

# THE FALSE PROMISE OF GENERAL JURISDICTION

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*The Supreme Court has said that general jurisdiction provides at least one clear and certain forum to sue defendants, and that assumption has begun to shape the Court's understanding of specific jurisdiction. But that assumption is wrong. General jurisdiction does not provide a guaranteed U.S. forum for foreign defendants or in cases involving multiple defendants. And even when defendants can be sued "at home," such cases may be (and not infrequently are) dismissed for forum non conveniens, sometimes even when no alternative forum is available.*

*Nor is a regime reliant on a general jurisdiction backstop desirable. The Court's narrowed version of general jurisdiction creates incentives for states to favor local defendants—as Michigan has done through choice-of-law rules that give preference to lex fori and substantive laws that favor car manufacturers. Overreliance on general jurisdiction also channels litigation to states that may not want it—a concern already voiced by Delaware courts.*

*This Article warns against developing the law of personal jurisdiction on the assumption that general jurisdiction will guarantee an available forum in which to sue defendants. Instead, we argue that the primary engine of personal jurisdiction must remain a flexible doctrine of specific jurisdiction. Rather than hunting for new formalisms in specific jurisdiction's relatedness requirement, the Justices should embrace specific jurisdiction's reasonableness factors as a ready-made tool for answering their recent worries.*

### INTRODUCTION

In *Ford Motor Co. v. Montana Eighth Judicial District Court*, the Supreme Court allowed two car-crash victims to sue an auto-manufacturing giant in the states where the victims lived and the accidents occurred.<sup>1</sup> This result should not have been surprising, especially in light of *World-Wide Volkswagen Corp. v. Woodson*, which had treated just such a localized car crash as a paradigmatic exercise of specific jurisdiction.<sup>2</sup> Indeed, what is most remarkable about *Ford* is that,

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1. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1023, 1032 (2021). The defendant, Ford Motor Company, had argued that it should not be subject to personal jurisdiction in those states because it was not at home there and because the particular cars involved were designed, manufactured, and originally sold in other states. *Id.* at 1023–24.

2. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises

seventy-five years after *International Shoe Co. v. Washington* and forty years after *World-Wide Volkswagen*, Ford could argue with a straight face that specific jurisdiction was lacking.

Part of the explanation is that, for most of this period, there was no need to consider specific jurisdiction over major national corporations like Ford. Before 2011, plaintiffs could rely on general “doing business” jurisdiction to establish personal jurisdiction over corporations that target their conduct towards every state.<sup>3</sup> But in *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>4</sup> and *Daimler AG v. Bauman*,<sup>5</sup> the Supreme Court abandoned the loose doing business conception and narrowed general jurisdiction over corporations to states where they are essentially at home—typically the state or states where a corporation is incorporated and has its principal place of business.<sup>6</sup> In exchange for this narrower conception of general jurisdiction, the Court promised both clarity and a fail-safe: at least “one clear and certain forum in which a corporate defendant may be sued on any and all claims.”<sup>7</sup>

*Goodyear* and *Daimler*’s rejection of doing business jurisdiction meant that the Court has had to address new questions about specific jurisdiction. Yet in answering those questions, the Justices continue to rely on the promise of general jurisdiction as a way out of the personal jurisdiction labyrinth. In rejecting specific jurisdiction in *Bristol-Myers Squibb Co. v. Superior Court of California*, for instance, the Court took solace in *Daimler*’s home-court fail-safe, explaining that even if the plaintiffs allegedly injured by Bristol-Myers Squibb’s drug could not sue collectively in California, they could always join together to sue the pharmaceutical manufacturer in its home states of Delaware and New York.<sup>8</sup>

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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.”)

3. See, e.g., Kevin D. Benish, Note, *Penoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1610 (2015) (“[M]any famous procedure cases of the twentieth century would never have made it through the courthouse door under [*Daimler*’s] narrow standard.”); Alexandra D. Lahav, Personal Jurisdiction and the New Privity 10 (April 21, 2020) (unpublished manuscript) (on file with authors) (explaining the capaciousness of doing business jurisdiction even under *Penoyer*); Meir Feder, *Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 675 (2012) (noting that prior to 2011, “lower courts widely embraced the notion that any corporation ‘doing business’ in a state was subject to general jurisdiction there—i.e., that state may assert jurisdiction over ‘any claim asserted against a defendant having regular and consistent commercial activities in the forum, no matter how removed the facts of the claim are from those activities’” (quoting Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173)).

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

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

6. See Benish, *supra* note 3, at 1618.

7. *Daimler*, 571 U.S. at 137.

8. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783 (2017) (“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.”). In its amicus curiae brief in *Bristol-Myers Squibb*, the United States government specifically relied on the general jurisdiction fail-safe. Brief for the United States as Amicus Curiae Supporting Petitioner

In this Article, we explain why general jurisdiction is not the fail-safe the Justices say it is. General jurisdiction cannot live up to *Daimler*'s promise because state courts are not always able or willing to hear "any and all claims" brought against resident corporations. Nor is general jurisdiction desirable as the primary engine of personal jurisdiction. Limiting general jurisdiction to defendants' home courts, as today's law does, will predictably lead to defendant-friendly substantive law. And in the unlikely event that general jurisdiction is re-expanded to its pre-*Daimler* doing business<sup>9</sup> or pre-*International Shoe* "corporate presence" scope,<sup>10</sup> states may be tempted to sell their forums to the plaintiffs' bar. Put another way, relying on general jurisdiction to be the primary engine of personal jurisdiction will pit states against each other in ways that will lead to too much regulation or too little.

Despite the musings of some of the Justices,<sup>11</sup> however, no revolution is required. To the contrary, the doctrine of specific jurisdiction is already capable of addressing the Justices' recent concerns. In particular, courts should reclaim a tool that has gone missing in the Supreme Court's most recent specific jurisdiction decisions: the reasonableness factors.<sup>12</sup> It is specific jurisdiction's reasonableness factors—not general jurisdiction or new rules of relatedness—

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at 29, *Bristol-Myers Squibb*, 137 S. Ct. 1773 (No. 16-466). Ford also raised the general jurisdiction fail-safe in its reply brief. Reply Brief for Petitioner at 24, *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368, 19-369), 2020 WL 2133053 at \*24 ("[G]eneral jurisdiction provides 'at least one clear and certain forum' in the unlikely event that a plaintiff cannot identify any jurisdiction in which the defendant took an act relevant to his claims." (quoting *Daimler*, 571 U.S. at 137)).

9. Justice Sotomayor seems to be the only vote in favor of such a reversal. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring in part and dissenting in part) ("Instead, the majority opinion goes on to reaffirm the restrictive 'at home' test set out in *Daimler*—a test that, as I have explained, has no home in our precedents and creates serious inequities.").

10. In his concurrence in *Ford*, Justice Gorsuch seemed to contemplate a return to a pre-*International Shoe* regime of general jurisdiction, in which multinational corporations whose "business is everywhere" would be deemed "present" and thus subject to suit on any claim in every state. *Ford*, 141 S. Ct. at 1038 & n.5 (Gorsuch, J., concurring).

11. *Id.* at 1039 (Gorsuch, J., concurring) ("The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy. On those scores, I readily admit that I finish these cases with even more questions than I had at the start."); *id.* at 1032 (Alito, J., concurring) ("To be sure, for the reasons outlined in Justice Gorsuch's thoughtful opinion, there are grounds for questioning the standard that the Court adopted in *International Shoe Co. v. Washington*. And there are also reasons to wonder whether the case law we have developed since that time is well suited for the way in which business is now conducted." (citation omitted)); cf. *BNSF Ry. Co.*, 137 S. Ct. at 1560 (Sotomayor, J., concurring in part and dissenting in part); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 892–93 (2011) (Breyer, J., concurring) (reserving considerations of changing the law of personal jurisdiction for a case that requires "a better understanding of the relevant contemporary commercial circumstances" and "in which the Solicitor General participates").

12. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) ("[C]ourts 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,' . . . and the 'shared interest of the several States in furthering fundamental substantive social policies.'" (alteration in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980))).

that can provide the safety valve to protect decoy whittlers in Maine<sup>13</sup> or artisanal potters in Appalachia,<sup>14</sup> for whom litigation in a far-flung forum might be unconstitutionally burdensome. The reasonableness factors also allow courts to identify and weigh competing state interests in a manner that will better account for interstate federalism than will blanket assumptions about state interests baked into rule-like tests. And the reasonableness factors help ensure that specific jurisdiction retains the flexibility it needs to adapt to ever-changing conditions on the ground.

This is not to suggest that personal jurisdiction doctrine is perfect—far from it. But asking this Court to start over or rewind the clock seems far more likely to destabilize personal jurisdiction than to improve it. This Article thus largely accepts the doctrine as it has developed since *International Shoe* and explains how that doctrine is flexible enough to alleviate the Justices' recent worries.

We begin in Part I by addressing the fallacy of *Daimler's* promise that defendants can always be sued at home. In suits against foreign defendants or in complex cases, there may not be a single state that has at-home jurisdiction. And, even if there is, the defendant's home state may not *want* to exercise jurisdiction over claims that arose beyond its borders. Nearly all states allow courts to use *forum non conveniens* to dismiss claims against hometown defendants. New York and Delaware—two major at-home jurisdiction states—are willing to do so even when no alternative forum is available.<sup>15</sup> This means that at-home general jurisdiction and *forum non conveniens*, if coupled with too narrow a view of specific jurisdiction, could form a sort of jurisdictional Bermuda Triangle where cases that everyone assumes should be heard in the United States simply vanish from the map.

Part II explains why restricting specific jurisdiction in reliance on general jurisdiction is unwise even if the defendant's home court could be counted on to keep the case. Using the example of Delaware, we show how a regime that relies on at-home jurisdiction would flood certain states with more cases, even though those states have expressed a preference not to hear all of them. Using the example of Michigan, we also show how at least some states would be motivated to provide local-defendant-friendly choice-of-law rules (e.g., applying *lex fori*) and local-defendant-friendly substantive law (e.g., caps on punitive damages or limitations on strict liability). In short, a personal jurisdiction regime that relies heavily on at-home jurisdiction risks creating justice on defendants' terms. Nor would a return to broader understandings of general jurisdiction be preferable: general jurisdiction based on doing business

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13. *Ford*, 141 S. Ct. at 1028 n.4 (“[C]onsider . . . a hypothetical offered at oral argument. ‘[A] retired guy in a small town’ in Maine ‘carves decoys’ and uses ‘a site on the Internet’ to sell them.” (quoting Transcript of Oral Argument at 39, *Ford*, 141 S. Ct. 1017 (Nos. 19-368, 19-369), 2020 WL 6203594)).

14. *J. McIntyre Mach., Ltd.*, 564 U.S. at 891 (Breyer, J., concurring).

15. See *infra* Part I.B.

risked exorbitant exercises of jurisdiction,<sup>16</sup> while general jurisdiction based on corporate presence was both underinclusive and overinclusive, leading to legal fictions that made jurisdiction over corporations unpredictable.<sup>17</sup>

Part III offers our simple prescription: A broad and flexible doctrine of specific jurisdiction must remain the primary engine of personal jurisdiction. But that does not mean specific jurisdiction is without limits. A renewed attention to the reasonableness factors can ensure that specific jurisdiction does not intrude on the fairness and federalism interests it was designed to protect. We therefore encourage the Supreme Court, as well as other federal and state courts, to keep these factors in mind.

## I. WHEN DEFENDANTS CANNOT BE SUED AT HOME

Arthur von Mehren and Donald Trautman coined the terms “specific” and “general” jurisdiction in 1966, twenty years after *International Shoe*.<sup>18</sup> By specific jurisdiction, von Mehren and Trautman meant the power to adjudicate based on “affiliations between the forum and the underlying controversy.”<sup>19</sup> General jurisdiction, by contrast, meant the power to adjudicate any claim against a defendant solely based on a particular relationship between the defendant and the forum, such as domicile, presence, or consent.<sup>20</sup> The Supreme Court adopted von Mehren and Trautman’s terminology in 1984 and has used it ever since.<sup>21</sup>

The terminology can be a bit confusing, however.<sup>22</sup> For one thing, specific may sound more narrow or limited than general,<sup>23</sup> yet the intent (of von Mehren and Trautman as well as the Supreme Court) was always for specific jurisdiction to be the primary basis for the authority to adjudicate.<sup>24</sup> For another, the Supreme Court in *Daimler* seemed to conflate “general jurisdiction” with

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16. See, e.g., Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 481–82 (2006).

17. See Lahav, *supra* note 3, at 11–12 (discussing similar cases that came out in opposite ways applying the legal fiction of corporate presence).

18. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

19. *Id.*

20. *Id.* at 1136–37.

21. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 629 & n.88 (1988) (noting the use of the terms in *Calder v. Jones*, 465 U.S. 783 (1984), and *Helicopteros Nacionales v. Hall*, 466 U.S. 408 (1984)).

22. See, e.g., Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 503 (2015) (“[G]eneral and specific jurisdiction have had an uneasy relationship from the beginning and have conspired to generate an illogical and unpredictable jurisprudence.”).

23. *Cf.* *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1034 (2021) (Gorsuch, J., concurring) (suggesting that “specific jurisdiction” affords a narrower authority than general jurisdiction in the sense that it requires the controversy to be related to the defendant’s purposeful contacts).

24. See *Daimler AG v. Bauman*, 571 U.S. 117, 128, 132–33, 132 n.9 (2014); von Mehren & Trautman, *supra* note 18, at 1164–65, 1177–79.

jurisdiction based on domicile (or, as we will call it, “at-home jurisdiction”) without indicating whether other traditional bases of general jurisdiction, like tag jurisdiction or consent, remain valid.

When the Supreme Court interred general doing business jurisdiction in *Daimler*, it reassured readers that at-home jurisdiction will provide plaintiffs with “one clear and certain forum in which a corporate defendant may be sued on any and all claims.”<sup>25</sup> A few years later, when identifying limits on specific jurisdiction’s relatedness requirement for the first time in *Bristol-Myers Squibb*, the Court emphasized that nothing in the Court’s decision prevented “the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over [the defendant].”<sup>26</sup>

There is a seductive simplicity to the idea of at-home jurisdiction. Individuals have long been subject to general jurisdiction in the state in which they are domiciled.<sup>27</sup> And assigning a corporation a “home” where it too is answerable for all claims promises to keep claims from falling through the cracks. If you cannot, for whatever reason, obtain jurisdiction over the corporation where you live or where the corporation’s actions are felt, at least you can follow it home and sue there.

Unfortunately, at-home jurisdiction cannot live up to these promises. This Part shows how defendants’ nationalities and the presence of multiple defendants or claims, on the one hand, and the doctrine of forum non conveniens, on the other hand, can render *Daimler*’s promise an empty one.

### A. Foreign Defendants and Complex Cases

First, when the defendant is a foreign corporation or citizen, at-home jurisdiction will not be available in any U.S. state.<sup>28</sup> To be sure, there are some disputes where jurisdiction over a foreign party would not be appropriate in the United States. But for the kinds of cases where courts need to think hard about specific jurisdiction over foreign defendants—that is, cases with a U.S. plaintiff

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25. *Daimler*, 571 U.S. at 137.

26. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783 (2017).

27. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924; *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (“Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment by means of appropriate substituted service.”). An individual may also be subject to personal jurisdiction where served with process, potentially subject to reasonableness analysis. See *Burnham v. Superior Ct.*, 495 U.S. 604, 624 (1990).

28. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 899 (2011) (Ginsburg, J., dissenting) (“[A]ll agree, McIntyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly ‘at home’ in New Jersey.”); Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT’L L. 663, 671 (2012) (noting *Goodyear* limited jurisdiction over foreign corporations); Jonathan Remy Nash, *The Rules and Standards of Personal Jurisdiction*, 72 ALA. L. REV. 465, 506–08 (2020) (discussing the ways in which foreign corporations under current doctrine can avoid being subject to personal jurisdiction despite strong contacts with the United States).

or a U.S. injury—at-home jurisdiction will not provide a backstop.<sup>29</sup> Specific jurisdiction must do the work if a foreign defendant (e.g., a foreign car company like Volkswagen) is to be haled into a U.S. court.<sup>30</sup>

Second, the at-home jurisdiction fallback is unreliable because cases may involve multiple defendants, not all of whom may be subject to at-home jurisdiction in the same forum.<sup>31</sup> The first-year Civil Procedure chestnut *World-Wide Volkswagen v. Woodson*<sup>32</sup> illustrates the point. In that case, the Robinson family was injured when the gas tank of their Audi exploded in a crash on an Oklahoma highway.<sup>33</sup> The Robinsons sued Audi and others, alleging that the car had been defectively designed.<sup>34</sup> Under the law today, none of the defendants would have been subject to general jurisdiction in Oklahoma (or in any other single state). Yet if the Robinsons had tried to sue another driver involved in the accident who was an Oklahoma resident, personal jurisdiction over that driver (whether general or specific) likely would be available *only* in Oklahoma. Only specific jurisdiction could do the work of allowing the Robinsons to sue both the car manufacturer and the other driver at the same time.

Counting on at-home jurisdiction to pull the laboring oar in such multi-party cases leads to inefficient and often unfair results.<sup>35</sup> Imagine, for example,

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29. Notably, Mary Twitchell's famous article on personal jurisdiction—cited repeatedly in *Goodyear* and *Daimler*—suggested that one reason to retain a concept of general jurisdiction was that “general jurisdiction offers the only possibility for domestic jurisdiction over foreign defendants in suits that arise outside the United States and are insufficiently related to the defendant’s domestic activities to warrant specific jurisdiction.” Twitchell, *supra* note 21, at 666; *see also Daimler*, 571 U.S. at 128, 132 n.9, 137 (citing Twitchell, *supra* note 21); *id.* at 159 n.12 (Sotomayor, J., concurring) (quoting Twitchell, *supra* note 21); *Goodyear*, 564 U.S. at 925 (citing Twitchell, *supra* note 21). In other words, Twitchell must have imagined a concept of general jurisdiction broader than the place of incorporation and principal place of business because otherwise it would never be possible for it to apply to foreign defendants that do not have U.S. headquarters.

30. It is often poor comfort to direct a U.S. plaintiff to sue the foreign corporation in *its* home jurisdiction—be it in Germany, Japan, or Zimbabwe—as a host of legal, practical, and financial obstacles may render that option impossible. *See, e.g.,* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1109–19 (2015) (noting the conventional wisdom that if there is no U.S. forum available, “transnational litigation has no other place to go” but also documenting exceptions to this accepted wisdom for certain kinds of cases and in certain countries); *id.* at 1130 (“The winners of [rising barriers to suing foreign parties in U.S. courts] . . . are not U.S. parties, or an undifferentiated class of ‘foreign defendants,’ but multinational companies incorporated and headquartered in [foreign states where it is difficult legally or practically to sue.]”); Axel Halfmeier, *Transnationale Delikte vor nationalen Gerichten oder: Wie weiter nach dem Ende der amerikanischen Rechtshegemonie?*, in Festschrift für Ulrich Magnus 433, 439 (Peter Mankowski & Wolfgang Wurmnest eds., 2014) (suggesting that U.S. courts declining jurisdiction in cases against foreign defendants could result in a potential regulatory vacuum).

31. *See Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) (arguing that narrowing specific jurisdiction “make[s] it impossible to bring a nationwide mass action in state court against defendants who are ‘at home’ in different States” and “will result in [unnecessary] piecemeal litigation and . . . bifurcation of claims”).

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

33. *See id.* at 288.

34. *Id.*

35. The purpose of joinder, intervention, and impleader is to consolidate interrelated claims, improving efficiency while reducing the risk of inconsistent judgments and the unfairness to parties that



that the Robinsons sued the other driver for all injuries and the other driver wanted to implead Audi for contribution on the theory that the design defect turned a fender bender into a serious accident.<sup>36</sup> Again, only a robust doctrine of specific jurisdiction can do the work of bringing these claims together.<sup>37</sup>

Indeed, as cases get more complex, the likelihood that at-home jurisdiction will converge on a single forum decreases.<sup>38</sup> Consider another Volkswagen example, the “clean diesel” litigation: a local, independent dealership’s allegedly false and misleading advertising may have convinced purchasers to buy the supposedly eco-friendly cars. But for any one car purchase, there would be no court that would have at-home jurisdiction over claims against the dealership *and* claims against Volkswagen AG for rigging its cars’ emissions systems.<sup>39</sup> And no court would have at-home jurisdiction over any attempt to aggregate claims by purchasers from across the country against their local dealerships—let alone if they also wanted to add Volkswagen.<sup>40</sup> At best, at-home jurisdiction would foster piecemeal litigation, risking inefficiency, unfairness, and inconsistent judgments.<sup>41</sup>

Of course, all the potential parties to a dispute cannot always be joined in a single lawsuit. The point is that, contrary to the Court’s assertions, the promise of an at-home jurisdiction fail-safe is viable only in simple cases involving

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would result. See FED. R. CIV. P. 13–14, 18–24; 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1581 (3d ed. 2002) (“With the advent of industrialization, high-speed transportation, and urbanization, more intricate disputes appeared with greater frequency, making it obvious that some procedural method was necessary for obviating piecemeal litigation. The drafters of the federal rules therefore decided . . . to codify the increasingly liberal attitude of the states toward joinder.”).

36. See FED. R. CIV. P. 14(a).

37. The understanding of specific jurisdiction advanced by the defendants and rejected by the Supreme Court in *Ford* would not have been sufficiently robust to allow such claims to be litigated in a single lawsuit. Even after *Ford*, it is not assured that specific jurisdiction would allow the other driver to implead Audi in this hypothetical; for example, would it matter that the Robinsons here are out-of-state plaintiffs, unlike the plaintiffs in *Ford*, or that the manufacturer is a foreign company?

38. For additional discussion of this point, see Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1429–33 (2018).

39. This is true about claims by the purchaser against Volkswagen and claims by the dealership against Volkswagen. See *supra* notes 35–37 and accompanying text (discussing impleader example).

40. This is true even though many of the claims in the clean diesel litigation arose under federal law. Indeed, because one of the main federal statutes on which the clean-diesel plaintiffs relied lacks a provision for nationwide service of process, see Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–12, it is possible that there would not be specific jurisdiction against Volkswagen in any one state, either.

41. Federal multidistrict litigation (MDL) is not a cure-all for piecemeal litigation, either. While MDL allows pretrial consolidation of federal cases filed around the country, there is no mechanism for nationwide consolidation of cases filed in *state* court. Cf. Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1714–15 (2021) (detailing mechanisms for state-by-state coordination). Nor does MDL expand the number of federal courts in which a case could be originally filed, and thus in which a defendant could go to trial, since the MDL statute permits consolidation for “pretrial proceedings” only. 28 U.S.C. § 1407; see also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998). So even if the MDL panel were able to consolidate all related federal cases, any trials would still be disaggregated in various transferor courts across the country. See Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants’ Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251 (2018).

domestic parties. Restricting the law of specific jurisdiction based on the assumption that defendants can always be sued at home is misguided.

### B. *Forum Non Conveniens*

The inability of general jurisdiction to reach foreign defendants and some complex cases is not—or at least should not be—news to scholars and judges. But there is another, less appreciated reason why at-home jurisdiction does not provide “one clear and certain forum in which a corporate defendant may be sued on any and all claims”<sup>42</sup>: even if the defendant can be sued at home, its home state court may still dismiss the case against it for forum non conveniens.

Both state and federal courts can and do dismiss cases for forum non conveniens even when the cases are brought against at-home defendants. While forum non conveniens historically was limited to cases involving non-local defendants, that traditional limitation has all but disappeared.<sup>43</sup> In the 1981 case *Piper Aircraft v. Reyno*, the Supreme Court itself affirmed the forum non conveniens dismissal of a suit even though the case had been transferred to the home forum of one defendant.<sup>44</sup> Although half of the federal circuits have now cast doubt on the appropriateness of forum non conveniens dismissals when a case is brought in the defendant’s home forum,<sup>45</sup> *Piper* likely prevents the outright prohibition of such dismissals as a matter of federal law.

State courts apply their own doctrines of forum non conveniens, and almost all of them currently allow dismissal of cases brought against at-home defendants.<sup>46</sup> That includes major at-home jurisdiction states like Delaware and New York.<sup>47</sup> To be clear, the willingness to use forum non conveniens to dismiss cases brought against local defendants is not limited to states of incorporation but includes states where defendants live or maintain their principal places of business.<sup>48</sup> Thus, whether plaintiffs turn to federal or state

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42. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

43. See Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 415–17 (2017).

44. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 235, 237 (1981).

45. Maggie Gardner, *Deferring to Foreign Courts*, 169 U. PA. L. REV. 2291, 2324 n.212 (2021).

46. See generally William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. (forthcoming 2023) (on file with authors) (surveying state doctrines of forum non conveniens). Although no state high court appears to have permitted dismissal of cases involving in-state defendants before 1950, a majority of states have affirmatively applied forum non conveniens to at-home defendants or stated that it would be permissible to do so. *Id.* (manuscript at 37 & nn. 246–47).

47. See N.Y. C.P.L.R. 327 (McKinney 2021) (“The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action [for forum non conveniens.]”); *Hall v. Maritek Corp.*, 170 A.3d 149, 160 (Del. Super. Ct. 2017) (“Delaware incorporation does not preclude dismissal on *forum non conveniens* grounds . . .”).

48. See, e.g., *Garrett v. Swift Transp. Co. of Ariz. L.L.C.*, No. 1 CA-CV 19-0840, 2020 WL 5529637, at \*2–3 (Ariz. Ct. App. Sept. 15, 2020), *review denied*, (Ariz. 2021) (affirming dismissal of wrongful death action brought by Washington plaintiffs against company headquartered in Arizona and explaining that “[w]hen the only Arizona party does not desire the Arizona court’s assistance, Arizona’s interest in the case is not fundamental”); *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 749, 755–56, 763 (Cal. 1991) (affirming dismissal of

court, *forum non conveniens* stands in the way of a defendant's home jurisdiction being the "one clear and certain forum" in which the defendant can be sued.

That practical reality undercuts the Supreme Court's reassurance in *Bristol-Myers Squibb*, when rejecting California's specific jurisdiction over some of the aggregated claims, that "the California and out-of-state plaintiffs [could] join[] together in a consolidated action in the States that have general jurisdiction over [Bristol-Myers Squibb]."<sup>49</sup> When the Court offered that suggestion in 2017, other pharmaceutical companies had already secured *forum non conveniens* dismissals of similar collective actions brought in their home forums, including at their principal places of business.<sup>50</sup> Indeed, Ohio first permitted *forum non conveniens* dismissals (reversing its prior rejection of the doctrine) in a Bendectin-related mass action brought against Merrell-Dow in the county where Merrell-Dow maintained its headquarters.<sup>51</sup>

Nor have plaintiffs in nationwide mass actions necessarily fared better since 2017. In *Cyr v. Ford Motor Co.*, for example, plaintiffs from all fifty states, Puerto Rico, and Canada brought a mass action against Ford in its home state of Michigan<sup>52</sup>—just as *Bristol-Myers Squibb* suggested they should. The Michigan

suit against a California corporation with a principal place of business in California that had designed and manufactured the relevant medical device in California based in part on "[t]he [considerable] burden on the California courts of trying these numerous complex actions"; *Durkin v. Intevac, Inc.*, 782 A.2d 103, 107 & n.2 (Conn. 2001) (ordering dismissal of complaint brought against several military contractors with principal places of business in Connecticut, as well as four other U.S. companies); *Fihe v. Rexall Sundown, Inc.*, 966 So. 2d 415, 417, 423 (Fla. Dist. Ct. App. 2007) (affirming dismissal of product liability suit brought by U.S. plaintiffs against maker of supplements that was incorporated in and had its principal place of business in Florida and which had designed, manufactured, distributed, and advertised its supplements from Florida); *Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269, 279–80 (Ill. 2005) (ordering dismissal of putative class action even though State Farm's principal place of business is in Illinois); *Gianocostas v. Interface Grp.-Mass., Inc.*, 881 N.E.2d 134, 136–37 (Mass. 2008) (ordering dismissal of tort claim brought by Massachusetts residents against Massachusetts-based tour operator); *Russell v. Chrysler Corp.*, 505 N.W.2d 263, 263–64 (Mich. 1993) (clarifying that cases brought against Chrysler and General Motors, which maintain their principal places of business in Michigan, can be dismissed for *forum non conveniens*); *Harrington v. Energy W., Inc.*, 396 P.3d 114, 116, 120 (Mont. 2017) (affirming dismissal of employment dispute involving a Montana corporation with its principal place of business in Montana); *In re Vioxx Litig.*, 928 A.2d 935, 937 (N.J. Super. Ct. App. Div. 2007) (affirming dismissal of British plaintiffs' tort claims against Merck, which maintains its corporate headquarters in New Jersey); *Koop v. Guskind*, 984 N.Y.S.2d 68, 70 (N.Y. App. Div. 2014) (affirming dismissal of personal injury claim by Canadian plaintiff brought against a New York citizen); *Chambers v. Merrell-Dow Pharms., Inc.*, 519 N.E.2d 370, 371–72 (Ohio 1988) (affirming dismissal of British plaintiffs' tort claims against Merrell-Dow, which has its principal place of business in Ohio); *In re Bridgestone/Firestone*, 138 S.W.3d 202, 204 (Tenn. Ct. App. 2003) (ordering dismissal of product liability claims against Firestone, which maintains its principal place of business in Nashville).

49. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783 (2017).

50. *See Chambers*, 519 N.E.2d at 371–72 (affirming dismissal of British plaintiffs' tort claims against Merrell-Dow, which has its principal place of business in Ohio); *In re Vioxx Litig.*, 928 A.2d at 937 (affirming dismissal of British plaintiffs' tort claims against Merck, which maintains its corporate headquarters in New Jersey); *Jones v. Searle Lab's*, 444 N.E.2d 157, 159, 163 (Ill. 1982) (ordering dismissal of action brought against pharmaceutical company with its principal place of business in Illinois).

51. *Chambers*, 519 N.E.2d at 373–74; *see also id.* at 381–82 (Douglas, J., dissenting).

52. *Cyr v. Ford Motor Co.*, No. 345751, 2019 WL 7206100 (Mich. Ct. App. Dec. 26, 2019) (per curiam).

Court of Appeals dismissed the case for forum non conveniens, explaining that Michigan “has an interest in dissuading this sort of mass automotive litigation from habitually clogging [its] court system.”<sup>53</sup> The solution, according to the Michigan court, was for the plaintiffs to sue separately in the states where they resided or else to bring a class action,<sup>54</sup> which would likely have led to the removal of the case to federal court.<sup>55</sup> Where the case did *not* belong, the Michigan court felt, was in the defendant’s home state court.

Those familiar with the federal doctrine of forum non conveniens might expect that *Piper*’s requirement of an available alternative forum would prevent the total denial of any forum. We are not so sanguine. For one thing, *Piper*’s requirement is a very low threshold;<sup>56</sup> courts in cases like *Cyr* may treat a forum as available even if plaintiffs cannot sue collectively in it. Denying plaintiffs a forum in which they can sue collectively can, in some cases, be equivalent to denying them any forum at all.<sup>57</sup>

Moreover, not all states require an available alternative forum as a prerequisite for forum non conveniens dismissal. Consider again New York and Delaware, two of the most significant at-home jurisdictions for corporate defendants.<sup>58</sup> In *Islamic Republic of Iran v. Pahlavi*, the New York Court of Appeals held in 1984 that cases could be dismissed for forum non conveniens even if no alternative forum were available to hear them.<sup>59</sup> In 2018, Delaware likewise rejected an alternative forum requirement in *Aranda v. Philip Morris USA Inc.*, affirming the dismissal of a case brought against a Delaware corporation without finding that any other court would be available to hear it.<sup>60</sup> If more litigation is pushed to at-home jurisdictions, those jurisdictions may become

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53. *Id.* at \*7.

54. *Id.*

55. See 28 U.S.C. § 1332(d).

56. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 (1981) (“Ordinarily, this [adequate alternative forum] requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction.”); see also Kevin M. Clermont, *The Story of Piper: Fracturing the Foundation of Forum Non Conveniens*, in *CIVIL PROCEDURE STORIES* 193, 193–216 (Kevin M. Clermont ed., 2004); Gardner, *supra* note 43, at 405.

57. *Cf.* *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 246 (2013) (Kagan, J., dissenting) (noting that prohibiting plaintiffs from proceeding collectively can make arbitration “prohibitively expensive” and thus prevent the “effective vindication” of their claims).

58. See *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1775 (2017) (exemplifying a corporate defendant that is incorporated in Delaware, headquartered in New York, and thus subject to at-home jurisdiction in each state).

59. *Islamic Republic of Iran v. Pahlavi*, 467 N.E.2d 245, 249 (N.Y. 1984).

60. *Aranda v. Philip Morris USA Inc.*, 183 A.3d 1245, 1254–55 (Del. 2018) (acknowledging that “foreign plaintiffs who have been injured by Delaware corporations might not be able to bring cases in Delaware against those defendants,” but concluding that courts “have the discretion to dismiss a transnational dispute . . . even if an alternative forum is not available”). New York and Delaware are currently outliers in this regard, though Colorado, Oklahoma, and Texas have adopted statutes that could be interpreted as similarly treating the availability of an alternative forum as a factor rather than a requirement. See Dodge, Gardner & Whytock, *supra* note 46 (manuscript at 27–28).

even more willing to dismiss cases without a guarantee that the plaintiffs could still sue the defendants elsewhere.<sup>61</sup>

In short, at-home jurisdiction does not guarantee plaintiffs one clear and certain forum. Unless the Court (or Congress) is ready to federalize forum non conveniens and narrow it to its historical roots, relying on the promise of at-home jurisdiction when restricting specific jurisdiction may lead to real jurisdictional gaps, even beyond the problems of foreign defendants and complex cases.

## II. THE COSTS OF GENERAL JURISDICTION

While the previous Part illustrated that at-home jurisdiction cannot be relied upon to provide “one clear and certain forum,” this Part explains why one should not *want* to rely on general jurisdiction to carry such a heavy burden. First, reliance on at-home general jurisdiction would flood the courts of states such as Delaware with large numbers of cases that they do not necessarily want. Second, such an arrangement could yield jurisdiction—and justice—on defendants’ terms.<sup>62</sup> Overreliance on at-home jurisdiction creates incentives for states to adopt forum-law-friendly choice-of-law rules as well as local-defendant-friendly substantive law. These possibilities are grounded in today’s reality, not hypothetical posturing—but could be exacerbated if specific jurisdiction continues to shrink. Finally, going back to looser conceptions of general jurisdiction seems both unlikely and potentially unwise.

### *A. Misallocation of Jurisdiction*

Last Term, Ford argued to the Court that personal jurisdiction doctrine serves a “jurisdiction-allocating function” among the several states.<sup>63</sup> Heavy reliance on at-home jurisdiction, however, leads to a jurisdictional “allocation” that is uneven and unfair. Some states are home to many more corporations than others, even though their corporations engage in business all over the country. Because the administrative burden of at-home jurisdiction is significant, states may not *want* to hear all cases brought against resident corporate defendants.<sup>64</sup> It is not surprising, from this perspective, that

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61. We note that *Pahlavi* and *Aranda* involved non-U.S. plaintiffs, but the New York and Delaware courts did not limit their holdings to transnational cases, leaving open the possibility that the same reasoning could be applied in cases involving U.S. plaintiffs. See *Pahlavi*, 467 N.E.2d at 246; *Aranda*, 183 A.3d at 1247.

62. Cf. *Bradt & Rave*, *supra* note 41; *Dodge, Gardner & Whytock*, *supra* note 46 (manuscript at 57–58) (describing hydraulic pressures between and among state and federal courts that encourage development of pro-defendant procedure).

63. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1030 (2021) (quoting Brief for Petitioner at 24, *Ford*, 141 S. Ct. 1017 (Nos. 19-368, 19-369)).

64. See, e.g., *Aranda*, 183 A.3d at 1252–53 (“With the doors to the federal courthouses closing, state courts now shoulder more of the transnational litigation. These cases are complex and strain judicial

Delaware's expansion of forum non conveniens came *after* the circumscription of personal jurisdiction in cases like *Daimler* and *Bristol-Myers Squibb* pushed more litigation against corporate defendants into Delaware's courts.<sup>65</sup> Put bluntly, it is a signal from the Delaware courts that they do not want all the cases that the Supreme Court assumes belong with them.<sup>66</sup>

Meanwhile, the plaintiffs' home states and the states where the conduct or harm giving rise to the lawsuit took place do have an affirmative interest in providing a forum for resolution of that suit, as even *Pennoyer v. Neff* recognized.<sup>67</sup> Yet the Court often unhelpfully derides plaintiffs' choice of forum (rather than defendants' efforts to switch forums or preselect a particular home jurisdiction) as "forum shopping."<sup>68</sup> In short, states have a more diverse set of

resources. . . . Delaware has no real connection to the dispute except for the defendants' place of incorporation." (footnote omitted)); *Martinez v. E.I. DuPont De Nemours & Co., Inc.*, 82 A.3d 1, 38 (Del. Super. Ct. 2012) (noting "the burden that is placed upon the limited resources of the Superior Court when it is required to adjudicate asbestos cases involving plaintiffs from all fifty states" and acknowledging "that the citizens of Delaware have to shoulder the expense and strain on its judges and juries by the onslaught of additional foreign cases that have no other connection to Delaware than the mere residency of their parent corporation"); *Radeljak v. Daimlerchrysler Corp.*, 719 N.W.2d 40, 45–46 (Mich. 2006) ("If every automotive design defect case against Michigan-based automobile manufacturers must be heard in Wayne County if a foreign plaintiff so desires, there will certainly be increased congestion in an already congested local court system.").

65. See *Aranda*, 183 A.3d at 1255 (holding that the availability of an alternative forum is not a threshold requirement for forum non conveniens dismissals); *Gramercy Emerging Mkts. Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033, 1044 (Del. 2017) (lowering the standard for forum non conveniens dismissal when the Delaware suit was not the first-filed action but the first-filed action is no longer pending).

66. That is not to say they do not want some. Delaware courts seem less inclined to dismiss for forum non conveniens when cases involve either Delaware's corporate law, which Delaware has a particular interest in developing, or "commercial disputes against Delaware entities, even where the dispute involves foreign law and the parties and conduct are centered in a foreign jurisdiction." *Candlewood Timber Grp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 1000 (Del. 2004); see also, e.g., *Irving Firemen's Relief & Ret. Fund v. Page*, No. 2019-0355-SG, 2019 WL 2743702, at \*1 (Del. Ch. July 1, 2019) ("[I]t is difficult to imagine a derivative litigation involving a Delaware corporation, and alleging breaches of fiduciary duty by corporate directors or officers of that Delaware corporation, that is nonetheless subject to dismissal on *forum non conveniens* grounds . . ."); *Nokia Sols. & Networks Oy. v. Collision Commc'ns, Inc.*, No. N19C-10-262 AML CCLD, 2020 WL 2095829, at \*6 (Del. Super. Ct. Apr. 30, 2020) ("Delaware has [a] substantial interest in adjudicating . . . an action implicating a Delaware corporation's internal affairs."). The broader lesson is that Delaware's interest in cases involving Delaware corporations is more nuanced than the Court has assumed when prioritizing the interests of defendants' home states in cases like *Bristol-Myers Squibb*. Cf. Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1055–59 (2013) (identifying potential benefits of some cases involving Delaware corporate law not being decided by Delaware courts).

67. *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877) ("Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens."), *overruled on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977).

68. See *Ford*, 141 S. Ct. at 1031 (distinguishing *Bristol-Myers Squibb* on the basis that there, the "plaintiffs were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State"); *id.* at 1032 (Alito, J., concurring) (distinguishing *Ford* from *Bristol-Myers Squibb* because in *Ford*, "Minnesota and Montana courts have not reached out and grabbed suits in which they 'have little legitimate interest'" (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017))). Justice Kagan's definition of forum shopping—when plaintiffs choose to sue in a particular forum "because it was thought plaintiff-friendly, even though their cases had no tie to the State"—is unfortunately tautological. *Id.* at 1031. The personal jurisdiction question is whether the plaintiff's case has a sufficient "tie

interests than the Court's recent cases seem to recognize: corporations' home jurisdictions do not always have a stronger interest in hearing cases than do states with other regulatory interests.<sup>69</sup>

### B. *The Political Economy of At-Home Jurisdiction*

The misallocation of jurisdiction not only burdens corporations' home courts, but also may augur potentially problematic shifts in substantive law. When states' courts are filled with cases brought by out-of-state plaintiffs against local corporate defendants, one may sensibly predict that states will adopt laws protective of those local interests. This insight is not new, but it may have been lost. In 1966, von Mehren and Trautman explained that one of the benefits of specific jurisdiction was that it erases "the bias favoring defendants that is ordinarily associated with unlimited general jurisdiction, a bias that is doubtless fully appropriate as between parties of relatively equal economic power and legal sophistication but that is harder to justify when an ordinary plaintiff is thereby compelled to seek out a corporate defendant."<sup>70</sup> Conversely, narrowing specific jurisdiction and relying on the promise of general jurisdiction to guarantee a forum encourages states to act on that bias. That bias can appear through choice-of-law rules, substantive laws, or both.

In the *Ford* litigation, the parties and the Court seemed to assume choice-of-law rules are similar enough among U.S. states that they would direct courts to apply the same substantive law, presumably the law of the place of the accident, no matter where the cases were filed.<sup>71</sup> But this assumption is mistaken. Different states may constitutionally apply different law, substantive or procedural, to the same case.<sup>72</sup> And while uniformity of applicable law

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to the State." *Id.*; see also Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 588–93 (2016) (discussing tautological, derisive definitions of forum shopping).

69. Cf. ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* 652–53 (1965) ("[E]xclusive emphasis on any single relationship between the forum and the total situation makes it impossible to take into account the jurisdictional implications of the three aspects of the total situation analytically relevant: the parties' relation to the forum, the underlying controversy's relation to the forum, and other litigation and enforcement considerations. Thus jurisdiction to adjudicate based on the defendant's domicile ignores the implications of the underlying controversy for the assumption of jurisdiction.")

70. Von Mehren & Trautman, *supra* note 18, at 1147.

71. Brief for Respondents at 32, *Ford*, 141 S. Ct. 1017 (Nos. 19-368, 19-369), 2020 WL 1531238, at \*32 ("[A]pplying the choice-of-law standards that prevail across the United States, Ford likely will be liable in these cases under the laws of Minnesota and Montana no matter where the cases are heard."); *Ford*, 141 S. Ct. at 1030 (noting the forum states have an interest in providing a forum for their residents as well as an interest in "enforcing their own safety regulations"). *But cf.* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 8, at 24–25 ("Most States have abandoned the traditional choice-of-law rule that a tort is governed by the law of the place of injury; only around ten States still appear to adhere to that brightline rule." (citing Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1868–75)).

72. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981); Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 768 (2012) ("In several

regardless of the forum is a laudable goal of any choice-of-law system, American choice-of-law scholars have long recognized that the likelihood of all states actually applying the same law was akin to “chasing rainbows.”<sup>73</sup> States apply different laws now, and reliance on at-home jurisdiction as a fail-safe will encourage them to do so more often in the future.

Michigan is a poster child for how the Supreme Court’s capacious understanding of states’ freedom to apply different laws, combined with greater reliance on at-home jurisdiction, might spark a regulatory race to the bottom, with states adopting choice-of-law and substantive legal rules that protect local industry at the expense of other states’ citizens. For decades, Michigan used *lex loci delicti* (law of the place of the injury) as the conflicts rule for out-of-state torts, including claims arising out of car accidents.<sup>74</sup> In 1982, however, the Michigan Supreme Court rejected that rule, holding simply that “when two residents, or two corporations doing business in the state, or any combination thereof, are involved in an accident in another state, the forum will apply its own law.”<sup>75</sup> Over the course of the 1980s and 1990s, Michigan developed a two-step “rational reason” test that creates a rebuttable presumption in favor of *lex fori* (law of the forum).<sup>76</sup> Michigan courts have stated that “this balancing approach most frequently favors using the forum’s (Michigan’s) law.”<sup>77</sup> Thus, in cases involving car accidents in other states, courts applying Michigan’s choice-of-law rules have found that those states’ interests in having their law applied to claims brought by their residents for in-state accidents did not overcome Michigan’s interest in applying Michigan law to Michigan car manufacturers.<sup>78</sup>

Michigan’s products-liability law, in turn, is remarkably defendant friendly. Michigan, for instance, has not adopted a strict liability rule for products cases.<sup>79</sup>

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opinions by Justice Stone, the Court turned away from the vested-rights approach in favor of the position that multiple laws might apply in a given case. Given that there were admittedly multiple plausible answers to most choice-of-law questions, the scope of the Supreme Court’s review of state courts’ choice-of-law decisions would be much more limited.”)

73. See Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 262 (1958).

74. See *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843, 847 (Mich. 1982).

75. *Id.* at 845 (deciding car accident case where plaintiffs and defendants were Michigan residents and accident occurred outside of Michigan).

76. The two-step test asks: (1) if the foreign state has an interest in having its law applied and (2) if that interest overcomes Michigan’s own interests in applying Michigan law. *Hall v. Gen. Motors Corp.*, 582 N.W.2d 866, 868 (Mich. Ct. App. 1998). The Michigan Supreme Court devised the test in 1987 and then formally adopted it in 1997. See *Olmstead v. Anderson*, 400 N.W.2d 292, 302 (Mich. 1987) (applying Michigan law, *lex fori*, in a case arising from a car accident in Wisconsin between a Minnesota driver and a Michigan driver, reversing the lower court that had applied Wisconsin law and thereby the Wisconsin limit on damages for wrongful death); *Sutherland v. Kennington Truck Serv., Ltd.*, 562 N.W.2d 466, 471 (Mich. 1997).

77. *Hall*, 582 N.W.2d at 868.

78. See *Gaillet v. Ford Motor Co.*, No. 16-13789, 2017 WL 1684639, at \*6 (E.D. Mich. May 3, 2017); *Burney v. P V Holding Corp.*, 553 N.W.2d 657, 660 (Mich. Ct. App. 1996); *Standard Fire Ins. Co. v. Ford Motor Co.*, 723 F.3d 690, 695 (6th Cir. 2013).

79. *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 181 (Mich. 1984).



It also strictly caps compensatory damages and bans punitive damages.<sup>80</sup> This defendant-friendly substantive law is no accident. As one court observed, “By insulating companies such as Ford, who conduct extensive business within its borders, Michigan hopes to promote corporate migration into its economy.”<sup>81</sup>

It is true that, in out-of-state accident cases, several states that are common homes to large corporations tend to apply the law of the place of injury, based on the “most significant relationship” test promulgated by the *Restatement (Second) Conflict of Laws*.<sup>82</sup> But because the most significant relationship test is highly flexible, requiring courts to balance multiple factors,<sup>83</sup> these factors could be subject to manipulation in the face of local bias. Moreover, because some states stress that different presumptions apply for different causes of action,<sup>84</sup> the outcome is even more likely to be case-specific. In other words, no formal change to doctrine is needed for courts in these states to choose *lex fori* in out-of-state tort cases, especially if the courts are inundated with cases against local corporate defendants that are otherwise unconnected to the forum. And courts are not the only relevant actors. Corporate defendants are often powerful interests within the state that can effectively lobby the legislature for protective legislation, especially when it comes at the expense of out-of-state plaintiffs.<sup>85</sup>

Indeed, Brainerd Currie himself assumed, at least until the very end of his career, that a state with jurisdiction *ought* to apply its own substantive law unless

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80. MICH. COMP. LAWS § 600.2946a (1961).

81. *Kelly v. Ford Motor Co.*, 933 F. Supp. 465, 471 (E.D. Pa. 1996) (articulating Michigan’s interests when applying Pennsylvania’s choice-of-law rules to select Michigan law to govern product liability case against Ford arising from a Pennsylvania accident involving Pennsylvania residents). More generally, a state’s desire to encourage even interstate business through friendly substantive law is considered a valid interest in choice-of-law analysis, even though the interest is clearly parochial. *See, e.g., McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010) (“A state has a legitimate interest in attracting out-of-state companies to do business within the state, both to obtain tax and other revenue that such businesses may generate for the state, and to advance the opportunity of state residents to obtain employment and the products and services offered by out-of-state companies.”).

82. RESTATEMENT (SECOND) OF CONFLICT OF L. §§ 6, 145 (AM. L. INST. 1971); *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63, 67 (S.D. 1992); *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980); *O’Connor v. O’Connor*, 519 A.2d 13, 23 (Conn. 1986); *Gen. Motors Corp. v. Eighth Jud. Dist. Ct.*, 134 P.3d 111, 117 (Nev. 2006); *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 458 (N.J. 2008). New York, another common home for large corporate defendants, applies a more nuanced “interest analysis” approach, which distinguishes between claims involving *conduct-regulating* laws and claims involving *loss-allocating* laws. *Padula v. Lilam Props. Corp.*, 644 N.E.2d 1001, 1002–03 (N.Y. 1994). We have not found evidence of this test being distorted in favor of local defendants either, but it is important to note that the test differs—and may yield different results—from conflicts tests in other jurisdictions. The same might be said for California’s “comparative impairment” analysis. *See, e.g., McCann*, 225 P.3d at 533.

83. *See* Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1242 (1965) (referring to the “vagueness of the *Second Restatement’s* give-it-up formulas”).

84. *See, e.g., Camp Jaycee*, 962 A.2d at 467–68.

85. *See, e.g., Bradt & Rave, supra* note 41, at 1294; *Dodge, Gardner & Whytock, supra* note 46 (manuscript at 24) (describing Colorado’s adoption of its *forum non conveniens* statute); Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1554, 1574–75 (2012) (showing through economic analysis that a jurisdictional rule that limits suits to the defendant’s home state would drive defendants to choose states with inefficiently lenient product liability regimes and encourage states to weaken their product liability laws to attract businesses).

it had no interest in doing so; when that substantive law was codified in a state statute, Currie viewed application of forum law as an almost inexorable legislative command.<sup>86</sup> Nor is there a constitutional limit on doing so as long as the state has a “significant contact” with the case,<sup>87</sup> which would be satisfied by the domicile of the defendant.<sup>88</sup> As a result, designating the defendant’s home as the forum may effectively ensure the application of the defendant’s home forum’s law.

Once choice-of-law rules point in the direction of the forum state’s law (*lex fori*), then all of the other locally friendly substantive laws—like limitations on punitive damages, strict liability, or respondeat superior—come in as well. Indeed, even if a state court finds that another state’s substantive law applies, it may nevertheless apply its local law on issues like damages limitations.<sup>89</sup> These developments not only disadvantage out-of-state plaintiffs who sue defendants in their home jurisdictions because they cannot obtain specific jurisdiction elsewhere, but they may also discourage such plaintiffs from bringing suit in the first place.<sup>90</sup> And, again, the more cases are pushed towards the defendant’s home forum, the more likely states will have incentives to develop or apply choice-of-law rules and substantive law along these lines.

### C. *The Cost of Going Back to the Future*

We hasten to add that the problems we identify are not evidence that general jurisdiction has gone astray. Before turning to the importance of having a robust specific jurisdiction doctrine, we refute potential objections that today’s narrower scope of general jurisdiction is simply misconceived—that we should go back to the way things were. Justice Sotomayor, for example, has argued that the at-home test in *Goodyear* and *Daimler* cut back general jurisdiction too far.<sup>91</sup> And Justice Gorsuch in *Ford* seemed nostalgic for a *Pennoyer*-style

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86. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 119 (1963) (“The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state.”); see also Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT’L L.J. 197, 199 (1991) (“The majority of cases presenting real conflicts are resolved by application of forum law.”). In his final article, Currie backed off of this idea a bit and approved of states’ taking a “moderate and restrained” view of their own law in true conflicts cases. Brainerd Currie, *The Disinterested Third State*, 28 L. & CONTEMP. PROBS. 754, 757, 763–64 (1963). Unfortunately, because of his untimely death, Currie was unable to expand on this idea. For additional discussion of this evolution in Currie’s thinking, see Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, 215 RECUEIL DES COURS 9, 76 (1989) (noting that Currie had “significantly increased the flexibility of his approach”).

87. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981).

88. See *id.* at 312–14.

89. See, e.g., *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 528 (N.Y. 1961).

90. Bookman, *supra* note 68, at 613; Bradt & Rave, *supra* note 41 (discussing *Bristol-Myers Squibb* and multidistrict litigation).

91. *Daimler AG v. Bauman*, 571 U.S. 117, 157–60 (2014) (Sotomayor, J., concurring).

version of general jurisdiction based on presence and consent.<sup>92</sup> We think it unlikely that five Justices of the Supreme Court would agree to return to either of these earlier understandings of general jurisdiction. But this Subpart explains why we also think that such a move would be unwise.

### 1. *General Doing Business Jurisdiction*

Truly dispute-blind doing business jurisdiction, under which corporations that did a lot of business in a given state could be subject to jurisdiction there even regarding disputes and conduct completely unrelated to the forum state, was often criticized as exorbitant and unfair. Foreign countries criticized the breadth of doing business jurisdiction over their nationals.<sup>93</sup> Economists argued that it put companies operating in the United States at a disadvantage because they could be subject to jurisdiction here for their conduct abroad, but their U.S.-avoiding counterparts could avoid such accountability.<sup>94</sup> Broad notions of doing business jurisdiction also might invite states to become “busybodies,” regulating conduct without any legitimate governing interest, as the Court suggested California was doing in *Bristol-Myers Squibb*.<sup>95</sup>

Critics of general doing business jurisdiction portrayed that era as representing the flipside of the political economy problems that an at-home jurisdiction regime presents<sup>96</sup> because it encouraged “forum selling” to plaintiffs.<sup>97</sup> If there is general jurisdiction effectively everywhere, then the plaintiffs’ bar need only capture a single state legislature and push for

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92. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039 n.5 (2021) (Gorsuch, J., concurring).

93. See Bookman, *supra* note 30, at 1092; Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 95–96 (1999) (“The Europeans’ principal objection to U.S. jurisdictional law is its proclivity to base general jurisdiction on rather thin contacts, . . . [including] doing business in the forum.”); Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1036–38 (2004).

94. See, e.g., Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 341–42 (2008); Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1146 (2007).

95. See Howard M. Erichson, John C. P. Goldberg & Benjamin C. Zipursky, *Case-Linked Jurisdiction and Busybody States*, 105 MINN. L. REV. HEADNOTES 54 (2020).

96. See, e.g., Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT’L L. 456 (2011); Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT’L L. 385, 388–90 (2004) (casting doing business jurisdiction as a form of global U.S. forum selling and urging its reform from a comparative perspective).

97. See Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016); Linda J. Silberman, *“Two Cheers” for International Shoe (and None for Asahi): An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAVIS L. REV. 755, 765 (1995) (pointing out that doing business jurisdiction “present[ed] unlimited opportunities for forum-shopping for everything from generous juries and liberal forum-access provisions to favorable choice-of-law rules and longer statutes of limitations,” though arguing for its narrowing rather than for its demise); cf. Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT’L L. 227 (2020) (discussing the market for adjudication of international commercial disputes between arbitration and the rise of international commercial courts).

plaintiff-friendly law and choice-of-law rules that would apply to claims that arise anywhere.

In short, dispute-blind doing business jurisdiction had its own problems. But even if a corporation's extensive contacts in a forum are no longer sufficient for jurisdiction over disputes entirely unrelated to the forum, corporations may still be subject to jurisdiction for disputes linked to those in-state contacts.<sup>98</sup> And, of course, the more contacts a defendant has with a state, the more disputes will be related to its in-state contacts. In other words, the demise of general doing business jurisdiction requires more rather than less reliance on specific jurisdiction.

## 2. *General Jurisdiction Based on "Presence"*

To the extent that Justice Gorsuch and others seem to yearn for the simpler era of personal jurisdiction under *Pennoyer*, a return to that regime, too, would be misguided.

*Pennoyer's* conception of jurisdiction recognized only dispute-blind theories because a state's power was based on territory, not the connections between the state and the dispute.<sup>99</sup> This fetishization of physical presence over economic relations was dated even in *Pennoyer's* own day.<sup>100</sup> *Pennoyer* authorized jurisdiction too broadly—covering defendants who owned unrelated property that happened to be in the forum state<sup>101</sup> or who were served with process while fleetingly in a state.<sup>102</sup> And it authorized jurisdiction too narrowly—leading

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98. See Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L & COMPAR. L. 111, 119 (1999) (explaining the benefits of "aggressive forms of specific jurisdiction, coupled with the headquarters basis of general jurisdiction").

99. Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 145–46.

100. *Id.* at 147 ("By failing to recognize the concept of specific jurisdiction, *Pennoyer* was out of tune with the times. Even in those horse-and-buggy days, the exclusive reliance on process servers and tracers of assets made little sense in a federal system that harbors a mobile population and a burgeoning economy." (footnote omitted)). *Pennoyer* was also far out of step with twentieth century jurisprudential fashion. See Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 271–72 ("Appraised by contemporary critical standards for assessing logic and policy in judicial decision, *Pennoyer v. Neff* arouses dismay and even despair. It is an example *par excellence* of what Karl Llewellyn called the Formal Style in juristic reasoning. That it survives at all is some kind of a monument to American legal thought.").

101. See, e.g., *Harris v. Balk*, 198 U.S. 215 (1905). This kind of quasi in rem jurisdiction was largely eliminated in *Shaffer v. Heitner*, 433 U.S. 186 (1977). Indeed, Geoffrey Hazard accurately predicted the demise of quasi in rem jurisdiction in his classic article *A General Theory of State-Court Jurisdiction*. Hazard, *supra* note 100, at 281 ("Ever since *International Shoe*, *Pennoyer v. Neff* has been eligible for oblivion."); see also von Mehren & Trautman, *supra* note 18, at 1178–79 (predicting and supporting the obsolescence of *Harris v. Balk*).

102. Such exorbitant tag jurisdiction was approved by the Supreme Court in *Burnham*, although its application to corporations remains contested. For the classic criticism of the growth of tag jurisdiction after *Pennoyer* established that service of process in the forum state was a necessary condition for *in personam* jurisdiction, see Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 292 (1956); von Mehren & Trautman, *supra* note 18, at 1164 (advocating the demise of tag jurisdiction as likely "unnecessary" and "conflicting with ideas of rationality and fairness").

courts to develop legal fictions based on ideas of implied consent, constructive presence, and doing business in order to avoid clear miscarriages of justice.<sup>103</sup>

The period between *Pennoyer* and *International Shoe* was thus marked by highly manipulable, formalistic legal doctrines and court decisions that stretched these legal fictions beyond their breaking points as they tried to adapt to modern conditions.<sup>104</sup> The result was uncertainty and extra litigation, as corporations (like *International Shoe*) tested the limits of the “presence” requirement while courts struggled to justify their decisions. What was needed was a personal jurisdiction framework focused on the relationship between the forum and the *dispute*—a framework that *International Shoe* provided and that came to be called specific jurisdiction.

### III. EMBRACING SPECIFIC JURISDICTION

The foregoing analysis demonstrated that we cannot rely on general jurisdiction as the primary engine for personal jurisdiction. At-home jurisdiction cannot promise one clear forum in light of forum non conveniens, foreign defendants, and joint liability. Overreliance on general jurisdiction also triggers predictable adverse pressures on states, whether to shield corporate defendants or to sell forums to plaintiffs.<sup>105</sup>

The false promise of general jurisdiction, however, does not necessitate another revolution in personal jurisdiction. To the contrary, *International Shoe* remains worthy of celebration *because* it shifted the focus to specific jurisdiction, requiring not just a relationship between the defendant and the forum but a relationship among the defendant, the forum, and the dispute.<sup>106</sup> The story since *International Shoe* has been—and should remain—the rise of specific jurisdiction as the primary basis for adjudicative authority. As Justice Ginsburg explained in *Daimler*, “general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*’s sway,” while “general jurisdiction has come to occupy a less dominant place in the contemporary scheme.”<sup>107</sup> That trade-off between

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103. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (recognizing implied consent); *Clermont*, *supra* note 93, at 103 (explaining how a focus on state power “gives self-evidently *wrong* answers” that are either too broad and thus “unfair to the defendant” or too restrictive and thus blind to “the interests of states and persons other than the defendants?”). See generally Philip B. Kurland, *The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

104. See Kurland, *supra* note 103, at 573 (“The rapid development of transportation and communication in this country demanded a revision of Johnson’s ‘eternal principles’ incorporated by Field in the Due Process Clause: ‘eternal principles’ which were appropriate for the age of the ‘horse and buggy’ or even for the age of the ‘iron horse’ could not serve the era of the airplane, the radio, and the telephone.”).

105. Cf. Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 247 (2014) (arguing that, depending on how they are structured, personal jurisdiction rules can encourage bias against out-of-state plaintiffs or out-of-state defendants).

106. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945).

107. *Daimler AG v. Bauman*, 571 U.S. 117, 132–33 (2014).

the scope of specific and general jurisdiction was recognized by Trautman and von Mehren when they first coined the terms.<sup>108</sup> And it was recognized by Mary Twitchell in her influential 1988 article, where she explained that “we do not need to justify broad exercises of dispute-blind jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants.”<sup>109</sup>

Nonetheless, the current Court seems wary of allowing a robust doctrine of specific jurisdiction to take center stage. We suggest the problem stems from the Court’s apparent forgetfulness of, or possibly discomfort with, a critical component of the specific jurisdiction analysis: the reasonableness factors.<sup>110</sup> Since at least *World-Wide Volkswagen*, specific jurisdiction doctrine has asked not only whether there were minimum contacts, but also whether the exercise of jurisdiction would be unreasonable, looking to the burden on the defendant, the forum state’s interest, the plaintiffs’ interests, interstate interests, and fundamental social policies.<sup>111</sup> And yet, perhaps because defendants in *Bristol-Myers Squibb* and *Ford* conceded reasonableness, this part of the jurisdictional analysis has gone missing.<sup>112</sup> Renewed attention to and application of the reasonableness factors would address many of the Justices’ recent concerns without requiring any significant modification of current doctrine.

First, the reasonableness factors allow fine-tuning of the minimum-contacts determination. In particular, the reasonableness factors can distinguish between small defendants with few contacts and large defendants with many

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108. von Mehren & Trautman, *supra* note 18, at 1177–79.

109. Twitchell, *supra* note 21, at 676.

110. As Kevin Clermont has pointed out, one might more accurately refer to the “unreasonableness” factors because it is the defendant’s burden to show that the exercise of jurisdiction would be unreasonable. See Clermont, *supra* note 93, at 104.

111. The Court has not always been clear or consistent in how it describes the analysis for specific jurisdiction. Like most civil procedure professors, we draw from *Burger King v. Rudzewicz* a two-part test. 471 U.S. 462, 472, 476 (1985). First, the defendant must have “minimum contacts” with the state, which in turn requires (1) the defendant to purposefully avail itself of the forum and (2) for the controversy to “arise out of or relate to” those contacts. *Id.* at 472. We call these prongs, respectively, “purposeful availment” and “relatedness,” and we refer to them collectively as the “minimum contacts analysis.” Second, “[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” *Id.* at 476 (quoting *Int’l Shoe*, 326 U.S. at 320). Those factors include “the burden on the defendant, the interests of the forum State, . . . the plaintiff’s interest in obtaining 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.” *Asahi Metal Industry Co. v. Superior Ct.*, 480 U.S. 102, 113 (1987) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). We call these the “reasonableness factors” and this half of the jurisdictional analysis the “reasonableness inquiry.” It is this inquiry that the Roberts Court seems to have forgotten (or is assiduously avoiding), much to the detriment of personal jurisdiction doctrine.

112. The reasonableness factors are alluded to in *Bristol-Myers Squibb* via case citations but were not discussed. See 137 S. Ct. 1773, 1780 (2017).

contacts<sup>113</sup>—something that has (rightly) troubled the Justices. For example, Justice Breyer worried in his *Nicastro* concurrence that:

[w]hat might appear fair in the case of a large manufacturer . . . might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii).<sup>114</sup>

The seemingly obvious response to his concern is to set the minimum contacts threshold low enough to reach the large manufacturer over whom the exercise of jurisdiction “might appear fair” and then use the reasonableness factors to avoid any unfairness for the occasional Appalachian potter—or “small Egyptian shirt maker, . . . Brazilian manufacturing cooperative, or . . . Kenyan coffee farmer.”<sup>115</sup> Justice Breyer’s concurrence, however, makes no mention of the reasonableness factors.

Similarly, in *Ford*, Chief Justice Roberts asked at oral argument how the parties’ proposed approaches to the relatedness requirement would protect a retiree in Maine who carves decoys and occasionally sells them over the Internet,<sup>116</sup> a hypothetical that the Court’s opinion set aside for another day.<sup>117</sup> Missing (again) was any discussion of the reasonableness factors, yet those factors provide the easiest route to protecting the Maine decoy carver. The reasonableness factors are a critical component of the specific jurisdiction analysis because they provide an off-ramp that can correct for potential jurisdictional overreach in close or difficult cases.

Second, renewed attention to the reasonableness factors can help resolve the tension between “treating defendants fairly and protecting ‘interstate federalism.’”<sup>118</sup> The Court has repeatedly insisted that personal jurisdiction doctrine reflects both sets of values, yet it has never fully explained how to locate interstate federalism within a due process inquiry.<sup>119</sup> One problem is that the Court in recent cases has attempted to address interstate federalism exclusively through the minimum contacts inquiry, but that inquiry does not by

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113. See Burbank, *supra* note 96, at 390 (noting that the reasonableness inquiry “has the capacity to distinguish the lot of an individual from that of a corporate (as well as that of a domestic from that of a foreign) litigant”).

114. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 891–92 (2011) (Breyer, J., concurring).

115. *Id.*

116. Transcript of Oral Argument at 39–41, *Ford Motor Co. v. Mont*, Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368, 19-369), 2020 WL 6203594, at \*39–41.

117. *Ford*, 141 S. Ct. at 1028.

118. *Id.* at 1025 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

119. *Compare* *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”), with *World-Wide Volkswagen Corp.*, 444 U.S. at 294 (“[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”).

itself adequately account for interstate interests.<sup>120</sup> Asking whether a defendant has purposefully availed itself of a state and whether there is a sufficient relationship among the defendant, the state, and the dispute does give us some purchase on whether the forum state has a legitimate interest in exercising adjudicatory power over the defendant. But it tells us very little about the interests of *other* states—and how those interests might compare to those of the forum state. Indeed, in attempting to define the relatedness requirement in *Bristol-Myers Squibb*, the Court did not even bother to explain the horizontal federalism effect of California hearing claims brought by out-of-state plaintiffs, leaving readers to wonder exactly which states' sovereign toes were trampled by California's assertion of jurisdiction. Squeezing all federalism interests into the relatedness requirement also invites broad generalizations about state interests that may not be true, like the assumption that states have a strong interest in hearing all cases brought against local corporations. As the Delaware courts have suggested, state interests in hearing cases involving local corporations are more nuanced than that.<sup>121</sup>

The reasonableness inquiry, by contrast, explicitly invites consideration of competing sets of interests assessed from multiple angles of interstate federalism—the possible interest, disinterest, and incentives behind multiple states' "desires" to provide a potential forum for a dispute. It directs courts to weigh the forum state's interests alongside the states' shared interests in efficient resolution of controversies and "fundamental substantive social policies."<sup>122</sup> And as a standard that must be assessed case by case, it allows courts to account for comparative and case-specific variations in state interests.<sup>123</sup>

If this is starting to sound like choice of law, that is not a coincidence.<sup>124</sup> Choice of law and personal jurisdiction can function as two means to the same

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120. This problem is not entirely of the Court's own making since the defendants in *Bristol-Myers Squibb* and *Ford* conceded reasonableness. See *Ford*, 141 S. Ct. at 1026 (noting that Ford's argument was not about reasonableness but about the requirement of relatedness); *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1787 (2017) (Sotomayor, J., dissenting) ("Bristol-Myers does not dispute that it has purposefully availed itself of California's markets, nor—remarkably—did it argue below that it would be 'unreasonable' for a California court to hear respondents' claims.>").

121. Indeed, while we are concerned about states reflexively protecting their own residents or using friendly substantive law to lure out-of-state business to relocate there, states could also have a legitimate interest in holding their residents to a higher standard of care, even when dealing with an out-of-state plaintiff. See Singer, *supra* note 86, at 204 ("In many cases, application of forum law will benefit a non-resident, as when a foreign tort or contract plaintiff sues a resident defendant and claims that the higher standard of care imposed by forum law applies to regulate the defendant's conduct there.>").

122. *Id.*

123. While the Court may be particularly wary of balancing tests these days, there is nonetheless a time and a place for standards—and this is one of them. Cf. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018) (arguing against rights absolutism and in favor of proportional balancing of competing interests in a variety of constitutional contexts).

124. This is not to suggest that choice-of-law analysis should replace personal jurisdiction analysis. Cf. Brief of United States as Amicus Curiae Supporting Petitioner, *supra* note 8, at 24) ("[W]here a defendant lacks the necessary contacts with a State or where a claim fails to arise out of or relate to those contacts, the



end—setting limits to states’ regulatory imperialism. Just as multiple states may have a sufficient interest in their substantive law applying to a dispute, multiple states may have a sufficient interest in providing a forum for resolving it.<sup>125</sup> Like choice of law, personal jurisdiction is more of a buffet than a *prix fixe*. Ultimately, then, the task is to decide which states’ courts and laws ought to constitutionally be on the plaintiff’s menu. The Supreme Court has shown very little appetite for policing state choice of law;<sup>126</sup> if it is instead going to use personal jurisdiction doctrine to prevent states from overreaching, it ought to be clearer about what it is doing. Because they address multiple states’ interests directly, the reasonableness factors provide the opportunity to do so with some transparency and justiciability. If the problem with California’s jurisdiction in *Bristol-Myers Squibb* was that its regulatory interest was insufficient to govern the entire nation’s worth of cases,<sup>127</sup> then there is a reasonableness factor for that<sup>128</sup>—the Court need not rely on a wooden formulation of relatedness.

A third reason to reemphasize the reasonableness inquiry is to obviate the quixotic search for a clear rule for relatedness. Advocates before the Supreme Court, and at least some of the Justices,<sup>129</sup> have argued that the “relatedness” inquiry would benefit from a bright-line rule, such as a causation test. The Court in *Ford* rightly rejected just such a rigid rule. *Ford*’s proposed proximate causation test was particularly unworkable: it was unclear, costly to apply, and would block jurisdiction over cases that everyone—including a unanimous Supreme Court—agrees belong in a given state’s courts.<sup>130</sup> And yet there could be instances where even *Ford*’s strict rule might be under-protective of small defendants.

Consider again the Maine decoy carver. What if the decoy carver does sell a few decoys to customers in Hawaii<sup>131</sup> and one of those decoys causes injury

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plaintiff may not compensate for that inadequacy by showing that the forum State is ‘the “center of gravity” of the controversy, or the most convenient location for litigation.’”). Rather, we mean to emphasize that the purposes of the two inquiries overlap.

125. While no one can agree on what the “right” choice-of-law rules ought to be, if there is consensus on anything among “modern” conflict-of-laws scholars, it is that multiple laws may justifiably apply to the same case and that states ought to have some leeway to choose among them. See, e.g., Andrew Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603, 609–11 (2015).

126. See Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 276 (1996) (“[T]he Supreme Court has denied the Constitution (and thus itself) a significant role in choice of law.”).

127. See Erichson, Goldberg & Zipursky, *supra* note 95, at 57 (“Without describing it as such, *Bristol-Myers Squibb* relied upon what we refer to as the ‘anti-busybody principle’—the principle that a state’s courts ought not meddle in affairs in which they lack sufficient interest.”).

128. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (“Thus courts in ‘appropriate case[s]’ may evaluate . . . ‘the forum State’s interest in adjudicating the dispute . . .’” (alteration in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

129. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1033 (2021) (Alito, J., concurring) (complaining that “‘arise out of’ and ‘relate to’” is unbounded and arguing that “‘limits must be found’”).

130. See *id.* at 1026–27.

131. It is unclear whether just one sale would be enough to satisfy purposeful availment. Compare *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957) (establishing specific personal jurisdiction based on a single contractual contact with the forum state), with *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011)

in Hawaii? A strict causation rule for relatedness would seem to require a conclusion that jurisdiction over the decoy carver is appropriate—and to the extent that strikes some Justices as unfair, it might lead to an even more demanding relatedness requirement. Relatedness, in other words, does not resolve the decoy-carver hypothetical because such a case must turn on case-specific context: how does the plaintiff's interest in a local forum weigh against the burden on the defendant to litigate at a distance? How do Hawaii's interests in the case compare to those of Maine? In short, no rule for relatedness will be sufficient to protect small defendants without the assistance of the reasonableness factors.

More broadly, the search for clear rules in a constitutionalized personal jurisdiction doctrine is problematic.<sup>132</sup> The more rule-like specific jurisdiction becomes, the more the Court has to confront the inherent imprecision of rules: that they will either be overinclusive (i.e., allowing too many cases to go forward) or underinclusive (i.e., allowing too few).<sup>133</sup> All signs from this Court suggest it is much more likely to err on the side of rules that are underinclusive. That is, to prevent the violation of the due process rights of any one potential defendant, the Court will sacrifice lower courts' authority to adjudicate disputes over a much broader swath of defendants. Corporate America understands this trade-off: this is why Ford and Bristol-Myers Squibb argued not that personal jurisdiction was unreasonable *as to them* but instead that a narrower rule for relatedness was necessary to protect smaller and more geographically isolated defendants.<sup>134</sup> It also explains the Court's preoccupation with Appalachian

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(Breyer, J., concurring) (“None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient.”). So we assume that the decoy maker has done enough to show he targeted Hawaii.

132. See, e.g., *Clermont*, *supra* note 93, at 105 (“[T]he unreasonableness test . . . should impose a flexible outer boundary that prevents jurisdictional excess in particular, unforeseeable circumstances. The Constitution is not the place to seek certainty.”). It is true the Court has suggested that bright-line rules are preferable when interpreting *statutory* grants of subject-matter jurisdiction. See *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). But statutes are different from constitutions: if the Court gets statutory interpretation wrong, Congress can fix it. Indeed, even in the context of subject-matter jurisdiction, the Supreme Court has saved bright-line rules for interpretations of statutory limitations on federal jurisdiction; its own interpretations of the constitutional limits on federal jurisdiction have been much broader. Compare *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824) (finding Article III's federal question jurisdiction extends to any case with a federal “element”), and *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967) (explaining that Article III only requires minimal diversity), with *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908) (requiring a federal question to appear on the face of the complaint in order to fall within the statutory grant), and *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (requiring complete diversity as a matter of statutory interpretation). As a constitutional doctrine, specific personal jurisdiction has always been, and should remain, a flexible standard.

133. See, e.g., *Duncan Kennedy*, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 n.236 (1992).

134. See, e.g., Brief of Prod. Liab. Advisory Couns., Inc. as Amicus Curiae Supporting Petitioner at 21–22, *Ford*, 141 S. Ct. at 1017 (Nos. 19-368, 19-369), 2020 WL 1478605; Brief of Prod. Liab. Advisory Council, Inc. as Amicus Curiae Supporting Petitioner at 16–18, *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017) (No. 16-466), 2017 WL 956640; Transcript of Oral Argument at 13, *Bristol-Myers Squibb*, 137 S.

potters and Maine decoy carvers. But this approach is wrong from the jump. Legitimate concern with potential outlier cases is precisely when standards—like the reasonableness factors—are more appropriate than rules.

A standard, however, need not be unpredictable. Even without a “causation” test or other strict rule for relatedness, the minimum contacts inquiry already tells most defendants most of the time where they will be subject to jurisdiction. There is no need to strip states of the authority to adjudicate cases that are connected to their territory in order to protect the occasional Appalachian potter, Maine decoy carver, or Kenyan coffee farmer: the reasonableness inquiry can prevent such unfair surprise in the unusual cases.<sup>135</sup>

## CONCLUSION

When the Court confined general jurisdiction in *Goodyear* and *Daimler* to corporations’ home jurisdictions, it promised that this doctrinal emphasis would provide “one clear and certain forum in which a corporate defendant may be sued on any and all claims.”<sup>136</sup> That promise, however, was false—and a dangerous premise on which to reconstruct the flipside of personal jurisdiction: specific jurisdiction. We have shown that for certain kinds of cases general jurisdiction offers no such guarantee, and even if it did, excessive reliance on at-home jurisdiction would create perverse incentives for some states to develop their choice-of-law rules and substantive law in local-defendant-friendly ways that could lead to a regulatory race to the bottom. Such reliance, moreover, misjudges states’ interests in litigation (or lack thereof) and miscalculates the competing state interests that are part of the federalism values embedded within personal jurisdiction. The reasonableness factors, however, offer the tools to correct these errors.

It is possible that after the flurry of recent cases, the Justices may have tired of trying to reach consensus on a new approach to personal jurisdiction, as they seemed to after prior periods of intense activity.<sup>137</sup> If so, we may be in for

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Ct. 1773 (No. 16-466), 2017 WL 1482003 (invoking “small businesses”); Transcript of Oral Argument at 16, *Ford*, 141 S. Ct. 1017 (Nos. 19-368, 19-369), 2020 WL 6203594 (invoking “small manufacturers”).

135. Indeed, Linda Silberman and Nathan Yaffe have found that courts use the reasonableness factors to dismiss cases brought against foreign defendants who have minimal contacts with the relevant state forum but over whom the exercise of personal jurisdiction would otherwise be unfair. See Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE J. COMPAR. & INT’L L. 405, 408 (2017).

136. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

137. For example, it was almost twenty years from *Hanson* to *Shaffer*, and another twenty from *Burnham* to *J. McIntyre*. See *Hanson v. Denckla*, 357 U.S. 235 (1958); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Burnham v. Superior Ct.*, 495 U.S. 604 (1990); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). Of course, the Court might feel the need to take up personal jurisdiction as it relates to class actions or corporate registration statutes. See, e.g., *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 296 (D.C. Cir. 2020) (discussing *Bristol-Myers Squibb* and class actions); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016)

another period of benign neglect, like we saw from 1990 to 2011, where the lower courts will be left to put meat on the bones of the Court's recent work. Fortunately, the doctrinal tools are readily at hand to help them do so. And if the Court braces itself to decide the difficult cases of the modern era, it should recall that the reasonableness factors have long been an important part of that doctrine and can mark the path forward.

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(discussing personal jurisdiction and Connecticut's corporate registration statute). But there is no guarantee that it will reach a new consensus on doctrinal theory in resolving those cases.