decisions in *Daimler* and *McIntyre*, has it become more difficult to establish jurisdiction? If so, how does this impact litigants in your state?

If it didn't restrict it, we wouldn't be talking about it.

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Don't you think for general jurisdiction, now, we are—as state court judges—we are somewhat hamstrung by the U.S. Supreme Court? It does seem to be fairly rigid. It is either the principle place of business or it is the place of incorporation or it is the very, very rare exception where there is such systematic and, you know, continuous contact, but they made it clear that that is going to be very rare exceptions.

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The most recent Supreme Court rulings do not give the opportunity to be as creative and flexible and to apply the standards from *International Shoe*, which pretty much guided this jurisprudence for seventy years.

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It sounds like we are moving towards a system where, at least in injury cases, plaintiffs are going to have to be safe. We are going to have to go into the lion's den and sue wherever the corporation is at home. It sounds like that.

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The thing is you try to get around these things. If you are a good lawyer, you are going to find a way around these. The next wave is coming. The response to *Bristol-Myers Squibb* is being cooked up even as we speak. They are going to find a way to try to get around it. It is going to come up again.

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For general jurisdiction, I think the answer is yes. It is either the principle place of business, place of incorporation, or a very, very rare case to fall within the exception. I think from a general jurisdiction standpoint, the U.S. Supreme Court has made it a lot harder to get general jurisdiction in states other than those places.

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You are kind of surprised that Justice Ginsburg, Justice Kagan and Sotomayor seem to be doing this, in a sense, to help the flow of commerce. If a British company can be sued in New Jersey, it can be sued in Florida, it can be sued in Texas, it can be sued every single place one of those metal sheering machines shows up. They are restricting the jurisdiction there. I wonder if it is done in part to worship at the altar of free trade, to facilitate international trade. It is just going to be more difficult because our economy is completely different than it was 30 years ago. It is much more dominated by imports.

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I'm frustrated by the Supreme Court's decisions.

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I think definitely it is. I think in the U.S. Supreme Court cases, it's clear. It's going to impact a lot of litigants. Let's take the example of Iowa. You've got a citizen who has this injury, and all of a sudden, because of the general or explicitly jurisdictional problems in the face of the U.S. Supreme Court decisions, they're not going to get relief in Iowa, whereas in the past, under older theories, they would.

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Yes, it limits general jurisdiction.

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It is a big country, with lots of jurisdictions. Somebody has got to figure out when a Massachusetts plaintiff can bring a suit to California, I mean, somebody has got to figure it out. I guess that is the Supreme Court's bailiwick.

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Bright lines always attract lawyers and judges, but maybe this is not a good bright-line situation.

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## Do jurisdictional disputes, in addition to the heightened pleading standards, contribute to the front-loading trend? What impact does the front-loading trend have on litigants' access to justice?

Sure, they contribute.

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In the United States, access to justice is decreasing, whether you're talking about the criminal system or the civil justice system. So jurisdictional issues are fundamentally, I think, changing based on global commerce.

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What I am seeing from the U.S. Supreme Court is that they are closing the courthouse doors more than opening them. It started with the arbitration step. They keep doubling down on that. Every time you get a new case, they just keep saying, "No, this is mandatory arbitration. You have to do it." I don't see this coming back in the other direction for a while.

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It's hard to see how the *Bristol-Myers* case does anything but make that much more complicated and difficult.

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There seem to be a lot of hurdles in place for plaintiffs—that's where the law has evolved. Adding this jurisdiction component just makes it more difficult for them.

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I don't know that I view it so much as a matter of sovereignty, which is ultimately about us as courts. I view it more as, is there essentially a denial of any effective remedy for a plaintiff? It's not really about us, it's really about to what extent are these jurisdiction decisions similar to the arbitration decisions, meaning that, effectively, there is no remedy for plaintiffs in various circumstances, either because



foreign corporations are establishing shells, or because they're relatively small claims, with no ability to get any meaningful remedy in the absence of bringing in enough people to make it worth their while.

So I think we basically view it essentially as an access to justice issue, as to what extent are the courts essentially saying, "Yes, we know that you have no effective remedy now, but that is the law and we will give you one only if we absolutely, positively have to."

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When we talk about this as an access to justice issue, there is always a forum. There are actually multiple fora available to plaintiffs. When plaintiffs insist that they must litigate in a certain forum that has only a tenuous connection to the state, that sounds a lot to me like forum-shopping, and it implies a distrust in the judicial system as whole. So, I don't warm to any of these concepts the way the panel perhaps wishes I would.

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It just seems to me that they are creating another hurdle for the plaintiffs to jump over here, and going through this analysis, you are totally dependent on the defendant to be honest to give you the facts that will establish jurisdiction. If you have a large corporation that's doing 10 percent here, 5 percent here, where are they at home under that analysis, other than where they are incorporated and where their headquarters are? So they are forcing everybody to sue in the home state of the defendants, for better or worse. If you're from Hawaii, and you want to sue big pharma in New York or New Jersey, that's a long haul and it's very difficult.

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I am still trying to get over *McIntyre*. It is just the injustice of that. And then to have the Court decide *Bristol-Myers* after that, it just makes me very worried that they even have access to justice on their radar. We are supposed to be able to keep the courthouse doors open to people. It is just been made very difficult.

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I have a lot of concern about the sort of looming issues about access to justice for products that are marketed globally and, really, pharmaceuticals that are bombarding us with advertisements—in every state—but if you are injured by a particular one, you can only pursue a remedy in certain states.

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Well, I don't think there's any doubt that it contributes to the front-loading trend. It's just one more issue that has to be decided right up front. And therefore, that's an additional cost that the plaintiffs have to incur, and probably another means of encouraging parties to resolve the dispute short of trial. So, I think it does add something up front, and therefore makes it harder to actually get a jury trial.

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I think there is a very sophisticated infrastructure that has been funded by corporate interests, that has—in a very sophisticated and relentless way—favored front-loading.

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I think it's critical that every jurisdiction provide a forum for relief to those who are injured in that jurisdiction. If there is a problem with that, then the problem runs much deeper than personal jurisdiction.

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## Do you think the minimum contacts standard adequately addresses the expansive nature of commerce in today's society?

I think the basis of *International Shoe* is that the minimal contacts establish due process, but the cases since then don't go along with that. Whether we think they should or not, it's kind of immaterial.

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It's really confusing. We have a lot of high tech industry like SAS that produces software, that's marketed globally to businesses all over the place, and they're not necessarily physically present, but their products are everywhere. And I'm not sure that old construct of minimum contacts really works in today's world. Because businesses are everywhere. I'm not sure how realistic that is long-term.

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—I think about e-commerce. If you're purchasing directly from the manufacturer, that's one thing. But if you're purchasing, say, through Amazon, what is Amazon? It's basically a distributor of other people's products. And you could apply that test, I would think, to where Amazon is incorporated, where they are. They have many warehouses now, to distribute products. So if they have contacts in your state, that might be a nexus that might be sufficient. It depends on your state jurisdiction, how they look at that.

—I'll bet when you're ordering from Amazon you're clicking on a button that means you "agree" to a forced arbitration clause.

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I don't know what fair means. It seems like it is an open-ended concept that gives great rise to discretion on the part of the judges. Perhaps these structures, these tests, are a way of giving us some analytical structure, analytical approach or thoughtful approach to the application to the power of the state, an application of what is fair. It means you jump through these hoops, and maybe that is what we have to do in order to determine what is fair as opposed to leaving the idea of what is fair to the individual predilections of the judge, which is an invitation to the exercise of unbridled discretion, I think.

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Many of these cases that deal with foreign defendants, I think, pose an extra layer of difficulty for courts because we are not talking about somebody going from Indiana to Iowa, but you are talking about companies that are truly out of reach. And why wouldn't we protect our citizens to allow them to have cause of action against a foreign manufacturer or not allow that manufacturer to be selling things here in the states?

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No one has really talked about this issue in regard to the world being smaller. What is driving this jurisprudence are corporate defendants. There are very few corporate defendants nowadays who are not marketing to the idea that the world is indeed getting smaller. They are certainly trying to market their products throughout the country.

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Jurisdictional questions that come up now in light of all the technology and how the Internet is used and how business is done transactionally through electronic medium, that is a huge area of jurisdictional difficulty.

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Just listening to the presentation this morning and thinking about the sort of the globalized commerce that we now have, it seemed like that whole framework is a little antiquated. If we're talking about what's a fiction, I think a lot of that sounded like a fiction imposed on a system that may not necessarily make any sense any more.

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There is not an amorphous concept. Fairness in one person's eyes is not fairness in another person's eyes. Perhaps all these tests we have are a way of organizing our approach to this as structure, to give us some kind of structure to analyze what is fair, as opposed to just making a discretion decision partly judged at the moment. These structures, these tests, these layers, these personal specific jurisdictions are a way of making our arbitrary decisions, what is fair and what is not fair. I guess we just have to figure out how much structure we want to put into the process.

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—We are obviously living in a far more complex world than we were when, say, *International Shoe* was decided. I don't think it is surprising or bad that the Supreme Court has had to revamp the law to new realities in the way business is being conducted. It is just not quite as easy as it was in 1945.

—The focus is no longer on minimum contacts. It is certainly there. You have to have them. But the focus has shifted to traditional notions of fair play and substantial justice.

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We are talking about how things are evolving. The fact is transportation is so much easier than it was back in the *International Shoe* days. The ability to appear in a foreign jurisdiction is much easier in most cases than it was back then. I'm not sure that it shouldn't be going in the expansive direction rather than the restrictive direction. Really, what we are all striving for is justice. Fair play and justice are what that test is about. If they fit within that framework, I think we should bring them in.

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—I define "fair" as a place where you go to buy cotton candy. It has nothing to do with the law. It is perspective. We need, in my opinion, to get rid of that term. Just get rid of it.

—I disagree entirely with that. I think there is a core meaning that it has to a lot of people. It is a core of our democratic system that there is a notion that courts are fair and impartial. Everybody's got a fair chance. The smallest dog gets to lift his leg against the biggest tree.

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—We accept the state of incorporation is a basis for general jurisdiction. Yet, that may be the most minimum contact that a lot of organizations have with a foreign state. They may never do business, sell a product, or anything in that state of incorporation. Yet, it is a given.

—The one thing about that is they do purposefully avail themselves. Once they do that, then it is fair.

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—Is the minimum contacts standard satisfied by these big distribution facilities? These little *cities of distribution*, that employ hundreds and hundreds of people?

—I think, absolutely.

—I think they should be.

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To me the key is that we are not just saying "minimum contacts" and then we are done. It is minimum contacts *such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice*. So you are putting that in some context and looking at the nature of those contacts, minimum contacts.

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- What about TV advertising?
  - TV advertising or solicitation through the Internet. We haven't had that issue yet in our court.
  - I think Internet or TV advertising can be sufficient, depending upon what the advertising is. If it is targeting particular individuals. If it is tailored for instance, to particular markets as it is rolled out, which often times it is, it could be.
  - We have to look at the whole picture.
- 

When we are talking about some sort of massive distribution center, there's a huge one in my home town. It's one of the big deals in our town. Our unemployment would be five or six points higher if we did not have that one facility. The company is neither incorporated in our state nor is it their principal state, they just built the thing. They make a major product there and distribute it from there. That's what they do. Certainly, if there is an accident or something, there is minimum contact, there are hundreds of employees. But there is a huge difference between that on one hand and the company being on the Internet or having an ad that happens to filter through my television.

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If you were a plaintiff's lawyer, why would you take the risk of going to any state but where the defendant's principal place of business was or where they're incorporated? Why have the discussion? Why would you put your plaintiff to the expense of an appellate discussion over something that's very clear?

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- Are traditional notions keeping up with the modern-day world?
  - I think so.
  - And the custom of being present in the forum state? I don't think it takes into account *virtual* presence now. I don't they were foreseeing the Amazons and everything else.
  - “Traditional notions” would not include Amazon. We don't include the idea of businesses having a virtual presence or a lot of things that we see in businesses today. So I guess it depends on what you focus on, the “fair play and substantial justice” language, or the “traditional.”
  - The traditions change. It's not “historical notions.”
- 
- When you say “traditional notions of fair play,” I guess I see that as being sort of transcendent of technology, transcendent of modern-versus historical, and again, this is where it gets unpredictable because it could mean anything. But “traditional notions of fair play” is “That just ain't fair. That just ain't right.”
  - When you say “significant presence,” you can have a presence through targeted ads. You could have a presence through Internet presence that you have chosen geographically where you want to pay for the ads. I think you can have a presence in technology.
- 

*International Shoe* works for me, because I think we have all come to understand what it means. If you apply it literally, what was traditionally fair play and substantively just in 1945, before *Brown vs. Board of Education* was decided is very different from what's just and traditionally fair today. So I am not sure that that language works when applied literally, but culturally I think we have come to understand what *International Shoe* means.

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I think in another decade the Supreme Court is going to reverse itself on *Bristol Myers*. I'm not wishing death upon any Supreme Court justice, but as those die off who may not even get on a computer and do any of their own opinions, I think younger people will think, "this Internet, we're all within reach of each other, there is no way that the notions of *International Shoe* can continue." I'm old enough to remember the Kirby guy selling vacuum cleaners door to door.

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—I think "traditional notions of fair play and substantial justice" are a sliding scale. The Supreme Court is going to tell us what it is every time they issue an opinion, and it's going to change as time goes by. It's not a hard and fast rule; it's what is in the eye of the beholder.

—You know it when you see it.

—It's as flexible as they want it to be in any given case.

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It is just not that simple to say you can go elsewhere and bring a lawsuit.

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If you ask all the judges in this room to decide a case under *International Shoe*, most of the time, most of us will come to the same decision, but we are not applying literally the notion of what was traditional in 1945, because commerce was very different in 1945 than it is today. I think what we do is we fudge a little bit and say, "Whatever is traditional now we will accept as substantively just." It is not the clearest standard in the world, but as I say, I will bet that most of us would decide most cases the same under that standard most of the time.

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## How might you determine whether a sufficient affiliation exists between the forum and the underlying controversy to move away from general jurisdiction, and to justify specific jurisdiction?

—We talked a lot about the Supreme Court cases. What is the most tangible discrete question that they have left unanswered in this area?

—How much more can corporations avoid being sued?

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—Some of us are thinking, look, we want some sort of bright line standard. Others are saying, no, flexibility. But there is a floor, right? *Bristol-Myers* establishes a floor. You cannot establish a sliding scale test that disconnects the conduct from the claim in such a way that there is essentially no contact.

—I am not sure I understand how *Bristol-Myers* holds that notion. If the interest of California might be in efficient, single-resolution of a case that is clearly appropriate in California, it doesn't seem it is respecting the state sovereignty or state's rights focus as much as it is looking at what is the individual entitlement of this defendant.

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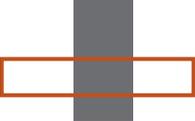
—By legislative fiat, if you sell a product in our Pacific Coast state, you are bound to accept jurisdiction here, do you think a legislature could do that?

—If the legislature passed a statute that says you have jurisdiction to bring that lawsuit in our state, we would have to defer to that statute.

—But then somebody could say it is unconstitutional.

—You have to entertain a Constitutional due process challenge.

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- My guess is that most legislatures would like to have a rule that lets them easily get jurisdiction over corporations that cause injury in their state. I am not sure what the political driver is for getting general jurisdiction just for the sake of getting it.
  - My instinct is that there would be tremendous business kickback against any sort of requirement like that with regard to making a corporation suable, if you will, simply by signing up to do business in a particular state.
  - I think there is a national political push to avoid a one-on-one litigation.
- 

Discovery becomes a real big issue. When you talk about front-loading, you didn't get a chance to do discovery, or it depends on are you going to follow federal procedure, the way they interpret procedure, or is their state more a factor, is there a co-state? We have different rules. And ironically it was supposed to be the feds were looser on pleading than the co-state. Now, with the U.S. Supreme Court's decision in that area, we states are a lot more open than the federal courts on pleading.

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- There is drug advertising going on these days and I am always amazed by when they start reading the list, now they are telling you all the bad things that might happen, including death.
  - They talk really fast.
  - Let's say you have a husband and wife in Iowa, and the wife is taking a certain medication. She has an adverse reaction and passes away. I am assuming that with the drug being dispensed in Iowa and the advertising and everything, if the couple wanted to bring a case in Iowa, they could make the drug manufacturer come defend there. I assume that is at least enough minimum contacts to get the suit in Iowa. I don't think they would have to go to Delaware or New Jersey or wherever the drug was manufactured in.
  - That is the same as *Bristol Myers* for the California residents.
  - That would have to be fact-driven, wouldn't it?
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- We were talking about Internet sales before, so much of what we do anymore is online, obviously. Whenever you do anything online, especially the first time, you have got to agree to all these terms and conditions. They go on for pages. I just check the box. I wonder how many of those things we do just kind of, without thinking about it, check off the "I Agree to the Terms and Conditions," including forum selection.
  - There's going to have to be an evidentiary hearing. There's going to have to be discovery and a hearing on it.
  - If you were a plaintiff, why would you go through that?
  - I'll tell you a reason why people will do it, because they cannot afford to live any place else, and there is no one else who is going to take the case. And so it's a shot off the bow.
  - More cynically, a plaintiff's lawyer doesn't want to lose the case, so he prosecutes it there rather than refer it to another lawyer. All these cases are contingency cases, so they can get picked up somewhere else. It does become an access to justice question, because there's no reason that a local court couldn't apply the law of Delaware in those circumstances.
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I do think that's part and parcel of the same thing we're now seeing with technology. It used to be with these jurisdictional cases you'd look for how many phone calls, how many trips to the foreign state did they make, and now you have emails, advertising over the Internet, things like that. I do think that a reexamination is warranted.

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Why wouldn't the principles of *International Shoe* ultimately apply? Why wouldn't those kinds of factors come back and haunt us once more? Because they originally defined due process. One of the things that *International Shoe* did was they moved in that direction because of the nation's increasingly industrialized economy.

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- The plaintiff is going to have to say what the connection is. A lot of these cases involve a subsidiary and a corporation that's only in France or wherever. How can you bring those into your court when we don't even have any presence there?
  - Think of Blue Cross. I mean, "Blue Cross" is not just Blue Cross. There's Blue Cross of Illinois, Blue Cross of Texas, Blue Cross of New Mexico. Yet you just say "Blue Cross." So I think the plaintiff needs to dig down and see, who is this person? Who is this entity?
  - That is where the front-loading comes again, and for the plaintiff to do data analytics on whether it's a company that has Internet ads in the state, that is not going to be enough. It sounds like the courts are saying that you would want to do research on, of all of their Internet ads throughout the country, how many are coming to this state? That's not what I necessarily think is right, but that's what it seems to be.
  - So you want to have discovery on that.
  - You have to allow discovery on that, and there's so much information now compared to 30 years ago, compared to 10 years ago. There's so much information that's publicly available about these things. It's not all trade secrets. It's publicly available information. So I think it's a combination of preparation at the front end for the plaintiff to really think how to show this before filing the claim, and then wait for somebody to ask for discovery. With a public company, you can look at their filings, their SEC filings, their websites. You have so much information online.
  - You can see how many orders this company took from this state, and particularly, orders of, if not the exact same product, that family of product? They'll have the financials, especially these companies that love to have investors; they put all that out there.
- 

We would look at what the underlying controversy is and compare that to the actual contacts that the defendant has in our state, and then look to see if there is a nexus between those two things. So it's applying a "but-for" test: could the underlying controversy have happened but for the forum contacts? That would be sufficient. And then you would also look at reasonableness on top of that, but you have to kind of get by that nexus hurdle first.

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There was a time when *International Shoe* just gave you the answer, and we are getting away from that.

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I had a products liability case where we had jurisdictional discovery. Otherwise there's no way of knowing the minimum contacts of this company. But there were limitations, and that's a whole other issue. How many interrogatories are you going to allow them to do? How many depositions, if any? That would turn into a whole other series of pleadings, figuring out what should be done with jurisdictional discovery. I think every judge is kind of all over the place on this.

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—Typically you'd be filing a 12(b)(6), right? Based on lack of personal jurisdiction, and a motion to dismiss, you don't consider anything outside the pleadings. So what is the point of the discovery?

—Our supreme court have set up a system where the defendant files a motion with an affidavit, and the plaintiff responds with their affidavit, and the judge is allowed to consider it as evidence. If the plaintiff wants to show that the defendant isn't giving you the whole story, the judge can allow the plaintiff to get that discovery from the defendant.

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I disagree with *McIntyre*, or at least what seems to be the rough consensus of *McIntyre*. It's decided by people who have never been in business. I happen to own a small business, and let me tell you, when somebody buys my stuff, and I don't care what state it is, I have purposefully availed myself of that state, and if it blows up there I expect to be sued there. I try to sell it wherever I can. I understand that when I sign an international distribution agreement, I am attempting to avail myself of the privilege of doing business in all of these forums, and if I cause a problem there, I might expect to get sued there. That doesn't seem controversial to me. I recognize that it's probably controversial if you go to the U.S. Supreme Court. They tend to be a little bit more nuanced than that. But I don't have a problem with the general rule that if you engage in an effort, you're not looking to do a specific transaction or perform a specific service in a specific state that has unintended consequences elsewhere. If you want to sell stuff worldwide, I think you accept the consequences of where you sell. That would be my suggestion.

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## Some may view the recent Supreme Court decision in *Bristol-Myers Squibb* as a cautionary signal against “forum-shopping.” Do you see much evidence of forum-shopping?

We called it forum-shopping when I was a defense lawyer. Then, when I became a plaintiff lawyer, it was trying to find justice for my client.

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—I'm sure that lawyers on both sides are always trying to strategize about the most advantageous location for whatever. “Forum shopping” is kind of a strong term. But people are always trying to strategize.

—I think lawyers on both sides are always trying to figure out where they have the best chance of success.

—It's not just interstate. We see this intrastate—“Which county are we going to bring the lawsuit in?”

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I don't like the word forum-shopping. As a former trial lawyer, you are going to do what's best for you client. If the options are there, why is it forum-shopping? You're just assessing risk, just like the defense does. If you have the options, why not evaluate the case in the most favorable way to your client? I think defense attorneys do that.

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- Actually, especially at the appellate level, we don't care. We don't care if they're forum-shopping or not.
  - In our midwest state we have seen the opposite of forum-shopping. We have a lot of industry, and you would think that anyone suing would want to sue in our state, especially in a big city where there is a good jury pool. But, because our state has enacted so many laws that are not friendly to products liability—like very low caps on recovery, short statutes of limitations for product cases, etc.—we have seen an abandonment of products liability litigation in our state. In our court we may see a total of two or three cases a year. So, we have the reverse of forum-shopping.
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- The MDL is where the sophisticated forum-shopping really occurs, where you strategize where to file and where the defendant corporation seeks to decide which law it favors, which plaintiffs' lawyers it would rather work with, and where its defense counsel are located. That's the real forum-shopping, isn't it?
  - To some extent. Forum-shopping is what case you have to pick as the primary case, to get tried first or to try to settle first.
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That is what you do if you are representing your client.

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I don't think there's anything wrong with a plaintiff's lawyer trying to bring a mass action that targets *Bristol Myers Squibb* and putting the defendant to the tactical economic decision of whether to file the motion.

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- Certainly it's forum-shopping. It seems that they like to file initially in the state, and then they wait to see what happens on the removal question. It's perceived that the state courts are easier to work with and they get better outcomes.
  - Why would you ever file in federal court if you could avoid that? If you're a plaintiff's lawyer and you're not forum-shopping, you're not doing your job.
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I think it will promote forum shopping. Where I live we have been targeted by the chamber of commerce as one of the “judicial hellholes.” It's jury poisoning and it's been going on for 15 years now. We used to be a very, very large county, with railroads, barges, etc., and politically we are a very Democratic county, and so we did have very large verdicts. If you look at our verdicts now, we are really not that way. The railroads are gone, the barges are gone. We have almost no industry. Most of the verdicts now are defense verdicts and malpractice cases.

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## To what extent do you think *Bristol-Myers Squibb* may result in inefficient splitting of related causes of action, duplication of judicial work, and consequent waste of judicial resources?

- I am really upset with *Bristol-Myers*. Creative solutions just don't appeal to the Supreme Court. There is nothing wrong with allowing *Bristol-Myers* to be sued in California. They are either going to be sued there or they are going to be sued in New Jersey, in New York, in Florida, or somewhere else. How does that make sense?

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- And they are already being sued there anyway.
  - Efficiency. Judicial economy. What is the downside, except you don't want to make it easy for these plaintiffs to address their grievances?
  - I am wondering if the Supreme Court isn't really saying, "Look, if you really want to litigate it together, file as a class action in federal court. Of course, that assumes that class action jurisprudence is not as restrictive as it has been moving towards. Again, it really is I think a movement to take cases that are greater, national joint cases, and really pushing them all back into the federal court."
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You can't really get personal jurisdiction over some of these for some of your plaintiffs. What it does is it breaks the mass tort into 50 different pieces, and the state courts really don't have any mechanism for multi-state litigation the way the federal courts do. And so as a result the defendants can force you to go to New Jersey or New York, or the horror of horrors, to go to New York City, and then there's Los Angeles. And then you have to hire local counsel, and believe me I've arbitrated in New York, and I want to be an arbitrator in New York for the fees. But plaintiffs don't get what I call justice in a convenient location.

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If the defendant in California is already defending the exact same types of claims for a whole bunch of California residents, it's hard to see how from a substantive standpoint it's any different if there's a lot more people from another state that have suffered the exact same harm. It just seems to further disperse the litigation and make it more expensive and complicated, and challenge to access.

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In our Pacific state our trial court judges are specialized, particularly for mass torts like mesothelioma cases, and you have specialized courts, with judges trained to handle complex litigation. So I would imagine whether it's plaintiff or defense, you may want to go to a jurisdiction where there are courts specialized in just doing complex cases.

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Even with multi-district litigation cases, where the whole point is to improve efficiency, you still have to have jurisdictional arguments that the defense can make. I chair our state's "mini-MDL." We do the mass torts for the state. They're within the state. We just did one this past week. The various counties in the state are now suing the major manufacturers of opiates. They're suing Purdue Pharma, which is headquartered in Connecticut, and has research labs in New York. They're suing Johnson & Johnson, Endo Pharmaceuticals. And they're suing them because of the increased Medicaid costs that the counties have to pay for the opiate epidemic that's going on with people being addicted and leading to additional medical expenses. It started this week, and they expect to have the bulk of the counties suing these pharmaceutical manufacturers. If you go on the Internet, you'll see that many states have started this type of litigation, and we may see this as appellate judges coming up the pipeline.

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Well, if it's your county, and you're suing in your state, they still have an argument that, gee, we're not at home in your state. We're home in some other state. So we're going to expect those jurisdictional arguments to be raised in that mass torts case that's now started.

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So there's a lot of this going around the country. It's like tobacco litigation. Everybody wants to shake down the manufacturers to get money for the governments. Like the attorneys general did that. So this is the same thing.

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- Some of these very sophisticated firms, they saw this coming. The asbestos lawyers that I know, they have already opened offices in San Francisco and Delaware and New York, and other friendly forums because they saw this personal jurisdiction thing coming. So they know they are going to have to file against the defendants in their home forums, and now they have offices everywhere. I don't know if it's going to be more work for us, or maybe less work.
- It's less work. In my western state our federal court actually needs more work. It's very, kind of underutilized, and that affects the budget and the number of judges you have and staff and all that. So is everybody overwhelmed with work?

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There has been a marked decline over the last ten years in filings across the country in all courts, both civil and criminal, down anywhere from 20 to 25. We have gone down a million cases in our midwest state in the last 10 years. And so I think it depends on your jurisdiction within your states as to exactly how busy you are and how many judges are in that particular jurisdiction within your counties or your court levels, however it is done.

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- There is one factor that's taking place, and that is nationalization of various employers all over the country. As a result, you go in and say, "In what state can we go after these people?"
  - You have a real concern for defendants in these multi-plaintiff, single-defendant cases because in many cases it will get right to affirmative collateral estoppel. Assuming one plaintiff wins, that's the end of the liability for all the rest. I don't think the defendants want to try 15 cases and win, but lose the 16<sup>th</sup> and then they have to pay the next hundred. So you're going to line up with affirmative collateral estoppel and split these things.

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The tobacco companies said they were going to try until they lost one. The first year or two they won every case, but when they lost one then they started settling them all over because of that.

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I don't know what the end result is going to be with *Bristol-Myers*, but I suspect they may want to settle those cases rather than send lawyers out to the 50 states, because that's a cost, too. So you know, sometimes it's a strategy that takes place, rather than "We really don't believe you have the right to sue us, etc." They know they're going to get sued. The question is where, and what cost to get out of it. So it's crazy, this business.

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- There were 700 plaintiffs from 34 states. Only 86 were from California. I guess it is going to result in duplication, because now you are going to have 34 lawsuits in 34 states and potentially conflicting decisions, right? But we have dealt with that before. I don't know about you guys, but it seems like asbestos.
  - Suppose there are not enough plaintiffs to justify bringing a lawsuit in a particular state? You know, maybe there are only 12 plaintiffs in Georgia, and the claims are all small. I understand that a non-resident claim against a non-resident defendant is kind of weird. But at the same time, supposed there are only 12 plaintiffs in Georgia, and there is not enough money for plaintiffs to bring a case. Those people are out of court. There are no lawyers that are going to take the risk, who can afford to do it in Georgia, for instance, if there are only 12 or 13 cases. They are gone. They are out of court. Is that enough to make us change our jurisdiction rules? I don't know.



When you look at the *Bristol Myers* case, I agree there is some inefficiency going on. Probably there is a great deal of overlap between the claim of California plaintiff 37, and the claim of Ohio plaintiff 12, and the claim of Vermont plaintiff 3, in terms of liability issues, at the very least. They may have all different medical histories, different levels of injury from taking the drug. But if you are going to split those out all to different states, and there is not a federal judge clumping this all together under some federal rule, it is going to be very costly from the defense side. And strategically it may never end up being wise for the defense to exercise that option and split them around all different states, unless they think that maybe they can exhaust plaintiff's pool of resources to actually try the cases.

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If you've got all those plaintiffs and they're from all those different states, but they all have the exact same claims as the California plaintiffs, but you're going to make them try the cases in a whole bunch of states, that's kind of like the definition of inefficiency.

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## Is it now the case that most jurisdictional disputes pose a Constitutional question? Would legislative guidance on standards for minimum contacts and purposeful availment be desirable?

If I'm the defendant, I'm certainly going to claim that most jurisdictional disputes pose a Constitutional question.

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- I would agree that they're Constitutional questions, because of just all the varieties of jurisdictional decisions that have to be made are pretty much born out of the Constitution. If there's tort reform, limits, caps, that has been challenged as an affront to access to courts and remedies by capping your remedy.
  - That's a Constitutional question.
  - States have found that to be Constitutional, depending on how the statute would be written. Statutes of limitations are, you know, jurisdictional. You cannot bring your action if it is beyond your statute of limitations. That's established by legislature. So I do believe that you're absolutely correct that you can't divorce the jurisdictional issues from the Constitution, and the rights that are afforded litigants, all citizens, in the Constitution.
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I think with our court that might somewhat tip the balance. Even though it is a Constitutional analysis we would take into account that legislation, especially because due process is partly a concept of notice, and when the statute is out there you have notice.

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Let's carry that to the logical extreme. What corporation is not going to want to do business wherever it can do business? So what's left of jurisdiction? We would never have any issues, because every corporation would be subject to suit everywhere, and maybe that's a good outcome.

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The other side of the coin is if a state gets too particular on what's required, the plaintiff is going to object because their due process rights are gone for bringing the lawsuit against the defendant. They have certain due process rights, too. It might shift it the other way. I don't know how a state can get into the legislating of that.

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—I guess a state could legislatively make its jurisdiction more restrictive than the Constitution.

—You could make your long arm a shorter arm.

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In our state we have a state constitutional provision that guarantees people a remedy. It is in general terms; it's rarely litigated, but there would maybe be a state constitutional argument if the legislature shortened the arm too much.

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—It is a Constitutional issue, not a legislative issue to me.

—And you can you imagine, just from a practical standpoint, if we think that we have an unsympathetic court of nine, imagine who has got the lobbying power to craft that legislation. I would hate to see the results of that legislation.

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It seems like all the legislature could do is make it more restrictive. They can't make it more broad.

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—We have so few lawyers in our legislature, we spend all our time explaining unintended consequences on legislation.

—We've been talking all day about the unintended consequences of the words of the justices of the Supreme Court of the United States. I don't know that the legislatures will be able to do any better, with regard to unintended consequences. We would have 50 different versions of what minimum contacts is, and then those would all still be subject to whatever the Supreme Court says.

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—The legislature is not going to give us anything. That is why we have job security, because of these statutes.

—I do think that is really a Constitutional question.

—Agreed.

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—Could you imagine the tug and pull that would be in the legislatures?

—They would never get it done.

—The efforts of corporations and businesses.

—In reality, the legislation is being narrowed around the person. I mean, a lot of legislation would narrow it to less than what we have now.

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I don't think that the United States Supreme Court would care what the state legislature said.

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—No.

—That would be pointless.

—Most of what we do is try to figure out what it is the legislature was trying to do.

—The legislature can say what they think, but they can't say what the 14<sup>th</sup> Amendment requires or doesn't require.

“Legislative guidance” would be an oxymoron. If there was a uniform statute on the subject maximizing state court jurisdiction, that might be useful. But anything short of that I don’t think would be very useful.

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—Can you trust the legislature to get it right? They won’t. It’s real simple. They won’t.

—Our legislators openly say that they don’t pay any attention to the Constitution, that’s for the courts to pay attention to.

—Plus, things change over time, so if they’re trying to define something, trying to narrow it in such a way is just going to cause more problems in the future. Things change so quickly.

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Giving the legislature the reins to the buggy is problematic. These, for the most part, are not lawyers. The folks that weigh in and have influence in the hearings and behind the scenes are lobbyists, and more and more so—both with states and the U.S. Congress. I would be just afraid, I think, of what would come out. I would rather see judges establish through case law the answers to these questions.

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*International Shoe* talks about offending traditional notions of fair play and substantial justice. Now, I appreciate that’s directed at judges, but doesn’t that sound like policymaking to you? And what is so wrong about lobbyists being involved in the process? I mean, that’s how it works in this country. So I don’t see a particular problem with that.

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“Legislative guidance” could make it more confusing. I guarantee you that.

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## When litigants file cases in your state’s courts, do you want to retain jurisdiction?

We would apply the law, we wouldn’t have a predisposition to say we’re going to retain the case or dismiss the case.

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—As to “wanting” to retain jurisdiction, I don’t think we’re used to having that discretion.

—It doesn’t matter if we want to or don’t want to.

—When we go to sleep at night, we don’t ask for another case.

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—“Do you want to retain jurisdiction?” My answer is, “Hell no. That is less work, you know?”

—When I was sitting as a civil trial judge for 10 years, when there was a removal, I was like, “Thank goodness!” But in terms of *wanting* to retain personal jurisdiction, that is a little bit different. I had several cases dismissed for want of personal jurisdiction. I would say that I did have a tendency to try to have a forum for the people. I kind of wanted the people of the state to have a forum.

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You don’t say, “Oh, I really like this case so I will keep it.” I mean you might think that, but you won’t do it.

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We have plenty of work anyway.

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It is embarrassing sometimes. We have to spread those cases out. There is not much to do.

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- I never have any interest in whether the case stays in my court, but with the caseloads going down, the legislature is going to decide at some point whether to reduce the size of the courts.
  - There is a movement now to use time study with judges.
  - That is how our state determines what our staff needs are—workload.
  - We have a constitutional amendment, and they cannot reduce us.
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I bet we reverse the trial court less than one in five times.

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We treat it like every other case. We ask if they are right or wrong, and apply the appropriate standards.

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- At the appellate bench we're happy to take them and decide them, but we see some trial judges that, if they have an opportunity to get rid of a case, they will.
  - I see quite the opposite. I was a trial judge for 15 years, and I saw a lot of jealousy, with “This is my case and I'm keeping it.”
- 
- Why would you care?
  - I don't think we do care.
  - I guess I care. State judicial systems have limited resources. You don't necessarily want to be the center of the universe of litigation that has little or no connection to your state. If a couple thousand cases roll in and have very little to do with our state, we probably wouldn't be that interested in it.
  - But if it comports with due process, a person has a right to have a remedy.
  - I just generally think that access to the courts has been decreasing, whether it's a state law and finding too much waiver, or some other issue, that's why I care.
  - If you start kicking cases out on limited resources, what other cases do you want to not hear?
  - I am completely devoted to the concept of access to justice, especially for under-represented people and those who have difficulty getting representation. But if *several thousand* cases came rolling in with little nexus to the state, yeah, maybe.
  - To the extent they come to the home of a corporation in my state, then absolutely we have a duty and obligation and a right to have them litigated.
  - But no nexus other than the home office?
  - That's a pretty doggone big nexus.
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## How often do you see cases being removed to federal court? Why do you think that is done?

- In our state, plaintiffs have started saying they'd rather be in federal court than state court. They can get a jury trial in federal court much faster than they can in state court. So we have had a surge of plaintiffs filing their lawsuits—forget about removal—filing their lawsuit in federal court for the purpose of taking advantage of the expedited review.
  - We have just the opposite in my state. It's much quicker in state court. Federal courts are so backlogged, they're so heavy with criminal cases, civil cases have a hard time getting to the top, and it's years before you get to trial.
  - You know some of our federal judges, and they'll try 30 cases a year.
  - It depends.
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- I think in our state a lot of commercial litigators opt to go to federal court because it is shorter. We have a situation where you can appeal anything. But in federal court, they don't have the interlocutory decrees. There is a lot of time that is spent in state court that wouldn't get spent in federal court. For commercial cases, they opt.
  - “They” being the defendants. Plaintiffs wouldn't want to be in federal court unless they filed in federal court.

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We see many, many cases at least attempted to be removed to federal court. Many of them are remanded back.

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Let's face it. Remember that statistic Judge Young gave at lunch, that the success rate of plaintiff suits in federal courts is down 70 percent? You only win one in four cases over there because they'll throw you out on any excuse they can get.

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I do believe the corporate defendants think they get treated better in federal court.

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In my previous life as an attorney representing local governance, pretty much every police misconduct case filed at state court got removed by us.

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I expect that we're going to be seeing is plaintiffs bringing more cases in federal court, because they don't think they're going to be able to get the scope of jurisdiction they want in a state court, which my guess is probably what the U.S. Supreme Court ultimately wanted to happen.

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I think the bar likes to file with state first because the perception is you get a fair shake in state court.

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Well, they claim whatever they want to claim, and the federal court takes one quick look at it and throws it back to us. We don't mind. We like deciding cases. We don't get that in the appellate court so much, because they have already done that.

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Some defense lawyers have told me that they don't want to remove to federal court even though it might be a little bit more favorable because the cost is so great. You have a whiplash case that you could try in an afternoon, and it's like four banker's boxes if you're in federal court, and they hold the defendants' feet to the fire just like they do with the plaintiff's lawyers, even if they're not handling it on a fast track. So they sometimes don't like to litigate in federal court unless they're looking for delay and looking to increase costs and looking for hearings on every single thing and looking for lots of extra red tape.

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—The federal court moves faster, much faster. It's like they have 10 percent of the cases that we do, so it moves faster.

—It can be faster, but even if it's faster there's more potential for more hearings, and in the pretrial order you have to list every single piece of evidence. The rules are so complex. If you are billing by the hour it's a great thing, I suppose, if you need the billable hours. But if you're a plaintiff lawyer on contingency it was never a good thing.

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As a plaintiff's lawyer, I would at least try to argue that by filing the removal in the state court you subject yourself to the jurisdiction of the state court.

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—The answer is pretty obvious. In federal court they get rid of cases right away on the pleadings. Then you've got *Daubert* hearings and summary judgment. Why wouldn't the defendant try to get over to federal court? I bet they never end up trying the case.

—It's not the conservative nature of federal court, it's that they can't get to trial in federal court.

—Criminal cases take precedence. Sometimes you've got your "firm" trial date, you've got experts from all over America, and then it's "Sorry, this drug case just bumped you," and you're looking at another year and a half before you get back on track.

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## Other Topics Raised by the Judges

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### Is the Jurisdiction Analysis Defense-Centric?

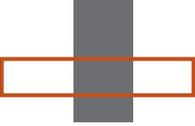
Two plus two equals four. George Washington was the first president of the United States. A discussion of personal jurisdiction is categorically defense-centric.

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The analysis is defense-centric because the defendant is the unwilling participant in the lawsuit. That is why this focus on the defendant. Are we going to exercise the power of the government on this person who is not willing to have it exercised on him?

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I recommend reading *Bristol-Myers Squibb*, where what they are talking about is the defendant's activities and what the defendant did in California vis-a-vis the resident plaintiffs in California versus the non-resident plaintiffs. Clearly, that was the case where it is an ultimate hypothetical of having a centralized lawsuit involving similar complaints from a host of people from across the country. But that wasn't the determining factor in the minds of eight of the Justices. They asked, "Does it make sense for this defendant to be exposed to these claims in this forum?"



Of course, personal jurisdiction primarily concerns the defendant. But I think the real question is the standard by which it becomes fair to bring the defendant into court. I suggest that it is really the fair notice, due process standard. And the question is, at what level do we adjust the parameters?

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## Tensions Between the State Courts and the U.S. Supreme Court

Why are state courts so quick to analyze our constitutions and walk in step with the Supreme Court? I wonder, because it seems to me that personal jurisdiction is pretty much a state issue. But the federal courts by their very nature are supposed to be courts of limited jurisdiction to begin with. I mean, they are to be limited. We have got a pretty broad spectrum of jurisdiction in our respective states. I wonder if that informs their jurisprudence, just that subconscious circumstance.

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We have to follow the U.S. Supreme Court. Unless you can distinguish the case, you're stuck with the United State Supreme Court's view of due process in personal jurisdiction. That's just the way it is. We're stuck. This is a whole changing dynamic from when you went to law school and you had to study *International Shoe* and approach it like that.

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Our mid-Atlantic state does not follow the federal mandate that's coming down from the Supreme Court. We're more like, "You do business in our state, you subject yourself to our jurisdiction."

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—Doesn't everyone in their state jurisprudence have the principal that the state may extend its jurisdiction to the extent permitted by the United States Constitution? And to the extent the Supreme Court is issuing decisions like *Bristol-Myers*, boom. I'm sure that's what is frustrating. Maybe it's interesting for our panel members, but it's frustrating for me.

—As a state court judge, I would love to think that I could rule contrary to the United States Supreme Court on the basis of "sovereignty." To me that's absurd. We have to abide by the U.S. Supreme Court's decisions. Where there's confusion, we interpret that. But to imply that this is a state sovereignty issue, that one of the states is more powerful in interpreting the U.S. Constitution than the U.S. Supreme Court is, it's absurd.

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The Supreme Court can speak in the language of jurisdiction, but I guess—I emphasize the word "guess," because they haven't chatted with me recently—that what you see is a basic general disrespect for state courts, especially state courts in certain jurisdictions which they view as plaintiffs' havens, and they want to protect corporations from, especially, class-action lawyers seeking to bring those cases in those forums. It's thought that they want to move them basically to a federal court where they have greater control over the superintendents of federal cases, and there are laws restricting the scope of state action.

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—I don't understand that comment. And somebody at the podium made a similar comment, so I must be missing something. The test for personal jurisdiction in the state courts, for many of them, is "as far as due process allows." The test in federal court is for personal jurisdiction, as far as due process allows. So how does this encourage plaintiffs to bring their cases more in federal court, or force plaintiffs to bring more in federal court? Seems like to me it's the same question.

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## Default to the *International Shoe* Standard?

I would look at it very simply. Professor Grossi said that we shouldn't go past *International Shoe* because that case resolved all of the problems. With the adaptation to the principles, everything else has gotten bigger. Therefore, as a result, all of these complications—when I say complications, we can call them restrictions—are unnecessary. I can go back to *International Shoe* and resolve every one of these issues without thinking about stream of commerce or fact-based.

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I may be bound, but I am not gagged. If you think about it from the professor's approach, I guess *International Shoe* has never been overruled. You theoretically could write your appellate opinion in line with *International Shoe* and know these other cases and so on. You can, in your opinion, write a very fact-based paper focusing on the injustice and so forth, letting the defendant off the hook under certain circumstances. Now, I may get reversed, but at least I have acted in *my* court, and in accord with my understanding of the existing law.

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The due process clause is defined in *International Shoe*. We have these other Supreme Court cases coming along afterwards to make it more difficult to exercise jurisdiction. But where there is room, where there is an open question, defaulting back *International Shoe* seems like the appropriate analysis.

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## Is There an Anti-Plaintiff Bias in the Supreme Court's decisions?

There's more of a pro-defendant sort of stance...and a higher burden on the plaintiff. The plaintiff now has the burden to actually show why that defendant should be here, as opposed to the defendant's burden showing that they shouldn't.

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This whole movement is to divide and conquer, it's to give the defendant home-state advantage in all of these cases. The injured plaintiff has to basically go to the defendant's home state, where they're incorporated or where their headquarters are, and sue there, and then you're still subject to forum non conveniens.

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For me, that is a huge concern, but when you peel back the onion, so to speak, it seems as though, perhaps, it's going that direction because of efficiency. If we're not applying fundamental principles to these cases, I think it does, at the end of the day, hurt the plaintiffs.

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Do you think that is one of the reasons why they are narrowing personal jurisdiction, because of the fact that it is so easy to try a case in any jurisdiction? It is not like the olden days where you and the plaintiff live in this jurisdiction, and it would be hard to go three states away. Now, it is pretty easy. You can do everything by Skype.

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My southwestern state used to be a very plaintiff-friendly state about 25 years ago, and now it is the exact opposite.

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## Forced Arbitration

Given the overriding principle of access to justice, in so many of these cases now, you're dealing with consumer litigation. You're dealing with contracts that when you got the cell phone, when you bought product you had a forum clause in there, a choice of law clause usually. So there's general jurisdiction or specific jurisdiction, but that's being trumped by these contracts all over the place that say, if you want a cell phone you've got to just sue in this one location. That's so common in America. And then of course then you "agree" to arbitration, that's something else. That seems to be overcoming a lot of these tests about whether you're going to be in this state court of this state court. You're not even in state court, you're in arbitration someplace else.

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In our midwestern state I find that the much bigger procedural issue these days relates to arbitration provisions. Justice Scalia basically set out the language that you put in there for a provision where the courts don't even get to decide arbitrability. I think that's where we're seeing this vortex sucking away civil litigation, in our state at least, at least involving corporate defendants, is with arbitration clauses.

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The courts anymore don't even get to decide whether it's arbitrable or not. And I have yet to see one where a case comes back into the court system because the arbitrator said, "I don't think I should be handling this and being paid for my time; I think it should go back to the circuit court."

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It's a much, much bigger issue in our state than minimum contacts/jurisdiction issues. It's arbitration, and we have seen a significant decline in civil litigation in our state in the last five years alone.

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- We are quickly turning to where we have the arbitration thing for the rich and the courts are for the poor. Our family law and criminal cases are still going to come through the court systems. But all the money cases, they are right out to arbitration. That is not good for the court system.
  - Somewhere in the jurisprudence there is the phrase "arbitration is favored." If you Google that you will find thousands of cases that say arbitration is favored. When did arbitration become favored? That phrase worked itself into jurisprudence to the point where jury trial or not, "arbitration is favored."
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# POINTS OF CONVERGENCE

In the discussion groups, the moderators were asked to note areas in which the judges' thinking on issues raised in the Forum appeared to converge. These observations were summarized and announced during the Closing Plenary Session.

## Frequency of disputes over jurisdiction

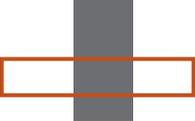
- It varies with the state. They are rare in most states, but some states see them frequently.
- Most disputes are resolved in favor of due process.
- There was some concern that, after *Bristol-Myers*, there will be no jurisdiction anywhere in the United States to hale international defendants into court.
- Jurisdiction disputes arise in mass tort cases, but are not common in general cases.
- Following the recent U.S. Supreme Court decisions, judges expect to see more motions to dismiss for want of jurisdiction.

## Is there a conflict between the Supreme Court's due process decisions and state sovereignty?

- There is a conflict, but while state appellate courts must observe the rulings of the U.S. Supreme Court, state courts can use their own states' standards in interpreting them.
- Some judges exercise jurisdiction without concern for restrictions on sovereignty.
- Fairness is not a self-defining concept. Fairness is a balancing test that considers all of the interests, including what's fair to the defendant.
- Judges are concerned that U.S. Supreme Court decisions are denying a remedy to plaintiffs.

## Competing jurisdictional analyses

- Many judges say their states use purposeful availment, but some feel this standard is too new to be used as a final determination of their states' law. Some feel that the law is not certain at this time.
- Purposeful availment is a universal requirement, but it can be hard to determine if it has been satisfied.
- Some use purposeful availment, others use sufficiency of contacts. Still others resolve disputes based on whether or not the requirements of the state's long-arm statute have been satisfied, and do not reach a Constitutional issue.
- We should avoid using labels for jurisdictional analyses.
- A simple corporate registration is not very compelling as a conclusive, implied consent or waiver of jurisdictional disputes, and may raise a Commerce Clause issue.



## Prof. Grossi's discussion of "fact-based" versus "doctrinal and mechanical" approaches to personal jurisdiction

- Some judges did not see a distinction between the two approaches.
- Jurisdiction discovery must be available if courts are going to require these standards.
- There is a need for clear rules, as well as for discretion in analyzing fact patterns.
- Judges do not necessarily look at doctrine versus fact. They get facts and try to follow the law.
- Judges don't feel they have the right to get creative to reach a particular result.
- The fact-based approach requires discovery, which front-loads the litigation, which in turn could have a limiting effect on access to the courts. The mechanical approach would not necessarily lead to front-loading.
- The advantage of the fact-based approach is that judges can rely on the trial courts as fact-finders. Its disadvantage is that it front-loads the process with discovery. The advantage of the doctrinal/rule-based approach is the promise of consistency.
- The fact-based approach is better, because the facts are different in every case.
- The fact-based approach has the advantages of bringing state issues, definitions, and concerns to the forefront so that they can be resolved in context. The doctrinal approach has disadvantages of being inflexible, and it appears to threaten court overload by dismissing federal cases and thus sending them to state courts, or by shutting the door to litigants altogether.
- The doctrinal/mechanical approach is easier to apply and more predictable.
- Due process issues are relevant to both plaintiffs and defendants.
- Predictability is a value, so the mechanical approach has appeal.

## The effect of the Supreme Court's decisions in *Daimler* and *McIntyre* on litigants

- Post-*Daimler* and -*McIntyre*, jurisdiction is more difficult to establish.
- State courts still retain their tools for interpreting and applying the Supreme Court's rulings.
- There are concerns about increased litigation costs, increased delay, and homogenization of the law.
- Following *Daimler* and *McIntyre*, plaintiffs' ability to litigate will be limited, as will be the availability of class actions.
- States will not see the impact of *Daimler* and *McIntyre*, because plaintiffs will not bring cases in state courts.
- With *Daimler* and *McIntyre*, there will be more of an effect on suits against international defendants than on suits against American defendants.
- The Supreme Court's decisions have resolved some questions, but along the way they have created new questions.



### **Effect of jurisdictional disputes, in addition to the heightened pleading standards, on the front-loading trend in civil litigation, and resulting impact on litigants' access to justice**

- Front-loading imposes additional cost and delay on plaintiffs and requires more attention from the courts, all of which limit access to justice.
- Front-loading is definitely occurring. It is part of a larger effort to reduce litigation. Much of it involves forum non conveniens and choice-of-law disputes, and demands for arbitration.
- Even if a case survives a jurisdiction battle, forum non conveniens motions will likely get the case dismissed.

### **The current viability of the minimum contacts standard, given the expansive nature of commerce in today's society**

- The minimum contacts standard seems to be in limbo given the recent Supreme Court decisions.
- There is tension between the Constitution's requirements and fairness to litigants.
- The minimum contacts standard is a starting point, but courts must also look at the facts and issues of substantial justice and due process.
- Courts need to take into consideration the newer forms of marketing – such as online promotion and sales—which can originate, and be concluded, anywhere in the world.
- Minimum contacts is still viable, because appellate courts can apply and interpret the standard. Much depends on the factual determinations of trial courts.
- Each case must be evaluated separately on its facts.
- *International Shoe* still provides adequate guidance.

### **How courts can determine whether a sufficient affiliation exists between the forum and the underlying controversy in order to justify specific jurisdiction (over general jurisdiction)**

- Facts and claims must be the starting point.
- This determination will first be made by the trial court through discovery, then the appellate court will examine the trial court's decision for sufficient affiliation, based on state laws.
- Either you have general jurisdiction or you don't. If you don't, then look at sufficient affiliation.
- The supporting facts must be in the pleadings, and limited discovery is necessary in many cases. It has to be crystal-clear that the court has jurisdiction.
- Look to the facts first, then examine the nexus. Generally, this is easy to determine.



## The recent Supreme Court decision in *Bristol-Myers Squibb* as a cautionary signal against “forum-shopping”

- The lawyer’s job is to find a forum for a fair hearing.
- A Constitutional limit is appropriate, but the plaintiff does have a right to choose the best forum for the case.
- “Forum shopping” is not a pejorative term. It represents good lawyering.
- Plaintiffs “shop” for the best forum, and defendants litigate to get away from the forum and to discourage plaintiffs from coming into the forum in the first place.

## Likely effect of *Bristol-Myers Squibb* on splitting of related causes of action, duplication of judicial work, and consequent waste of judicial resources

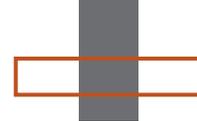
- *Bristol-Myers Squibb* may encourage split causes of action and multiple case filings, with resultant waste and inefficiency.
- It is not unfair for the defendant to have all claims against it resolved in one jurisdiction, and duplication of judicial work and waste of judicial resources is a concern.
- *Bristol-Myers Squibb* will no doubt lead to increased litigation expense and risk of inconsistent results.

## Desirability of legislative guidance on standards for minimum contacts and purposeful availment

- The legislature has the right to determine policy, but state legislatures cannot alter the U.S. Constitution.
- Constitutional issues are for judges, not legislators. There are separation-of-powers issues.
- Changing the rules on jurisdiction might not be politically viable; or the legislature might never get the job done; or the legislature might narrow jurisdiction even further.
- Express state registration or consent provisions might be helpful, but the courts would still have to decide if they conflict with Constitutional due process.
- There can be unintended consequences from new legislation.

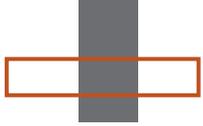
## When litigants file cases in the state’s courts, do the courts want to retain jurisdiction?

- Yes, but jurisdiction is totally fact-driven.
- Courts won’t bend the rules to take jurisdiction.
- Courts don’t “want” to retain or not retain jurisdiction, but they do have concerns about committing state court resources to cases with little or no nexus to the state, and about access to justice.



## Removal to federal court

- Defendants want to be before federal judges, whom they see as more defendant-friendly, and they want access to better discovery and tougher sanctions.
- State courts are seeing substantial declines in their civil caseloads.
- Removal to federal court is as much good lawyering by the defense bar as “forum-shopping” is good lawyering by the plaintiff bar.
- Litigants come to our state courts to try to get a fairer shake than they’ll get in the federal courts.



# APPENDICES

## Faculty Biographies

### Paper Writers and Speakers

**HONORABLE RALPH D. GANTS (JUDICIAL WELCOME)** was appointed Associate Justice of the Massachusetts Supreme Judicial Court in January 2009. He became the 37th Chief Justice in July 2014. Before joining the SJC, he served for more than eleven years as an Associate Justice of the Massachusetts Superior Court. He was born in New Rochelle, New York in 1954, and received his B.A. from Harvard College in 1976, graduating *summa cum laude* and Phi Beta Kappa. The following year, he completed a Diploma in Criminology at Cambridge University in England. In 1980, he earned a J.D. degree, *magna cum laude*, from Harvard Law School, where he was the Notes editor of the *Harvard Law Review*. He clerked for U.S. District Court Judge Eugene H. Nickerson, served as a Special Assistant to FBI Director William H. Webster, and later served as an Assistant U.S. Attorney in Massachusetts and Chief of the Public Corruption Unit before entering private practice. He has taught at Harvard Law School, New England Law—Boston, and Northeastern University School of Law. Chief Justice Gants is chair of the SJC’s Standing Committee on Model Jury Instructions on Homicide and of the SJC Indigency Committee, and was co-chair of the Massachusetts Access to Justice Commission from 2010 to 2015.

**SIMONA GROSSI (MORNING PAPER PRESENTER)** graduated from L.U.I.S.S. University, Rome, Italy in 2002. She completed LL.M. and J.S.D. programs at UC Berkeley School of Law. She worked for the U.N. from 2000 to 2002 and then went into private practice with the Clifford Chance LLP and Bonelli Erede Pappalardo law firms, doing national and transnational litigation from 2002 to 2008. Professor Grossi joined Loyola Law School L.A. in 2010. She is an elected member of the American Law Institute and of the International Association of Procedural Law (IAPL). Her scholarship focuses on civil procedure, federal courts, judicial decision making, and legislative reform. In 2016 Professor Grossi served as the Chair of the AALS Executive Committee for the Section on Civil Procedure.

**ADAM STEINMAN (AFTERNOON PAPER PRESENTER)** is the Frank M. Johnson Faculty Scholar & Professor of Law at the University of Alabama, where he teaches civil procedure, complex litigation, and international human rights. He was previously a Professor of Law at Seton Hall University and the University of Cincinnati. Professor Steinman is an elected member of the American Law Institute and an author on the Wright & Miller FEDERAL PRACTICE & PROCEDURE treatise. Prior to becoming a professor, he practiced with the Appellate Litigation Program at Georgetown University Law Center and the law firm of Perkins Coie LLP in Seattle. He also served as a law clerk to federal judges on both the trial and appellate levels. Professor Steinman earned his undergraduate degree from Yale University and his J.D. from Yale Law School.

**HONORABLE WILLIAM G. YOUNG (LUNCHEON SPEAKER)** Judge of the United States District Court, District of Massachusetts, has been an active trial judge for more than 25 years, serving on both the Massachusetts Superior Court (1977-85) and the United States District Court for the District of Massachusetts (1985-present). After receiving his A.B., *magna cum laude*, from Harvard University in 1962, he served two years as an officer



in the United States Army. His legal career began in 1967 when he was admitted to the Massachusetts bar upon graduating from the Harvard Law School and served as law clerk to the Chief Justice of the Supreme Judicial Court. Following his clerkship, he practiced law with the firm of Bingham, Dana & Gould. His legal career has also included stints as a Special Assistant Attorney General and as Chief Counsel for former Massachusetts Governor Francis W. Sargent. A longtime teacher of evidence and trial advocacy, he has taught at several law schools including Harvard, Boston College, and Boston University. Often referred to as “the Education Judge,” he is active in judicial education at the Federal Judicial Center and the Flaschner Judicial Institute. He has been a frequent instructor at continuing legal education programs and institutions, including Virginia Continuing Legal Education and the Practising Law Institute (PLI). He has won national acclaim for his work on the Massachusetts Continuing Legal Education’s annual lecture series “On Trial with Judge Young,” which offers each fall an intensive 15-week study of trial techniques and trial evidence. In addition to teaching in the classroom, Judge Young has written extensively. He is the principal author of MASSACHUSETTS EVIDENTIARY STANDARDS (1992 through 2005 eds.), Vols. 19 and 19A of EVIDENCE (Mass. Practice Series 1998), and co-author of “Daubert’s Gatekeeper: The Role of the District Judge in Admitting Expert Testimony” (Tulane Law Review), and “An Open Letter to U.S. District Judges” in THE FEDERAL LAWYER, July 2003 (decrying the decline of jury trial in federal courts).

**ELLEN RELKIN (FORUM MODERATOR)** is President of the Pound Civil Justice Institute. She is of counsel to Weitz & Luxenberg, P.C. in New York City and Cherry Hill, New Jersey. She is licensed to practice in New York, New Jersey, Pennsylvania, and the District of Columbia, and is certified by the New Jersey Supreme Court as a Certified Civil Trial Attorney. Ms. Relkin is an elected member of the American Law Institute. She serves on the Board of Governors of the New Jersey Association for Justice and the Board of Visitors of the University of California at Irvine Law School. She is a former chair of the Toxic, Environmental and Pharmaceutical Torts Section of the American Association of Justice.

## Panelists

**ALANI GOLANSKI** is the director of the appellate litigation unit at Weitz & Luxenberg, New York, NY, with particular emphasis on asbestos-cancer and toxic environmental tort litigation. His appellate work has included cases involving products liability and duty standards, choice of law, state Labor Law issues, punitive damages, and federal court review of the interplay of New York’s complex judgment molding rules and statutes. He recently authored the chapter “Legal Considerations of Forensic Applications of Epidemiology in the U.S.,” in FORENSIC EPIDEMIOLOGY: PRINCIPLES AND PRACTICE (M.D. Freeman & M.P. Zeegers eds., Elsevier 2016). Mr. Golanski received his B.A. from Trinity College in Hartford, Conn., Phi Beta Kappa, an M.A. in analytic philosophy from the Graduate Center of the City University of New York, a J.D. degree from the University of Connecticut School of Law, and an LL.M. degree from Columbia Law School, where he was a James Kent Scholar (Columbia Law’s highest academic distinction).

**HONORABLE GERALDINE S. HINES** is Associate Justice of the Massachusetts Supreme Judicial Court. She was born in Scott, Mississippi, and grew up in the Mississippi Delta. She graduated from Tougaloo College in 1968 and from the University of Wisconsin Law School in 1971. Upon graduation she became a staff attorney at the Massachusetts Law Reform Institute, engaging in prisoner’s rights litigation. From 1973 to 1977 she practiced criminal law with the Roxbury Defenders’ Committee, eventually becoming its Director. She later litigated civil



rights cases relating to discrimination in education and advised on special education law while a staff attorney at the Harvard University Center for Law and Education. Justice Hines entered private practice in 1982, appearing in state and federal courts on criminal, administrative, labor and family law matters, and was a founding partner in the first law firm of women of color in the New England region. She was appointed to the Superior Court in 2001, to the Appeals Court in 2013, and to the Supreme Judicial Court in 2014. Justice Hines has been active in the American Civil Liberties Union, the National Lawyers Guild, and the National Conference of Black Lawyers, and has observed elections and investigated human rights abuses in Africa and the Middle East. She was an adjunct faculty member at Northeastern University Law School from 1980 to 2013, co-teaching the Criminal Advocacy clinic and teaching criminal trial advocacy. She has also served as a faculty member on scores of Massachusetts Continuing Legal Education programs for attorneys and judges on diverse subjects, including trial advocacy, federal civil litigation, civil rights claims, and appellate procedure.

**LONNY HOFFMAN** is the Law Foundation Professor at the University of Houston Law Center. An expert on procedural law in federal and state courts, he is a highly prolific scholar whose work has appeared in the leading law reviews in the country and been highly influential with commentators, lawyers and courts, including the United States Supreme Court. In addition to his scholarly work, Lonny is actively involved in professional practice. He has testified before Congress on several occasions, spoken by invitation to federal rulemakers and lectured around the world on civil litigation subjects. In 2009, he was elected to membership in the American Law Institute.

**TOYJA E. KELLEY** is a partner in the commercial litigation practice of Saul Ewing LLP, a full-service law firm with more than 270 lawyers in 11 East Coast offices. Mr. Kelley concentrates his practice in general commercial litigation, construction litigation, professional and products liability, business torts, and insurance coverage. He has experience representing clients in the manufacturing, construction, retail, real estate, and automotive industries. Mr. Kelley also currently serves as First Vice President of DRI—the Voice of the Defense Bar. He will be installed as the organization's President in 2018. DRI is the leading civil defense organization of more than 22,000 defense attorneys and in-house counsel members.

**LINDA MORKAN** practices with Robinson Cole in Hartford, CT. She has specialized in appellate advocacy for almost 30 years, and has been involved in more than 200 appeals before the appellate courts in Massachusetts, Connecticut, Rhode Island and New York, the United States Courts of Appeals for the First, Second, Fifth, Sixth, Eleventh and DC Circuits, and one appeal in the United States Supreme Court. In 2008, she was the first woman in Connecticut inducted into the American Academy of Appellate Lawyers, whose invitation-only membership is limited to 500 lawyers in the U.S. Linda has just completed a three-year stint as Co-Chair of the Appellate Advocacy Section of the Connecticut Bar Association. She is also currently a Vice Chair of the Torts and Insurance Practice Section of the ABA, and regularly publishes in state and national publications on topics related to appellate practice and persuasive advocacy techniques.

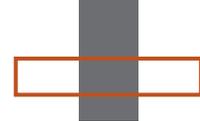
**HONORABLE JENNY RIVERA**, an Associate Judge of the New York State Court of Appeals, has spent her entire professional career in public service. She clerked for the Honorable Sonia Sotomayor, on the Southern District of New York, and also clerked in the Second Circuit Court of Appeals Pro Se Law Clerk's Office. She worked for the Legal Aid Society's Homeless Family Rights Project, the Puerto Rican Legal Defense and Education Fund (renamed Latino Justice PRLDEF), and was appointed Special Deputy Attorney General for Civil Rights by the New York State Attorney General. Judge Rivera has been an Administrative Law Judge for the



New York State Division for Human Rights, and served on the New York City Commission on Human Rights. Prior to her appointment to the Court of Appeals, she was a tenured faculty member of the City University of New York School of Law, where she founded and served as Director of the Law School's Center on Latino and Latina Rights and Equality. Judge Rivera is an elected member of the American Law Institute, and has published extensively on interpersonal violence, women's rights, and issues that impact the Latino community. She served on the American Bar Association's Commission on Hispanic Legal Rights and Responsibilities from 2010 to 2012, and as the Reporter to the Commission authored the Commission's Report. Judge Rivera has received several awards, including the ABA Spirit of Excellence Award and the NYSBA Diversity Trailblazer Lifetime Achievement Award. She graduated from Princeton University, and received her J.D. from New York University School of Law, where she was a Root-Tilden Scholar. She received her LL.M. from Columbia University School of Law.

**MATT WESSLER** is a principal at Gupta Wessler PLLC in Washington, DC, where he focuses on public interest and plaintiff-side appellate and complex litigation. He handles high-profile cases at all levels of both state and federal courts, and has argued multiple cases before the U.S. Supreme Court, including *Coventry Health Care of Missouri v. Nevils* and *US Airways v. McCutchen*. Outside of the Supreme Court, Matt's practice involves a wide range of areas including class actions, health care, personal injury, employee benefits, consumer protection, preemption, arbitration, antitrust, and banking. He has long worked to oppose forced arbitration clauses, and recently secured a landmark victory in the Fourth Circuit, in *Hayes v. Delbert Servs. Corp.*, for a class of consumers opposing a tribal payday lender's efforts to force claims into "tribal arbitration." Before forming Gupta Wessler, Matt spent six years as a staff attorney at Public Justice, P.C. in Washington, DC, where he spearheaded the firm's focus on Supreme Court litigation and handled cases involving ERISA, preemption, arbitration, and health care. Matt is a graduate of Williams College and of Cornell Law School.

**MARGARET WOO** is Professor of Law at Northeastern University School of Law. In 1997, she was named the law school's Distinguished Professor of Public Policy. She is also co-editor of the *JOURNAL OF LEGAL EDUCATION*, the premier legal education journal published by the Association of American Law Schools. Professor Woo has published and spoken widely on the role of courts in economic development and democracy. A specialist on Chinese legal reform, she is an associate of the East Asian Legal Studies Program at Harvard University, and was a fellow of the Bunting Institute at Radcliffe College. She has received grants from the National Science Foundation and the Ford Foundation, and was on the Senior Scholar Roster for the Fulbright Scholars Program. Her books include *East Asian Law: Universal Norms and Local Culture* (Routledge, 2003), *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* (Aspen Publishing, 2006), and *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge University Press, 2011). Professor Woo is an elected member of the American Law Institute and of the International Association of Procedural Law, and a fellow of the American Bar Foundation. She previously served on the Board of Directors for the Law and Society Association and chaired the civil procedure section of the Association of American Law Schools. A graduate of Brown University, Professor Woo received her J.D. from New York University School of Law and her LL.M. from Georgetown University School of Law.

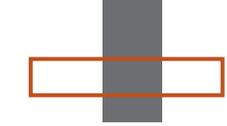


## Discussion Group Moderators

**LINDA MILLER ATKINSON** is Of Counsel to the firm of Atkinson, Petruska, Kozma & Hart, with offices in Gaylord and Channing, Michigan. She is licensed in Michigan and is an emeritus member of the Wisconsin and Georgia bars. She is a 1963 graduate of Oberlin College, Oberlin, Ohio, and a 1973 graduate of Wayne State University Law School in Detroit, Michigan. Linda is an author and editor of *TORTS: MICHIGAN LAW AND PRACTICE*, published by the Institute of Continuing Education since 1994, of *LAWYERS DESK REFERENCE* (8th edition, Westlaw), and author of the “Depositions” chapter of *LITIGATING TORT CASES* (AAJ Press, published by Westlaw). She received the American Association for Justice’s Champion of Justice Award in 2007, the Trial Lawyer of the Year Award in 1995, and the Women Trial Lawyer’s Caucus Marie Lambert Award in 2000. She is a past president of the Michigan Association for Justice, a member of the President’s Club of the American Association for Justice, a Trustee of the Melvin M. Belli Society and Chair of the Belli Seminar Faculty, and a Fellow and Trustee of the Pound Civil Justice Institute. In her life outside the courtroom she is a certified Hunter Education Instructor, and has provided outdoor emergency care with the National Ski Patrol for more than 20 years.

**LESLIE A. BAILEY** litigates complex public interest appeals on behalf of consumers who have been cheated and advocates for the public’s right of access to court records. She has testified before both houses of Congress about how court secrecy threatens public health and safety, and has successfully blocked attempts by major corporations to hide evidence of wrongdoing through secrecy orders. She also has extensive experience in the enforceability of arbitration clauses in consumer and employment contracts. She has briefed and argued numerous arbitration appeals, and has successfully opposed petitions for *certiorari* in several arbitration cases. She has spoken at numerous national conferences and served as a panelist at the 2014 Pound Forum for State Appellate Court Judges, which addressed forced arbitration. Leslie graduated *cum laude* from Claremont McKenna College and received her J.D. *cum laude* from the New York University School of Law and. She serves as Co-Chair of the Board of Directors of the National Association of Consumer Advocates. In her spare time, she is the lead singer of the San Francisco rock band Lucy & the Long Haul.

**KATHRYN H. CLARKE** is a sole practitioner in Portland, Oregon, who specializes in appellate practice and consultation on legal issues in complex tort litigation. She served as President of the Pound Civil Justice Institute from 2011 to 2013. She is a member of the Oregon Trial Lawyers Association, and has been a member of its Board of Governors for over 25 years, served as President from 1995 to 1996, and received that organization’s Distinguished Trial Lawyer award in 2006. She is also a member of the Board of Governors of the American Association for Justice. She was a member of the adjunct faculty at Lewis and Clark Law School, and taught a seminar in advanced torts for several years. In 2008 she served as a member of a work group on Tort Conflicts of Law for the Oregon Law Commission, which resulted in a bill passed by the 2009 legislature. She has served as member and Chair of Oregon’s Council on Court Procedures, and has been a member of the Oregon State Bar’s Uniform Civil Jury Instructions Committee. In 2016 she was honored by the Pound Institute for her lifetime achievement as an appellate advocate.



**CARAGH GLENN FAY** is managing partner of the Fay Law Group in Washington, DC. Her practice includes personal injury, medical malpractice, general civil litigation, and terrorism and Foreign Sovereign Immunities Act cases. She is admitted to practice in Maryland, the District of Columbia, and a number of federal courts. She holds a B.A. degree from the University of Maryland and a J.D. degree from the David A. Clarke School of Law of the University of the District of Columbia, where she was a member of the UNIVERSITY OF THE DISTRICT OF COLUMBIA LAW REVIEW. She is a member of the Maryland and District of Columbia Bars, the Trial Lawyers Association of Metropolitan Washington DC, and the American Association for Justice, and is a Fellow of the Pound Civil Justice Institute. Her pro bono activities include representation of children with disabilities and those in need of special education support.

**THOMAS FORTUNE FAY** practices in Washington, DC with the Fay Law Group, P.A. In addition to a general civil trial litigation practice, the firm prosecutes cases arising from foreign state-sponsored terrorist attacks carried out against American citizens and employees. Mr. Fay is a graduate of Notre Dame University and Rutgers School of Law. He is a Supporting Fellow of the Pound Civil Justice Institute, a member of the American Board of Trial Advocates, a trustee of Public Citizen, and a director of No Greater Love, an organization whose mission is the recognition and remembrance of persons who lost their lives in service to others.

**WENDY R. FLEISHMAN** is a partner in the New York office of Lief, Cabraser, Heimann & Bernstein, specializing in litigation involving prescription drugs, medical devices, automobile design defects, and complicated medical malpractice cases. She is an officer of the New York State Trial Lawyers Association, a Fellow of the American Bar Foundation, the Women's Caucus representative to the Board of Governors of the American Association for Justice, and a former chair of AAJ's Section on Tort, Environmental and Products Liability Litigation. She received her B.A. degree from Sarah Lawrence College and her J.D. degree from Temple University's James E. Beasley School of Law.

**STEVE HERMAN** practices with Herman, Herman & Katz, in New Orleans, Louisiana. The author of *AMERICA AND THE LAW: CHALLENGES FOR THE 21<sup>ST</sup> CENTURY*, Herman teaches an advanced torts seminar on class actions at Loyola Law School and an advanced civil procedure course in complex litigation at Tulane. He is a past president of the Louisiana Association for Justice, a past president of the Civil Justice Foundation, and a fellow of both the International Academy of Trial Lawyers and the Litigation Counsel of America. Herman served for six years as a Lawyer Chair for one of the Louisiana Attorney Discipline Board Hearing Committees, and he currently serves on the Louisiana State Bar Association's Committee on the Rules of Professional Conduct. For the past seven years, Herman has served as Co-Liaison / Co-Lead Class Counsel for Plaintiffs in the *Deepwater Horizon* Oil Spill Litigation.

**PAT MALONE** practices law in Washington, DC, representing seriously injured people in professional liability and pharmaceutical products liability litigation. He is co-author of *RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY* and the author of *WINNING MEDICAL MALPRACTICE CASES WITH THE RULES OF THE ROAD TECHNIQUE*. He has also published a book for consumers: *THE LIFE YOU SAVE: NINE STEPS TO FINDING THE BEST MEDICAL CARE—AND AVOIDING THE WORST*. His recent articles include "Paying It Forward by Pressing for Safety Changes" (*TRIAL*, June 2014), and "Unethical Secret Settlements: Just Say No" (*TRIAL*, Sept. 2010, co-author with Jon Bauer). Mr. Malone is a graduate of Yale Law School, an elected member of the American Law Institute, a fellow of the International Academy of Trial Lawyers, and a Trustee of the Pound Civil Justice Institute.



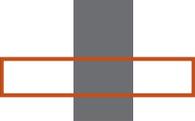
**ANDRE M. MURA** is a partner at the Gibbs Law Group, LLP in Oakland, California, representing plaintiffs in class action and complex litigation concerning consumers' and workers' rights, products liability, drug and medical devices, federal jurisdiction, and constitutional law. Previously he was senior litigation counsel at the Center for Constitutional Litigation PC, in Washington, DC, where he represented plaintiffs in state and federal appellate courts, including the United States Supreme Court. In *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), he represented the plaintiff before the U.S. Supreme Court, authoring merits briefing on specific personal jurisdiction. In *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012), Mura successfully argued that a state law limiting compensatory damages in medical malpractice cases violated his client's constitutional right to trial by jury. He contributes to Consumer Law Watch, a blog analyzing developments in the law of consumer class actions, and is a member of the Lawyers Committee of the National Center for State Courts, a member of the American Association for Justice, and a Fellow of the Pound Civil Justice Institute.

**WAYNE PARSONS** practices in Honolulu, Hawai'i. He received B.S. and M.S. degrees in engineering, physics and mathematics from the University of Michigan. After college he went to work with NASA on the Apollo space project, which took him to the astronomical observatory on the Island of Maui. After seeing Hawai'i, he went to the University of Michigan Law School and moved to Hawai'i permanently. He specializes in personal injury matters for plaintiffs and engages in consumer advocacy in the construction industry. Mr. Parsons has been president of the Hawai'i State Bar Association, was a founder of the Consumer Lawyers of Hawai'i, has served as a governor of the American Association for Justice, and has been the Hawai'i chair of the Public Justice organization. He is a Fellow of the Pound Civil Justice Institute and a member of several construction, engineering and architecture organizations.

**GALE PEARSON** is senior partner of the law firm of Pearson, Randall & Schumacher, P.A., in Minneapolis. Her practice concentrates on environmental, pharmaceutical, medical device, and corporate fraud litigation, including Qui tam. She received her bachelor's degree from California State University at Northridge with a major in Laboratory Medicine, Physics and Chemistry, and her law degree from Loyola Law School in Los Angeles. She is a Certified Clinical Laboratory Scientist. She is a member of the Minnesota and American Associations for Justice and a board member for Public Justice. She has served in the speakers' bureau for Minnesota's "We the Jury" project and is a frequent lecturer on topics that intersect science and the law.

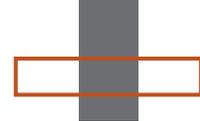
**ALINOR STERLING** practices law as a member of Koskoff, Koskoff & Bieder, PC in Bridgeport, Connecticut. She handles complex civil cases at trial and on appeal. Alinor received her undergraduate degree from Princeton University, where she took her major in the Woodrow Wilson School of Public and International Affairs and her minor in Russian Studies. After a year-long graduate fellowship in Moscow, Alinor attended the UCLA School of Law, where she was elected to the Order of the Coif and was an editor of the *UCLA Law Review*. Alinor is a Fellow of the Pound Civil Justice Institute and Chair of the Connecticut Trial Lawyers Association's Rules Committee. She enjoys teaching Connecticut practice and procedure at CLE programs.

**JOHN VAIL** is the proprietor of John Vail Law PLLC, "An appellate voice for the trial bar." Since 1997 Mr. Vail has focused his work solely on access to justice issues, representing clients in numerous state supreme courts and in the Supreme Court of the United States. He has received the Public Justice Achievement Award from Trial Lawyers for Public Justice for his "outstanding work and success challenging the constitutionality of legislation limiting injury victims' access to justice." His legal theories, and the evidence he has developed to support them, have been used widely to keep the doors to America's courtrooms open. His articles, such as *Blame it*



*on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. Sch. L. Rev. 323 (2006) and *Big Money v. The Framers*, Yale L.J. (The Pocket Part), Dec. 2005, <http://www.thepocketpart.org/2005/12/vail.html>, have enlivened scholarly debate and have guided practitioners. Mr. Vail spent seventeen years doing legal aid work, concentrating on major litigation to advance individual rights. He has been recognized by the legal services community for “inspired vision and outstanding leadership” and for “tireless devotion as a champion for the rights of low income people.” He was an original member of the Center for Constitutional Litigation, where he was Vice President and Senior Litigation Counsel. Mr. Vail has served as Professorial Lecturer in Law at the George Washington University School of Law. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

**DAVID WIRTES** practices in Mobile, Alabama. He is admitted to practice before all state and federal courts in Alabama and Mississippi. He is a member of the Alabama State Bar Association and has served on its Ethics Committee and its Long-Range Planning Committee, and presently serves as an editor of *THE ALABAMA LAWYER*. He is also an active member of the Mississippi Bar Association. He is a long-time member of the Alabama Supreme Court’s Standing Committee on the Rules of Appellate Procedure, a Sustaining Member, Governor and Executive Committee member of the Alabama Association for Justice, and a member of the American Association for Justice.



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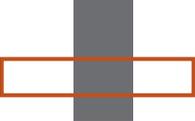
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## About the Pound Civil Justice Institute

### What is the Pound Civil Justice Institute?

The Pound Institute is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs and publications. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest scholars. The Pound Institute promotes ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury in an effort to bring positive changes to American jurisprudence. At conferences, symposia, and judicial forums, in reports and publications, and through grants and awards, the Pound Institute promotes a balanced debate which strives to bring positive changes to American jurisprudence and guarantee access to justice.

### What Programs Does the Institute Sponsor?

**Annual Forum for State Appellate Court Judges**—Since 1992, Pound's Judges Forum has brought together judges from state appellate courts, legal scholars, attorneys, and policymakers to discuss major issues affecting the civil justice system. Lauded by attending judges as “one of the best seminars available to jurists in the country,” the Forum is unique in its mission to educate state judiciaries on the civil justice system. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Forums have addressed such issues as jurisdiction, rulemaking, electronic discovery, mandatory arbitration, transparency in the courts, judicial independence, and the civil jury. Forum reports are distributed widely to members of the judiciary, law school faculty and libraries, policy-makers, attorneys and the public.

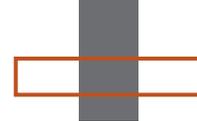
**Academic Symposia**— One of Pound's primary goals is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute established its Academic Symposium, which seeks to provide opportunities for new research supportive of the civil justice system. Symposia to date include Jury Trial and Remedy Guarantees with Oregon Law Review and the Oregon Jury Project (2017); The Demise of the Grand Bargain with Rutgers and Northeastern (2016); The “War” on the Civil Justice System with Emory Law in October (2015); on medical malpractice with Vanderbilt Law School (2005); and on forced arbitration with Duke University Law School (2002). The academic papers prepared for the Symposia are published in the co-sponsoring law schools' Law Review.

**Appellate Advocacy Award**—The Institute established this award for legal practitioners to recognize excellence in appellate advocacy in America. The Award is given to attorney(s) who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, access to civil justice.

**Howard Twiggs Memorial Lecture on Legal Professionalism**—Founded in 2010 to honor former Pound President Howard Twiggs – a legal giant, consummate professional, and champion of justice for Americans – this annual lecture series educates attorneys on ethics and professionalism in the legal field. Lectures have been delivered by Prof. Arthur Miller of NYU School of Law, Prof. Stephen Bright of Yale Law School, Hon. Mark Bennett of U.S. District Court (IA), Hon. R. Fred Lewis of the Florida Supreme Court, Hon. James Kitchens of the Supreme Court of Mississippi, Oliver Diaz, formerly of the Supreme Court of Mississippi, and attorney Mark Mandell of Rhode Island.

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## Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for download at [www.poundinstitute.org](http://www.poundinstitute.org).)

### 2017 • JURISDICTION: DEFINING STATE COURTS' AUTHORITY

Simona Grossi, Loyola Law School, Los Angeles, *Personal Jurisdiction: Origins, Principles, and Practice*  
Adam Steinman, The University of Alabama School of Law, *State Court Jurisdiction in the 21st Century*

### 2016 • WHO WILL WRITE YOUR RULES—YOUR STATE COURT OR THE FEDERAL JUDICIARY?

Stephen B. Burbank, University of Pennsylvania Law School and Sean Farhang, University of California, Berkeley, School of Law, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*

Stephen Subrin, Northeastern University School of Law and Thomas Main, University of Nevada, Las Vegas, Boyd College of Law, *Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?*

### 2015 • JUDICIAL TRANSPARENCY AND THE RULE OF LAW

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*  
Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*

### 2014 • FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*

Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After Conception*

### 2013 • THE WAR ON THE JUDICIARY: CAN INDEPENDENT JUDGING SURVIVE?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*  
Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

### 2012 • JUSTICE ISN'T FREE: THE COURT FUNDING CRISIS AND ITS REMEDIES

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, *New England School of Law, State Courts and Public Justice: New Challenges, New Choices*

J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

### 2011 • THE JURY TRIAL IMPLOSION: THE DECLINE OF TRIAL BY JURY AND ITS SIGNIFICANCE FOR APPELLATE COURTS

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*

Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*

Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

### 2010 • BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*

Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

### 2009 • PREEMPTION: WILL TRADITIONAL STATE AUTHORITY SURVIVE?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*

Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

### 2008 • SUMMARY JUDGMENT ON THE RISE: IS JUSTICE FALLING?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*

Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*



### **2007 • THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS**

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of Minnesota v. White*

Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

### **2006 • THE WHOLE TRUTH? EXPERTS, EVIDENCE, AND THE BLINDFOLDING OF THE JURY**

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*

Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

### **2005 • THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS**

Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

### **2004 • STILL COEQUAL? STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS**

Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

### **2003 • THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS**

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

### **2002 • STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?**

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

### **2001 • THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE**

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

### **2000 • OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE**

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

### **1999 • CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS**

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

### **1998 • ASSAULTS ON THE JUDICIARY: ATTACKING THE "GREAT BULWARK OF PUBLIC LIBERTY"**

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

### 1997 • SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS AND CONTROVERSIES

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

### 1996 • POSSIBLE STATE COURT RESPONSES TO AMERICAN LAW INSTITUTE'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

### 1995 • PRESERVING ACCESS TO JUSTICE: EFFECTS ON STATE COURTS OF THE PROPOSED LONG RANGE PLAN FOR FEDERAL COURTS

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

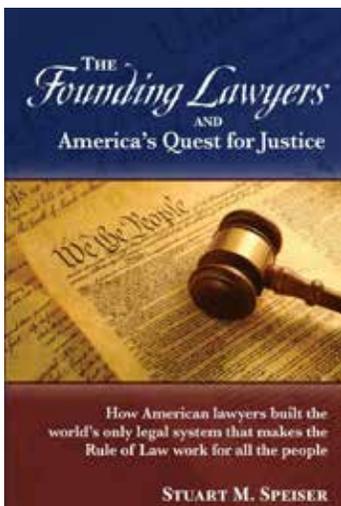
### 1993 • PRESERVING THE INDEPENDENCE OF THE JUDICIARY

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

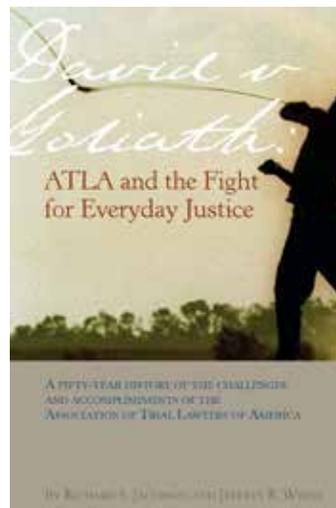
### 1992 • PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM

Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

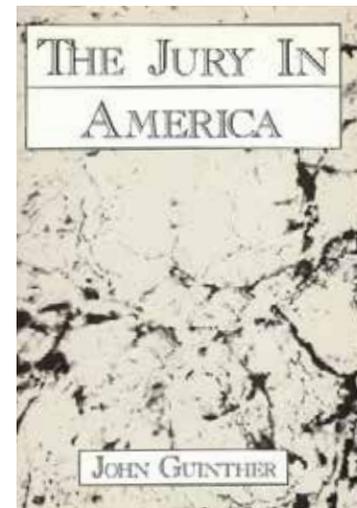
## Books distributed by the Pound Civil Justice Institute



*The Founding Lawyers and America's Quest for Justice*  
by Stuart M. Speiser (2010)



*David v. Goliath: ATLA and the Fight for Everyday Justice*  
by Richard S. Jacobson & Jeffrey R. White (2004)  
(Free viewing and downloading  
at [www.poundinstitute.org](http://www.poundinstitute.org).)



*The Jury In America*  
by John Guinther (1988)



## Reports of the Chief Justice Earl Warren Conferences on Advocacy

- 1989 • MEDICAL QUALITY AND THE LAW
- 1986 • THE AMERICAN CIVIL JURY
- 1985 • DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY
- 1984 • PRODUCT SAFETY IN AMERICA
- 1983 • THE COURTS: SEPARATION OF POWERS
- 1982 • ETHICS AND GOVERNMENT
- 1981 • CHURCH, STATE, AND POLITICS
- 1980 • THE PENALTY OF DEATH
- 1979 • THE COURTS: THE PENDULUM OF FEDERALISM
- 1978 • ETHICS AND ADVOCACY
- 1977 • THE AMERICAN JURY SYSTEM
- 1976 • TRIAL ADVOCACY AS A SPECIALTY
- 1975 • THE POWERS OF THE PRESIDENCY
- 1974 • PRIVACY IN A FREE SOCIETY
- 1973 • THE FIRST AMENDMENT AND THE NEWS MEDIA
- 1972 • A PROGRAM FOR PRISON REFORM

## Reports of Roundtable Discussions

### 1993 • JUSTICE DENIED: UNDERFUNDING OF THE COURTS

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

### 1991 • SAFETY OF THE BLOOD SUPPLY

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, DC, attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

### 1990 • INJURY PREVENTION IN AMERICA

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of Everyday Law and TRIAL magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

### 1988-89 • HEALTH CARE AND THE LAW III

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

### 1988 • HEALTH CARE AND THE LAW

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”

### 1988 • HEALTH CARE AND THE LAW II—POUND FELLOWS FORUM

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

# Research Monographs

**Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts.** This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

**The Pound Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D.** Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public's views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

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