Personal Jurisdiction in the Twenty-First Century

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Personal Jurisdiction in the Twenty-First Century

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I. Introduction

Will SCOTUS finally resolve the many applications and interpretations about the “Stream of Commerce”? After Bauman, Walden, and International Shoe, and with SCOTUS accepting two personal jurisdiction cases to be heard this term, the landscape of personal jurisdiction will be defined once again. Our distinguished panel will discuss leading opinions from state and federal courts shaping the law of personal jurisdiction.
II. Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman

NOTES

PENNOYER’S GHOST: CONSENT, REGISTRATION STATUTES, AND GENERAL JURISDICTION AFTER DAIMLER AG V. BAUMAN

Kevin D. Benish*

This Note evaluates general personal jurisdiction based on a “consent-by-registration” theory, arguing that this old basis of jurisdiction is unconstitutional after Daimler AG v. Bauman. Daimler overturned nearly seventy years of law on general jurisdiction, and in doing so provoked the return to a basis of jurisdiction dating back to Pennoyer v. Neff, with plaintiffs arguing that foreign corporations “consent” to general jurisdiction when they register to do business in states outside their place of incorporation or principal place of business. But Pennoyer is dead. Thus, the question is whether Pennoyer’s ghost provides a constitutional basis for general jurisdiction, even after Daimler’s severe limitations of it.

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* Copyright © 2015 by Kevin D. Benish. J.D. Candidate, 2016, New York University School of Law. My deepest gratitude goes to Professor Linda Silberman for her guidance and inspiration, to Nathan Yaffe for his incredible insight and willingness to ponder Pennoyer at any time, and to Aaron Simowitz, Jack Millman, Susan Navarro Smelcer, Nicole Kramer, Mitchell Stern, and Nick Reichard for their thoughtful edits. Thanks also to the Staff Editors of the New York University Law Review for their assistance in reviewing the Appendix to this piece. This Note is dedicated to my mother, to Cindy McGinnis, and to Laura McDonald, three people whose support made my legal education a reality.
INTRODUCTION

Daimler AG v. Bauman signaled the end of an era. Through that decision, eight justices of the Supreme Court overturned nearly seventy years of jurisprudence on general personal jurisdiction. The impact of Daimler is so fundamental that many famous procedure cases of the twentieth century would never have made it through the courthouse door under the decision’s narrow standard.

But Daimler has proven to be a double-edged sword. Daimler limited general jurisdiction under the Due Process Clause to a defendant corporation’s principal place of business or place of incorporation. In doing so, longstanding bases of personal jurisdiction in the United States have been eliminated, sparking the search for alternative means to establish general jurisdiction over foreign corporations.

2 Daimler, 134 S. Ct. at 763.

General jurisdiction is the “power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected.” Arthur T. von Mehren & Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 HARV. L. REV. 1121, 1136 (1966).

In contrast, specific jurisdiction is based on “affiliations between the forum and the underlying controversy,” which “normally support only the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate.” Id.

4 Daimler, 134 S. Ct. at 760.
5 This includes “doing business,” which long prevailed as a basis for general jurisdiction. Id. at 761 n.18.
6 For the purposes of this Note, “foreign corporation” means any corporation sued outside its place of incorporation or principal place of business. Thus, “foreign
This search produced an unanticipated result: Century-old cases are finding new life, and the theory that foreign corporations “consent” to general jurisdiction by registering to do business in a forum state is now the go-to alternative to *Daimler*’s holding. This notion of “consent-by-registration” implicates case law as old as *Pennoyer v. Neff*, a cornerstone of American civil procedure.

But *Pennoyer* is dead. As Professor Linda Silberman has noted, the death-knell rendered to *Pennoyer* in *Shaffer v. Heitner* was so long-coming it proved anticlimactic. Yet the turn to consent-by-registration after *Daimler* signals the rise of *Pennoyer*’s ghost, a theory of general jurisdiction based on a corporation’s compliance with state registration statutes.


<table>
<thead>
<tr>
<th>Circuit Court</th>
<th>Constitutionality of Consent-by-Registration</th>
<th>Case</th>
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<tbody>
<tr>
<td>First Circuit</td>
<td>Violates due process</td>
<td>Cossaboon v. Me. Med. Ctr., 600 F.3d 25, 37 (1st Cir. 2010).</td>
</tr>
<tr>
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</tr>
<tr>
<td>Sixth Circuit</td>
<td>Undecided</td>
<td>None</td>
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</tbody>
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corporation” includes corporations from other U.S. states and corporations established outside the country. “Nonresident” and “foreign” corporations are synonymous.

7 *See infra* Part I.B (discussing post-*Daimler* litigation over the jurisdictional impact of corporate registration statutes).

8 *See generally infra* Appendix (surveying the laws of all fifty states regarding registration to do business and the penalties for failure to register to do business and collecting post-*Daimler* case law).

9 95 U.S. 714 (1877).


11 All fifty states have such statutes. *See sources cited infra* Appendix (providing a full account of these provisions).

12 326 U.S. 310 (1945); *see also infra* notes 40–43 and accompanying text.
As the table above illustrates, the Third and Eighth Circuits interpret consent-by-registration to general jurisdiction as consistent with the Due Process Clause, and are supported in dicta by the Second and Ninth Circuits. Opposed to this interpretation, the First, Fourth, Fifth, Seventh, and Eleventh Circuits hold consent-based general jurisdiction violates due process. Only the Sixth,

13 See Bane v. Netlink, Inc., 925 F.2d 637, 641 (3d Cir. 1991) (holding that Netlink was subject to general personal jurisdiction because it was authorized to do business in Pennsylvania).

14 See Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) (holding that foreign corporations that appoint an agent for service of process under Minnesota’s registration statute have consented to general jurisdiction regardless of any minimum contacts analysis).


16 See King v. Am. Family Mut. Ins. Co., 632 F.3d 570, 576 n.6 (9th Cir. 2011).

17 The First Circuit suggests that the scope of consent-by-registration is limited to specific jurisdiction only. Compare Cossaboon v. Me. Med. Ctr., 600 F.3d 25, 37 (1st Cir. 2010) (“Corporate registration . . . adds some weight to the jurisdictional analysis, but it is not alone sufficient to confer general jurisdiction.”), with Holloway v. Wright & Morrissey, Inc., 739 F.2d 695, 697 (1st Cir. 1984) (“It is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent’s authority.”).

18 See Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 748 (4th Cir. 1971) (“Applying for the privilege of doing business is one thing, but the actual exercise of that privilege is quite another. . . . The principles of due process require a firmer foundation than mere compliance with state domestication statutes.”).

19 See Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 181 (5th Cir. 1992) (“[B]eing qualified to do business . . . is of no special weight in evaluating general personal jurisdiction.” (internal quotation marks omitted)).

20 See Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1245 (7th Cir. 1990). While the Seventh Circuit did not expressly discuss “consent,” it held that registration to do business alone “cannot satisfy . . . the demands of due process.” Id.
Tenth, D.C., and Federal Circuit Courts of Appeal have yet to take a position on the jurisdictional impact of consent-by-registration. But post-*Daimler* courtroom battles over whether this “consent” to general jurisdiction satisfies due process in cases where foreign corporate defendants are not “at home” under the *Daimler* standard are growing in number. Until the Supreme Court resolves this question, Pennoyer’s ghost will haunt defendants in every forum where they are registered.

This Note argues that it is unconstitutional to assert general jurisdiction over foreign corporations based on a consent-by-registration theory. Consent is a possible basis of limited jurisdiction, but in the twenty-first century there is no constitutional basis for asserting general jurisdiction over foreign corporations based on a consent-by-registration theory. Consent is a possible basis of limited jurisdiction, but in the twenty-first century there is no constitutional basis for asserting general jurisdiction over foreign corporations based on a consent-by-registration theory.

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21 See Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1293 (11th Cir. 2000) (citing *Learjet*, 966 F.2d at 183, and *Ratliff*, 444 F.2d at 748). *Sherritt* does not explicitly mention consent, but the case cites *International Shoe* and holds that “casual presence of a corporate agent . . . is not enough to subject the corporation to suit where the cause of action is unrelated to the agent’s activities.” *Id.*


23 See, e.g., *Gucci Am., Inc. v. Li*, 768 F.3d 122, 136 n.15 (2d Cir. 2014) (suggesting the district court consider whether consent-by-registration is a valid basis of general jurisdiction); *Chatwal Hotels & Resorts LLC v. Dollywood Corp.*, 2015 WL 539460, at *6 (S.D.N.Y. Feb. 6, 2015) (“After *Daimler* . . . the mere fact of [the defendant’s] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.” (citation omitted)); Brown v. CBS Corp., 19 F. Supp. 3d 390, 396–400 (D. Conn. 2014) (holding that the imposition of general jurisdiction on a foreign registered entity, pursuant to Connecticut’s registration statute, violated due process); Sioux Pharm, Inc. v. Summit Nutritional Int’l, Inc., 859 N.W.2d 182, 187 (Iowa 2015) (dismissing jurisdiction over foreign corporation but noting it was “never . . . registered to do business in Iowa”); Zucker v. Waldmann, N.Y. Slip Op. 50055, 2015 WL 390192 (N.Y. Sup. Ct. 2015) (stating foreign corporations can consent to jurisdiction by registering to do business in New York); see also infra Part I.B (elaborating on judicial reactions to *Daimler*).

24 All fifty states and the District of Columbia have registration statutes, though states vary on whether registration establishes consent to jurisdiction, and whether that jurisdiction is general or specific. See infra Appendix.


26 See infra Part II.A (outlining a statutory and constitutional analysis to determine whether registration to do business establishes consent to jurisdiction); see also, e.g., *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–05 (1982) (noting possible bases of consent); *JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 106* (4th ed. 2005) ("[P]erhaps the biggest exception to the Pennoyer rule was the notion, still valid today, that a defendant not physically present in the state may consent to the jurisdiction of its courts."); *AUSTIN WAKEMAN SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 39* (1922) ("[J]urisdiction over the
eral jurisdiction through a corporation’s compliance with state registration statutes.27 Daimler provoked the rise of Pennoyer’s ghost by eliminating “doing business” as a basis of general jurisdiction; however, in doing so, it simultaneously made assertions of consent-by-registration to general jurisdiction violative of post-Daimler due process limits.

Part I of this Note provides an overview of personal jurisdiction in the United States and then reviews the Daimler decision and its less anticipated effect—the exploration of consent-by-registration as a separate basis for general jurisdiction over foreign corporations. Part II analyzes consent-by-registration as a theory of general personal jurisdiction under two separate lenses of due process. Part II.A analyzes the theory in the context of Daimler’s rationale that calls for “uniqueness” and “ascertainability.” Part II.B examines the history of consent-by-registration and its relationship to the now invalidated “doing business” basis of general jurisdiction in order to determine whether compliance with registration statutes is a “touchstone of jurisdiction” that satisfies due process outside the prevailing minimum contacts standard required by International Shoe and its progeny. Part III then illustrates an additional concern implicated by consent-by-registration—the unconstitutional conditions doctrine. Under each analysis, this Note demonstrates that Daimler renders consent-by-registration to general jurisdiction unconstitutional. Ultimately, this Note concludes that the future of personal jurisdiction lies in reforms to specific jurisdiction, not fictions done away with by International Shoe and its progeny—including the Daimler case itself.28

27 In the decades prior to Daimler, others have articulated the problems with consent-by-registration, yet none have addressed the due process concern or anticipated the particulars of twenty-first century personal jurisdiction. See, e.g., D. Craig Lewis, Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated, 15 Del. J. Corp. L. 1 (1990) (arguing consent-based general jurisdiction is an unconstitutional condition); Pierre Riou, General Jurisdiction over Foreign Corporations: All that Glitters Is Not Gold Issue Mining, 14 Rev. Litig. 741, 793–800 (1995) (arguing consent-based general jurisdiction should be overturned on federalism grounds); Lee Scott Taylor, Note, Registration Statutes, Personal Jurisdiction, and the Problem of Predictability, 103 Colum. L. Rev. 1163, 1192–93 (2003) (arguing registration statutes satisfy due process but are unpredictable).

It all started with *Pennoyer*.29 A shibboleth for first-year law students, *Pennoyer* established the connection between personal jurisdiction and the Due Process Clause.30 Articulating a theory of jurisdiction that prevailed from the late-nineteenth to the mid-twentieth century, *Pennoyer*’s territorial view united notions of “power”31 and “consent”32 at a time when territorial borders determined the reach of state authority.33 Under *Pennoyer*’s “power theory,” summons issued to natural persons who were physically present in a forum, combined with service of process that guaranteed notice, were the requisite components of jurisdiction.34 Consequently, state

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29 *Pennoyer v. Neff*, 95 U.S. 714 (1877); see Kurland, *supra* note 28, at 570 (citing *Pennoyer* for “the origins of our modern law of personal jurisdiction”).

30 *Pennoyer*, 95 U.S. at 733.

31 *Pennoyer*, 95 U.S. at 722 (“[T]he laws of one State have no operation outside of its territory. . . . [N]o tribunal . . . can extend its process beyond that territory so as to subject either persons or property to its decisions.”); see also Shaffer v. Heitner, 433 U.S. 186, 197 (1977) (stating that, under *Pennoyer*, “any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power”).

32 *Pennoyer*, 95 U.S. at 733 (holding that courts may exercise *in personam* jurisdiction over nonresident defendants when those individuals make a “voluntary appearance” within a state or “assent[ ] in advance” to substituted service of process). See also Shaffer, 433 U.S. at 197 (stating that, under *Pennoyer* recognized that if a defendant “consented to the jurisdiction of the state courts or was personally served within the State, a judgment could affect his interest in property outside the State” (internal citation omitted)).

33 Under *Pennoyer*’s “power theory,” summons issued to natural persons who were physically present in a forum, combined with “service of process” that guaranteed notice, were the requisite components of jurisdiction. *Pennoyer* itself typifies the required nexus between these dual requirements. At the time of the initial state court action that eventually led to the *Pennoyer v. Neff* decision, Neff did not live in the forum state. As a result, Neff was not personally served. Service in the state action was made by newspaper publication. *Id.* at 717.
authority over corporations was limited by the nineteenth-century view that corporations resided only in their state of incorporation. 35

Corporate liabilities were not so limited, however, and tensions quickly developed between Pennoyer’s rigid territoriality and economic reality. As corporations increasingly conducted commerce beyond the borders of their places of incorporation, courts struggled to reconcile a legitimate interest in regulating activities taking place within their borders and the personal jurisdiction doctrine that constrained them. 36 Fictions of jurisdiction developed in response, 37 complementing Pennoyer through more expansive interpretations of “consent,” “presence,” and—by the beginning of the twentieth century—“doing business.” 38

But even these were insufficient. Principles of due process once “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.” 39 In response to exponential economic growth, new communications, and transportation that could travel farther and faster, the Supreme Court signaled its formal departure from Pennoyer’s sway in International Shoe v. Washington. 40 Instead of “power

35 See infra Part II.B (discussing this issue and its relationship to consent-by-registration). For a historical overview of jurisdiction over corporations up to the mid-nineteenth century, see William F. Cahill, Jurisdiction over Foreign Corporations and Individuals Who Carry On Business Within the Territory, 30 HARV. L. REV. 676, 679–90 (1917).

36 See, e.g., Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 169 (1939) (describing the “long, tortuous evolution” of personal jurisdiction precedent with respect to corporations as a “history of judicial groping for a reconciliation between the practical position achieved by the corporation in society and a natural desire to confine the[ir] powers”).

37 See Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 194 (1915) (“Whatever long ago may have been the difficulty in applying the principles of Pennoyer v. Neff to corporations, . . . such difficulty ceased to exist.”) (citing St. Clair v. Cox, 106 U.S. 350 (1882)).

38 Kurland, supra note 28, at 577–86, charts the development of these three jurisdictional bases between Pennoyer and International Shoe, arguing “consent” and “presence” were used interchangeably and ultimately subsumed by “doing business” jurisdiction. Cowan v. Ford Motor Co. supports Kurland’s assessment. 694 F.2d 104, 107 (5th Cir. 1982) (holding that appointing an agent and conducting substantial business in Mississippi established general jurisdiction based on consent), on reh’g, 713 F.2d 100 (5th Cir. 1983), certified question answered, 437 So. 2d 46 (Miss. 1983); see also Friedrich K. Juenger, The American Law of General Jurisdiction, 2001 U. Chi. Legal F. 141, 149–52 (noting differences between “presence” and “consent” and arguing the Supreme Court “vacillated” between them).

39 Kurland, supra note 28, at 573 (citations omitted).

over the defendant’s person,”41 the relationship between the parties, the dispute, and the forum became the new inquiry for personal jurisdiction.42 Due process no longer limited adjudicative authority to the territorial borders of each state; instead, defendants could be called into court wherever they had “certain minimum contacts . . . such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”43

Through its “minimum contacts” test, International Shoe established the standards for specific jurisdiction and general jurisdiction,44 doing away with the fictions of “consent” and “presence” that courts developed to complement Pennoyer. Without overturning the results reached in earlier cases, International Shoe acknowledged that earlier cases involving corporations “resort[ed] to the legal fiction that [the corporation] has given its consent to service and suit, consent being implied from its presence in the state. . . . But more realistically . . . those authorized acts were of such a nature as to justify the fiction.”45 However, responses to Daimler demonstrate that these fictions somehow persist, even after Pennoyer was thought overruled in Shaffer v. Heitner.46

The Supreme Court decided only three general jurisdiction cases between International Shoe and Daimler: Perkins v. Benguet Consolidated Mining Co.,47 Helicopteros Nacionales de Colombia, S.A. v. Hall,48 and Goodyear Dunlop Tires Operations S.A. v. Brown.49 All three of these cases quietly inform the consent-by-registration jurisdictional issue.50 However, Goodyear had the greatest influence on the Supreme Court’s decision in Daimler.

42 Id. at 204 (“T[he] relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest, became the central concern of the inquiry into personal jurisdiction [after International Shoe].”).
43 Int’l Shoe, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
44 See von Mehren & Trautman, supra note 2, at 1136 (defining specific and general jurisdiction). But see Kurland, supra note 28, at 586 (arguing International Shoe “served rather to destroy existent doctrine than establish new criteria”).
45 Int’l Shoe, 326 U.S. at 318 (emphasis added) (citing Smolik v. Phila. & Reading Coal & Iron Co., 222 F. 148 (S.D.N.Y. 1915)). For more on Smolik, see infra Part II.B.
46 Shaffer, 433 U.S. at 206 (“T[he] law of state-court jurisdiction no longer stands securely on the foundation established in Pennoyer.”).
50 In every general jurisdiction case heard by the Supreme Court following International Shoe, Justices have either commented on or made inquiries into the consequences of consent-by-registration. First, in Perkins, 342 U.S. at 440 n.2, the Court noted that the foreign corporation did not register to do business or appoint an agent for
In *Goodyear*, a unanimous Court found it unconstitutional to assert general jurisdiction over foreign tire manufacturers sued in North Carolina after two thirteen-year-old residents were killed in a tragic bus accident abroad. The jurisdictional question raised was an “easy case” based on Supreme Court precedent, as well as the prevailing view among lower courts, which acknowledged that “regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.” But *Goodyear* went further than affirming already accepted views of general jurisdiction. By holding that general jurisdiction requires a corporation’s forum contacts be “so continuous and systematic as to render [it] essentially at home in the forum state,” and by listing “domicile, place of incorporation, and principal place of business as ‘paradigm’ bases for the exercise of general jurisdiction,” *Goodyear* gave a preview of the new era *Daimler* would usher in.

### A. The Daimler Case

The Supreme Court’s decision in *Daimler* represents a fundamental shift in personal jurisdiction, but few would have imagined that

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51 *Goodyear*, 131 S. Ct. at 2851.
54 *Goodyear*, 131 S. Ct. at 2857 n.6.
55 See, e.g., *Silberman*, *supra* note 52, at 612 (noting general jurisdiction would not be established over Goodyear’s foreign subsidiaries “even under a theory of aggregate contacts”).
56 *Goodyear*, 131 S. Ct. at 2851 (emphasis added) (internal quotation marks omitted).
57 *Id. at 2854* (alteration in original) (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988)).
the case would produce such a result.59 In Daimler, twenty-two Argentinian plaintiffs sued in California federal district court, alleging German car manufacturer DaimlerChrysler AG was vicariously liable for the acts of its Argentinian subsidiary during Argentina’s “Dirty War.”60 According to the complaint, Mercedes-Benz Argentina—a Daimler subsidiary—collaborated with state security forces from 1976 to 1983, aiding in the torture, kidnapping, detention, and murder of plaintiffs or their close relatives.61

After a series of dramatic appeals,62 the case eventually reached the Supreme Court, which held that Daimler could not be sued in California, because Daimler could not be deemed “at home” in that state.63 However, in the process of reaching that decision, the Court jettisoned notions of “doing business” and “presence” based on “continuous and systematic” activities,64 theories that supported general jurisdiction over claims for more than a century—even after Goodyear.65

In Daimler, Justice Ginsburg’s opinion for eight members of the Court held that general jurisdiction over corporations is limited to places where those defendants are “fairly regarded as at home.”66 Two

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59 Before Goodyear, the view was that “continuous and systematic” activities of a corporation could suffice for general jurisdiction. See, e.g., Matthew Kipp, Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction, 9 REV. LITIG. 1, 35 (1990) (“[C]ontinuous and substantial contacts with the forum permitted the assertion of general jurisdiction.”); Riou, supra note 27, at 742 (“[A] corporation is amenable to general jurisdiction if it has ‘continuous and systematic’ contacts with the forum state.”).

60 Daimler, 134 S. Ct. at 750–52; see also Linda J. Silberman, Jurisdictional Imputation in DaimlerChrysler AG v. Bauman: A Bridge Too Far, 66 VAND. L. REV. EN BANC 123, 124 (2013) (outlining the basis for the claims leveled against Daimler).

61 Daimler, 134 S. Ct. at 751.

62 For an overview of the case history in Daimler, see Silberman, supra note 60, at 133.

63 Daimler, 134 S. Ct. at 762 (“It was therefore error for the Ninth Circuit to conclude that Daimler . . . was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.”).

64 Id. at 761 n.18 (concluding Perkins’s citation to cases upholding the exercise of general jurisdiction based on presence “should not attract heavy reliance today”).

65 Doing business jurisdiction was the most controversial and most commonly utilized basis of general jurisdiction prior to Daimler. See Meir Feder, Goodyear, “Home,” and the Uncertain Future of Doing Business Jurisdiction, 63 S.C. L. REV. 671, 678–95 (2012) (criticizing doing business jurisdiction for lacking historical pedigree and predictability); Silberman, supra note 52, at 614 (critiquing the “excesses of general jurisdiction” prior to Goodyear and Daimler); Mary Twitchell, Why We Keep Doing Business with Doing-Business Jurisdiction, 2001 U. CHI. LEGAL F. 171 (arguing for the elimination of doing business jurisdiction). But see Patrick J. Borchers, The Problem with General Jurisdiction, 2001 U. CHI. LEGAL F. 119, 129–39 (arguing general jurisdiction is an “unpleasant necessity” because of problems with specific jurisdiction, and suggesting alternatives to doing business as a basis for general jurisdiction).

66 Daimler, 134 S. Ct. at 760 (internal citations omitted).
“paradigms” for that standard exist in the corporate-general-jurisdiction context: a corporation’s principal place of business, and its place of incorporation.67 Noting that “[s]imple jurisdictional rules . . . promote greater predictability,”68 the Court’s stated rationale in finding that these two paradigms satisfy due process was that they are unique (”each ordinarily indicates only one place”) and ascertainable.69 And though it left open the door to an “exceptional case” where “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State,”70 Justice Ginsburg’s majority opinion was explicit that “general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business” would be “unacceptably grasping.”71

Stating that general jurisdiction “calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide,” rather than a defendant’s in-state contacts alone,72 the Court held Daimler’s activities in California did not come near the level required to establish general jurisdiction over the German parent corporation, even if the contacts of Daimler AG’s subsidiary, Mercedes-Benz USA (MBUSA), were imputed to Daimler and MBUSA was considered “at home” in California.73 According to the Court, holding otherwise would merely substitute the now-defunct “doing business” jurisdiction for the Court’s nascent “at home” standard,74 allowing “exorbitant exercises of all-purpose jurisdiction [that] would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”75 For the majority, such rampant unpredictability violated due process.76

67 Id. (internal citations omitted).
68 Id. (internal quotation marks omitted) (citing Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010)).
69 Id.
70 Id. at 761 n.19.
71 Id. at 761.
72 Id. at 762 n.20.
73 Id. at 762. The Court noted that MBUSA’s California sales accounted for only 2.4% of Daimler’s global sales. Id. at 752. The Court also noted that neither MBUSA nor Daimler had its principal place of business or place of incorporation in California. Id. at 761.
74 See id. at 762 n.20 (“A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.”).
75 Id. at 761–62 (internal citations and quotation marks omitted).
76 In the process of limiting general jurisdiction to all but two “paradigm” locations and putting an end to doing business jurisdiction, the Court overturned two long-standing
B. Responses to Daimler: Problems in the Courts and Legislatures

The response to the Court's decision was immediate. In the post-Daimler Era, courts have overwhelmingly followed the Supreme Court's restraint of general jurisdiction, finding it only in instances where a corporation is genuinely "at home." Yet Daimler also produced an unanticipated response: Courts are now looking to "consent" as a basis of general jurisdiction over foreign corporations, asserting not that foreign corporations have consented to be "found at home" through registration to do business, but that they have consented to be sued over anything. Neither Daimler nor any other post-International Shoe Supreme Court case clearly ruled on consent-based general jurisdiction, leaving lower courts to interpret the issue independently. This has produced disparate results, and state and federal cases: Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898), and Tauza v. Susquehanna Coal Co., 115 N.E. 915 (1917) (Cardozo, J.). Daimler, 134 S. Ct. at 761 n.18 (putting an end to cases "dominated by Pennoyer's territorial thinking" and suggesting that general jurisdiction based on consent-by-registration is subject to the same due process limitations as any other theory of jurisdiction).

77 See Lawrence Hurley, U.S. Top Court Rules for Daimler in Argentina Human Rights Case, REUTERS (Jan. 14, 2014, 10:37AM), www.reuters.com/article/2014/01/14/us-usa-court-rights-idUSBREA0D0YF20140114 (describing the case as "a boost for multinational companies facing lawsuits alleging misconduct abroad").

78 See, e.g., Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014) ("It is . . . incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business."); Sonera Holding B.V. v. Çukurova Holding A.S., 750 F.3d 221, 226 (2d Cir. 2014) (stating that Daimler makes "clear that even a company's 'engage[ment] in a substantial, continuous, and systematic course of business' is alone insufficient to render it at home in a forum" (alteration in original)), cert. denied, 134 S. Ct. 2888 (2014); Gliklad v. Bank Hapoalim B.M., No. 155195/2014 (N.Y. Sup. Ct. Aug. 11, 2014) (denying general jurisdiction over a foreign bank with place of incorporation and principal place of business in Israel, even though the defendant bank possesses a New York branch that is "the center of its operations in the United States, where it actively conducts business"); see also Linda J. Silberman & Aaron D. Simowitz, Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?, 91 N.Y.U. L. REV. (forthcoming 2016).

One case that seemingly departs from Daimler's "at home" standard is Barriere v. Juluca, No. 12-23510-CIV, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014). In that case, a Florida district court asserted general jurisdiction over an Anguillian corporation in a suit where an American plaintiff slipped and fell at the corporation's resort in Anguilla. Id. at *1. The district court acknowledged Daimler's requirement that a corporation must be "at home" in the forum for a court to exercise general jurisdiction. Id. at *6. Nevertheless, the district court held that, under Daimler, it is still "possible for a corporation to be 'at home' in places outside of its place of incorporation or principal place of business." Id. at *7. It should be noted that the defendant at issue failed to offer documents supporting its argument against jurisdiction. As a result, it may be argued that the defendant thus waived its objection to general jurisdiction being asserted over it.

79 But see infra note 223 (discussing the singular mention of "consent" in Justice Ginsburg's Daimler opinion).
courts are in disarray over the jurisdictional and due process implications of registration statutes, especially after Daimler.

For instance, in AstraZeneca AB v. Mylan Pharmaceuticals, Inc., the Swedish company AstraZeneca and its Delaware-based U.S. subsidiary filed a patent infringement claim in Delaware federal district court against Mylan, a corporation with its place of incorporation and principal place of business in West Virginia. Plaintiff AstraZeneca alleged three bases for the court’s exercise of jurisdiction over Mylan: (1) general jurisdiction; (2) specific jurisdiction; and (3) consent to general jurisdiction. The district court judge was quick to find Mylan was not “at home” in Delaware and thus not subject to general jurisdiction based on that standard. The case would have been uninteresting but for AstraZeneca’s third alleged basis: “Consent to personal jurisdiction obviates the need to consider due process and minimum contacts.”

Noting disagreement on the consent-by-registration issue, the district court held that “compliance does not amount to consent to jurisdiction or waiver of due process” in the post-Daimler world. Not only did the district court deny general jurisdiction based on consent, it rejected a widely cited 1988 Delaware State Supreme Court decision upholding consent-by-registration, stating that it “can no longer be said to comport with federal due process,” because “just as minimum contacts must be present so as not to offend ‘traditional

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81 Id. at *1.
82 Id. at *6. This Note focuses on consent to general jurisdiction, but the Delaware district court’s willingness to find specific jurisdiction in this case demands attention. The court noted specific jurisdiction has been historically disfavored involving the claims at issue in AstraZeneca, id. at *6, but nevertheless found specific jurisdiction was proper. Id. at *7. According to the district court judge, because of Daimler’s impact on general jurisdiction, courts must look at specific jurisdiction in new ways. Id. at *6–7; see also Silberman, supra note 1, at 12–17 (discussing the likelihood that courts will attempt to expand specific jurisdiction in the wake of Daimler); cf. Eli Lilly & Co. v. Mylan Pharm., Inc., No. 1:14-CV-00389-SEB-TA, 2015 WL 1125032, at *4–5 (S.D. Ind. Mar. 12, 2015) (upholding specific jurisdiction over Mylan after determining the foreign corporation is not “at home” in Indiana).
83 AstraZeneca, 2014 WL 5778016, at *3. The court also discussed the “exceptional case” scenario outlined in Daimler and the creative attempts by plaintiffs to use it. Id. at *4.
84 Id. at *3.
85 Id.
86 Id. at *4.
87 Id. at *5.
notions of fair play and substantial justice,’ the defendant’s alleged ‘consent’ to jurisdiction must do the same.”89

Less than two months later, in a case involving the same defendant and the same claims, a different Delaware district court judge reached the opposite conclusion on the consent issue. Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.90 differs from AstraZeneca in only two respects—different judge, different plaintiff. Conceding AstraZeneca’s “rejection of consent as a basis for general jurisdiction,” and noting that the holding in that case “may well be the correct view,”91 Acorda held that “Daimler does not change the fact that [the defendant subsidiary] consented to this Court’s exercise of personal jurisdiction when it registered to do business and appointed an agent for service of process in the State of Delaware.”92 The court noted International Shoe’s minimum contacts test, but nevertheless held that “due process may also be satisfied by consent of the party asserting a lack of personal jurisdiction.”93

According to the judge, consent satisfies due process, even in cases of general jurisdiction. In Acorda, it did not matter that neither the subsidiary nor parent corporate defendants were “at home” under the Daimler standard. Based on the theory that registration to do business in a state constitutes “consent to general jurisdiction,” even the fact that no section of Delaware’s registration statute “expressly addresses whether or not registration to do business in Delaware constitutes consent [to] general jurisdiction”94 was irrelevant.95

Post-Daimler litigation over consent-by-registration general jurisdiction continues to grow.96 Exemplifying the tension created

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89 AstraZeneca, 2014 WL 5778016, at *5 (citation omitted) (“[M]ere compliance with such statutes sufficient to satisfy jurisdiction would expose companies . . . to suit all over the country, a result specifically at odds with Daimler.”).
93 Id. at *5.
94 Id. at *10.
95 Id. at *12 (“Daimler does not expressly address consent.”).
between consent-based general jurisdiction and *Daimler*, Mylan Pharmaceuticals—the same defendant exposed to conflicting decisions in *AstraZeneca* and *Acorda*—has been subjected to general jurisdiction in at least two states outside its “home.” The tension between these lower court decisions and *Daimler* illustrates the need for Supreme Court resolution of the consent-by-registration issue.

In addition to new case law, the New York State Legislature is considering legislation to “reinforce the continuing viability of consent as a basis of general (all-purpose) personal jurisdiction over foreign corporations authorized to do business in New York.” Based on recommendations of the New York Advisory Committee on Civil Practice, the proposal suggests *Daimler* is limited to jurisdiction “decided on the basis of constitutional due process.” The proposed law relies on consent as a separate basis for general jurisdiction, pur-

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98 *Acorda* is currently on appeal to the Federal Circuit as an issue of first impression before that court, but resolution either way could exacerbate the unpredictable nature in which consent-based general jurisdiction works. Given the existing circuit split on this issue, *supra* Table 1, and the fact that federal district courts would be bound by the Federal Circuit on issues related to its jurisdiction (e.g., patents), federal district courts simultaneously bound by their own circuit will be forced to interpret the same statute in two ways, depending on how *Acorda*’s appeal is resolved.


100 A. Doc. 6714-7013, *supra* note 99. However, every assertion of jurisdiction must meet the requirements of due process. The issue is whether consent-by-registration satisfies due process based on a theory outside *Daimler*’s “at home” standard. See *infra* Part II.B (concluding it does not).
porting to make clear that registration to do business in New York results in consent to general jurisdiction in that state.\textsuperscript{101}

If enacted, the New York statute will almost certainly face constitutional challenge.\textsuperscript{102} Ultimately, its success and the validity of court decisions like \textit{Acorda} depend on whether consent-based general jurisdiction is within the limits of the Due Process Clause. However, as Part II demonstrates, it is not.

\section*{II}
\textbf{Consent-by-Registration to General Jurisdiction Violates Due Process}

Mere compliance with state registration statutes and the appointment of an agent for service of process\textsuperscript{103} is an insufficient constitutional rationale for asserting general jurisdiction over a foreign corporation in the post-\textit{Daimler} Era. Consent-by-registration to general jurisdiction was ambiguous and the subject of a split among state and federal courts even in the twentieth century.\textsuperscript{104} After \textit{Daimler}, registration statutes cannot serve as a constitutional basis for general jurisdiction over foreign corporations for three reasons. First, neither \textit{Daimler}’s demand for “uniqueness” and “ascertainability” as prerequisites for general jurisdiction, nor \textit{International Shoe}’s minimum contacts requirement is satisfied under a consent-by-registration theory. Second, the consent-by-registration theory asserted against foreign corporations is not a “touchstone of jurisdiction” that warrants its use.

\textsuperscript{101} Historically, New York courts have overwhelmingly upheld consent-by-registration as a basis for general jurisdiction. \textit{E.g.}, Spiegel v. Schulmann, 604 F.3d 72, 77 n.1 (2d Cir. 2010) (discussing consent-by-registration in dicta); Steuben Foods, Inc. v. Oystar Grp., Inc., No. 10-CV-7808, 2013 WL 2105894, at *3 (W.D.N.Y. May 14, 2013) (stating that for at least 60 years, “New York courts have determined that general jurisdiction may be asserted over a corporation solely on the basis that it has registered to do business”); Augsbury Corp. v. Petrokey Corp., 470 N.Y.S.2d 787, 789 (N.Y. App. Div. 1983) (“The privilege of doing business in New York is accompanied by an automatic basis for personal jurisdiction.”). \textit{See also infra} Appendix (detailing how New York courts uphold the consent-by-registration theory). Note, however, that even recent courts blur concepts of “presence” and “consent” in the context of registration statutes. See STX Panocean (U.K.) Co. v. Glory Wealth Shipping Pte Ltd., 560 F.3d 127, 131–32 (2d Cir. 2009) (discussing consent-by-registration but also stating “registration with the State satisfies the . . . test for being ‘found’”).

\textsuperscript{102} In addition to New York’s proposed legislation, a Pennsylvania jurisdiction statute, 42 PA. CONS. STAT. § 5301(a)(2)(ii) (2013), is a prime candidate for constitutional challenge after \textit{Daimler}. The Pennsylvania provision states that Pennsylvania may “exercise general personal jurisdiction” over corporations through “[c]onsent, to the extent authorized by the consent.”

\textsuperscript{103} As the statutes in the Appendix illustrate, all fifty states provide the requirement for both registration and appointment, so these provisions can be treated as the same for the purposes of consent-based jurisdiction.

\textsuperscript{104} \textit{Supra} Table 1.
as an alternative basis for satisfying due process. Third, consent-by-registration to general jurisdiction after *Daimler* likely violates the unconstitutional conditions doctrine.

A. Consent-by-Registration Is Not Unique, Ascertainable, or Sufficient Under a Minimum Contacts Analysis

Differing interpretations of registration statutes might render foreign corporations subject to general jurisdiction in dozens of states. Each state may interpret broadly its jurisdiction-rendering statutes (such as registration statutes and long-arm statutes) to the limits of due process. But that interpretive authority neither requires states to open their courts to the full extent permitted under the Due Process Clause, nor does it prohibit states from doing so. As demonstrated in the Appendix to this Note, different states thus interpret their registration statutes to have different consequences. Furthermore, because federal courts are not required to follow state court interpretations of federal due process, and because state courts are only truly bound by federal due process interpretations of the U.S. Supreme Court, foreign corporations are subjected to varying consequences when they register to do business. Registration statutes fail to satisfy *Daimler*’s due process requirements as a result.

Determining whether registration to do business establishes consent to general jurisdiction requires courts to perform a three-step statutory and constitutional analysis: (1) Determine whether the applicable registration statute equates compliance with consent to personal jurisdiction as an alternative basis for satisfying due process. Third, consent-by-registration to general jurisdiction after *Daimler* likely violates the unconstitutional conditions doctrine.

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105 E.g., Sondergard v. Miles, Inc., 985 F.2d 1389, 1393 (8th Cir. 1993) (stating consent-by-registration would establish general jurisdiction over unrelated claims arising even before registration); Rose’s Stores, Inc. v. Cherry, 526 So. 2d 749, 752 (Fla. Dist. Ct. App. 1988) (“By having a registered agent in the state, the minimum contacts requirement is met.”). But see Cossaboon v. Me. Med. Ctr., 600 F.3d 25, 37 (1st Cir. 2010) (“Corporate registration in New Hampshire adds some weight . . . but it is not alone sufficient to confer general jurisdiction.”); Sandstrom v. ChemLawn Corp., 904 F.2d 83, 88–90 (1st Cir. 1990) (counting registration to do business as a contact in the determination of whether there is general jurisdiction, but finding it insufficient even when combined with in-state advertising and employee recruitment).

106 Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952) (“W)e find no requirement of federal due process that either prohibits Ohio from opening its courts to the cause of action here presented or compels Ohio to do so.”).

107 The Advisory Committee on Civil Practice—which initially suggested the consent-based general jurisdiction legislation in New York—asserts that “Daimler’s limitation on general jurisdiction was decided on the basis of constitutional due process.” REPORT OF THE ADVISORY COMMITTEE ON CIVIL PRACTICE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 31 (2015). Problematically, this suggests that due process need not be met in order to assert jurisdiction, which cannot be the case as long as jurisdiction is tied to the Fourteenth Amendment. Minimum contacts might not be the sole basis for personal jurisdiction, but due process must always be satisfied.
jurisdiction, or whether it only intends to provide service of process resulting in notice to defendants;\(^{108}\) (2) Decide whether that consent establishes general or specific jurisdiction;\(^{109}\) (3) Consider whether this consent satisfies due process.\(^{110}\) The first two steps are matters of statutory interpretation. The third is crucial after \textit{Daimler}. It is a matter of constitutional due process that must ultimately be answered by the Supreme Court, and one on which state courts and federal courts differ widely.\(^{111}\)

Split decisions persist not only between federal district and circuit courts, but also in \textit{intra}-forum splits between state and federal courts interpreting the same statute. Connecticut’s registration statute and cases interpreting it illustrate this issue.\(^{112}\) Nearly thirty years before \textit{Daimler}, a Connecticut state appellate court in \textit{Wallenta v. Avis Rent a Car System, Inc.} interpreted Connecticut’s registration statute as consent to general jurisdiction.\(^{113}\) Later, a Connecticut federal district

\(^{108}\) \textit{E.g.}, \textit{Pittock v. Otis Elevator Co.}, 8 F.3d 325, 329 (6th Cir. 1993) (reasoning the Ohio Supreme Court “rejected the proposition that service of process may be equated with personal jurisdiction” (citing \textit{Wainscott v. St. Louis-S.F. Ry.}, 351 N.E.2d 466 (Ohio 1976))); \textit{Anderson v. Bedford Assocs., Inc.}, No. 3:97cv1018 (GLG), 1997 WL 631117, at *3 (D. Conn. Sept. 19, 1997) (distinguishing between “service of process” and personal jurisdiction and collecting cases on that point); \textit{Werner v. Wal-Mart Stores, Inc.}, 861 P.2d 270, 272 (N.M. Ct. App. 1993) (“While designation of an agent for service of process may confer power on a state to exercise its jurisdiction, it does not automatically do so. We must look to the legislative intent.”).

\(^{109}\) \textit{E.g.}, \textit{Gray Line Tours v. Reynolds Elec. and Eng’g Co.}, 238 Cal. Rptr. 419, 421 (Ct. App. 1987); \textit{Springle v. Cottrell Eng’g Co.}, 391 A.2d 456, 468 (Md. Ct. Spec. App. 1978); \textit{Middlestadt v. Rouzer}, 328 N.W.2d 467, 469 (Neb. 1982); \textit{Osage Oil & Refining Co. v. Interstate Pipe Co.}, 253 P. 66, 69 (Okla. 1926); \textit{Eure v. Morgan Jones & Co.}, 79 S.E.2d 862, 863 (Va. 1954); \textit{Robert C. Casad & William B. Richman, Jurisdiction in Civil Actions § 3.02[2][a] (4th ed. 2014) (observing that courts have reached different conclusions as to whether consent confers specific or general jurisdiction).}

\(^{110}\) \textit{See supra} Table 1 (outlining the circuit split on the question). As this Note demonstrates, courts throughout the United States are grappling with this issue. \textit{Compare In re Asbestos Litig.}, No. CV N14C-03-247 ASB, 2015 WL 5016493, at *3 (Del. Super. Aug. 25, 2015) (“\textit{Daimler} does not foreclose a state registration statute from conferring jurisdiction over a foreign corporation registered to do business in Delaware by virtue of its express consent.”), \textit{motion to certify appeal denied}, No. CV N14C-03-247 ASB, 2015 5692811 (Del. Super. Sept. 24, 2015), \textit{with Keely v. Pfizer Inc.}, No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) (“A defendant’s consent to jurisdiction must satisfy the standards of due process and finding a defendant consents to jurisdiction by registering to do business in a state or maintaining a registered agent does not.”).

\(^{111}\) \textit{See infra} Appendix.

\(^{112}\) The wording of Connecticut’s registration statute is similar to that of most state registration statutes: “The registered agent of a foreign corporation authorized to transact business in this state is the corporation’s agent for service of process, notice or demand required or permitted by law to be served on the foreign corporation.” \textit{Conn. Gen. Stat. Ann.} § 33-929(a) (West 2015).

\(^{113}\) \textit{S22 A.2d 820, 823 (1987). This case was remanded to determine whether or not assertion of general jurisdiction satisfied due process. Id. at 824.}
court judge disagreed with that interpretation, stating the statute merely constitutes consent to service, and that “amenability to service of process is different from activities sufficient to subject the company to personal jurisdiction.”\footnote{Anderson v. Bedford Assocs., Inc., No. 3:97cv1018 (GLG), 1997 WL 631117, at *3 (D. Conn. Sept. 19, 1997).} More than a decade later, in \textit{Talenti v. Morgan},\footnote{968 A.2d 933 (2009).} a Connecticut state appellate court ignored the federal court decision, but went further than \textit{Wallenta} to equate registration with a “voluntary consent” to general jurisdiction that meets the requirements of the Due Process Clause.\footnote{Id. at 940–41 n.14 (stating the defendant “voluntarily consented” to jurisdiction, and that “the exercise of jurisdiction by the court does not violate due process”).}

This schism on issues of statutory interpretation and due process persists,\footnote{See, e.g., WorldCare Ltd. Corp. v. World Ins. Co., 767 F. Supp. 2d 341, 355 (D. Conn. 2011) (“Expansive, non-explicit consent to being hailed into court on any claim whatsoever in a state in which one lacks minimum contacts goes against the longstanding notion that personal jurisdiction is primarily concerned with fairness.”).} though at least one Connecticut district judge since \textit{Daimler} has held that due process is not satisfied, even if the state’s registration statute is interpreted as consent to general jurisdiction.\footnote{Brown v. CBS Corp., 19 F. Supp. 3d 390, 394, 396–400 (D. Conn. 2014).} Regardless, the state of personal jurisdiction in Connecticut illustrates that consent-by-registration fails to meet \textit{Daimler}’s due process demand for limited, “unique,” and “ascertainable” locations for general jurisdiction.\footnote{Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014).}

It is thus incompatible with the Court’s post-\textit{Daimler} interpretation of due process to uphold consent-by-registration as a basis for general, all-purpose jurisdiction. Not only does such a theory bury \textit{Daimler} by keeping in place the pre-\textit{Daimler} jurisdictional status quo (merely switching the ostensible basis of jurisdiction from “doing business” to “consent”), it contradicts the due process criteria required for general jurisdiction: \textit{ascertainability} and \textit{uniqueness}. This latter point is best illustrated by the circular logic announced in the legal guidelines provided by New York State to foreign corporations contemplating registration to do business:

\begin{quote}
[\textbf{I}]f an organization is not doing business that subjects it to jurisdiction . . . it is not doing business that requires qualification. Conversely, by qualification an organization concedes that it is subject to jurisdiction . . . however, not all business activity engaged in by a foreign organization rises to “doing business” in the qualification sense.\footnote{NEW YORK SECRETARY OF STATE, OFFICE OF GENERAL COUNSEL, “DOING BUSINESS” IN NEW YORK: AN INTRODUCTION TO QUALIFICATION, www.dos.ny.gov/cnsl/}
\end{quote}
These guidelines stand in stark contrast to the Uniform Law Commission’s Model Registered Agent Act, which ten states and the District of Columbia have implemented to explicitly state that registration statutes provide no jurisdictional basis over foreign corporations.

Furthermore, compliance with a registration statute neither establishes the continuous and systematic contacts that render a foreign corporation “at home” as Daimler requires nor results in an “exceptional case” that allows jurisdiction to be asserted over claims wholly unrelated to a forum state. Prior to Daimler, some courts considered registration to do business or the appointment of an agent for service of process to be sufficient to uphold general jurisdiction under a traditional minimum contacts analysis, even in cases where foreign corporations registered, but never conducted any actual business in a forum state. However, Daimler invalidates the theory that registration creates sufficient contacts for general jurisdiction by holding that even “continuous and systematic contacts” are insufficient to confer general jurisdiction, unless those contacts render a corporation “at home.” Almost every court accepts this view in the wake of Daimler.

Ironically, the post-Daimler disarray described above provokes the same concerns that Daimler sought to address, exacerbating the Supreme Court’s concern over comity in the U.S. exercise of judicial jurisdiction. Yet consent-by-registration to general jurisdiction...
might nevertheless satisfy due process if that theory were rooted in the origins of American jurisprudence on personal jurisdiction, allowing the theory to potentially circumvent a minimum contacts analysis. However, Part II.B demonstrates that statutory compliance with registration statutes lacks that requisite history and tradition.

B. Consent-by-Registration Is Not a “Touchstone of Jurisdiction”

Consent-by-registration goes to the heart of Pennoyer, but its constitutionally permissible boundaries are significantly more limited than what post-Daimler decisions upholding consent-based general jurisdiction suggest. Because consent-by-registration fails a traditional minimum contacts analysis under Daimler, its due process validity depends on the Supreme Court’s willingness to consider consent-based general jurisdiction a “touchstone of jurisdiction” along the lines of personal jurisdiction based on physical presence discussed in Justice Scalia’s plurality opinion in Burnham v. Superior Court.

A “touchstone of jurisdiction” is a basis of adjudicative authority that satisfies due process because of its historical connection to the adoption of the Fourteenth Amendment and its continued practice up to the present day. In Burnham, Justice Scalia wrote for four justices of the Court, upholding jurisdiction over natural persons based on their physical presence in a forum. Because they found so-called “tag” jurisdiction to be part of personal jurisdiction’s history and tradition since the days of Pennoyer v. Neff, service upon a physically present defendant in the forum state was enough to establish personal corporation which establishes a place of business in England is deemed to be present in England.

126 See Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (plurality opinion) (arguing that jurisdiction based on just being physically present in the forum satisfies due process because it always has and is rooted in American jurisprudence); see also Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988) (holding that the Court has long approved forum-state application of its own statute of limitations, and there was no justification to alter that tradition); Carol Andrews, Another Look at General Personal Jurisdiction, 47 WAKE FOREST L. REV. 999, 1072–73 (2012) (arguing that “consent theory changes the constitutional inquiry” by “shift[ing] any due process analysis from minimum contacts to the validity of the consent”).

127 Burnham, 495 U.S. at 619. However, as Justice Scalia’s Burnham opinion discussed, “International Shoe confined its ‘minimum contacts’ requirement to situations in which the defendant ‘be not present within the territory of the forum.’” Id. at 621. But see Burt Neuborne, General Jurisdiction, Corporate Separateness, and the Rule of Law, 66 VAND. L. REV. EN BANC 95, 107 & n.45 (2013) (arguing Burnham alone survived International Shoe’s “‘minimum contacts’ shipwreck” and that Burnham’s unanimous result “obscures the fierce disagreement” over whether International Shoe’s fairness standard controls all assertions of personal jurisdiction).

128 Burnham, 495 U.S. at 622.
jurisdiction. No question into whether minimum contacts existed was required.\footnote{129} But while historically supported in-state service may require no inquiry into “traditional notions of fair play and substantial justice,”\footnote{130} assertions of consent-by-registration to general jurisdiction demand one. As the remainder of this Part demonstrates, consent-by-registration to general jurisdiction carries neither the history nor the tradition required to establish it as a touchstone of jurisdiction. On the contrary, although registration statutes were commonly accepted as a basis for specific jurisdiction, it was not until the twentieth century that three of America’s most prominent jurists, in a rapid trilogy of cases, expanded the scope of state authority over foreign corporations to include what is known today as general jurisdiction. Thus, even accepting the argument that “[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it,”\footnote{131} consent-by-registration is still an insufficient basis for asserting general jurisdiction over foreign corporations.

1. Consent in Context: A Nexus of Territory, Registration, Service, and Jurisdiction

Consent is far from a singular concept, especially in the personal jurisdiction context.\footnote{132} As such, “the primary source of problems arises in those cases in which the thesis of consent has been extended to cover cases where in fact consent does not exist.”\footnote{133} The question of whether or not genuine consent exists complicates a constitutional inquiry into the validity of registration statutes as a basis for general jurisdiction.\footnote{134} Nevertheless, while some forms of consent are valid bases of jurisdiction, consent-by-registration to general jurisdiction is not one of them.

\textit{Pennoyer} established the nexus between adjudicative authority over a defendant and fair notice to that defendant provided through
service of process.\footnote{Harold L. Korn, The Development of Judicial Jurisdiction in the United States: Part I, 65 Brook. L. Rev. 935, 983 (1999). Through “process,” a state established jurisdiction, whereas “service” of it gave notice to defendants. Jurisdiction and notice through service of process seemed indivisible during the Pennoyer Era, but there is no doubt they can be achieved through separate means today. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (noting due process requires both notice and personal jurisdiction, and that adequate service established notice but was insufficient to confer jurisdiction); Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 181, 183 (5th Cir. 1992) (denying general jurisdiction based on registration to do business and categorizing registration statutes as a “procedural requirement[] of notice”).} Like the doctrine of personal jurisdiction itself, the meaning of “service of process” and its relationship to assertions of jurisdiction have changed over time.\footnote{As noted by Professor Korn, “process” is a legal term “laden with more meanings than it can usefully bear,” given the evolution of the jurisdiction-notice nexus. Korn, supra note 135, at 983.} In Pennoyer’s heyday, service of process was limited to the territorial borders of each state. As a result, while service on a natural person “sufficed both to assert the state’s power over him and to give the defendant notice of the pending action,”\footnote{St. Clair v. Cox, 106 U.S. 350, 354 (1882) (citation omitted) (discussing situations when a corporate officer travels to other forums and noting that “his functions and his character would not accompany him”).} such service was impossible over a corporation that existed only in its home state. This was a result of the nineteenth-century principle that “a corporation must dwell in the place of its creation,” and the fact that officers of a corporation did not carry corporate liabilities with them and thus could not be automatically served while in another state.\footnote{Id. at 354–55 (“To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein.”). Note that in Barrow v. Kane, one of the two “Pennoyer Era” cases overturned by Daimler, the Supreme Court acknowledged that registration statutes were about establishing jurisdiction over causes of action arising out of contracts in a particular forum state. Barrow S.S. Co. v. Kane, 170 U.S. 100, 107–08 (1898) (noting that since it would be a “manifest injustice” to allow foreign corporations to “do business” and sue in courts without being subject to suit themselves, states have responded by enacting statutes that required foreign corporations “making contracts within the state” to appoint agents “upon whom process may be served in actions upon such contracts” (emphasis added)). Liabilities on which a corporation could be sued, however, were limited to instances involving specific jurisdiction under today’s standard.}

Registration statutes developed as a solution to this “manifest injustice.”\footnote{Id. at 354–55 (“To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein.”). Note that in Barrow v. Kane, one of the two “Pennoyer Era” cases overturned by Daimler, the Supreme Court acknowledged that registration statutes were about establishing jurisdiction over causes of action arising out of contracts in a particular forum state. Barrow S.S. Co. v. Kane, 170 U.S. 100, 107–08 (1898) (noting that since it would be a “manifest injustice” to allow foreign corporations to “do business” and sue in courts without being subject to suit themselves, states have responded by enacting statutes that required foreign corporations “making contracts within the state” to appoint agents “upon whom process may be served in actions upon such contracts” (emphasis added)). Liabilities on which a corporation could be sued, however, were limited to instances involving specific jurisdiction under today’s standard.} But registration statutes alone did not remedy states’ inability to assert jurisdiction over foreign corporations under Pennoyer’s power theory.\footnote{Scott, supra note 26, at 50 n.46 (“A corporation . . . is domiciled only in the state creating it. Hence, jurisdiction over a foreign corporation cannot be based upon domicile.”).} Instead, states conditioning the right to
conduct interstate business in compliance with registration statutes relied on Pennoyer’s other basis of jurisdiction—consent.141

But while Pennoyer permitted courts to establish general “tag” jurisdiction over a natural person through service based on defendants’ physical presence—recognized in Burnham—consent had a comparatively limited jurisdictional reach.142 As noted by Arthur von Mehren, “[l]egislation, passed in the early decades of the nineteenth century, involved the state’s power to exclude foreign corporations from doing business in the state and required that they consent to state-court jurisdiction over causes of action arising from business done locally on their behalf.”143 That the limitations of consent-by-registration precede the Pennoyer Era itself is a fact demonstrated by the Supreme Court’s decision in Lafayette Insurance Co. v. French.144

In 1855, thirteen years before the ratification of the Fourteenth Amendment and more than twenty years prior to Pennoyer, an Ohio citizen sued in Indiana federal court to enforce an Ohio judgment. In the original suit, the Ohio Supreme Court held it could imply consent of a foreign corporation to suits arising out of in-state contacts based on service of process upon a foreign corporation’s in-state agent.145 Like the registration statutes of today, Ohio’s registration statute required state authorization and appointment of an agent for service before a foreign corporation could legally conduct business.

Upholding Ohio’s jurisdiction over the nonresident Indiana corporation, the U.S. Supreme Court wrote that a “corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. . . . This consent may be accompanied by such conditions . . . provided they are not repugnant to the constitution or laws of the United States.”146 The Court emphasized its decision was limited to claims arising out of in-state activity.147

141 See supra note 32 (noting the role of consent in Pennoyer).
142 See, e.g., Simon v. S. Ry. Co., 236 U.S. 115, 130 (1915) (“[T]he statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states.” (citing Old Wayne Mut. Life Ass’n v. McDonough, 204 U.S. 8, 22 (1907))).
143 ARTHUR T. VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW 175 (2006) (emphasis added).
144 59 U.S. 404, 407 (1855).
145 Id.
147 French, 59 U.S. at 408–09 (“We limit our decision to the case of a corporation acting in a State foreign to its creation, under a law of that State which recognized its existence,
other words, French was a specific jurisdiction case in today’s personal jurisdiction vocabulary. But as the legal fiction of corporate presence developed, so did the consequences for corporations registering to do business in foreign states.148

In St. Clair v. Cox149 the Supreme Court expanded the notion of implied consent articulated in French to encompass cases where corporate consent to jurisdiction could be implied by the fact that a corporation was “doing business” in the forum state, even if they had not registered to do business.150 Yet the Supreme Court continued to consistently limit jurisdiction to only those claims that arose out of each forum state, since those were the truly voluntary acts corporations were making by directing commerce into foreign forums.151 But that jurisdictional limitation vanished in the early twentieth century.

2. “Doing Business” and the Leap to Consent-by-Registration to General Jurisdiction

As cases overruled by Daimler illustrate, limits on a consent theory of jurisdiction began to change as interpretations of “doing business” expanded and came to more closely resemble a corporation’s “presence” rather than its implied “consent.”152 This more

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148 Mary Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610, 622 (1988) (noting the analogy sometimes drawn between corporations and natural persons and arguing that corporate “presence” supported general jurisdiction as if a natural person were in the forum).


150 Nevertheless, general jurisdiction still applied only where corporations at the time could be said to reside: in their place of incorporation. As Justice Field noted in St. Clair:

The principle that a corporation must dwell in the place of its creation, and cannot . . . migrate to another sovereignty . . . prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

Id. at 354.


152 In Barrow S.S. Co. v. Kane, a New Jersey plaintiff sued, in New York, a British corporation that kept offices, property, and employees in New York City. 170 U.S. 100, 101 (1898). At the time, service on New York agents did not establish jurisdiction, but the Supreme Court upheld jurisdiction, stating it “may be implied from a grant of authority . . . to carry on its business there.” Id. at 107 (emphasis added). Tauza v. Susquehanna Coal Co., 115 N.E. 915, 918 (N.Y. 1917), held the same. Writing for the New York Court of Appeals, Judge Cardozo upheld general jurisdiction over the defendant Pennsylvania company, because it maintained a “branch office in New York” that “contain[ed] eleven desks, and other suitable equipment” for salesmen. Id. at 916. Although both Barrow and
expansive interpretation of “doing business” eventually confused the three concepts.\textsuperscript{153} As a result, consent-by-registration experienced a theoretical leap to general jurisdiction through a trilogy of cases decided one hundred years ago.

Writing in the 1915 case \textit{Smolik v. Philadelphia & Reading Coal & Iron Co.},\textsuperscript{154} Judge Learned Hand held that “in the interests of justice,” courts may “impute[ ] results to the voluntary act of doing business within [a] foreign state, quite independently of any intent.”\textsuperscript{155} The defendant in \textit{Smolik}, a Pennsylvania mining corporation, was sued by Anthony Smolik after he was injured in a mine operated by the company.\textsuperscript{156} Although no part of its mines were in New York, the defendant was found to be “doing business” in the state. By virtue of having obtained a state license, the defendant had appointed an agent for service of process, but since service was made on the non-resident corporation on a claim unrelated to New York, the defendant moved to set aside the service.\textsuperscript{157}

In a four-page opinion, Judge Hand upheld jurisdiction over the unrelated claim, stating that “personal jurisdiction . . . depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes.”\textsuperscript{158} Interpreting the relevant statute to permit New York residents to “sue foreign corporations upon any cause of action whatever,”\textsuperscript{159} Hand found “no constitutional objection to a state’s exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business.”\textsuperscript{160}

\textit{Tauss} were cited in \textit{Perkins v. Benguet Consolidated Mining Co.}, 342 U.S. 437, 446 & n.6 (1952), \textit{Daimler} made clear that these cases are no longer persuasive. Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.18 (2014).

\textsuperscript{153} The first Supreme Court case articulating a rule that collapses these theories appears to be \textit{People’s Tobacco Co. v. American Tobacco Co.}, 246 U.S. 79, 87 (1918) (“The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has \textit{subjected} itself to the local jurisdiction, and is \ldots \textit{present} within the state or district where service is attempted.” (emphasis added)). \textit{Cf. Phila. & Reading Ry. Co. v. McKibbin}, 243 U.S. 264, 265 (1917) (Brandeis, J.) (discussing “presence” and “doing business” “in the absence of consent”).

\textsuperscript{154} 222 F. 148 (2d Cir. 1915).

\textsuperscript{155} \textit{Id.} at 151 (emphasis added).

\textsuperscript{156} \textit{Id.} at 149.

\textsuperscript{157} \textit{Id.} The defendant’s argument was that “the express consent [of registering to do business and appointing an agent for service of process] must be limited in exactly the same way” as implied consent is limited. \textit{Id.} (discussing defendant’s arguments related to \textit{St. Clair v. Cox}, 106 U.S. 350 (1882)).

\textsuperscript{158} \textit{Id.} at 150.

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.} at 150–51. After upholding jurisdiction over the unrelated claim, he acknowledged that “[w]hen . . . a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does \textit{not} mean that . . . it has
In a New York Court of Appeals decision one year later, Judge Cardozo articulated the same view held by Judge Hand. *Bagdon v. Philadelphia & Reading Coal & Iron Co.* presented nearly identical facts to those in *Smolik.* The exact same defendant contested the validity of service upon it in New York for the same reason as in the year before: Registration to do business in New York State only established jurisdiction for claims related to that forum. According to the Pennsylvania company, “any other construction would do violence to its rights under the federal Constitution.”

Judge Cardozo held otherwise. Citing *Smolik* and characterizing the issue before the court as one of contract, Cardozo wrote “when a foreign corporation *is* engaged in business in New York, and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted.”

Doing business in New York required a “stipulation” that designated an agent for service of process in the state. Thus the court in *Bagdon,* like Judge Hand in *Smolik,* determined its jurisdictional reach as a matter of statutory interpretation. As such, the stipulation involved was considered “a true contract,” one that “deals with the jurisdiction of the person.” *Bagdon*’s only reference to due process rights of the defendant was contained as an aside in the case’s closing sentence.

Other courts in the United States quickly adopted the rationale of these cases to expand jurisdiction over claims unrelated to a

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161 *Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075 (1916).*
162 *Id.* at 1075.
163 *Id.* at 1077 (“We are not imposing or implying a legal duty. We are construing a contract.”).
164 *Id.* This case is in conflict with contemporary views of due process and jurisdiction, since Judge Cardozo’s view of jurisdiction over the defendant in *Bagdon* is undermined by its reliance on “presence.” Compare *id.* (“Officer and agent [serve] a corporation engaged in business in this state. Their presence in that service has brought the corporation within our jurisdiction; and in coming here it has become subject to the rule that transitory causes of action are enforceable wherever the defendant may be found.” (emphasis added)), with *Burnham v. Superior Court,* 495 U.S. 604, 617–18 (1990) (plurality opinion) (noting “*Pennoyer*’s rigid requirement of either ‘consent,’ . . . or ‘presence,’ . . . were purely fictional,” and that “*International Shoe* cast those fictions aside”).
165 *Bagdon,* 111 N.E. at 1076. Nonresident corporations failing to provide such a designation lose their right to sue in New York and every other state. See Appendix. Under the Erie Doctrine, the consequences of this holding go farther than *Bagdon* anticipated. See infra notes 200–05 and accompanying text.
166 *Bagdon,* 111 N.E. at 1076.
167 *Id.* at 1077 (“We think there is nothing to the contrary either in the decisions of the Supreme Court of the nation or in the guaranty of due process under the federal Constitution.”).
One year later, the Supreme Court accepted the principle established in Smolik and Bagdon. In Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co., a Pennsylvania insurance company registered to do business in Missouri, establishing an agent for service of process pursuant to the statutory requirements for that registration. The Gold Issue Mining and Milling Company was an Arizona corporation that owned property in Colorado insured by Pennsylvanian Fire. After that property was struck by lightning and destroyed, Gold Issue Mining sued Pennsylvania Fire in Missouri over the Colorado claim.

Departing from the Court’s narrower precedents of the past, Justice Holmes held that “when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant’s voluntary act.” However, as suggested in Part II.A, the unpredictable “risk of interpretation” rationale underlying the holding of Pennsylvania Fire creates an impermissible level of uncertainty for defendants under the Daimler standard. But cases far predating Daimler also support the fact that Pennsylvania Fire can no longer provide a constitutional basis for consent-by-registration to general jurisdiction.

While Pennsylvania Fire, Bagdon, and Smolik stand for the proposition that state registration statutes can be interpreted to uphold general jurisdiction over foreign corporations based on a “consent” theory, courts relying on this trilogy of cases ignore the qualifications quickly placed on it by the Supreme Court in Chipman, Ltd. v.

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168 See, e.g., Rishmiller v. Denver & R.G.R. Co., 159 N.W. 272, 273–74 (Minn. 1916) (upholding jurisdiction “no matter where the cause of action arose” based on “consent,” “presence,” and “doing business,” stating “[n]either the nature of the business nor the volume of the business transacted is important so long as the corporation can fairly be said to be doing business in the state” (citing Int’l Harvester Co. of Am. v. Kentucky, 234 U.S. 579 (1914); Comm. Mut. Accident Co. v. Davis, 213 U.S. 245, 256 (1909); Bagdon, 111 N.E. at 1075)).

169 243 U.S. 93 (1917); see also Kipp, supra note 59 (suggesting registration statutes were enacted to establish service on corporations, not jurisdiction); Riou, supra note 27, at 748–68 (analyzing Pennsylvania Fire).


171 Pennsylvania Fire, 243 U.S. at 96.

Thomas B. Jeffrey Co., and Robert Mitchell Furniture Co. v. Selden Breck Construction Co. Through these cases, the Supreme Court clarified the intended scope of its Pennsylvania Fire decision.

Chipman presented facts similar to the Pennsylvania Fire-Bagdon-Smolik trilogy. However, a significant difference was that the foreign corporation was no longer “doing business” in New York—it had merely not yet revoked its registration. Although the Court noted registration could be of “federal cognizance,” it specifically distinguished the case from both Bagdon and Tauza based on the quantum of activity the foreign corporations in those cases were conducting compared to the Wisconsin-based Thomas B. Jeffrey Company. Robert Mitchell provided a similarly narrow decision to further cabin Pennsylvania Fire. Stressing the “limited interpretation of a compulsory assent,” Justice Holmes stated courts should not expand the scope of registration, and that “appointment of the agent is the only ground for imputing to the defendant an even technical presence.”

This stands in contrast to post-Daimler theories of consent-by-registration as a separate basis for general jurisdiction, especially given the history of those statutes that illustrates their use as a commonly accepted basis for specific jurisdiction, and the fact that their validity was questioned and caved from the start. Notable early twentieth-century proceduralists support the view that the Pennsylvania Fire-Bagdon-Smolik trilogy’s true basis of jurisdiction was “doing business,” not consent. Furthermore, as discussed by

173 251 U.S. 373 (1920).
175 Here, suit was filed in a New York court by a New York plaintiff over a Wisconsin-based claim against a Wisconsin-based corporation. Chipman, 251 U.S. at 376–77.
176 Id. at 378.
177 Id. at 378–79.
178 Robert Mitchell, 257 U.S. at 216.
179 See supra Part II.B.1 (demonstrating this point).
180 See, e.g., Chipman, Ltd. v. Thomas B. Jeffery Co., 260 F. 856, 858 (S.D.N.Y. 1919) (interpreting Smolik as requiring a foreign corporation to have been “transacting business” in order for a court to hear claims unrelated to its jurisdiction), aff’d sub nom., Chipman, Ltd., v. Thomas B. Jeffrey Co., 251 U.S. 373 (1920); see also Henderson, supra note 151, at 94–96 (criticizing the rationale supporting Smolik and Bagdon).
181 Austin Scott’s 1922 treatise articulated the three bases of personal jurisdiction over foreign corporations: “implied consent,” “presence,” and “doing business.” Smolik, Bagdon, and Pennsylvania Fire are placed clearly under the “doing business” category, which underscores the unreliable nature of a consent-by-registration theory over claims unrelated to a forum after Daimler. Scott, supra note 26, at 48–52. However, “doing business” does not capture the full theoretical scope for which Scott cites Smolik. See id. (citing Smolik for the “principle[ ] of justice [that] if a corporation voluntarily does business within the state, it is bound by the reasonable regulations by the state of that business” (emphasis added)); see also Cahill, supra note 35, at 691–95 (arguing the
Justice Scalia in *Burnham*, presence and consent in the context of jurisdiction over corporations were “purely fictional,” and “*International Shoe* cast those fictions aside.” And although the most important cases purporting to establish general jurisdiction through consent-by-registration were decided at a time when it was “difficult . . . it seem[ed] impossible, to impute the idea of locality to a corporation,” *Daimler* stands for the proposition that “[a] corporation that operates in many places can scarcely be deemed at home in all of them.” Thus, according to an overwhelming majority of the Supreme Court, the world has changed. It is necessary to understand the limits of consent-by-registration as a theory of jurisdiction in this new light.

*Daimler* endorsed the move away from jurisdictional fictions, stating that “changes in the technology of transportation and communication, and the tremendous growth of interstate business activity” have transformed our understanding of how jurisdiction functions. The consequence has been that both “consent and doing business . . . have narrower implications.” With “doing business” interred by *Daimler*, the general jurisdiction consent-by-registration theory embodying Pennoyer’s ghost is equally impermissible, and is thus likely unconstitutional.
III
CONSENT-BY-REGISTRATION IS AN UNCONSTITUTIONAL CONDITION AFTER DAIMLER

After Daimler, consent-by-registration also burdens foreign corporations with an unconstitutional condition.188 Under the unconstitutional conditions doctrine, “the government ‘may not deny a benefit to a person because he exercises a constitutional right.’”189 Describing the doctrine in its “canonical form,” Richard Epstein once noted that “even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improp-
erly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional right.”190 Requiring foreign corporations to relinquish their due process right to be free from lawsuits where they are not “at home” violates this doctrine.

A. The Coercive Effect of Registration Statutes in the Absence of Doing Business Jurisdiction

The crux of the unconstitutional condition question presented by Pennoyer’s ghost is coercion. Professors Adam Cox and Adam Samaha have illustrated elsewhere that “there is no snappy and established test for analyzing unconstitutional conditions questions.”191 While various analyses exist, ranging from “germaneness” tests,192 to “balancing” tests,193 to tests focused on other factors that may trigger

188 Commentators made this assertion nearly a century ago. See Recent Case, Foreign Corporations—Service of Process—Jurisdiction Over Cause of Action Arising Outside the State, 29 HARV. L. REV. 880, 880 (1916) (arguing Bagdon and Smolik likely present an unconstitutional condition).
189 Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013) (citation omitted); see also Kathleen Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1421–22 (1989) (“Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.”).
190 Epstein, Unconstitutional Conditions, supra note 146, at 6–7.
191 Adam B. Cox & Adam M. Samaha, Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory, 5 J. LEGAL ANALYSIS 61, 67 (2013); see also id. at 68 (“Unconstitutional conditions doctrine’ actually designates a kind of problem calling for analysis rather than the analysis used to solve a kind of problem.” (footnote omitted)); cf. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 301 (1993) (calling the unconstitutional conditions doctrine an “anachronism” and arguing that it should be abandoned).
193 See, e.g., Sunstein, supra note 191, at 365–18 (arguing for a shift “away from an emphasis on whether there has been ‘coercion’ or ‘penalty,’ and toward an inquiry into the
an unconstitutional condition, case law on the relationship between foreign corporations, judicial power, and unconstitutional conditions suggests that a “coercive effects test” will most likely apply in a challenge to the consent-by-registration general jurisdiction question.

The coercive effects test applied here is triggered if an entity is required to sacrifice one constitutional right for another when exercising a privilege or a benefit. This test is specific to consent-based general jurisdiction, since a full-blown analysis of the relationship between genuine consent and coercion is beyond the scope of this Note. However, as this Part demonstrates, this coercive effects test is both independently sufficient and historically supported as a means to identify an unconstitutional condition involving registration statutes and foreign corporations. Under this analysis, and even assuming that compliance with a registration statute constitutes “consent to general jurisdiction” (it does not), a foreign corporation’s statutory compliance is likely a “coerced consent” unable to withstand legal scrutiny after Daimler.

As long as “doing business” and “continuous and systematic” activities were accepted bases of adjudicative authority, courts and states extracted nothing more than they already had over corporations—general personal jurisdiction. Prior to Daimler, it did not matter whether general jurisdiction was based on minimum contacts or consent-by-registration. General jurisdiction existed on the basis of “doing business,” so there was arguably no constitutional right to be sacrificed. Thus, registration statutes possessed no coercive effect on foreign corporations that failed to comply. But with “doing business” eliminated as a basis of general jurisdiction, the courthouse door-closing penalty statutes enacted by states for failure to register to

nature of the interest affected by the government and the reasons offered by government for its intrusion”).

194 See Cox & Samaha, supra note 191, at 67 n.11 (collecting sources).
196 For a discussion of “unimpeachable consent” and coercion in the broader context of the civil justice system, see Benish & Yaffe, supra note 132.
197 But see Lewis, supra note 27, at 15–20 (arguing there was a possible unconstitutional condition, even when “doing business” was a valid basis of jurisdiction); Recent Case, supra note 188, at 880 (same).
198 See supra Part I.A.
do business bear the hallmarks of coercion that trigger an unconstitutional condition.  

In the wake of Daimler, a foreign corporation conducting interstate commerce in a state that upholds consent-by-registration to general jurisdiction is forced to forfeit one of two constitutional rights: (1) the due process protection against unwarranted assertions of all-purpose jurisdiction; or (2) access to federal courts via diversity jurisdiction, which is likely barred by door-closing state penalty statutes that eliminate access to state courts and thus also deny federal court access under the Erie Doctrine, specifically under the Supreme Court’s holding in Woods v. Interstate Realty Co. But if corporations may engage freely in interstate commerce and be free from general personal jurisdiction except in cases where they are “at home,” it follows that states do not have the power to demand a tradeoff between the Fourteenth Amendment’s due process protections and access to federal court diversity jurisdiction under Article III of the Constitution. The coercive effect of this false choice represents no choice at all, except between “the rock and the whirlpool.”

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199 Part III.B and the Appendix to this Note detail contemporary penalties for failure to comply with foreign corporate registration statutes.

200 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

201 337 U.S. 535 (1949). In Woods, a Tennessee corporation brought a diversity action against a Mississippi defendant in Mississippi federal court. Because the foreign corporate plaintiff was not registered to do business in Mississippi, the defendant asserted that the suit had to be dismissed pursuant to a Mississippi door-closing statute providing that non-registered corporations “shall not be permitted to bring or maintain any action or suit in any of the courts of this state.” In a 6–3 decision, the Supreme Court held that “where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court.” Id. at 538; cf. Union Brokerage Co. v. Jensen, 322 U.S. 202, 211–12 (1944) (upholding door-closing statute as permissible under the Commerce Clause where foreign corporation was “localized” and the state law was designed “for the purpose of insuring the public safety and convenience” (internal quotation marks and citation omitted)).


203 U.S. CONST. art. III, § 2. There is an unresolved tension between those cases that held non-removal statutes to be an unconstitutional condition and the Erie Doctrine’s impact on door-closing penalties for non-compliance with registration statutes. Compare supra notes 199–203 and accompanying text (discussing Woods v. Interstate Realty Co., 337 U.S. 535 (1949)), with infra notes 208–18 (discussing non-removal statutes and unconstitutional conditions). Though beyond the scope of this Note, analysis of these two lines of case law is necessary to determine whether this tension can be resolved.

204 Frost v. R.R. Comm’n of State of Cal., 271 U.S. 583, 593 (1926). Further emphasizing the coercive effect of this false choice is that corporations are incentivized to violate state laws in order to preserve their due process protection against exorbitant jurisdiction, an argument against consent-by-registration made 100 years ago in Smolik. Smolik v. Phila. & Reading Coal & Iron Co., 222 F. 148, 150 (S.D.N.Y. 1915). There, the defendant argued that its express consent to appoint an agent for service of process could not be expanded beyond the jurisdictional reach of consent when it is implied (e.g., when corporations fail to
This coerced consent-by-registration to general jurisdiction is likely void under the unconstitutional conditions doctrine as a result.205

B. Parallels Between Today’s Door-Closing Penalties and the Original Unconstitutional Condition Cases

The unconstitutional condition implicated by consent-by-registration statutes and the sufficiency of the coercive effects test that identify it are supported by historical parallels between today’s consent-by-registration statutes and what are considered the original unconstitutional conditions cases: Nineteenth-century statutes that conditioned a foreign corporation’s right to do business on waiving the right to federal diversity jurisdiction.206 Struck down as an unconstitutional condition between 1874 and 1922,207 these “non-removal” statutes are similar to the registration statutes at issue today in terms of their door-closing effect on federal court access. An overview of the cases overturning these bygone statutes illustrates the invalidity of consent-by-registration to general jurisdiction today.

Home Insurance Co. v. Morse was the first Supreme Court case to address a state statute conditioning a foreign corporation’s authority to do business within a state upon surrendering access to federal court.208 The basic facts of the case are as follows: The Home Insurance Company was a New York corporation with its principal place of business in New York City that registered to do business and appointed an agent for service of process. To hold otherwise would leave “an outlaw who refused to obey the laws of the state . . . in better position than a corporation which chooses to conform.” Id. After Daimler, the observation made long ago by Henderson, supra note 151, at 99, that “a corporation occupies a more favorable constitutional position because it has violated a state law” suggests a coerced consent rather than a genuine one capable of meeting due process.

205 Cf. Union Pac. R.R. Co. v. Pub. Serv. Comm’n, 248 U.S. 67, 70 (1918) (“It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.”).

206 Berman, supra note 195, at 63 n.246 (crediting an 1876 dissent as the Supreme Court’s first reference to “unconstitutional conditions” (citing Doyle v. Cont’l Ins. Co., 94 U.S. 535, 543–44 (1876) (Badley, J., dissenting))).

207 For an overview of this history, see Berman, supra note 195, at 59–70.

208 87 U.S. (20 Wall.) 445 (1874). As discussed in Part II.B, States throughout the nineteenth century could exclude corporations entirely from their borders. Compare Morse, 87 U.S. (20 Wall.) at 458–59 (Chase, C.J., dissenting) (“The right to impose conditions upon admission follows . . . from the right to exclude altogether.”), with Sec. Mut. Life Ins. Co. v. Prewitt, 202 U.S. 246, 249 (1906) (“A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution.”).
“agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal courts.” Upon being sued in Wisconsin state court over an insurance policy, the New York company attempted to remove the dispute to federal court on the basis of diversity jurisdiction. However, the state trial court refused to recognize the removal and rendered judgment in favor of the plaintiff.

The Supreme Court reversed the case after Wisconsin’s supreme court affirmed the trial court judgment. Although noting an individual’s right to forego the right to federal court removal “as often as he sees fit, in each recurring case,” the Court stated that a defendant cannot “bind himself in advance . . . to forfeit his rights at all times and on all occasions, whenever the case may be presented.” Citing Article III and the Judiciary Act of 1789, the Supreme Court held that the Constitution provides an “absolute right” to remove cases into federal court, that Wisconsin’s non-removal statute was “repugnant to the Constitution” and void, and that the explicit agreement between Home Insurance and the State of Wisconsin which sacrificed the corporation’s removal right was “void, as it would be had no such statute been passed.”

Constitutional questions surrounding non-removal statutes were fully resolved in 1922 by the Supreme Court in *Terral v. Burke Construction Co.* In that case, a Missouri corporation was on the verge of losing its license to do business in Arkansas because it was attempting to maintain suits in Arkansas federal district court. Holding that states may not “exact from [a foreign corporation] a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not,” the Court rested its decision on the ground that States cannot “curtail the free exercise” of rights endowed by the U.S. Constitution.

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209 Morse, 87 U.S. (20 Wall.) at 446 (internal quotation marks omitted).
210 Id. at 447.
211 Id.
212 Id. at 451 (emphasis added).
213 Id. at 453–54.
214 Id. at 458.
216 Id. at 530.
217 Id. at 532.
218 Id. at 532–33 (“[T]he sovereign power of a state . . . is subject to the limitations of the supreme fundamental law.”); see also Harrison v. St. Louis & S.F. R.R. Co., 232 U.S. 318, 328 (1914) (“[T]he several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render ineffectual [the Constitution’s judicial power].”).
Today’s door-closing penalties for non-compliance with consent-by-registration statutes raise concerns similar to those that rendered non-removal statutes unconstitutional one hundred years ago. Present-day registration statutes might soon be invalidated under the unconstitutional conditions doctrine as a result. Today a corporation conducting interstate business and seeking to maintain federal court access is faced with registration statutes in multiple states that are interpreted as “consent to general jurisdiction.” By obeying those laws, that corporation forfeits its due process protection from all-purpose jurisdiction “in advance,” “at all times,” and “on all occasions.” This scenario presents coercive effects that are at least as severe as those which triggered an unconstitutional condition in both *Morse* and *Terral*. Thus, like the unconstitutional conditions struck down in those cases, the conditions attached to general-jurisdiction-rendering registration statutes after *Daimler* are too burdensome and likely void as a result.

**CONCLUSION**

Séances with ghosts of jurisdiction past are no way to satisfy the demands of due process. “The Constitution is not to be satisfied with a fiction,” and consent to general jurisdiction through a registration statute appears to be just that—a fiction capable of transforming every court in the United States into an all-purpose forum for disputes throughout the world. The potential for such outcomes, and the tension it creates with the Court’s overwhelming consensus in *Daimler*, illustrates the constitutional inadequacy of consent-by-registration to general jurisdiction.

Those seeking jurisdictional inroads must look beyond the vestiges of *Pennoyer*’s bygone era. Rather than focus the lawsuits of tomorrow on a constitutionally suspect theory of jurisdiction, the future of adjudicative authority lies in reforms to specific jurisdict-

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220 *Cf.* *Bendix Autolite Corp. v. Midwesco Enters.*, Inc., 486 U.S. 888, 895 (1988) (Kennedy, J.) (“[D]esignation with the Ohio Secretary of State of an agent for the service of process likely would have subjected [the defendant] to the general jurisdiction of Ohio courts over transactions in which Ohio had no interest. . . . [T]his exaction is an unreasonable burden on commerce.”).


222 Based on the facts of *Daimler* itself—Daimler AG’s subsidiary (MBUSA) was registered to do business in California at the time the original suit was filed—Daimler hypothetically could have been hailed into California’s courts if (1) that state adopted a consent-by-registration theory of general jurisdiction; and (2) that consent could be attributed to Daimler. *Cf.* *Daimler*, 134 S. Ct. at 761 n.19 (“It is one thing to hold a corporation answerable for operations in the forum . . . quite another to expose it to suit on claims having no connection whatever to the forum State.”).
Such reforms present better opportunities for successful suits, rather than the entrenchment likely to result from reliance on registration statutes as a basis of general jurisdiction.

Fictions must not be allowed to deny “fair play and substantial justice.” However, the story of Pennoyer’s ghost demonstrates that “fair play” is a two-way street. Defendants must not be forced to litigate over any and every issue wherever they might have registered to do business as required by the laws of all fifty states, but plaintiffs must also have access to justice. That access depends on courts asserting jurisdiction where the authority to do so exists, as well as guaranteeing everyday people the same protections from unconstitutional burdens which corporations enjoy. By taking these needs into account and moving away from consent-based general jurisdiction, reformers and civil justice advocates can make personal jurisdiction less about avoiding disputes and more about enforcing rights.

Consent is referenced only once in Justice Ginsburg’s Daimler opinion. However, that reference provides twenty-first century insight into consent-by-registration as a theory of jurisdiction and suggests avenues of future research into how compliance with corporate registration statutes affects specific jurisdiction. Compare Daimler, 134 S. Ct. at 755–56 (referencing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), as “the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum” (quoting Goodyear Dunlop Tires Operations S.A. v. Brown, 131 S. Ct. 2846, 2856 (2011) (internal quotation marks and brackets omitted) (emphasis added)), with Perkins, 342 U.S. at 440 n.2 (noting the foreign corporate defendant in Perkins did not register to do business or appoint an agent for service of process), and Daimler, 134 S. Ct. at 755 (noting that “specific jurisdiction . . . form[s] a considerably more significant part of the scene” in American courts today (internal citation omitted)).
APPENDIX

This Appendix outlines the jurisdictional implications of corporate compliance with registration statutes in all fifty states and the District of Columbia. Most states are unclear and have not yet clarified the jurisdictional consequences of their registration statutes (thirty-two states have no definite interpretation). However, eleven states and the District of Columbia have made clear that their corporate registration statutes affect service only, while six states have made it clear that registration to do business results in “consent” to general jurisdiction. Note also that New Jersey, New Mexico, and Tennessee each strongly suggest that a consent-by-registration theory is acceptable under the registration statutes enacted in those states.

**Alabama**

**Registration Statute:** Ala. Code § 10A-1-5.31 (LexisNexis 2013).


**Consequence of Registration:** Unclear. No relevant cases.

**Alaska**

**Registration Statute:** Alaska Stat. § 10.06.753 (2014).

**Penalty:** door-closing statute and fines (up to $10,000 per year). Alaska Stat. §§ 10.06.710, 713 (2014).

**Consequence of Registration:** Unclear. No relevant cases.

**Arizona**


**Arkansas**


**Consequence of Registration:** Service only. Ark. Code Ann. § 4-20-115 (Supp. 2013) explicitly states appointment of a registered agent has no effect on jurisdiction or venue.
California
Penalty: door-closing statute. Cal. Corp. Code § 17708.07 (West 2014). See also Cal. Corp. Code § 2203(a), which charges a $20 per day penalty to unregistered foreign corporations conducting business, and also states that unauthorized corporations “shall be deemed to consent to the jurisdiction . . . in any civil action arising in this state in which the corporation is named a party defendant.”

Colorado

Connecticut
Consequence of Registration: Unclear. Connecticut’s state supreme court has not issued a definitive interpretation of the state’s registra-

**Delaware**


**District of Columbia**


**Penalty:** None.

**Consequence of Registration: Service only.** D.C. Code § 29-104.02 explicitly states that registration to do business and designation of an agent does not itself establish personal jurisdiction.
Florida
Consequence of Registration: Unclear. There is no clear due process interpretation of the Florida registration statute. Compare Confederation of Canada Life Ins. Co. v. Vega y Arminan, 144 So. 2d 805, 810 (Fla. 1962) (holding that it does not violate due process to subject a registered foreign corporation to service of process on a cause of action that arose outside the forum), with In re Farmland Indus., No. 3:05-CV-587-J-32MCR, 2007 WL 7694308, at *12 (M.D. Fla. Mar. 30, 2007) (holding that general jurisdiction through Florida’s registration statute does not satisfy due process), and Sofrar, S.A. v. Graham Eng’g Corp., 35 F. Supp. 2d 919, 921 & n.2 (S.D. Fla. 1999) (holding that registration to do business is insufficient to subject company to personal jurisdiction under Florida’s long-arm statute).

Georgia

Hawaii
Consequence of Registration: Unclear. No relevant cases.

Idaho
Consequence of Registration: Service only. Idaho Code § 30-21-414 (2015) explicitly states that appointment of a registered agent has no effect on jurisdiction or venue.

Illinois

Indiana

Iowa

Kansas


Kentucky

Louisiana
Consequence of Registration: Unclear. No relevant cases.

Maine

Maryland
Penalty: door-closing statute, fines for corporations, as well as individual officers and agents, misdemeanor charges for individual officers and agents, and forfeiture of the right to do “intrastate business.” Md.
Code Ann., Corps. & Ass’ns §§ 7-301 to -02, 7-304 (LexisNexis 2014).


Massachusetts

Michigan
Consequence of Registration: Unclear. No relevant cases.

Minnesota
Consequence of Registration: General Jurisdiction. In Rykoff-Sexton, Inc. v. Am. Appraisal Assoc., Inc., 469 N.W.2d 88, 90–91 (Minn. 1991), the Minnesota State Supreme Court held that consent-by-registration establishes general jurisdiction over foreign corporations and satisfies due process.

Mississippi
Missouri
Consequence of Registration: Unclear. Although there is not a definitive interpretation of the Missouri registration statute, district courts in Missouri are starting to hold that consent-by-registration to general jurisdiction is unconstitutional in the post- Daimler era. See Keeley v. Pzifer Inc., No. 4:15CV00583 ERW, 2015 WL 3999488, at *4 (E.D. Mo. July 1, 2015) (“A defendant’s consent to jurisdiction must satisfy the standards of due process and finding a defendant consents to jurisdiction by registering to do business in a state or maintaining a registered agent does not.”); Neeley v. Wyeth LLC, No. 4:11-CV-00325-JAR, 2015 WL 1456984, at *3 (E.D. Mo. Mar. 30, 2015) (noting that adopting the consent-by-registration theory would make every foreign corporation registered to do business in Missouri subject to general jurisdiction and that “Daimler clearly rejects this proposition”).

Montana
Penalty: door-closing statute and fines ($1,000 per year maximum).
Consequence of Registration: Service only. Mont. Code Ann. § 35-7-115 (2013) explicitly states that appointment of a registered agent has no effect on jurisdiction, though it is silent on venue.

Nebraska
Consequence of Registration: General Jurisdiction. In Mittelstadt v. Rouzer, 328 N.W.2d 467, 469 (1982), the Nebraska State Supreme Court held that registration to do business and appointment of an agent establishes consent-based jurisdiction. In April 2015, a Nebraska federal district court held that Daimler did not change the consent-by-registration calculus. Perrigo Co. v. Merial Ltd., No. 8:14-CV-403, 2015 WL 1538088, at *7 (D. Neb. Apr. 7, 2015) (“Daimler circumscribes the extent to which a defendant can be compelled to submit to general jurisdiction, but . . . it does nothing to upset well-

224 This is repealed as of Jan. 1, 2016, and will be replaced by the Nebraska Model Business Corporation Act, 2014 Neb. Laws 749. However, this does not make any substantive changes to Nebraska’s law.
settled law regarding what acts may operate to imply consent.” (citation omitted)).

Nevada
Consequence of Registration: Service Only. The Nevada State Supreme Court interpreted the statute as consent to service only in Freeman v. Second Judicial Dist. Court ex rel. Cnty. of Washoe, 1 P.3d 963, 968 (2000).

New Hampshire
Consequence of Registration: Unclear. No decisive statutory interpretation. For an opinion holding that New Hampshire’s statute establishes at least specific jurisdiction (but refusing to comment on general jurisdiction), see Holloway v. Wright & Morrissey, Inc., 739 F.2d 695, 699 (1st Cir. 1984).

New Jersey
New Mexico

New York

North Carolina


North Dakota
Consequence of Registration: Service only. N.D. CENT. CODE § 10-01.1-15 (2012) explicitly states registration and appointment of a registered agent has no effect on jurisdiction or venue.

Ohio
Penalty: door-closing statute and fines up to $10,000. OHIO REV. CODE ANN. §§ 1703.28, .29 (West 2013). In addition, § 1703.99 states that corporate officers conducting business without registration will be charged with a misdemeanor. But see Citibank v. Eckmeyer, 2009 WL 1452614 (Ohio Ct. App. 11th Dist., May 8, 2009) (holding Ohio’s registration statute as applied to national banks is unconstitutional under the Supremacy Clause because of the National Banking Act, 12 U.S.C. § 1 (2011)).
Consequence of Registration: Service only. In Wainscott v. St. Louis-S.F. Ry. Co., 351 N.E.2d 466, 471 (1976), the Ohio State Supreme Court noted the “consent theory” of personal jurisdiction only supports claims arising out of activities within the forum. Federal courts interpreting Wainscott and the Ohio registration and appointment statutes echo this holding. E.g., Pittock v. Otis Elevator Co., 8 F.3d 325, 329 (6th Cir. 1993) (“[Wainscott] provided that proper service of process does not eliminate the requirement that minimum contacts exist to permit Ohio courts to acquire personal jurisdiction.”). See also Avery Dennison Corp. v. Alien Tech. Corp., 632 F. Supp. 2d 700, 711 n.7 (N.D. Ohio 2008) (“[I]t appears that registration to do business in Ohio is simply one fact to consider in analyzing personal jurisdiction.”).

Oklahoma
Consequence of Registration: Unclear. No relevant cases.
Oregon

Pennsylvania

Rhode Island

South Carolina
 Consequence of Registration: Unclear. No relevant cases.

South Dakota

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226 This replaced 15 Pa. Cons. Stat. § 4141 and § 4143, which are repealed.
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**Penalty:** door-closing statute and fines up to $1,000 per year. S.D. CODIFIED LAWS §§ 47-1A-1502, -1502.2 (2007).

**Consequence of Registration:** *Service only.* S.D. CODIFIED LAWS § 59-11-21 (2009) explicitly disclaims registration as a basis for jurisdiction or venue.

**Tennessee**

**Registration Statute:** TENN. CODE ANN. §§ 48-25-107, -110 (2012).


**Consequence of Registration:** *Specific or General Jurisdiction.* In *Davenport v. State Farm Mut. Auto. Ins. Co.*, the State Supreme Court of Tennessee noted the state has historically upheld “the consent theory as a basis of *in personam* jurisdiction over foreign corporations.” 756 S.W.2d 678, 679 (Tenn. 1988). In doing so, the court held foreign corporations that registered to do business did not benefit from a state statute which limited suits in Tennessee courts to claims arising from within Tennessee itself. *Id.* at 684. The opinion’s dicta may support a consent-by-registration to general jurisdiction argument, but one subsequent court interpreted this decision as relating to *specific jurisdiction*. Ratledge v. Norfolk S. Ry. Co., 958 F. Supp. 2d 827, 838 (E.D. Tenn. 2013). But see Alwood & Greene v. Buffalo Hardwood Lumber Co., 279 S.W. 795, 797 (1926) (citing Barrow Steamship Co. v. Kane, 170 U.S. 100 (1898) and using “consent” and “doing business” theories interchangeably to uphold general jurisdiction).

**Texas**

**Registration Statute:** TEX. BUS. ORGS. CODE ANN. § 5.201 (West 2012).

**Penalty:** door-closing statute and fines. TEX. BUS. ORGS. CODE ANN. §§ 9.051(b), .052 (West 2012).

**Consequence of Registration:** *Unclear.* No controlling case law. But see 800 Adept, Inc. v. Enter. Rent-A-Car, Co., 545 F. Supp. 2d 562, 569 n.1 (E.D. Tex. 2008) (“A party does not consent to personal jurisdiction merely by complying with a state’s registration statutes or appointing an agent for service of process.”); Leonard v. USA Petroleum Corp., 829 F. Supp. 882, 889 (S.D. Tex. 1993) (“A foreign corporation must have contact, other than mere compliance with Texas domestication requirements, to be subject to personal jurisdiction in Texas.”); Conner v. ContiCarriers and Terminals, Inc., 944 S.W.2d 405 (Tex. App. 1997) (“By registering to do business, a foreign corporation only *potentially* subjects itself to jurisdiction.”).
Utah
Registration Statute: UTAH CODE ANN. §§ 16-10a-1511, -17-203 (LexisNexis 2013).
Penalty: door-closing statute and fines ($5000 per year maximum). UTAH CODE ANN. § 16-10a-1502 (LexisNexis 2013).
Consequence of Registration: Service only. Under UTAH CODE ANN. § 16-17-401 (LexisNexis 2013), registration to do business and appointment of an agent do not create an independent basis for jurisdiction.

Vermont
Penalty: door-closing statute, fines ($1,000 per year maximum), fees, and injunction against doing business in Vermont. VT. STAT. ANN. tit. 11A, § 15.02 (2010).

Virginia

Washington


**West Virginia**


**Consequence of Registration:** *Unclear.* No relevant cases.

**Wisconsin**


**Consequence of Registration:** *Unclear.* No relevant cases.

**Wyoming**


**Consequence of Registration:** *Unclear.* No relevant cases.
III. Toward a New Equilibrium in Personal Jurisdiction

Toward a New Equilibrium in Personal Jurisdiction

Charles W. “Rocky” Rhodes** and Cassandra Burke Robertson**

In early 2014, the Supreme Court decided two new personal jurisdiction cases that will have a deep and wide-ranging impact on civil litigation in the coming decades: Daimler AG v. Bauman and Walden v. Fiore. Bauman eliminates the traditional “continuous and systematic” contacts test for general jurisdiction, and Walden significantly retracts the ability of courts to exercise personal jurisdiction over out-of-state defendants whose actions have in-state effects. Taken together, both cases will make it significantly more difficult for plaintiffs to exercise control over where lawsuits are filed. In some cases, such as large-scale class actions, the new decisions may make it impossible to identify a single forum where multiple defendants can be sued together and will therefore shift the balance of litigation power from plaintiffs to defendants.

This Article examines the effect that these rulings will have on future litigation and suggests solutions to the problems that will arise in the wake of these decisions. It analyzes how the Court’s new jurisprudence has shifted the balance of power in the jurisdictional framework, and it explores areas of future litigation. We predict four areas in which disputes are likely to

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** Professor of Law, Case Western Reserve University. We thank the participants on the Civil Procedure listserv for sharing their thoughts and insights into the Supreme Court’s 2014 decisions, including David Achtenberg, Janet Alexander, Stephen Burbank, Bryan Camp, Kevin Clermont, Maxwell Chibundu, Stanley E. Cox, Allan Erbsen, Joseph Glannon, Simona Grossi, David Hricik, Roger Kirst, John Parry, Andrew Perlman, Faust Frank Rossi, Tom Rowe, Bradley Scott Shannon, Paul Stancil, Howard Wasserman, Verity Winship, and Arthur D. Wolf. Those discussions were extremely helpful in suggesting areas of inquiry, and this Article provides a more lengthy response to some of the questions raised in that forum. We also thank Richard Friedman, Sharona Hoffman, John Parry, Patrick Woolley, and the participants of the Civil Procedure Roundtable at the Southeastern Association of Law Schools Conference, including Tom Metzloff, Michael Allen, Scott Dodson, Paul Gugliuzza, Megan LaBelle, Tanya Monestier, Phil Pucillo, and Howard Wasserman, for valuable comments on an earlier draft.
become more salient: first, the “connectedness” requirement of specific jurisdiction; second, the availability of personal jurisdiction over pendent claims that form part of a single case or controversy; third, the future availability of personal jurisdiction over a defendant whose out-of-state conduct has caused effects within the forum state; and fourth, the availability of “consent jurisdiction” based on the appointment of a registered agent for service of process. Even before the Court’s 2014 cases, circuit splits had arisen over the propriety of jurisdiction in each of these four areas. Now that the Court has limited other grounds for personal jurisdiction, we predict those pre-existing splits will become more critical to resolve and will take on a central role in future litigation.

Our Article suggests solutions to the problems that will inevitably arise in the wake of these decisions, and it proposes a method of recalibrating specific jurisdiction to account for the demise of general contacts jurisdiction and the limitation on effects-test jurisdiction. It recognizes that International Shoe v. Washington described two categories of specific jurisdiction (not just one), and it builds on this two-tier framework to reach a new equilibrium. When the defendant’s forum activities fall within International Shoe’s “continuous and systematic” category, the balance of individual and state interests should tilt toward authorizing jurisdiction as long as some loose connection exists between the forum and the actions that give rise to the litigation. Thus, in cases that would have been eligible for general jurisdiction in the past, the forum relatedness requirement should be relaxed. In contrast, for adjudicatory jurisdiction in the “single or occasional” acts scenario, the state must have a tighter link to its sovereign regulatory interests. This rebalanced jurisdictional framework would therefore take into account the defendants’ liberty interests as protected by Bauman and Walden without sacrificing the states’ sovereign interest in protecting their citizens.
INTRODUCTION

Sometimes it is clear from the moment the Supreme Court accepts certiorari in a case that its ultimate decision will have wide-ranging effects that shift the balance of power in society at large. Sometimes a case’s influence only becomes apparent years later. The Court’s procedural jurisprudence tends to fall into the latter category, with reaction to pivotal cases coming in waves: first sending the procedure buffs into a frenzy of activity, then expanding more broadly to encompass civil litigators who must struggle to incorporate the new rulings into their litigation strategy. It takes more time for the district courts to absorb the changes and apply them to the cases that follow.


3 See generally Stephen N. Subrin & Thomas O. Main, The Fourth Era of American Civil Procedure, 162 U. Pa. L. Rev. 1839, 1840-56 (2014) (explaining how the Supreme Court’s jurisprudence has led to a “fourth era” of civil procedure, marked by increasingly restricted court access and a diminution in the number of civil trials).
but once they do, the impact of the Court’s changing jurisprudence becomes apparent: the tides of litigation shift to reveal new winners and new losers.\(^4\)

The last four decades have seen a number of procedural rulings from the Supreme Court that markedly influenced the course of civil litigation.\(^5\) The current procedural revolution began in the 1980s with a trilogy of cases clarifying the standard of summary judgment and making it relatively easier for defendants to obtain summary judgment rulings.\(^6\) In the 1990s, the Supreme Court applied an influential “gatekeeping” standard for expert evidence, which raised additional hurdles for plaintiffs relying on expert testimony.\(^7\) The first decade of the new millennium brought us the so-called Twiqbal\(^8\) pleading cases, which made pre-trial (and pre-discovery) dismissal easier for defendants.\(^9\) In 2011, the Court heard two personal jurisdiction cases: in one case, the Court’s opinion did not gain a majority,\(^10\) while the


\(^7\) See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 599 (1993); see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 158 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146-47 (1997); Miller, supra note 5, at 313 (“Daubert’s high threshold has been particularly burdensome — financially, logistically, and sometimes both — for plaintiffs.”).


\(^9\) See Clermont & Eisenberg, supra note 4 (manuscript at 17) (“If the Supreme Court wanted to help out defendants through its summary judgment trilogy and Twombly-Iqbal pleading decisions, the data indicate that the Court has succeeded.”); Miller, supra note 5, at 331 (“By demanding that the plaintiff plead facts demonstrating that the claim has substantive plausibility, rather than a statement that is legally sufficient and gives notice of the plaintiff’s claim, these two cases represent a procedural ‘sea change’ in plaintiffs’ ability to survive the pleading stage.”).

\(^10\) See generally J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (delivering a plurality opinion where six justices agreed on the judgment, but only four joined the lead opinion's rationale).
other decision imposed a seemingly minor limit on the availability of general jurisdiction. Nonetheless, those cases hinted that the Court might adopt more significant limitations on personal jurisdiction in future cases, and in 2014, the Court fulfilled that promise in Daimler AG v. Bauman and Walden v. Fiore. The two cases limit the power of states to exercise adjudicative jurisdiction over non-residents and will significantly shift the balance of power in civil litigation.

This Article explores the landscape of civil litigation after Bauman and Walden. Part I introduces the legal landscape in which the two cases arose. In Part II, the Article critically examines the Court’s opinions, analyzing what the Court has changed, exploring points of contention between the justices, and explaining the importance of what the Court has left unsaid and undecided. Part III builds on these open questions by examining how the balance of power has shifted in the jurisdictional framework and exploring the likely areas of future litigation. It predicts four areas in which disputes are likely to become more salient: first, the “connectedness” requirement of specific jurisdiction; second, the availability of personal jurisdiction over pendent claims that form part of a single case or controversy; third, the future availability of personal jurisdiction over a defendant whose out-of-state conduct has caused effects within the forum state; and fourth, the availability of “consent jurisdiction” based on the appointment of a registered agent for service of process. Even before the Court’s 2014 cases, circuit splits had arisen over the propriety of jurisdiction in each of these four areas. Now that the Court has limited other grounds for personal jurisdiction, those pre-existing splits will become more critical to resolve and will take on a central role in future litigation.

Finally, Part IV proposes a rebalanced jurisdictional framework that takes into account not only the defendants’ liberty interests as protected by Bauman and Walden, but also the states’ sovereign interests in protecting their citizens and providing a forum for redress. By making it more difficult for courts to exercise personal jurisdiction over out-of-state defendants, the Supreme Court has tilted the balance of power toward the defense side of the spectrum. The shifting balance does not just make litigation more difficult for plaintiffs; instead, it creates a risk that the state’s ability to adjudicate claims of wrongdoing against its citizens will become so compromised that it is unable to function.

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14 See infra Parts III, IV.
effectively. Nevertheless, this risk does not have to be reality — recalibrating the jurisdictional framework can maintain a balance between the interests of the plaintiff, the defendant, and the state. Going forward, we argue that courts should apply a two-tier specific jurisdictional analysis we uncovered from *International Shoe Co. v. Washington.*

In balancing the relationship of the parties, the case, and the forum, the analysis requires that the cause of action bear a closer nexus to the forum when the defendant’s relationship with the forum is isolated or sporadic and allows a looser relationship with the suit in cases where the defendant’s relationship with the forum is continuous and systematic. Recognizing different categories of specific jurisdiction can bring the parties’ interests back into balance, protecting the ability of plaintiffs to bring suit — and maintaining the safeguards of our federalist system — without sacrificing defendants’ liberty interests.

I. PERSONAL JURISDICTION IN THE SUPREME COURT’S 2013 TERM

The Supreme Court’s personal jurisdiction cases of 2014 significantly shift the balance of litigation power between plaintiffs and defendants. Imagine the following hypothetical, which is loosely based on a string of similar cases involving recreational travel:

15 326 U.S. 310 (1945).

16 This standard would accomplish some of the goals of Justice Brennan’s desired sliding-scale test, yet without obviating the distinction between general and specific jurisdiction or displacing the defendant-centered liberties and sovereignty concerns that the Supreme Court has emphasized in the years since his proposal. See Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan,* 63 S.C. L. Rev. 551, 552 (2012) (“Brennan espoused what can be called a ‘mélange’ approach, under which all factors relevant to an *International Shoe* analysis — contact, state’s interest, burden on the defendant, etc. — are considered together ad hoc to assess jurisdiction under a general rubric of fairness. Ultimately, Brennan lost this battle. The Court adopted a rigid, defendant-centric, two-step model in which the issue of contact between the defendant and the forum is primary.”). Although forceful arguments can be marshaled to support Brennan’s favored approach, we believe that it is unlikely that the Court is currently poised to jettison its insistence on a defendant’s purposeful contact with the forum, especially in light of the decisions in *Nicastro* and *Walden.* See *infra* Parts II, III.

17 E.g., Myers v. Casino Queen, Inc., 689 F.3d 904, 908-09 (8th Cir. 2012); Nowak v. Tak How Invs., Ltd., 94 F. 3d 708, 711 (1st Cir. 1996); Shute v. Carnival Cruise Lines, 897 F.2d 377, 379 (9th Cir. 1990) (abrogated on other grounds); Marino v. Hyatt Corp., 793 F.2d 427, 427 (1st Cir. 1986); Pearrow v. Nat’l Life & Accident Ins. Co., 703 F.2d 1067, 1068-69 (8th Cir. 1983); Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 318-19 (2d Cir. 1964); Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 572-73 (Tex. 2007).
Escaping a brutally cold winter, a Michigan family vacations at a luxury resort in Florida—a resort that is owned and operated by a famous national hotel corporation with operations worldwide, including several in each of the fifty U.S. states. This particular hotel was not as profitable as it used to be; the operators were contemplating a major remodeling, but, in the meantime, had neglected regular maintenance activity. During the Michigan family's vacation, the elevator malfunctions, severely injuring the youngest child. May the plaintiffs bring a lawsuit against the hotel owners in the family's home state of Michigan? If, instead of suing, the parents had posted a negative review of the resort online, alleging that the hotel owner had embezzled funds intended for maintenance and upkeep, could the hotel sue them in Florida for defamation?

Historically, the conventional judicial wisdom would have answered "yes" to both questions. Although courts were far from unified, cases were allowed to proceed on similar facts more often than not. Two Supreme Court opinions from the 2013 term, however, have likely stood this conventional wisdom on its head. These two decisions, *Daimler AG v. Bauman*, and *Walden v. Fiore*, will have a tremendous effect on case valuation and civil litigation strategy.

Until the Supreme Court's decision in *Bauman*, most courts would have allowed a Michigan court to exercise personal jurisdiction over the

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18 See Myers, 689 F.3d at 914; Nowak, 94 F.3d at 719-21; Shute, 897 F.2d at 389; Pearrow, 703 F.2d at 1068-69; cf. Gelfand, 339 F.2d at 320-22 (setting out the factors that conventional judicial wisdom ought consider in light of *International Shoe*); Moki Mac, 221 S.W.3d at 584 (same, including more recent personal jurisdiction jurisprudence). But see Marino, 793 F.2d at 431-30.


defendant hotel corporation. Because the corporation operates nationwide (administering, in our hypothetical, a number of hotels located in Michigan), a court would have almost certainly have found that the corporation possessed “continuous and systematic” contacts with the forum state of Michigan that were substantial enough to allow it to be sued on any cause of action, whether or not that cause of action had any connection with the forum state.22 Jurisdiction over defendants for disputes unrelated to the forum is called “general personal jurisdiction,” and until now, first-year Civil Procedure casebooks taught students that national corporations with substantial operations in all fifty states (such as McDonalds or WalMart) would likely be subject to general personal jurisdiction in all fifty states, meaning that a traveling plaintiff, like the family in the hypothetical, would be able to sue in a home forum.23

In *Bauman*, however, the Supreme Court sharply curtailed the use of general jurisdiction, concluding that a court may only exercise general jurisdiction in the forum or fora where the defendant is “at home” — most often, only in the defendant’s state of incorporation and state of its principal place of business.24 The Court left unchanged (at least in this case) the concept of specific jurisdiction — the familiar idea that a defendant can be subject to jurisdiction for an action arising out of its “minimum contacts” with that forum, as long as the exercise of such jurisdiction would comport with “traditional notions of fair play and substantial justice.”25 Thus, our hypothetical traveling family would

22 Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 767 (1988) (“Courts currently measure the sufficiency of unrelated business contacts between the forum state and the defendant with the continuous and systematic test: the defendant’s activities in the forum state must be continuous and systematic to support jurisdiction.”). See generally Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 862-67 (2004) [hereinafter *Clarifying General Jurisdiction*] (discussing numerous cases upholding general jurisdiction over nonresident corporations conducting business operations from forum locales). While numerous academics contended that general jurisdiction should be more circumscribed and only available in limited fora, this prevailing academic view could not, in the years before *Goodyear* and *Bauman*, “be reconciled with even the narrowest jurisdictional holdings of federal and state courts.” *Id.* at 809.

23 See, e.g., Joseph W. Glannon, Andrew M. Perlman & Peter Raven-Hansen, *Civil Procedure: A Coursebook* 259 (2011) (concluding that McDonald’s, for example, would likely be subject to jurisdiction in all 50 states). This teaching comported with dicta in *Rush v. Savchuk*, 444 U.S. 320 (1980), which noted that “State Farm is ‘found,’ in the sense of doing business, in all 50 States” and that such forum contacts would support adjudicative jurisdiction “even for an unrelated cause of action.” See *Id.* at 330.


still have a choice of jurisdictions for filing suit: Florida, where the
cause of action arose; Delaware, where the hotel chain is incorporated;
or New Jersey, where its corporate headquarters (and thus its principal
place of business) is located. But they could not sue in their home state
of Michigan, regardless of the number of hotels that the corporation
operated within the state — at least, they could not sue in Michigan
unless they could establish a connection between the defendant's
Michigan contacts and the plaintiff's cause of action. If the plaintiffs
could establish such a connection, the case could fall within the
guidelines for specific jurisdiction.

A month after releasing *Bauman*, the Supreme Court decided its
second personal jurisdiction case of the 2013 term, *Walden v. Fiore*.26
*Walden* dealt with specific jurisdiction, rather than general jurisdiction.
In particular, it examined the so-called “effects test,” which can subject
a defendant to personal jurisdiction when out-of-state acts have a
foreseeable effect within the target forum.27 This time, the result was
more predictable; onlookers had expected that the Court would
conclude that the U.S. Court of Appeals for the Ninth Circuit's
jurisdictional holding went too far in requiring a law enforcement
officer from Georgia to defend a property seizure case in Nevada that
arose from actions the officer took at the Atlanta airport.28 Confirming
these expectations, the Court unanimously reversed the Ninth Circuit
judgment and dismissed the underlying case.29 Although the result itself
was not unexpected, the case nevertheless significantly limited the
reach of effects-test jurisdiction over out-of-state defendants whose
actions have in-state consequences. And while the Court was careful to
state in dicta that it was not deciding whether internet-based speech
could be considered “targeted” at out-of-state residents, the Court's
holding makes internet-based jurisdiction much more difficult going
forward; thus, our Michigan family who gives the hotel a negative
online review is likely to be insulated from suit outside their home
forum.30

2846, 2848 (2011) and *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
27 *See generally id.* (discussing the intricacies of the “effects test”).
28 *See, e.g.*, William Baude, *Argument Analysis: An Attempt to Find a Narrow Ground of
argument-analysis-an-attempt-to-find-a-narrow-ground-of-agreement/ (predicting that
Walden would prevail on personal jurisdiction).
29 *See Walden*, 134 S. Ct. at 1126.
30 *Compare Kaufman Racing Equip., LLC v. Roberts*, 930 N.E.2d 784 (Ohio 2010)
(allowing personal jurisdiction in the plaintiff's home state based on allegedly
defamatory internet postings), *with BroadVoice, Inc. v. TP Innovations LLC*, 733 F.
In short, these two cases significantly limit states’ authority over out-of-state defendants. This Part therefore examines the cases more closely, examining the contexts in which they arose, the arguments made by counsel, and the holdings of the Court. Understanding what the Court changed (and what the Court left open) is key to predicting how the shifting equilibrium of personal jurisdiction will expand or contract litigant interests going forward.

A. Limiting General Jurisdiction: Daimler AG v. Bauman

The plaintiffs in Daimler AG v. Bauman sought damages against Daimler based on events that occurred during the so-called Argentinian “Dirty War” of the late 1970s and early 1980s. The plaintiffs were Argentinian nationals who had either worked for Mercedes-Benz Argentina (a Daimler subsidiary) or had family members who worked for the company. They alleged that Mercedes-Benz Argentina had “collaborated with state security forces to kidnap, detain, torture, and kill” company employees, and they sought relief against parent-company Daimler, a German corporation headquartered in Stuttgart. The plaintiffs filed suit in a federal court in California in 2004, seeking relief under both the Alien Tort Statute (“ATS”) and the Torture Victim Protection Act (“TVPA”).

The plaintiffs asserted two possible grounds for personal jurisdiction over Daimler: first, that Daimler’s own contacts with California were substantial enough to subject the company to general jurisdiction in that state; and second, in the alternative, that the contacts of Mercedes-Benz USA (“MBUSA”), an “indirect subsidiary” of Daimler, were substantial enough for general jurisdiction and that those contacts should be imputed to Daimler so that Daimler would also be subject to general jurisdiction within California. The district court found neither ground sufficient, and dismissed for lack of jurisdiction. The Ninth Circuit initially affirmed the dismissal, but subsequently granted a motion for rehearing and concluded that the agency relationship was

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32 Id. at 751.
33 Id. at 750-51.
34 Id. at 751.
35 Cf. id. at 752 (noting the district court’s dismissal of the case because neither Daimler’s nor MBUSA’s contacts with the forum were substantial enough to confer general jurisdiction).
36 Id.
sufficient to allow a California court to exercise jurisdiction over Daimler.\footnote{id:at:753.}

Yet between the time the Ninth Circuit ruled in 2011 and the time the case reached the Supreme Court in 2013, the legal landscape had changed significantly for the plaintiffs' underlying claims. First, in 2012, the Supreme Court held that corporations and other organizations could not be subject to liability under the TVPA — only natural persons could be defendants in actions under the TVPA.\footnote{See Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710 (2012).} Then, in the spring of 2013, the Supreme Court held that a presumption against extraterritoriality applies to suits brought under the ATS, making it more difficult for plaintiffs to use the statute as a means of redressing injuries caused by foreign actors in foreign jurisdictions.\footnote{See Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).} Thus, by the time the Supreme Court decided the personal jurisdiction issue in Bauman, the plaintiffs' underlying case was already substantially weakened; it was clear that the TVPA claim could not proceed against Daimler, and it was unlikely that the ATS claim could overcome the presumption against extraterritoriality.\footnote{See Bauman, 134 S. Ct. at 762-63 (“Recent decisions of this Court, however, have rendered plaintiffs' ATS and TVPA claims infirm.”).}

Even though the underlying case was severely weakened, the jurisdictional issues remained very much alive. From a personal jurisdiction standpoint, Bauman presented a nice vehicle to follow up the Supreme Court's most recent ruling on general jurisdiction. In 2011, the Court had ruled that foreign subsidiaries of the Goodyear tire company would not be subject to personal jurisdiction in North Carolina to defend a claim arising out of an auto accident in France.\footnote{See Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011).} The Court found the case to be a relatively easy one, as the foreign subsidiaries had only minor connections with North Carolina.\footnote{See id. at 2851.} A small number of tires from the subsidiaries made their way into North Carolina each year, but none of those North Carolina–based tires had given rise to the claim at issue, as the accident had occurred in France.\footnote{Id.} The Court suggested that general jurisdiction was appropriate only when the defendant's contacts with a state were so significant as to render the defendant “essentially at home in the forum State,” and it had no trouble concluding that meager contacts of the foreign jurisdiction were not enough to establish personal jurisdiction.

\footnote{Id. at 753.}
subsidiaries did not come close to meeting that standard. Thus, because the contacts were so limited, Goodyear left open the question of what it meant for a corporation to be “essentially at home” in a jurisdiction — how extensive would the contacts need to be, in order to render the corporation “essentially at home”?  

Bauman gave the Court the opportunity to answer that question. Justice Ginsburg authored the Court’s opinion, which was joined by the entire Court with the exception of Justice Sotomayor, and gave a decisive answer: except in very rare circumstances, a corporation is “at home” only where it is domiciled — its state of incorporation and the state where it maintains its principal place of business. The Court assumed for the sake of argument that MBUSA was indeed “at home” in California (though that conclusion is certainly called into question by the Court’s holding) and also assumed for the sake of argument that all of MBUSA’s contacts could be imputed to Daimler. The MBUSA contacts imputed to Daimler were undeniably continuous, systematic, and substantial: MBUSA maintained a regional office in California, as well as two other facilities for sales and repair. In spite of these contacts, the Court concluded that Daimler would not be “at home” in California because it was “neither . . . incorporated in California, nor . . . [has] its principal place of business there.”

The Court acknowledged “the possibility that in an exceptional case, a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and

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44 See id. (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).
46 See Daimler AG v. Bauman, 134 S. Ct. 746, 761-62 (2014). In Goodyear, the Court described general jurisdiction as appropriate in fora in which the defendant was “essentially at home,” “fairly regarded as at home,” or “in [a] sense at home.” See Goodyear, 131 S. Ct. at 2851, 2853-54, 2857. In a judicial sleight of hand, Bauman dropped the qualifications from Goodyear and instead phrased the governing inquiry as merely whether the defendant was “at home.” See Bauman, 134 S. Ct. at 761-62.
47 See Bauman, 134 S. Ct. at 760.
48 See id. at 752 (“Although MBUSA’s principal place of business is in New Jersey, MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine.”).
49 Id. at 761.
of such a nature as to render the corporation at home in that State.”

The Court cited Perkins v. Benguet Consolidated Mining Co. for that proposition, explaining that the Court had allowed Ohio courts to exercise jurisdiction over a Filipino corporation during World War II, during a period of time when the Japanese occupation prevented the company from engaging in mining operations and the corporate president temporarily moved to Ohio where he “kept an office, maintained the company’s files, and oversaw the company’s activities.”

Although the Court acknowledged that an exceptional case like Perkins might justify exercising general jurisdiction outside of a corporation’s domicile, it left little room to consider applying that exception to more ordinary cases. Notably, the Court did not perceive the need to apply the particular facts of Daimler’s California contacts to see whether they justified such a departure. Instead, the Court disposed of that idea in a footnote, stating simply that the case “presents no occasion to explore that question, because Daimler’s activities in California plainly do not approach that level.” This conclusion is particularly striking in light of the fact that the Court had accepted, for the sake of argument, the idea that all of MBUSA’s California contacts could be attributed to Daimler — contacts which included several California facilities (including a regional office in the state) and car sales amounting to $4.6 billion annually. The Court therefore left little wiggle room for a party to argue that substantial in-state sales would be enough to render a corporation “at home” in a given state. To foreclose any remaining doubt, the Court explicitly stated that the formula commonly applied for general jurisdiction (that a corporation “engages in a substantial, continuous, and systematic course of business”) is not only insufficient, but also “unacceptably grasping.”

The Court did not see any need to consider the “reasonableness” factors originally set out in World-Wide Volkswagen v. Woodson and further developed in Asahi Metal Industry Co. v. Superior Court. In the Court’s view, any reasonableness analysis is “superfluous” to the general jurisdiction analysis. If a corporation is “genuinely at home in the

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50 Id. at 761 n.19 (citation omitted).
52 Bauman, 134 S. Ct. at 756 (citing Perkins, 342 U.S. at 448).
53 Id. at 761 n.19.
54 See id. at 766-67 (Sotomayor, J., concurring).
55 See id. at 761.
58 See Bauman, 134 S. Ct. at 762 n.20.
forum State,” the Court concluded, then there is no question that jurisdiction is reasonable. The obvious inference from the Court’s holding is that if the corporation is not “genuinely at home” in the forum state, then it doesn’t matter how reasonable it would be to exercise jurisdiction over the corporation. Thus, the Court’s analysis ended with its conclusion that Daimler was neither headquartered nor incorporated in California. After determining that Daimler was not at home in California, jurisdiction was improper without even examining how the fairness factors would apply to the case.

Interestingly, however, even though the Court did not apply the individual fairness factors first set out in World-Wide Volkswagen, the Court’s decision nevertheless was based on an underlying theory of fairness to the defendant. The Court emphasized the importance of predictability, stating that predictability in jurisdiction allows the defendant to structure its conduct “with some minimum assurance as to where that conduct will and will not render them liable to suit.” In the Court’s view, subjecting a defendant to suit in every state in which it has “sizable” sales would amount to an “exorbitant exercise of all-purpose jurisdiction” that would impair the defendant’s ability to control the forums in which it could be called upon to defend itself in court.

In the final section of the opinion, the Court buttressed its decision with a call to international comity. The Court quoted the Solicitor General’s brief, which had highlighted the objection of a number of foreign governments to “some domestic courts’ expansive views of general jurisdiction,” explaining this hindered efforts to negotiate a multilateral judgment-enforcement treaty and could discourage foreign investment. In contrast, a domicile-based approach had the international advantages of familiarity and predictability. The Court noted that the European Union already followed a similar approach, allowing a corporation to be sued in the nation in which it is domiciled, and concluded that “[c]onsiderations of international rapport” supported the conclusion that Daimler could not constitutionally be subject to general jurisdiction in California.

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59 See id.
60 See id. at 761.
61 See id. at 761-62.
62 See id. at 762 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).
63 See id.
64 See id. at 763.
65 See id.
In a sharply pointed concurrence, Justice Sotomayor disagreed with the Court’s decision to link general jurisdiction with domicile. Although she agreed with the ultimate judgment, she would have decided the case on reasonableness factors alone. In her view, the combination of “Argentine plaintiffs,” “a German defendant,” a cause of action “for conduct that took place in Argentina,” and no evidence of any connection to the United States made it unreasonable for a California court to exercise jurisdiction over the defendant.

Justice Sotomayor criticized the majority’s domicile-based analysis of general jurisdiction. She stated that the majority’s approach compares the relative magnitude of a defendant’s contacts in different states (to determine in which states the defendant is most “at home”) instead of more properly assessing the overall magnitude of the defendant’s contacts in the forum state. Justice Sotomayor argued that the Court’s relative comparison is inconsistent with the underlying theory of personal jurisdiction, which she described as one of “reciprocal fairness” — a defendant who has chosen to “invoke the benefits and protections of a State” should also be subject to judicial authority of that state. Justice Sotomayor argued that the majority’s approach will do nothing to increase the predictability of where the defendant may be subject to jurisdiction, and that applying the individual fairness factors would have been ample protection against any exorbitant exercise of jurisdiction.

Finally, Justice Sotomayor asserted that the Bauman opinion will give rise to four distinct injustices. First, it diminishes the “States’ sovereign authority to adjudicate disputes” involving defendants who have engaged in substantial in-state activity and who may have caused harm to in-state residents. Second, the decision means that multinational corporations may evade general jurisdiction more easily than a small business could do. A multinational corporation with four in-state factories could evade general jurisdiction as long as its headquarters and place of incorporation reside elsewhere, whereas a smaller business with

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66 See id. at 765 (Sotomayor, J., concurring).
67 Id.
68 See id. at 765-67.
69 Id. at 768 (quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
70 See id. at 770-71.
71 Id. at 772.
72 Id.
a single in-state factory would be subject to general jurisdiction because it operates only in the one state, and is necessarily therefore “at home” in the state.\(^{73}\) Third, the decision also means that multinational corporations may evade general jurisdiction more easily than individuals since individuals would still be subject to general jurisdiction based on in-state service of process.\(^{74}\) Fourth, Justice Sotomayor concludes that the decision will “shift the risk of loss from multinational corporations to the individuals harmed by their actions.”\(^{75}\) The decision, she believes, will make it more difficult for injured plaintiffs to sue in a convenient and accessible forum.\(^{76}\) If plaintiffs are injured outside their home state, they must sue in the defendant’s home state or in the location where they suffered the injury, even if the defendant has substantial operations in the plaintiff’s home state.\(^{77}\) This added inconvenience and expense may make it more difficult for individual plaintiffs to enforce their legal rights, allowing defendants to avoid liability in cases where the plaintiffs cannot afford to sue out of state or, in some cases, out of the country.\(^{78}\)

**C. Limiting Specific Jurisdiction Based on In-State “Effects”: Walden v. Fiore**

In *Walden v. Fiore*, the Supreme Court turned its attention to specific jurisdiction, and, in particular, the subset of specific jurisdiction based on the in-state effects of out-of-state conduct. Gina Fiore and Keith Gipson, the plaintiffs in *Walden v. Fiore*, were two professional poker players returning home after winning a substantial amount of money at a tournament in Puerto Rico.\(^{79}\) The pair carried approximately $97,000 in cash in their carry-on luggage, which aroused the suspicions of Drug Enforcement Agency (“DEA”) officials.\(^{80}\) While the couple was changing planes in Atlanta, agents carried out a “dog sniff test,” which was “at best, inconclusive.”\(^{81}\) The dogs did not alert on Fiore’s luggage

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\(^{73}\) *Id.*  
\(^{74}\) *Id.* at 772-73.  
\(^{75}\) *Id.* at 773.  
\(^{76}\) See *id.*  
\(^{77}\) See *id.*  
\(^{78}\) Cf. *id.* (“[T]he ultimate effect of the majority’s approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions.”).  
\(^{80}\) See *Walden*, 134 S. Ct. at 1118-19.  
\(^{81}\) *Id.* at 1119 & n.1.
at all, at most reacting to Gipson’s luggage. Additional testing failed to find any sign of drug residue. The plaintiffs were not arrested nor were they questioned further about alleged drug activity.

In spite of the fact that the agents found no sign of drug residue on the cash, the plaintiffs’ funds were seized and delivered to the DEA. Police officer Anthony Walden, who was assisting the DEA with the questioning of the plaintiffs and had participated in the seizure of the funds, was alleged to have subsequently drafted an affidavit of probable cause. The plaintiffs alleged, and the Supreme Court accepted as true for purposes of determining jurisdiction, that Walden’s affidavit contained intentional falsehoods: “that Gipson had been uncooperative and had refused to respond to questions” and “that Fiore and Gipson had given inconsistent answers during questioning.” The affidavit also allegedly excluded exculpatory information, such as the fact that Fiore and Gipson had no history of drug involvement and had been carrying documentation of their gambling activity.

Once the DEA determined that there was no evidence to suggest the funds constituted drug proceeds, the plaintiffs were offered their money back in exchange for signing a document releasing the government from liability. Fiore and Gipson refused to execute the release, but the DEA nevertheless returned the funds to them without further condition. After their funds had been returned, Fiore and Gipson brought a Bivens claim in federal court against Walden and three unnamed officials, alleging that the search and seizure violated their Fourth Amendment rights. Because the plaintiffs sued in their home state of Nevada, Walden moved to dismiss the case for lack of personal jurisdiction.

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82 Fiore v. Walden, 657 F.3d 838, 843 (9th Cir. 2011), superseded by, 688 F.3d 558 (9th Cir. 2012), rev’d, 134 S. Ct. 1115.
83 See Walden, 134 S. Ct. at 1119 n.1.
84 Id. at 1119.
85 Id.
86 See id. at 1119-20.
87 See id. at 1119 n.2.
88 Fiore v. Walden, 657 F.3d 838, 844 (9th Cir. 2011).
89 Id.
90 Id.
91 Id.
92 These officials were never identified or served with process, and thus were not parties to the jurisdictional challenge. Id. at 844 & n.8.
94 Fiore, 657 F.3d at 845.
It was undisputed that all of Walden’s activities had taken place in Georgia — where the search and seizure occurred, where he allegedly drafted a false affidavit, and where the U.S. Attorney’s office to which he allegedly sent the affidavit was located.\(^{95}\) Furthermore, there was no question that Walden could not be subject to general jurisdiction in Nevada. If the court was to exercise jurisdiction over him, it would have to be specific jurisdiction, requiring the suit to arise from or relate to his contacts with the forum.\(^{96}\) Because he had never physically entered the forum, the dispositive question for jurisdiction was whether Walden’s activity was “directed” or “aimed” at the state of Nevada.\(^{97}\)

The Ninth Circuit had followed the so-called “Calder effects test” (named for the leading case of Calder v. Jones\(^{98}\)) to conclude that Walden had indeed aimed a tortious act at the state of Nevada.\(^{99}\) The Calder effects test generally applies when the defendant does not have any of the traditional contacts demonstrating purposeful availment, but has allegedly committed a tort or engaged in other conduct that has an effect within the forum.\(^{100}\) The Restatement (Second) of Conflict of Laws suggests that jurisdiction is appropriate in these cases:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any claim arising from these effects unless the nature of the effects and of the individual’s relationship to the state make the exercise of such jurisdiction unreasonable.\(^{101}\)

In Calder, the Supreme Court adopted the Restatement’s approach, holding that a writer and editor located in Florida could be subject to jurisdiction for a defamation claim in California, even though they had never entered the state and even though they did not publish the article themselves (their employer, the National Enquirer, did not contest

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\(^{95}\) See id. at 843-44.

\(^{96}\) Cf. id. at 845 (discussing personal jurisdiction test used in the Ninth Circuit).

\(^{97}\) See Walden v. Fiore, 134 S. Ct. 1115, 1126 (2014) (“Petitioner’s relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction.”).


\(^{99}\) See Fiore, 657 F.3d at 848.

\(^{100}\) See Cassandra Burke Robertson, The Inextricable Merits Problem in Personal Jurisdiction, 45 UC DAVIS L. REV. 1301, 1309 (2012) (noting that the effects test may apply only when the “defendant does not have any of the traditional contacts demonstrating purposeful availment, but has allegedly committed a tort or engaged in other conduct that that [sic] has an effect within the forum”).

\(^{101}\) RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1988).
jurisdiction in California, where it sold numerous copies of the magazine). The Supreme Court concluded that it was sufficient that the writer and editor had “directed” their tortious activity at the location where the plaintiff lived and worked, and where the plaintiff would therefore feel the effects of the defamatory article.

In the years following, courts have applied the test to examine whether the defendant “purposefully directed” tortious conduct at the target forum, rather than whether it “purposefully availed” itself of the forum’s benefits and protections. In the three decades since Calder was decided, the Supreme Court had never returned to the question of effects-test jurisdiction, and courts began to disagree about what kind of conduct would support effects-test jurisdiction and how expressly that conduct needed to be targeted at a particular state.

In Walden v. Fiore, the Ninth Circuit applied a broad version of the effects test. The court stated that although the original search and seizure were not directed at Nevada, the alleged false affidavit was. By the time Walden executed the affidavit, the circuit court reasoned, he knew that the plaintiffs had a significant connection to Nevada and that

103 Id.
104 See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (stating that jurisdiction is appropriate “if the defendant has ‘purposefully directed’ his activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities” (citations omitted)); Yahoo! Inc. v. La Ligue Contre le Racisme et L’Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006) (stating that “[i]n tort cases, we typically inquire whether a defendant ‘purposefully direct[s] his activities’ at the forum state, applying an ‘effects’ test that focuses on the forum in which the defendant’s actions were felt” but that “in contract cases, we typically inquire whether a defendant ‘purposefully avails itself of the privilege of conducting activities’ . . . focusing on activities such as delivering goods or executing a contract” (alteration in original) (citations omitted)).
105 See Robertson, supra note 100, at 1310 (“[D]ecisions applying the effects test are often conflicting and contradictory, and efforts to smooth the inconsistent doctrine have been largely ineffective.”).
106 The alleged affidavit itself was not a part of the court record, and Walden’s brief to the Supreme Court stated that he “disputes drafting any affidavit at all — let alone a false one.” See Brief for Petitioner at 35, Walden v. Fiore, 134 S. Ct. 1115 (2014) (No. 12-574), 2013 WL 2390244 at *35. For purposes of the jurisdictional question, the Ninth Circuit accepted the plaintiffs’ allegations as true. Fiore v. Walden, 657 F.3d 838, 847 (9th Cir. 2011), superseded by, 688 F.3d 558 (9th Cir. 2012), rev’d, 134 S. Ct. 1115 (“We will draw reasonable inferences from the complaint in favor of the plaintiff where personal jurisdiction is at stake, and will assume credibility.”). However, it was likely error for the court to have assumed a fact critical to the jurisdictional inquiry; to allow otherwise would be to allow the plaintiff to create jurisdiction through aggressive pleading of controverted facts. See infra Part II.
they had requested that the funds be returned to them there.\textsuperscript{107} Thus, Ninth Circuit concluded, Walden knew that retention of the funds would give rise to “consequences felt in Las Vegas” and that “attempting to keep their ‘bank’ and their earnings would disrupt their business activities in Nevada.”\textsuperscript{108} The circuit court therefore concluded that Walden’s “fraudulent execution of the probable cause affidavit” had a sufficient connection with Nevada to support personal jurisdiction.\textsuperscript{109}

The Supreme Court unanimously reversed the Ninth Circuit’s judgment.\textsuperscript{110} In a relatively brief opinion, the Court concluded that Walden’s alleged actions had an effect in Nevada only “because Nevada is where respondents chose to be at a time when they desired to use the funds,” and not because “the defendant’s conduct connects him to the forum in a meaningful way.”\textsuperscript{111} Thus, because the defendant had not purposefully “create[d] contacts with the forum State,” jurisdiction was improper.\textsuperscript{112}

The Court’s most difficult challenge was to distinguish Walden from Calder. In both cases, an out-of-state defendant made statements that were allegedly untrue and harmful to the plaintiffs’ interests.\textsuperscript{113} In both cases, it would be expected that the plaintiffs would bear the brunt of the harm in the location where they lived and worked.\textsuperscript{114} Nonetheless, the Court distinguished libel claims from claims for misappropriation of funds.\textsuperscript{115} The Court relied heavily on the idea “[t]he tort of libel is generally held to occur wherever the offending material is circulated,” so that “the ‘effects’ caused by the defendants’ article — i.e., the injury to the plaintiff’s reputation in the estimation of the California public — connected the defendants’ conduct to California, not just to a plaintiff who lived there.”\textsuperscript{116} The effect of the missing funds, on the other hand, would have been felt “in California, Mississippi, or wherever else [the plaintiffs] might have traveled and found themselves wanting more

\textsuperscript{107} Fiore, 657 F.3d at 852 (“[T]he allegations in the complaint, taken as true for these purposes, establish that Walden necessarily recognized, at least by the time he wrote the probable cause affidavit, that the plaintiffs had a connection to Nevada . . . .”).
\textsuperscript{108} Id. at 853.
\textsuperscript{109} See id.
\textsuperscript{110} See Walden, 134 S. Ct. at 1126.
\textsuperscript{111} Id. at 1125.
\textsuperscript{112} Id. at 1126.
\textsuperscript{113} See id. at 1125 (“Relying on Calder, respondents emphasize that they suffered the ‘injury’ caused by petitioner’s allegedly tortious conduct (i.e., the delayed return of their gambling funds) while they were residing in the forum.”).
\textsuperscript{114} See id.
\textsuperscript{115} See id.
\textsuperscript{116} Id. at 1124 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984)).
money than they had.” Thus, the Court implied that effects-test jurisdiction would require the defendant’s conduct be more explicitly directed into the forum state, as when false statements are communicated to in-state residents. Because the defendant’s actions in Walden had no connection to Nevada, the Court concluded it would be improper for a Nevada court to exercise jurisdiction over the case. The mere fact the plaintiffs might suffer harm in Nevada from losing access to their funds was not enough of a connection to support personal jurisdiction over the defendants.

II. THE DIRECTION OF FUTURE LITIGATION

The Supreme Court in Bauman clarified the contours of general jurisdiction, and in Walden limited the exercise of effects-test jurisdiction. Nonetheless, the Court’s rulings probably raised more questions than they settled, and the opinions certainly raised new grounds for fights over personal jurisdiction. This section predicts the disputes that are likely to arise in the wake of the Supreme Court’s new case law, and it offers recommendations for resolving those disputes.

Although both cases will have an impact of the direction of future litigation, Walden is likely to be more limited in its impact. This is not to say that Walden will not be influential — it almost certainly will be. The number of effects-test cases has more than tripled in the last decade and there are roughly twice as many effects-test cases as there are stream-of-commerce cases now. The growth in effects-test cases has corresponded with the growth of the internet and the expansion of communications technology more generally. It is now much easier for individuals to engage in actions that have an effect outside their home forum. Many of the cases, for example, involve accusations of libel in online forums, with negative product reviews being a perennial favorite, as a bad review can have a marked effect on sales and revenue. Walden will therefore be an influential case, providing

117 Id. at 1125.
118 See id.
119 Id.
120 Id.
121 See Robertson, supra note 100, at 1304 n.9.
122 See id. at 1304.
123 Id. at 1349 (“Recent defamation suits over online consumer reviews evidence just such an attempt to crack down on allegedly wrongful speech.”); see, e.g., BroadVoice, Inc. v. TP Innovations LLC, 733 F. Supp. 2d 219 (D. Mass. 2010) (involving a dissatisfied customer who created a website to post complaints and derogatory remarks about an internet telephone service); Kauffman Racing Equip., LLC v. Roberts, 930
ammunition for defendants who seek to avoid being haled into a distant forum based on out-of-state communications alone.

*Bauman* is likely to be the more disruptive case, however.124 After *Bauman*, the “connectedness” or “relatedness” requirement is likely to emerge as the central battleground in personal jurisdiction litigation. This is especially true in cases brought against large multinational corporations outside of their home state.125 Given their extensive business activities, such corporations would not have previously contested personal jurisdiction in any state (and indeed, MBUSA did not contest general jurisdiction in the *Bauman* case itself; although it was not domiciled in California, it had multiple facilities and billions of dollars in annual sales in the state, and until now that would have appeared sufficient to support general jurisdiction). *Bauman* now gives such corporations a ground to contest jurisdiction outside of their home states, but in doing so it creates a fertile ground for jurisdictional litigation.

Plaintiffs who want to litigate outside of the defendant’s home states will look for a jurisdictional hook, and they will be highly incentivized to do so; nationwide class actions, for example, often depend on the existence of general jurisdiction since the cases typically involve multiple defendants with different home states.126 Now, plaintiffs will be searching for new jurisdictional grounds, and, at least when the defendant is a multinational corporation, there are several likely possibilities on which to base jurisdiction: first, that the case in some way arises from or relates to the defendant’s in-state contacts; second, that a claim arising out of state relates to another claim that arises from

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125 See infra Part II.A.

126 See infra Part II.D.
the defendant's in-state contacts; or third, that the defendant has consented to suit within the jurisdiction by appointing an agent for service of process. At the current time, there is a circuit split on each of these issues, and substantial disagreement from academic commentators about whether such claims should be allowed to go forward. In the past, there was less pressure to resolve the splits, because general jurisdiction provided a safety valve: if the defendant's activities in a forum were substantial enough, then it didn't matter whether jurisdiction could be gained on other grounds. Now, however, mere activity in a forum, no matter how extensive, will not alone give rise to general jurisdiction. As a result, plaintiffs will work harder to establish another ground for personal jurisdiction, forcing courts to clarify and resolve some of the remaining questions about the scope of adjudicative jurisdiction.

Justice Sotomayor is thus almost certainly correct that Bauman will not improve predictability. Although her grounds for that conclusion — that courts will simply shift their focus to determining where a defendant is most “at home” — will likely not come to pass as the Court in Bauman did not look beyond the defendant's state of incorporation and its principal place of business (a relatively simple determination after Hertz Corp. v. Friend), jurisdictional disputes won’t go away but will simply move to a new playing field. In cases

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127 See infra Part II. Another issue that may arise — albeit less frequently in light of the severe constriction of general jurisdiction — is whether the contacts of a subsidiary corporation that is “at home” in a forum state can be imputed to its parent corporation. The likely impact of this issue, which was the primary basis of the petition for certiorari in Bauman, is discussed in Lonny Hoffman, Further Thinking About Vicarious Jurisdiction: Reflecting on Goodyear v. Brown and Looking Ahead to Daimler AG v. Bauman, 34 U. Pa. J. Int’ L. 765 (2013) and Monestier, supra note 124.

128 See infra Part II.


130 See Hertz Corp. v. Friend, 559 U.S. 77, 92-93 (2010). But see Cornett & Hoffheimer, supra note 124 (manuscript at 31) (arguing that the same approach to ascertaining a principal place of business for subject matter jurisdiction purposes is not appropriate for personal jurisdiction).

131 In fact, this is beginning to happen. A California appellate court recently expanded its conception of specific jurisdiction to include claims brought by out-of-state plaintiffs in a nationwide class action, concluding that the defendant had substantial activity in California and that the claims brought by out-of-state plaintiffs were similar enough to the claims of California residents to support jurisdiction. See Bristol-Myers Squibb Co. v. Superior Court, 228 Cal. App. 4th 605, 637 (2014) (“[G]iven BMS’s substantial, continual contacts with California, including its extensive sales . . . the presence of dozens (not one or two) of resident plaintiffs who allege precisely the same wrongdoing . . . as well as the interstate nature of BMS’s business and
where the parties previously would have argued about whether defendant’s contacts were “systematic and continuous” for general jurisdiction, the parties will now argue about whether those contacts may give rise to specific jurisdiction or to pendent jurisdiction. Furthermore, there will be some cases in which the defendant’s contacts are so substantial that, in the past, the defendant (such as MBUSA) would not even have thought to contest jurisdiction, but now will.

This section analyzes the most likely areas for future jurisdictional disputes after Bauman and Walden: the “connectedness” requirement of specific jurisdiction, the propriety of pendent jurisdiction for related claims, the scope of the effects test (especially over internet activity), and the possibility of establishing consent to personal jurisdiction through the appointment of an agent for service of process. All of these areas have given rise to conflicting precedent in lower courts even before these two pivotal decisions, and these conflicts will only grow in number and play an increasingly important role in personal jurisdiction jurisprudence in the years to come.

A. The Connectedness Requirement

Now that general jurisdiction is only appropriate in the very limited fora in which a corporation is “at home,” future jurisdictional disputes will almost exclusively focus on the contours of the specific jurisdiction relationship between the defendant, the forum, and the litigation. But while such “case-linked” jurisdiction requires “an affiliation[n] between the forum and the underlying controversy,” the Court has never detailed the reach of the necessary relationship, rendering this requirement jurisdiction’s “least developed prong.” While the Court has pronounced that the defendant’s contacts must “arise from,” be “related to,” or “connected with” the plaintiff’s cause of action, these

132 See infra Parts III.A–B.
133 See infra Parts III.A–D.
135 Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994).
136 See Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (noting that specific jurisdiction concerns suits “arising out of or relating to” the defendant’s contacts with the forum” (quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (stating that specific jurisdiction is proper if the “litigation results from alleged injuries that arise out of or are related to” [defendants’] activities in the forum); Int’l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (applying to obligations that “arise out of or are connected with the activities within the state”).
alternative formulations (as Professor Patrick Borchers noted) are not “interchangeable,” but rather hint at very different linkages.\(^{137}\)

The Court’s most recent formulations of the connectedness standard have added even more alternatives to the traditional “arise from or relate to” standard. In \textit{Goodyear}, the Court referred to an “affiliation between the forum and the underlying controversy” and connected the idea of such affiliation to the state’s regulatory power, suggesting that the affiliation would be “principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”\(^{138}\) Likewise, in \textit{Walden}, the Court reiterated the “affiliation” language.\(^{139}\) But even to the extent that such dicta might hint at a broader standard, the Court has not disavowed the traditional formulations.\(^{140}\) Thus, nothing has been done explicitly to settle the question. Without the Supreme Court’s guidance, a bewildering array of approaches to this problem have developed, which has led to deep inter-circuit (and sometimes even intra-circuit) splits\(^{141}\) — splits that will now be the linchpin of most jurisdictional challenges.

One relatedness approach is the “substantive relevance” test outlined by Professor Lea Brilmayer, under which the requisite relationship exists if the defendant’s forum contact “is the geographical qualification of a fact relevant to the merits.”\(^{142}\) Specific jurisdiction under this approach is supported by the defendant’s forum contacts that bear on the substantive legal dispute between the parties: connected contacts are those forum occurrences “which would ordinarily be alleged as part


\(^{139}\) Walden v. Fiore, 134 S. Ct. 1115, 1121 n.6 (2014) (stating that “‘[s]pecific’ or ‘case-linked’ jurisdiction ‘depends on an affiliation[n] between the forum and the underlying controversy’” (quoting Goodyear, 131 S. Ct. at 2851)).

\(^{140}\) See Bauman, 134 S. Ct. at 754 (reiterating traditional “arises out of or relates to” standard).


of a comparable domestic complaint.\textsuperscript{143} This standard focuses on the causes of action asserted, not necessarily the situs of the alleged injury.\textsuperscript{144} Under the substantive relevance test, our Michigan family could bring their claim against the hotel owners only if elements of their alleged cause of action require proof of the defendants' actions in Michigan — such as a deceptive Michigan advertisement or a breach of a contract formed in part in Michigan — but not for a negligence claim without any claim elements depending on defendants' Michigan activities.

Other courts borrow tort law causation standards to evaluate the nexus required for specific jurisdiction. These approaches hinge upon a causal relationship between the defendant's purposeful forum contacts and plaintiff's alleged injury. The more restrictive technique emphasizes proximate or legal cause as the jurisdictional linchpin, which requires that a reasonably prudent person should have foreseen the injury as a result of the defendant's forum activities.\textsuperscript{145} This foreseeability element typically bars claims like those of our Michigan family — most courts would hold that no reasonably foreseeable expectation of danger arose in Michigan.\textsuperscript{146} As a result, some courts have loosened the connection to prevent perceived unjust results, overlaying “but for” causation on proximate causation to adjudge the requisite relationship.\textsuperscript{147} Still other courts employ this broader “but for” causality standard as a stand-alone test to ascertain whether the defendant's forum contacts are sufficiently connected to the litigation.\textsuperscript{148} The requisite connection here flows from

\textsuperscript{143} Id.

\textsuperscript{144} See id.


\textsuperscript{146} See, e.g., Luna, 851 F. Supp. at 832 (holding forum ticket purchase was not the proximate cause of Panama plane crash); Russo, 709 F. Supp. at 42 (holding plaintiff's forum purchase of an admission ticket and defendant's forum advertising was not proximate cause of injury at Sea World); cf. Nowak, 94 F.3d at 716 (recognizing that a Hong Kong hotel's forum solicitation was not the proximate cause of hotel drowning).

\textsuperscript{147} See, e.g., Nowak, 94 F.3d at 715-16 (holding a Hong Kong hotel's forum solicitation was “meaningful link” for specific jurisdiction over drowning at hotel pool); Sigros v. Walt Disney World Co., 129 F. Supp. 2d 56, 67 (D. Mass. 2001) (holding forum solicitation efforts and communications sufficed for specific jurisdiction over resort injury claim).

\textsuperscript{148} E.g., Mattel, Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 864 (9th Cir. 2003); Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995); Shute v. Carnival Cruise Lines, 897 F.2d 377, 385 (9th Cir. 1990), rev’d on other grounds, 111 S. Ct. 1522 (1991); Tatro v. Manor Care, Inc., 625 N.E.2d 549, 553-55 (Mass. 1994). The Third Circuit, while
a causal syllogism evaluating whether plaintiff’s cause of action would have occurred in the absence of the defendant’s forum activities: if our Michigan family would not have made its visit without the hotel’s Michigan activities (such as forum advertising and soliciting), the family can sue in its home state. 149

Instead of pronouncing a precise relatedness standard, many courts merely require a “substantial,” “causal,” or “sufficient” connection between the forum contact and the cause of action. 150 Because these terms merely substitute one indeterminate standard for another (as no more guidance is provided than following the Supreme Court’s articulation that the defendant’s forum contacts must be related or give rise to the lawsuit), 151 some courts supplement this approach with a “sliding scale,” under which the strength of the required connection is inversely proportional to the extent and quality of the defendant’s forum contacts. 152 With or without the sliding scale, though, this approach basically evaluates whether jurisdiction is fair and reasonable in light of the ties between the defendant’s forum contacts and the plaintiff’s claim. The necessary connection thus becomes subsumed in an “amorphous

employing “but for” causation as the initial step for the connectedness requirement, then evaluates the relationship of the defendant’s forum contacts to the substantive obligations arising in the suit. See O’Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 322 (3d Cir. 2007).

149 See, e.g., Alexander v. Circus Circus Enters., Inc., 939 F.2d 847, 853 (9th Cir. 1991) (accepting California residents’ argument that, “but for” the advertisement in the paper, they would not have traveled to the hotel where the injury occurred), withdrawn on other grounds, 972 F.2d 261 (9th Cir. 1992); Shute, 897 F.2d at 386-87 (holding Florida cruise line amenable in Washington for injury to Washington plaintiffs occurring in international waters).


151 Cf. Myers v. Casino Queen, Inc., 689 F.3d 904, 913 (8th Cir. 2012) (holding defendant’s forum marketing campaign was, as the Supreme Court required, “related to” suit brought by forum resident injured after responding to advertising).

‘goal of fairness,’ precluding ex ante predictions of the outcome; indeed, courts employing this approach have reached irreconcilable holdings on whether our Michigan family could sue at home.

Each approach has its drawbacks, which have been well-catalogued by prior commentary and case law. Briefly stated, the substantive relevance test is considered too narrow and dependent upon formal pleading requirements. The proximate cause test likely suffers from an even more extensive scope limitation and infuses a “foreseeability” element that the Court has held is not a “sufficient benchmark” for personal jurisdiction. “But for” causation is too broad and is difficult to reconcile with the Supreme Court’s limited guidance on the connection requirement. The “substantial connection” model, which offers no meaningful tutelage, engenders conflicting holdings, and

See supra note 154 and accompanying text.
the “sliding scale” elides the distinction between general and specific jurisdiction without offering predictive guidance.\textsuperscript{160} A new approach is sorely needed — and a heretofore unnoticed cipher for unraveling this dilemma can be found in the fountainhead of modern personal jurisdiction doctrine, 	extit{International Shoe Co. v. Washington}.\textsuperscript{161} An underappreciated aspect of 	extit{International Shoe} is that, in discussing the circumstances now known as “general jurisdiction” and “specific jurisdiction,”\textsuperscript{162} the Court described three (rather than two) situations supporting a nonresident defendant’s amenability. Jurisdiction over an out-of-state defendant, according to 	extit{International Shoe}, would be appropriate in a forum: (1) “when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on”; (2) when “the continuous corporate operations within a state were thought so substantial and of such a nature to justify suit against it on causes of action entirely distinct from those activities”; and (3) when “the commission . . . of such [single or occasional] acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient.”\textsuperscript{163} The second listed scenario — predicking jurisdiction on activities “entirely distinct” from the asserted cause of action — is general jurisdiction.\textsuperscript{164} But the first and third scenarios are different species of specific jurisdiction, as Justice Ginsburg highlighted in the opinions she penned for the Court in both 	extit{Bauman} and 	extit{Goodyear}.\textsuperscript{165}

\textsuperscript{160} See Richman, supra note 152, at 1340-46 (acknowledging sliding scale blurs divide between general and specific jurisdiction). Although Professor Richman makes a forceful case that the distinct categorization between general and specific jurisdiction is unwarranted, the Supreme Court has continued to abide by such a distinction. See Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 2857 (2011). In any event, the sliding scale still provides minimal predictive assistance: the relevant factors — the defendant’s benefit from the forum, the foreseeability of forum litigation, the defendant’s litigation burdens, and the defendant’s initiation of forum contacts — subsume almost all the typical steps in the minimum contacts analysis. Cf. Davis v. Baylor Univ., 976 S.W.2d 5, 9 (Mo. Ct. App. 1998) (adopting “balancing approach akin to the ‘sliding scale’ approach,” which encompassed the court’s entire jurisdictional analysis).

\textsuperscript{161} Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945).


\textsuperscript{163} Int’l Shoe, 326 U.S. at 317-18.

\textsuperscript{164} E.g., Goodyear, 131 S. Ct. at 2853.

\textsuperscript{165} See, e.g., Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (explaining specific
Most of the Supreme Court’s post-\textit{Shoe} decisions have explored the outermost limits of specific jurisdiction premised upon a defendant’s isolated forum activity, i.e., \textit{International Shoe’s} third category\textsuperscript{166}. With respect to such “single or occasional acts,” \textit{International Shoe} indicated that jurisdiction would sometimes be warranted and other times not, depending on the nature, quality, and circumstances of the activity\textsuperscript{167}. In its post-\textit{Shoe} cases addressing such limited forum activities, the Court frequently has disclaimed jurisdiction, viewing the defendant’s amenability as an undue burden in light of the de minimis state regulatory interests implicated by that defendant’s specific activities\textsuperscript{168}. But in other cases, the Court has viewed the nature, quality, and circumstances of the defendant’s isolated activities undertaken within or directed at the forum as sufficient to support adjudicative jurisdiction\textsuperscript{169}.

The Court’s caution in exercising jurisdiction over “single or occasional acts” is appropriate (even if all its holdings may not be). The Due Process Clause, at its core, attempts to achieve fairness through balancing individual interests, government interests, and due regard for justice, whether the context is procedural due process, substantive due process, or a unique due process strand\textsuperscript{170}. Because the Court has continued, without mentioning the intractable academic debate on the matter\textsuperscript{171}, to emphasize the Due Process Clause as personal jurisdiction exists both when the defendant’s continuous and systematic in-state activities give rise to the suit and for certain “single or occasional” forum acts when the suit relates to that in-state activity); \textit{Goodyear}, 131 S. Ct. at 2853 (highlighting that specific jurisdiction encompasses both of “these two \textit{International Shoe} categories”). See \textit{Goodyear}, 131 S. Ct. at 2854 (“Since \textit{International Shoe}, this Court’s decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving ‘single or occasional acts’ occurring or having their impact within the forum State.”). The Court continued to cite several prior decisions as examples. See id.

\textsuperscript{166} See \textit{Goodyear}, 131 S. Ct. at 2854 (“Since \textit{International Shoe}, this Court’s decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving ‘single or occasional acts’ occurring or having their impact within the forum State.”). The Court continued to cite several prior decisions as examples. See \textit{id}.


jurisdiction’s source, the Court has unsurprisingly announced the doctrine’s function is to ensure the “fairness” of subjecting the defendant to the adjudicatory power of the state in light of such factors as the defendant’s litigation burdens, the expected risks of forum litigation, and the state’s various sovereign interests supporting the regulation of defendant’s activities under the circumstances of the case.\textsuperscript{172} With respect to isolated or sporadic forum activities, a nonresident typically will have less reason to anticipate litigation in the forum and will suffer greater hardship through in-state litigation than a nonresident operating on a “continuous and systematic” basis within the state. This means that the “fairness” of the jurisdictional assertion in such cases will necessitate both: (1) a closer correlation between the risk of litigation and the benefits obtained from the forum state; and (2) a stronger state warrant for regulating the defendant’s conduct at issue through adjudication.

As a result, only a relatively tight connection can likely support specific jurisdiction based on a single or occasional purposeful forum act of a nonresident defendant, one closely linking the defendant’s act and the ensuing litigation to implicate state regulatory interests and minimize the scope of the defendant’s obligation. Professor Brilmayer’s substantive relevance test, at least her intended version rather than the erroneous conflation of it with the proximate cause approach adopted by some lower courts and commentators, is probably the best candidate. This test examines whether any of the factual occurrences that are conditions for the claim (such as the duty owed, the right violation, individual reliance, the injury, etc.) arose from the defendant’s actions within or directed at the forum.\textsuperscript{173}

Under the substantive relevance test, state adjudicative jurisdiction extends only to those activities within the state that undoubtedly

\textsuperscript{172} See, e.g., \textit{Burger King}, 471 U.S. at 473-74 (discussing reasons for a state to legitimately exercise personal jurisdiction over nonresidents, including state interest); \textit{Keeton v. Hustler Magazine, Inc.}, 465 U.S. 770, 775-76 (1984) (stating fairness in determining assertion of personal jurisdiction depends on state interest in defendant’s activities); \textit{World-Wide Volkswagen}, 444 U.S. at 291-92 (stating fairness in asserting personal jurisdiction depends on various factors, including burden on defendant, state’s interest, and convenience on plaintiff).

\textsuperscript{173} See Brilmayer, \textit{supra} note 142, at 82 & n.37. Professor Brilmayer distinguished between her substantive relevance test for the connectedness requirement and what she termed “substantive causation principles” that governed the attribution of contacts through intermediaries (such as distributors, etc.) to the named defendant. \textit{See id.} at 112-13. Her substantive relevance approach considers whether any of the defendant’s forum contacts are aspects of the plaintiff’s claim, not whether the contacts are the proximate cause of the plaintiff’s injury. \textit{Cf. O’Connor v. Sandy Lane Hotel Co.}, 496 F.3d 312, 318-19 (3d Cir. 2007) (describing various articulations of both tests).
implicate its sovereign regulatory interests. States in our federal system must have the authority to regulate conduct occurring within or purposefully seeking the benefits and advantages of the state's law, authorizing the judiciary to ascertain the consequences of such conduct. The defendant's related forum contacts, to satisfy the substantive relevance test, must be “exactly those already defined as a proper subject for regulation under the applicable substantive law”—a precisely tailored match between the defendant's isolated or sporadic forum contacts and the state's regulatory interests. The Supreme Court, in its earlier decisions in Hanson v. Denckla and Rush v. Savchuk, appeared to search for just such a nexus between the defendant's forum activities and the operative facts or substantive issues involved in the lawsuit, preventing the state from attempting to regulate via adjudication out-of-state enterprises in favor of its own citizens unless the nonresident's forum conduct implicates the controlling law. On the other side of the balance, in most instances, the defendant's burden can hardly be said to be undue via litigation in a forum in which it purposefully conducted activities that are components of the lawsuit.

The substantive relevance test accordingly appears to match all the various underlying jurisdictional policies for those defendants falling within the third Shoe category (limited to “single or occasional” forum acts), but the calculus changes when the defendant is within the first Shoe category (for “continuous and systematic” forum activities), where the substantive relevance test falls somewhat short (at least now in light of Bauman's limited view of general jurisdiction). Consider again our Michigan family, staying at a Florida luxury resort owned and operated by a national hotel corporation with multiple properties in Michigan.

174 See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1278 (7th Cir. 1997) (highlighting that the substantive relevance test ties due process constraints to the “state's proper interest in regulating conduct and adjudicating disputes”).

175 See id.

176 See Brilmayer, supra note 142, at 86.

177 See Rush v. Savchuk, 444 U.S. 320, 329 (1980) (holding insurance policy pertained “only to the conduct, not the substance of the litigation” as it was neither “the subject matter of the case” nor “related to the operative facts of the negligence action”); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (examining in part whether forum execution of powers of appointment was “at issue” in lawsuit).

178 Professor Brilmayer proposed a more expansive view of general jurisdiction than accepted by Bauman, authorizing general jurisdiction over those corporations that engaged in a large quantum of interstate activity that rose “to the level . . . of an insider” such that “relegating the defendant to the political processes is fair.” Brilmayer et al., supra note 22, at 742. As she envisioned jurisdictional doctrine, then, the relatedness issue would not arise for those corporations conducting substantial intrastate business in the forum similar in quantity and quality to in-state corporations.
Since the defendant is conducting substantial “systematic and continuous” activities in Michigan — the quantity and quality of activities that before Bauman sufficed (according to the lower courts) for general jurisdiction\textsuperscript{179} — would the exercise of jurisdiction in Michigan be “fair,” even if the claims were not dependent on the corporation’s Michigan activities? Or should the family instead be limited to bringing any non-substantively-relevant-to-Michigan claim in Florida (accident locale), Delaware (defendant’s state of incorporation), or New Jersey (defendant’s principal place of business)?

Intuitively, exercising jurisdiction in Michigan appears “fair” — indeed, until Bauman, the defendant would not have even bothered to challenge personal jurisdiction with respect to such a claim. But now that general jurisdiction is not available, Michigan’s adjudicatory jurisdiction depends upon the connectedness requirement, which, in order to comport with fundamental notions of fair play and substantial justice, demands a broader expanse for those cases falling within International Shoe’s first category.

When the nonresident defendant is conducting “continuous and systematic” activities within the state, the “estimate of the inconveniences” of litigation in the forum in which the plaintiffs reside is practically nonexistent\textsuperscript{180}. Evidence exists in the forum (i.e., the plaintiff witnesses and any of their documentary evidence, such as medical, income, or employment records)\textsuperscript{181}. The defendant undoubtedly maintains in-state counsel and insurance coverage to defend itself from forum suits, and many jurors may even view the company as a state “insider” due to its local presence. The only true disadvantage from the defendant’s perspective is the added forum shopping potential\textsuperscript{182}, but forum shopping can be limited by restricting the available fora to those with some additional state interest.

State regulatory power over the occurrence giving rise to the suit — while the most important government adjudicative interest — is not the

\textsuperscript{179} See generally Rhodes, Clarifying General Jurisdiction, supra note 22, at 862-67 (discussing cases).


\textsuperscript{182} Cf. Daimler AG v. Bauman, 134 S. Ct. 746, 762 (2014) (discussing concerns with forum shopping and defendant’s control of the jurisdictional consequences of its actions).
only one. The state also has interests in providing a procedure for resolving disputes between its citizens and those conducting activities within the state, protecting its citizens and visitors from harms suffered within the state, and providing a convenient forum for its citizens injured by nonresidents. Although the Supreme Court has held that the plaintiff's forum contacts cannot standing alone be decisive, in those cases in which the defendant is engaging in “continuous and systematic” forum conduct that is substantially similar to the occurrence that is the basis of the lawsuit, such additional state interests should allow the state to adjudicate the controversy, even if none of the defendant's forum contacts caused or will be aspects of plaintiff's claims.

Clues from the Supreme Court’s opinions support this view. Consider World-Wide Volkswagen Corp. v. Woodson, which held that a New York automobile detailer and its regional distributor were not amenable to jurisdiction in Oklahoma based on selling an automobile in New York that later crashed in the forum when they conducted no other business activity in Oklahoma. The Court indicated, however, that while these particular defendants were not amenable, jurisdiction was appropriate over Audi, the manufacturer of the automobile, and Volkswagen, the importer. The Court explained that, if the sale of a product “is not simply an isolated occurrence,” but results from the manufacturer's or distributor's efforts to serve the market 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.” Notice, though, that Audi and Volkswagen did not sell

183 E.g., Burger King, 471 U.S. at 473 (“A State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.”); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (noting the state’s “especial interest in exercising judicial jurisdiction over those who commit torts within its territory” and stating “[t]his is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection” (internal quotation marks omitted)); Shaffer, 433 U.S. at 207-08, 214 (recognizing the state’s strong interest in “providing a procedure for peaceful resolution of disputes” arising from property within the forum).
185 See generally Allan Ides & Simona Grossi, The Purposeful Availment Trap, 7 FED. CTS. L. REV. 118, 125-26 (2013) (“We believe that the personal jurisdiction formula should merely focus on meaningful connections with the forum state and the reasonable expectations to which those connections give rise.”).
187 See id. at 297.
188 See id.
this automobile in Oklahoma (so there is no substantively relevant or causal contact of either defendant in Oklahoma), yet the Court still indicated that jurisdiction would be warranted based on their continuous efforts to serve the Oklahoma market. Likewise, in Asahi Metal Industry Co. v. Superior Court, Justice O’Connor’s restrictive approach to purposeful availment still acknowledged that a foreign component manufacturer placing its goods in the stream of commerce could be amenable to specific jurisdiction based on associated (but not necessarily substantively or causally relevant) forum conduct, such as establishing distribution networks within the state. These conclusions could be supported under the rationale that, while such defendants do not have a substantively or causally relevant purposeful contact within the state, their “continuous and systematic” forum activity is sufficiently similar to their actions giving rise to the suit to implicate the state’s interests in protecting from harms suffered within the state.

Additional support is provided by a pre-Shoe case, Louisville & Nashville Railroad Co. v. Chatters, which found a sufficient relationship with the forum state for an out-of-state injury based entirely on the plaintiff's in-state purchase of his railroad ticket from another entity. The plaintiff had been injured in Virginia while the train was being operated by a Virginia railroad company; he purchased his ticket in New Orleans from a separate Kentucky railroad which operated the train from New Orleans to Alabama. Although the Virginia railroad's substantial Louisiana business activities arguably had no substantively relevant connection to the claim, the Court upheld jurisdiction in Louisiana, reasoning that the subsequent injury in Virginia was sufficiently connected to the defendant's Louisiana business since the defendant accepted a transportation obligation incurred by another entity in the state.

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189 See id.
191 At least one court has applied a similar analysis in a stream-of-commerce case. See Russell v. SNFA, 987 N.E.2d 778, 797 (Ill. 2013) (upholding specific personal jurisdiction based on the defendant's in-state aerospace activities, in spite of the fact that the component at issue in the suit had been manufactured elsewhere).
192 See Louisville & Nashville R.R. Co. v. Chatters, 279 U.S. 320, 327-29 (1929). Although the defendant had a registered agent in the forum, its appointment of an agent, under state law, constituted a jurisdictional basis only for causes of action arising out of its business within the state, requiring the Court to examine whether an adequate connection existed. Id. at 325-26.
193 Id. at 323.
194 See id. at 327-29.
These decisions do not, however, extend to support specific jurisdiction in every forum in which the defendant conducts continuous and systematic forum activities that are sufficiently similar to the occurrence in dispute — such reasoning would give the plaintiff the choice of essentially every state for proceeding against a national corporation. Nor do they support jurisdiction merely based on the plaintiff’s residence or an in-forum injury if the defendant is conducting “single or occasional” forum acts. But if the defendant is conducting extensive forum activities similar to the episode in dispute, and the suit implicates another sovereign state interest (such as providing a convenient forum for state citizens or protecting against harms suffered in the state), the relevant state interests will typically outweigh the minimal litigation burdens on the defendant, which should authorize suit within the forum, unless the defendant can establish that the exercise of jurisdiction is otherwise unreasonable.

The courts have extensive precedents to draw upon in determining whether the defendant’s forum activities are continuous and systematic: the pre-Bauman decisions purporting to find general jurisdiction based solely or predominantly on the continuity of the defendant’s forum activities. A more difficult issue will be the appropriate level of abstraction or generality for ascertaining similarity. For instance, in the case of a product manufacturer, does the product causing an in-state injury have to be precisely the same model as other products that the manufacturer is selling to the forum on a systematic and continuous basis, or is it enough to be within the same line of products, or even the same basic industry? Although precedent here is not as extensive, courts have grappled previously with this problem, recognizing that higher levels of generality will expand the state’s jurisdictional reach.

Returning again to our hypothetical, Michigan’s jurisdictional reach likely should encompass the vacation disaster suit, assuming the corporation is operating sufficiently similar properties in Michigan on a “continuous and systematic” basis. Michigan has a manifest interest in ensuring that a company operating resorts in its state is providing a

195 See Rhodes, Clarifying General Jurisdiction, supra note 22, at 828-86 (cataloguing prior decisions). Although many of these decisions ignored the need for the defendant’s forum activities to be of a substantial nature, as should have been necessary for general jurisdiction even before Bauman, see id. at 887, their holdings could nonetheless assist with the appropriate characterization of the defendant’s forum contacts as either isolated or continuous and systematic.

196 See, e.g., Russell, 987 N.E.2d at 797 (“In our view, defendant’s proposed distinction between subcategories of its primary product, custom-made aerospace bearings, is too restrictive and narrow for purposes of our jurisdictional inquiry.”).
safe environment for both its citizens and those visiting the state. While this interest is diminished to some extent because the particular injury did not occur within the state, Michigan still has an interest in protecting state citizens and providing them a convenient forum for suit. Jurisdiction in the state can hardly be said to be an undue burden to the corporate hotel when it is engaging in intentional conduct on a continuous and systematic basis providing similar services to the Michigan market — the mere fortuity, from its perspective, that this particular injury occurred in Florida should not preclude jurisdiction.

At the very least, going forward, litigants and courts need to be cognizant of the need to exercise specific jurisdiction over tenuously related contacts of those corporations conducting the quantity and quality of substantial in-state business that before *Bauman* sufficed for general jurisdiction. In order to achieve the ultimate due process goal of “fairness,” courts must be prepared to expand their jurisdictional reach in such cases. Even before *Bauman*, some courts and commentators had urged that specific jurisdiction sub-categories should be recognized as a basic matter of policy and fairness. The need for this approach is only heightened now. By highlighting *International Shoe*’s two specific jurisdiction categories in both *Goodyear* and *Bauman*, the Supreme Court hinted at a future path to serve this need.

### B. Pendent Personal Jurisdiction

The previous section argues that, after *Bauman*, courts should and likely will interpret the “arising from or relating to” standard more leniently, at least when the defendant’s forum contacts are substantial, continuous, and systematic. Such an expansion of “connectedness” analysis in certain contexts will give rise to another issue: what should the court do when the case involves multiple claims that share a common nucleus of operative fact, but not all of the claims satisfy the

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197 See, e.g., Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 128-29 (2d Cir. 2002) (examining entirety of law firm’s forum activities to ascertain whether the firm was subject to personal jurisdiction); Chew v. Dietrich, 143 F.3d 24, 29 (2d Cir. 1998) (contending that the relatedness inquiry should depend on whether defendant’s forum contacts are limited or substantial).

connectedness requirement? If one claim arises from in-state contacts (perhaps a false advertising claim attributable to a brochure mailed to the plaintiff’s home that induced the plaintiff to travel to a resort that conducted no other business within the state other than advertising), can the court also exercise jurisdiction over the defendant for additional claims that, though related, do not arise from the defendant's in-state contacts (for example, a premises liability claim arising when the family's child is injured at the resort)?

The issue is described as one of pendent personal jurisdiction, as the court possesses personal jurisdiction over the defendant for one claim, but, standing alone, would lack personal jurisdiction over the defendant for the second claim, unless it can tag along as a “pendent” claim. For the subset of federal-question cases in which Congress has authorized nationwide service of process, the nearly unanimous view is that a court may lawfully exercise pendent personal jurisdiction to hear related state-law claims. At the other end of the spectrum, and regardless of

199 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069.7 (3d ed. West 2014) (explaining that most federal courts have held that “a defendant who already is before the court to defend a federal claim is unlikely to be severely inconvenienced by being forced to defend a state claim whose issues are nearly identical or substantially overlap the federal claim. Notions of fairness to the defendant simply are not offended in this circumstance”); accord Linda Sandstrom Simard, Exploring the Limits of Specific Personal Jurisdiction, 62 OHIO ST. L.J. 1649, 1626 (2001) [hereinafter Exploring the Limits] (“Federal courts are far more willing to adjudicate pendent counts where personal jurisdiction over the anchor count is based upon a federal nationwide service of process provision . . . .”); see also Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180-81 (9th Cir. 2004) (“Pendent personal jurisdiction is typically found where one or more federal claims for which there is nationwide personal jurisdiction are combined in the same suit with one or more state or federal claims for which there is not nationwide personal jurisdiction.”); IUE AFL–CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056 (2d Cir. 1993) (“[W]here a federal statute authorizes nationwide service of process, and the federal and state claims ‘derive from a common nucleus of operative fact’, the district court may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available.” (citation omitted) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966))); Peterson v. Islamic Republic of Iran, No. 10 CIV. 4518 (KBF), 2013 WL 2246790, at *9 (S.D.N.Y. May 20, 2013) (“Rule 4(k)(2) provides a statutory basis for jurisdiction over the claims here because the turnover action (1) arises under federal law, (2) UBAE is not subject to the general jurisdiction of any state’s courts, and (3) exercising jurisdiction comports with due process . . . .”); Jon Heller, Note, Pendent Personal Jurisdiction and Nationwide Service of Process, 64 N.Y.U. L. REV. 113, 114 (1989); Steven Michael Witzel, Note, Removing the Cloak of Personal Jurisdiction from Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process, 51 FORDHAM L. REV. 127, 147 (1982). But see Jason A. Yonan, An End to Judicial Overreaching in Nationwide Service of Process Cases: Statutory Authorization to Bring Supplemental Personal Jurisdiction Within Federal Courts’ Powers, 2002 U. ILL. L. REV. 557, 579 (2002) (“In maintaining personal jurisdiction over transactionally related
whether the claims are founded on state or federal law, most courts will not exercise pendent personal jurisdiction over the defendant when the two claims do not arise out of a common nucleus of operative fact. In such a case, the defendant could not have foreseen being called to defend the unrelated claim in the forum and considerations of federalism and comity would weigh against the exercise of jurisdiction over the defendant for an unrelated claim.

In between these two focal points, however, are cases involving two distinct claims that do share a common nucleus of operative fact, but only one of which arises out of forum contacts, and here there is a deep circuit split. Assuming that the state's long-arm statute extends to the constitutional limit, and further assuming that one claim falls within that constitutional limit and the other falls outside of it, would it violate the Constitution for a court to hear both claims together? There is considerable disagreement over this point: some courts have allowed the extension of pendent personal jurisdiction over the related claim, while others have not.

The controversy goes back to the traditional struggle between sovereign power and litigant fairness in personal jurisdiction, requiring an analysis of what interests personal jurisdiction is intended to protect, an issue often debated, but always a moving target. Under a state-law claims where personal jurisdiction could not otherwise be obtained . . . courts have acted without congressional guidance and have overstepped their bounds.

200 See WRIGHT ET AL., supra note 199, § 1069.7 (noting that "a claim that is not part of the same constitutional case is much more likely to involve different litigational strategies and may require very different resources to defend against").

201 Id.

202 See, e.g., Inspirus, LLC v. Egan, No. 4:11-CV-417-A, 2011 WL 4439603, at *5 (N.D. Tex. Sept. 20, 2011) ("The court is satisfied that if a claim for breach of the confidentiality agreement has been properly alleged, the forum-selection clause in question would be sufficient to authorize this court to exercise in personam jurisdiction over Egan as to that claim. . . . [T]he court is inclined to think that if the breach of contract claim has been adequately alleged, the pendent personal jurisdiction doctrine would apply and that, under that doctrine, the court would be authorized to exercise jurisdiction over Egan’s person as to all of the claims asserted against him in the complaint, as amended."); see also Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 289 (1st Cir. 1999) (allowing jurisdiction over some, but not all, claims).


204 Andrews, supra note 141, at 1014 (explaining that the historical “philosophical divide” between power and fairness as the relevant policy concern underlying limitations on personal jurisdiction “remains among current members of the Court”); Megan M. La Belle, Patent Litigation, Personal Jurisdiction, and the Public Good, 18 GEO.
traditional power analysis, there should be no impediment to exercise pendent personal jurisdiction over related claims. Indeed, the Supreme Court in \textit{Burnham} allowed in-state service of process ("tag" jurisdiction) to support personal jurisdiction over a defendant even for claims entirely unrelated to the defendant's forum contacts.\footnote{See \textit{Burnham v. Superior Court}, 495 U.S. 604, 628 (1990). While \textit{Burnham} failed to garner a majority rationale, every member of the Court upheld jurisdiction based solely on "tag jurisdiction" without considering the potential relationship of the defendant's forum presence to the events at issue in the lawsuit, even though, as some commentators have argued, that might have been a better basis for the decision. See generally Stanley E. Cox, \textit{Would That Burnham Had Not Come to Be Done Insane?: A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of Why Transient Presence Jurisdiction is Unconstitutional, and Some Thoughts About Divorce Jurisdiction in a Minimum Contacts World}, 58 Tenn. L. Rev. 497, 555-71 (1991) (arguing that the result in \textit{Burnham} comported with due process given the case's particularized factual context, but that the overbroad language of the case created more problems than it solved).} If in-state service can give rise to such power, then surely sovereign authority should likewise extend to the adjudication of additional claims once the court has properly established personal jurisdiction over the defendant in a case. These additional claims, after all, would be part of the same case or controversy as the claim for which the court already has jurisdiction. Allowing the court to consider them would therefore require a much narrower extension of authority than was required in \textit{Burnham}, where the Court extended jurisdiction to cover even unrelated claims.

Likewise, under an \textit{International Shoe} "fairness" analysis, there should be no absolute bar to the exercise of pendent jurisdiction. Instead, the court would be required to analyze the fairness factors holistically, examining the interests of the plaintiff, defendant, and forum. In some cases (as in \textit{Asahi}, with its foreign locus, foreign plaintiff, and minimal state interest),\footnote{See \textit{Asahi Metal Indus. Co. v. Superior Court}, 480 U.S. 102, 116 (1987) ("Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.").} these factors will weigh heavily against jurisdiction.

More typically, however, the fairness factors will permit jurisdiction. If the injured plaintiff resides in the forum and the defendant is a multinational corporation with substantial in-state contacts, the fairness factors would suggest that jurisdiction over pendent claims is appropriate.

Thus, neither limits on state power nor respect for defendant fairness, standing alone, should prohibit the exercise of pendent personal jurisdiction. Nevertheless, the combination of the two might create a stronger barrier against pendent jurisdiction than either factor would do on its own. In particular, the Supreme Court has at times applied a conception of jurisdiction that combines elements of territorial federalism with defendant-oriented liberty protections. The Court articulated this view in Burger King v. Rudzewicz, where it stated that due process “require[es] that individuals have ‘fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,’” so that they can “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” Accordingly, a court would have to examine whether the defendant’s in-state activities would put it on notice that it could be haled into court to defend a claim. If so, the defendant could be subject to in-state jurisdiction; if not, it would not be. The defendant, therefore, could structure its business activities to weigh whether engaging in particular business activities would be worth the risk of being called on to defend in an inconvenient or unfavorable forum.

Under the pre-Bauman rubric for general and specific jurisdiction, this predictability principle might reasonably have limited courts’ exercise of pendent personal jurisdiction. By definition, the issue of pendent personal jurisdiction would arise only when the defendant’s in-state contacts were relatively minor. After all, if the defendant had

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207 Cf. id. at 114 (acknowledging the unusual posture of the Asahi case and noting that “often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant”).

208 See Andrews, supra note 141, at 1017 (“The defendant has a due process right to have states act only within the limits of their sovereignty. Otherwise, the process would not be fair or reasonable.”); Brilmayer, supra note 142, at 85 (“[T]he sovereignty concept inherent in the Due Process Clause is not the reasonableness of the burden but the reasonableness of the particular State’s imposing it.”).


210 See id. (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

211 See id.
engaged in continuous and systematic contacts within the forum, then the court would simply have exercised general jurisdiction over all claims, whether or not they related to forum contacts.\textsuperscript{212} Thus, in pre-
\textit{Bauman} cases, pendent personal jurisdiction would have rested on fairly tenuous grounds, with the court hearing one claim that related to in-state (but limited) contacts, and a second related claim that neither arose from nor related to the defendant’s in-state contacts at all. Given the tenuous connection between the forum and the defendant, it is not surprising that commentators might conclude that a court could not constitutionally exercise jurisdiction over the pendent claims.\textsuperscript{213} In those cases, the defendant’s contacts with the forum would likely have been too limited to put the defendant on notice that it might be called on to defend in the forum.\textsuperscript{214} As a result, a number of pre-
\textit{Bauman} cases concluded that the exercise of pendent personal jurisdiction would violate constitutional safeguards if the “anchor claim” rested only on a state’s long-arm statute and not on a federal provision allowing nationwide service of process.\textsuperscript{215} Because the defendant’s connection to the forum was likely to be relatively tenuous, the defendant might expect to be subject to jurisdiction only if something went unusually awry with its activities in the forum, and not in the usual course of

\begin{footnotes}
\item[212] See supra Part I.
\item[213] See \textsc{Wright et al., supra} note 199, \S\ 1069.7 (“[It would be unconstitutional for a state pendent personal jurisdiction policy to capture claims that fall outside of the Fourteenth Amendment’s due process limits on the state’s long-arm statute itself.”); see also \textsc{Glannon, Perlmutter & Raven-Hansen, supra} note 23, at 228-29.
\item[215] Cf. Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266, 274-75 (5th Cir. 2006) (“If a defendant does not have enough contacts to justify the exercise of general jurisdiction, the Due Process Clause prohibits the exercise of jurisdiction over any claim that does not arise out of or result from the defendant’s forum contacts.”); Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 289 (1st Cir. 1999) (“We commend the lower court’s decision to analyze the contract and tort claims discretely; Questions of specific jurisdiction are always tied to the particular claims asserted.”); Gehling v. St. George’s Sch. of Med., Ltd., 773 F.2d 539 (3d Cir. 1985) (holding that the district court could properly exercise personal jurisdiction over the defendant for fraudulent misrepresentation and emotional distress claims but not the related negligence and breach of contract claims, as these claims lacked a sufficient nexus to the defendant’s contacts with the forum); Moncrief Oil Int’l Inc. v. OAO Gazprom, 414 S.W.3d 142, 150 (Tex. 2013) (“[S]pecific jurisdiction requires us to analyze jurisdictional contacts on a claim-by-claim basis.”).
\end{footnotes}
business. In ordinary circumstances, the defendant would not expect to defend in the forum and would certainly not expect to defend an unrelated claim there. Thus, courts were understandably reluctant to subject defendants to personal jurisdiction for pendent claims.\textsuperscript{216}

Even before \textit{Bauman}, however, this reluctance was not universal. A number of leading scholars and courts concluded that there was no constitutional barrier to exercising pendent personal jurisdiction.\textsuperscript{217} Their analyses typically concluded that once the defendant was properly before the court for one claim (the “anchor” count), the court could then legitimately hear related claims against the same defendant.\textsuperscript{218} Of course, the reasonableness factors would still limit the court’s authority, if particular facts made the exertion of jurisdiction unreasonable, and prudential considerations could also circumscribe the trial court’s discretion, but constitutional concerns would be satisfied by the presence of a single claim supporting personal jurisdiction.\textsuperscript{219}

\begin{footnotesize}
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\item \textsuperscript{216} See, e.g., \textit{Evergreen Int’l Airlines}, 2012 WL 3637551, at *9 (“[W]here a defendant lacks continuous and systematic contacts . . . a court may only exercise personal jurisdiction over that defendant as to a claim arising out of conduct of the defendant that is either purposefully directed at the forum or calculated purposefully to avail the defendant of the privilege of conducting activities in the forum.”).
\item \textsuperscript{217} See, e.g., \textit{Salpoglou v. Widder}, 899 F. Supp. 835, 838 (D. Mass. 1995) (“[W]here a Court has subject matter jurisdiction over both the malpractice and the breach of contract claims, it may obtain personal jurisdiction based on either of the claims pursuant to the doctrine of pendent personal jurisdiction.”); \textit{Simard, Exploring the Limits, supra} note 199, at 1660 (“The Due Process Clause of the Fourteenth Amendment should not be interpreted to limit the scope of specific jurisdiction to particular legal theories when the basis for jurisdiction over the anchor count is minimum contacts rather than consent.”).
\item \textsuperscript{218} See, e.g., \textit{Miller v. SMS Schloemann–Siemag, Inc.}, 203 F. Supp. 2d 633, 642-43 (S.D. W. Va. 2002) (applying West Virginia’s long-arm statute to exercise personal jurisdiction over a breach-of-contract claim arising from a document signed in Korea purporting to limit the defendant’s potential liability and concluding that the court could hear a workplace-injury claim arising from the Korean accident after finding that defendant was properly before the court on the contract claim); \textit{Home Owners Funding Corp. of Am. v. Century Bank}, 695 F. Supp. 1343, 1345 (D. Mass. 1988) (“The law is settled that, in a multi-count complaint, if a court has personal jurisdiction over the defendant with respect to one count, it has personal jurisdiction over the defendant with respect to all counts.”).
\item \textsuperscript{219} See, e.g., \textit{United States v. Botefuhr}, 309 F.3d 1263, 1273-74 (10th Cir. 2002) (stating that most federal courts “have upheld the application of pendent personal jurisdiction, and we see no reason why . . . the assertion of pendent personal jurisdiction would be inappropriate,” but nonetheless concluding that once anchor claims are dismissed, district courts should not retain additional claims that lack an independent basis for personal jurisdiction); \textit{J4 Promotions, Inc. v. Splash Dogs, LLC}, No. 08 CV 977, 2009 WL 385611, at *21-22 (N.D. Ohio Feb. 13, 2009) (allowing pendent personal jurisdiction over related claims against the same defendant who was properly before the}
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After *Bauman*, the constitutional case for allowing the exercise of pendent personal jurisdiction becomes even stronger. Now, general jurisdiction is no longer assumed when a corporation carries on substantial business in the state, not even when it operates a chain of discount stores or a number of hotels in the forum. Such a corporation certainly derives benefits from its in-state activity, however, and it easily foresees being called on to defend against claims of wrongdoing that arise from those substantial activities — it expects that claims will arise as part of the ordinary course of business, and likely purchases insurance to cover just this risk. A defendant that already expects to defend some claims within the state would not be blindsided if the court also agreed to hear intertwined claims that arose out-of-state. Such a defendant has not structured its business to avoid in-state jurisdiction. To the contrary, it has engaged in extensive business within the state and is prepared to defend there. After *Bauman*, the defendant still will not be subject to general jurisdiction in the state, of course. Thus, completely unrelated cases must still be brought elsewhere, either in the defendant’s home forum or in the jurisdiction where the claim arose. But a case that contains multiple claims, some related to the forum and others not, should have enough of a forum nexus that the court could reasonably hear all related claims.

The ability to hear these intertwined claims becomes especially important once the scope of general jurisdiction is reduced. Without the availability of pendent personal jurisdiction as a safety valve, limiting general jurisdiction means limiting the number of fora that could hear the case as a whole, and therefore potentially requiring that different courts hear different claims within a larger case. As Professor Linda Simard has noted, “splitting [a] dispute between forums raises issues concerning additional inconvenience, potential for inconsistent verdicts, and systemic inefficiency.” These same considerations have led the federal courts to expand federal subject matter jurisdiction to encompass pendent claims, and Congress has formalized this procedure in its supplemental jurisdiction statute.

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220 See supra Part I.
221 See, e.g., Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 134 (2012) (“[T]o the extent that manufacturers are risk averse, they likely have (or can easily obtain) insurance.” (citing KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 3 (2008))).
jurisdiction is not allowed, then the same concerns animating the extension of supplemental subject matter jurisdiction will come into play, as plaintiffs would have to file suit in more than one forum to seek relief for injuries that arise from a single constitutional case or controversy. In addition to the added costs and inconvenience, it is entirely plausible that the different courts would reach inconsistent conclusions regarding liability — a possibility that raises significant due process concerns for both the plaintiff and the defendant. These risks have led to a federal rule generally prohibiting claim-splitting (and using the preclusion doctrines to enforce this prohibition). When the defendant’s settled expectations are not upended by the extension of pendent personal jurisdiction, there is no reason to recreate the risks and inefficiencies that arise from claim-splitting, and there is no constitutional requirement to do so, as the defendants will have “fair warning” that they will be subject to jurisdiction in the forum state.

The relevant unit of analysis, then, ought to be “cases” and not “claims,” a formulation supported, at least implicitly, by the Court’s recent choice of language in jurisdictional cases which refer to jurisdiction over an “episode-in-suit” rather than a particular claim. A court should continue to examine whether the defendant has sought to exploit the state’s benefits and protections and should ascertain jurisdiction; see also United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (stating the justification over pendent subject matter “lies in considerations of judicial economy, convenience and fairness to litigants”); Simard, Exploring the Limits, supra note 199, at 1657 (making an analogy between pendent personal jurisdiction and supplemental subject matter jurisdiction).

See Gene R. Shreve, Preclusion and Federal Choice of Law, 64 TEX. L. REV. 1209, 1260 (1986) (“Claim splitting is unfair to the party opposing the claim in the succeeding case, because it is likely to prolong conflict and increase the expense of litigation.”).


See Shreve, supra note 224, at 1260-61.

See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) (stating that “a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction”); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (“Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy.”).
whether the defendant’s in-state contacts are such that it could reasonably expect being called to defend within the state. If so, then the court need only examine whether the case as a whole has a sufficient nexus to the defendant’s in-state contacts to make the exercise of jurisdiction reasonable. If the defendant’s in-state contacts are deliberate enough and broad enough to offer it fair warning that it could be subject to jurisdiction in the forum, and if at least one claim in the suit arises from or relates to those deliberate contacts, then there is no constitutional ground to preclude the court from exercising jurisdiction over the entire case or controversy.229

Thus, returning to the hypothetical Michigan family, if the family chooses to sue the Florida hotel company in Michigan, the court would have to analyze the defendant hotel's actions in Michigan. If the company made a deliberate attempt to exploit the Michigan market, for example, by advertising extensively in the state to encourage travel, then it is entirely possible that the defendant could reasonably expect to be haled into court for actions arising from those contacts.230 The addition of other transactionally related claims should not change that expectation. Analyzing the entire case (and not just a single claim) allows the court to consider the scope of the defendant’s total contacts with the forum state.

C. Measuring Effects

Walden follows the same pattern as Bauman: it restricts one of the primary bases for the exercise of personal jurisdiction (the “aiming” of intentional conduct to cause effects within a forum), but it leaves a significant number of issues unsettled. Just as parties are now more likely to litigate about the “arising from or related to” requirement and the possibility of pendent jurisdiction after Bauman, the Walden decision is likely to increase litigation over the effects test.

Because the Court’s opinion in Walden is both short and unanimous, its impact is not immediately apparent. However, the opinion will likely be highly influential. The number of effects-test cases is both large and growing, having more than tripled in recent years. Now, there are more

229 See Simard, Exploring the Limits, supra note 199, at 1624.

230 See Simard, Meeting Expectations, supra note 141, at 378 (describing Nowak v. Tak How Invs., Ltd., 94 F.3d 708 (1st Cir. 1996), and noting that “[w]hen Hotel sent its direct mail solicitation to companies all over the United States, it sought to create an ongoing relationship with the states where these companies were located. Once these relationships were established, Hotel intended to derive an ongoing flow of business from each forum”).
effects-test cases filed each year than there are stream-of-commerce cases.\textsuperscript{231} Furthermore, internet-based contacts are one of the most common sources (if not the most common source) of disputes where out-of-forum actions can have in-forum effects.\textsuperscript{232} The typical effects-test case involves defamation and internet publication.\textsuperscript{233}

Given the importance of the effects test, it is unfortunate that the Court’s decision in \textit{Walden} leaves so much unsettled and unclear. This uncertainty is not visible on the face of the opinion: at first glance, the opinion seems only to be a counterpoint to \textit{Calder}, distinguishable based on the defendant’s lack of intentional interaction with Nevada. The facts that the Court excludes from its discussion of \textit{Calder}, however, suggest that the Court is going much further, such that \textit{Walden} is a “stealth overruling” of \textit{Calder}\textsuperscript{234} — if a new case were to arise today with the exact same fact pattern as \textit{Calder}, it is unlikely that the Court would sustain jurisdiction.

The Court’s predominant thrust — distinguishing \textit{Walden} factually from \textit{Calder} — is not persuasive. First, although the \textit{Walden} Court notes the importance of the California readership of the defamatory article in \textit{Calder}, making it sound as if liability in \textit{Calder} was predicated on the idea that the defendant had sought to circulate the defamatory content in California, that distinction misleadingly conflates the magazine (which published in California and did not contest jurisdiction) with the writer and editor (who had no control over circulation and no other contacts with California).\textsuperscript{235} In \textit{Calder}, the writer and editor were not the ones to communicate the defamatory content in California.\textsuperscript{236} They communicated the allegedly false statements only to their employer in Florida, who then published those statements in a magazine circulated

\textsuperscript{231} Robertson, supra note 100, at 1304 n.9.

\textsuperscript{232} See id. at 1312-13; see also Alan M. Trammell & Derek E. Bambauer, Personal Jurisdiction and “Teh Interwebs,” 100 CORNELL L. REV. (forthcoming 2015) (manuscript at 11-12), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494969 (explaining that the “intangible harm” at issue in \textit{Calder} was relatively unusual in the pre-internet era, but is much more common now that the internet provides a forum for the type of “intangible harm” found in defamation and trademark infringement cases, and arguing that “\textit{Calder} set the stage for courts to flub their lines when it came time to declaim on personal jurisdiction and the Internet”).


\textsuperscript{235} Robertson, supra note 100, at 1312.

\textsuperscript{236} Calder v. Jones, 465 U.S. 783, 784-89 (1984); see Robertson, supra note 100, at 1312.
in California.\textsuperscript{237} In \textit{Calder}, the Supreme Court was careful to note that it was not imputing the magazine's California circulation to the writer and editor, "so the \textit{Enquirer}'s California sales were not counted as minimum contacts in the case against the individual defendants."\textsuperscript{238} Thus, the California readership would certainly have been relevant to the damages suffered, but it would not have been relevant to the threshold jurisdictional question of whether the writer and editor "targeted" the state of California.\textsuperscript{239} The full import of the \textit{Calder} holding was therefore that the writer and the editor could be subject to jurisdiction in California even for statements made in Florida to their employer located in Florida — it was the foreseeable effects of that communication on the plaintiff's reputation in California, rather than the publication in California, that gave rise to jurisdiction.\textsuperscript{240} As a result, the \textit{Walden} Court's attempt to distinguish \textit{Calder} (relying on the idea that the \textit{Calder} defendants had deliberately targeted an in-state readership) ignores the Court's earlier holding that the defendants in \textit{Calder} could not be held responsible for where the publication was marketed.

Thus, \textit{Calder} and \textit{Walden} are rather more squarely at odds than the Court's opinions suggest. Perhaps the deprivation of funds is not activity that is "targeted" at a plaintiff's forum, whereas defamation, even if not communicated into the forum, necessarily affects the plaintiff in his or her home state. If that is the major distinction between the cases, then the Court has left much unresolved: the vast majority of effects-test cases are defamation and other speech cases, not property seizure cases.\textsuperscript{241} What the Court did not address is when a false statement is considered to be "targeted" at a jurisdiction; certainly, there can be little doubt that such a statement made \textit{to} someone in the forum is targeted at that forum, but if so, the effects test is largely unnecessary; the communication to people in the forum is itself a forum contact. The

\begin{itemize}
  \item See \textit{Calder}, 465 U.S. at 784-89.
  \item Robertson, \textit{infra} note 100, at 1313.
  \item See \textit{id}.
  \item Id.; see also Patrick J. Borchers, \textit{Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction}, 98 NW. U. L. REV. 473, 477-78 (2004) ("Had Jones been attempting only to assert jurisdiction over a corporation responsible for publishing the magazine, it would have been an easy case. . . . But the complicating factor in \textit{Calder} was that the defendants were individual defendants, not the publishing corporation itself.").
  \item Robertson, \textit{infra} note 100, at 1349 ("By their nature, effects-test cases often involve potentially wrongful speech. When there are other types of contacts — physical presence, contractual relationships, or in-state marketing or sales — plaintiffs generally will not need to rely on effects-test jurisdiction.").
\end{itemize}
more difficult and still unresolved question is when a statement made about someone in that forum is itself a forum contact. In *Calder*, the Court was willing to accept that a false statement made to a person in Florida about a person in California was a California contact;\textsuperscript{242} in *Walden*, the Court concluded that a false statement made to a person in Georgia about a person in Nevada was not a Nevada contact.\textsuperscript{243} Out-of-state allegations of defamation are common, however, and the Court will have to address when allegedly defamatory statements “target” a state.\textsuperscript{244}

What makes the speech cases so hard to reconcile, however, is their varying factual context. When speech is indisputably wrongful (whether fraudulent or defamatory), it is easy to see how that speech “targets” its victim.\textsuperscript{245} Especially in the case of defamation, it is also easy to see how the conduct targets the victim's location in the area where she lives and works; a defamatory comment is calculated to cause reputational harm, and will necessarily do so where the victim is best known, even if the statement is made in a different forum altogether.\textsuperscript{246} Likewise, when the underlying speech is indisputably privileged — as when the defendant has made unflattering, but true, statements about an individual — then it is much more difficult to say that the speech “targets” the subject's home forum, and the circuits are therefore divided about whether such speech should count for effects-test purposes.\textsuperscript{247} The stronger view is that only wrongful speech should count, after all, any harm to the subject's reputation is not attributable to the speech; it is (at least legally) attributable to the underlying unflattering facts.\textsuperscript{248} Nonetheless, the conflict persists. There is a great

\textsuperscript{242} See *Calder*, 465 U.S. at 790.

\textsuperscript{243} See *Walden* v. Fiore, 134 S. Ct. 1115, 1126 (2014).

\textsuperscript{244} The Court has already denied certiorari in at least two cases raising these allegations in the last five years: *Clemens* v. *McNamee*, 615 F.3d 374 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 3091 (2011), and *Kauffman Racing Equipment, LLC* v. *Roberts*, 930 N.E.2d 784 (Ohio 2010), *cert. denied*, 131 S. Ct. 3089 (2011).

\textsuperscript{245} See *Robertson*, supra note 100, at 1343.

\textsuperscript{246} See *Dudnikov* v. *Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1075 (10th Cir. 2008) ( likening the defendant’s conduct to “a bank shot in basketball” in which “[a] player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket”).

\textsuperscript{247} See *Tamburo* v. *Dworkin*, 601 F.3d 693, 704 (7th Cir. 2010) (“The circuits are divided over whether *Calder*’s ‘express aiming’ inquiry includes all jurisdictionally relevant intentional acts of the defendant or only those acts that are intentional and alleged to be tortious or otherwise wrongful.”).

\textsuperscript{248} See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.”).
deal of variation and inconsistency in how courts are deciding effects-test cases.\footnote{249} Often, though not always, the ultimate outcome can be predicted by “previewing” the underlying merits of the case — where the underlying merits of the claim are strong, the court is likely to assert jurisdiction based on in-state effects.\footnote{250} Where the underlying merits are weak, the court is much less likely to find that the defendant intentionally “targeted” the forum state.\footnote{251} Thus, context matters. Unfortunately, however, the context may not be known before trial: the statement that the plaintiff is suing about may be a defamatory statement, or it may be a true but unflattering one.\footnote{252} Before a trial on the merits has been conducted, there is simply no way to know which one is true. Some courts have attempted to solve this problem by assuming the truth of the plaintiff’s allegations.\footnote{253} The Supreme Court itself appeared to do so in \textit{Walden}, noting that “[b]ecause this case comes to us at the motion-to-dismiss stage, we take respondents’ factual allegations as true, including their allegations regarding the existence and content of the affidavit.”\footnote{254}
Not all motions to dismiss are evaluated by the same standard, however. For purposes of jurisdiction, in particular, it is error to accept the plaintiff’s allegations as true.\(^{255}\) This is different from a 12(b)(6) motion to dismiss for failure to state a claim or a non-evidentiary motion for summary judgment where the truth of the plaintiff’s allegations must be assumed before deciding whether to send the case to a jury.\(^ {256}\) Actually deciding jurisdictional questions, by contrast, is necessary to determine whether the court has the power to render judgment at all (in the case of subject matter jurisdiction) or whether the court may lawfully exercise power over the defendant (in the case of personal jurisdiction).\(^ {257}\) In either situation, the truth or falsity of the plaintiff’s allegations determines whether the court has the power to act. Thus, the court would be usurping a power it might not possess if it were merely to assume the truth of the alleged facts supporting jurisdiction.\(^ {258}\) As a result, the Supreme Court has required that jurisdictional facts must be supported by adequate proof, and it historically has not allowed them to be merely assumed.\(^ {259}\)

To the extent that the Court might have suggested that it credited the truth of the plaintiffs’ allegations in *Walden*, that statement was no affidavit in the court’s record. *Id.* at 1121 n.2; see also Brief for Petitioner at 35, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574), 2013 WL 2390244 at *35.

\(^ {255}\) Kevin M. Clermont, *Jurisdictional Fact*, 91 *CORNELL L. REV.* 973, 978 (2006) (acknowledging that jurisdictional facts cannot be simply assumed, and arguing that when jurisdictional facts are intertwined with substantive merits questions, the court should require no more than a prima facie showing of jurisdiction); see Robertson, *supra* note 100, at 1332 (“If the court automatically accepts the plaintiff’s allegations as true, it will be assuming the existence of facts giving rise to jurisdiction — and it will thereby assume the existence of jurisdiction even in cases where it lacks the power to act.”).

\(^ {256}\) See, e.g., *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 36 n.6 (D.D.C. 2007) (“Plaintiffs rightfully carry a heavier burden in answering a jurisdictional challenge under Rule 12(b)(2) than a 12(b)(6) challenge to the sufficiency of pled claim.”); *Kopff v. Battaglia*, 425 F. Supp. 2d 76, 80-81 (D.D.C. 2006) (distinguishing the 12(b)(6) context in which a court defers to the plaintiff’s well-pleaded allegations and holding that “[w]hen considering challenges to personal jurisdiction, the Court need not treat all of plaintiffs allegations as true and may receive and weigh affidavits and any other relevant matter to assist it in determining the jurisdictional facts” (citation omitted)).

\(^ {257}\) Robertson, *supra* note 100, at 1329.

\(^ {258}\) *Id.* at 1330.

\(^ {259}\) See, e.g., *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936) (stating that a plaintiff “must allege in his pleading the facts essential to show jurisdiction”); *Smithers v. Smith*, 204 U.S. 632, 644-45 (1907) (holding that a judge’s discretion to dismiss a case apparently without jurisdiction should be subject to certain limits, “lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial”).
ultimately dicta that did not affect the result in the case. Ultimately, the Court concluded that the defendant’s conduct had not been aimed at Nevada.\textsuperscript{260} Nevertheless, the statement is likely to lead to confusion among courts attempting to apply \textit{Walden} in other contexts, especially those that are dealing with defamation claims. In future cases, if a court is unwilling to accept the plaintiff’s allegations of tortious conduct as true, it will be less likely to find jurisdiction appropriate: because there is no finding of tortious conduct, there can be no finding of express aiming. And ultimately, this appears to be where the Court is headed. After \textit{Walden}, the Supreme Court seems to be moving toward a severely constrained version of the effects test — one that essentially requires such a direct connection with the forum that traditional contacts are likely to exist in any event.

Such a narrowed scope for the effects test becomes even more significant after \textit{Bauman}. As discussed above, the elimination of the “continuous and systematic” contacts test for general jurisdiction will create significant pressure to enlarge the sphere of specific jurisdiction. Effects-test jurisdiction has, in the past, provided a way for plaintiffs to demonstrate the connection between the defendant’s activities and the forum state. If effects-test jurisdiction also becomes more difficult to establish, then another avenue for plaintiffs to establish personal jurisdiction outside the defendant’s home forum has also been curtailed. This limitation may sometimes be warranted; it may be unfair to allow an attenuated in-state “effect” to support jurisdiction in a case where the main impact of the defendant’s conduct was felt elsewhere, and this is especially true when pendent claims are considered.\textsuperscript{261} Nonetheless, it is important to recognize that restricting plaintiffs’ forum choice will have a significant effect on access to justice.\textsuperscript{262}

\textbf{D. Registration Statutes and Consent}

In the face of a significantly narrowed test for contacts-based general jurisdiction, courts will be faced with new requests for consent-based general jurisdiction. General jurisdiction is an important part of modern litigation, and especially important to nationwide class actions that


\textsuperscript{261} \textit{See supra} Part II.B.

\textsuperscript{262} \textit{See Robertson}, \textit{supra} note 100, at 1345 (“[T]he access-to-justice problem is primarily practical rather than legal. Even though there is a forum with the legal power to hear the dispute, the plaintiff may not have the practical means to access the available forum.”).
involve multiple defendants. In a products liability case involving multiple manufacturers, for example, it is unlikely all defendants would have the same “home” jurisdiction. Assuming the case involves plaintiffs from all over the United States, it is also unlikely that there would be a single jurisdiction in which the harm arose. In the past, the defendant’s “continuous and systematic” contacts with the forum would have been sufficient to give rise to personal jurisdiction. Now, however, plaintiffs will be searching for another basis on which the court can exercise general jurisdiction, and if the plaintiffs cannot find one, then nationwide class actions are likely to be severely limited.

Thus, plaintiffs will push for a broad interpretation of what constitutes a defendant’s consent to personal jurisdiction. Unlike subject matter jurisdiction, which can never be waived, a court may gain personal jurisdiction over a defendant who either fails to timely object to jurisdiction or who affirmatively consents to the court’s exercise of jurisdiction. Thus, consent is a powerful tool to expand personal jurisdiction, especially because consent can be granted even in circumstances when the underlying claim is wholly unrelated to the defendant’s forum contacts.


266 See id. (“Daimler may even spell the end of nationwide class actions against multiple defendants filed anywhere other than the states (if any) in which all corporate defendants are ‘at home.’ . . . [S]uch claims cannot be heard. . . regardless of whether the defendant’s contacts with the forum state are extensive or whether consolidating all claims would be efficient.”).

267 See id. (“In the vast majority of nationwide class actions, the claims of most class members did not arise in the forum state.”).

268 See id. (“Daimler does not rule out all nationwide class actions, but hereafter such lawsuits can only be heard in a forum in which all defendants are ‘at home,’ not in any forum of the plaintiffs’ bar’s choosing.”).

269 See Ins. Corp. of Ir., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”).
jurisdiction in *Bauman*, the natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look for such consent is in a state registration filing that designates a corporate agent for service of process.\textsuperscript{270}

As with each of the other contested jurisdictional issues discussed above, courts have differed sharply in their willingness to assert jurisdiction based on state registration statutes.\textsuperscript{271} First, although some states explicitly provide that appointment of a registered agent will give rise to general jurisdiction, most state statutes are less clear (or, in some cases, explicitly provide that such registration does not give rise to general jurisdiction).\textsuperscript{272} Second, even when the state authorizes general jurisdiction based on consent, courts have differed in their willingness to enforce such terms.\textsuperscript{273} The U.S. Court of Appeals for the Fifth Circuit, for example, has rejected the idea of basing general jurisdiction on registration alone, stating that basing general jurisdiction on “mere service upon a corporate agent” demonstrates “a fundamental misconception of corporate jurisdictional principles” and “is directly contrary to the historical rationale of *International Shoe* and subsequent Supreme Court decisions.”\textsuperscript{274} The U.S. Court of Appeals for the Eighth Circuit, by contrast, has allowed states to exert general jurisdiction based on agent-registration statutes as an alternate basis to minimum

\textsuperscript{270} See Kevin N. Rolando, *Express Consent by Registration: A Personal Jurisdiction Reminder*, 60 R.I. B.J., Sept.-Oct. 2011, 11, 11 (“[T]he question of express consent by registration, if it can be answered in the affirmative, obviates at least the need to travel down the more complicated avenue of a minimum-contacts analysis.”).

\textsuperscript{271} For collections of conflicting authorities, see ROBERT C. CASAD & WILLIAM B. RICHMAN, *JURISDICTION IN CIVIL ACTIONS* § 3-2[2][a] (3d ed. 1998) and Rhodes, *Nineteenth Century Personal Jurisdiction*, supra note 269, at 441 n.328.

\textsuperscript{272} See Andrews, supra note 141, at 1070-71 (“[M]ost registration statutes require merely that the corporation name an in-state agent for service of process and do not mention ‘jurisdiction.’”); Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 2, 44 (1990) (concluding “most statutes fail to discuss the effects of appointment on the state’s jurisdiction over the foreign corporation,” with “only a few states . . . expressly provide[ing] for the assertion of general jurisdiction”).

\textsuperscript{273} Rolando, supra note 270, at 11-13.

\textsuperscript{274} Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992).
contacts.\textsuperscript{275} It concluded that registration can provide “a valid basis of personal jurisdiction,” and it therefore held that “resort to minimum-contacts or due-process analysis to justify the jurisdiction is unnecessary.”\textsuperscript{276}

The rationale for accepting jurisdiction is simple: by registering to do business in-state, the defendant has consented to general jurisdiction (at least where either the state registration statute or its case-law interpretation so provides).\textsuperscript{277} Since consent is a proper basis for jurisdiction, outside the parameters of the minimum contacts analysis,\textsuperscript{278} the registration alone suffices for jurisdiction over any claim asserted against the corporation in the forum.

The objections to jurisdiction, on the other hand, are more nuanced, depending primarily on whether exacted consent by the state as a condition for conducting intrastate business is constitutional. First, most commentators agree that implied consent, such as statutes that designate a state official as the agent for service of process, cannot give rise to jurisdiction for conduct unrelated to forum activity.\textsuperscript{279} Even when consent is explicitly given, however, some courts are reluctant to enforce an agreement for unrelated causes of action.\textsuperscript{280} Some have suggested that

\textsuperscript{275} See Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990).
\textsuperscript{276} Id.; see also Sondergard v. Miles, Inc., 985 F.2d 1389, 1397 (8th Cir. 1993).
\textsuperscript{277} See Rolando, supra note 270, at 11-12.
\textsuperscript{278} See Ins. Corp. of Ir., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (noting a “variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court,” irrespective of the court’s adjudicative reach under the minimum contacts test of \textit{International Shoe}).
\textsuperscript{279} See, e.g., Brilmayer et al., supra note 22, at 757 (“The most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment.”); Stanley E. Cox, The Missing “Why” of General Jurisdiction, U. Pitt. L. Rev. (forthcoming 2014) (manuscript at 23), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418495 (“[A] corporation cannot be forced to consent to all-purpose jurisdiction as a condition of doing limited business within a state.”); Rhodes, Clarifying General Jurisdiction, supra note 22, at 861 (“[C]ourts routinely opine that the mere appointment of an agent does not establish the requisite minimum contacts for adjudicatory jurisdiction.”). But see Verity Winship, Jurisdiction over Corporate Officers and the Incoherence of Implied Consent, 2013 U. Ill. L. Rev. 1171, 1185-86 (acknowledging that “[w]ith few exceptions . . . the implied consent statutes have been used without challenge as the basis for jurisdiction in most of Delaware’s corporate governance cases ever since Delaware declared them constitutional in 1980” and arguing in favor of moving away from an implied-consent jurisdictional framework for Delaware corporate law cases (citing Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980))).
\textsuperscript{280} E.g., Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1293 (11th Cir. 2000) (declining to find the defendant subject to general personal jurisdiction based on its appointment of an agent for service of process in connection with its bond and
states overreach by attempting to subject the corporation to any and all causes of action, regardless of whether the claims arise from or relate to the forum in any way. In addition, some have suggested that requiring a corporation to subject itself to general jurisdiction may violate the dormant commerce clause by imposing unconstitutional burdens on out-of-state businesses. The basic concern, whether analyzed as a matter of due process or under the dormant commerce clause, is that the state cannot extract the corporation’s consent to all-purpose adjudicative authority without exchanging anything in return. While the state has undoubted power to require the nonresident corporation, as a condition for the privilege of conducting business operations within the state and accessing its courts, to guarantee its amenability for claims related to its forum business, and even likely has the power to require the corporation to consent to any suit involving a state citizen as a condition to do business, the additional guarantee of all-purpose adjudicative authority for a nonresident to “do business” in the state may exceed constitutional limits.

Courts have not had to resolve their disagreement regarding the effect of registration statutes primarily because the idea that registration

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281 E.g., Lea Brilmayer, Consent, Contract, and Territory, 74 MINN. L. REV. 1, 29 (1989) (highlighting that any right the state has to regulate the corporation’s local conduct “does not necessarily entitle the state to regulate [its] activities elsewhere.”); Rhodes, Nineteenth Century Personal Jurisdiction, supra note 269, at 443 (“The state therefore attempts to extract the corporation’s consent to all-purpose adjudicative authority, but without relinquishing anything additional in return, as it has no authorization to demand the regulation of the corporation’s extraterritorial activities based on some quantum of in-state business.”).

282 See Andrews, supra note 141, at 1073; T. Griffin Vincent, Toward a Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents, 41 BAYLOR L. REV. 461, 493 (1989) (“[A] state statute authorizing the exercise of jurisdiction should be scrutinized under the Commerce Clause, balancing the resulting economic burden with the state interest in adjudicating such a dispute . . . .”).

283 See Rhodes, Nineteenth Century Personal Jurisdiction, supra note 269, at 442 (“A longstanding American jurisdictional tradition authorizes a state to require a nonresident corporation to appoint an in-state agent for service of process and to consent to jurisdiction for claims related to its forum business in return for the privilege of conducting in-state business. The Court first upheld such consent in 1856, and the judiciary has never questioned its constitutionality.”).
Statutes were needed for jurisdiction was viewed as largely obsolete, superseded by the modern jurisdictional scheme focused on contacts.\textsuperscript{284} Now, however, the issue will become much more salient to modern practice. Many of the cases dealing with the limits of express and implied consent to jurisdiction go back to the nineteenth century.\textsuperscript{285} Suddenly, these older cases are again relevant and are likely to be hotly debated in high-stakes lawsuits that the parties and judges in the nineteenth-century cases would never have even imagined. Again, however, the retraction of “continuous and systematic” contact as a basis for general jurisdiction might actually give rise to a stronger case for jurisdiction as an extracted concession under a state registration statute. After all, the calculation of state interest necessarily changes when the defendant’s in-state contacts are continuous, systematic, and substantial. Even if those contacts alone cannot give rise to general jurisdiction, such extensive contacts may nevertheless provide a basis to support the state’s decision to extract an agreement for jurisdiction, especially if that agreement operates as a two-way street, offering the corporation the right to sue as a plaintiff in state courts in exchange for the obligation to defend if sued by an in-state resident.

## III. Rebalancing the Jurisdictional Framework

Ever since the Supreme Court first applied constitutional limits to the states’ exercise of personal jurisdiction, lawyers and scholars have been expressing confusion and frustration regarding the lack of a coherent theory to guide predictable outcomes.\textsuperscript{286} That is not likely to change now. Despite the near-unanimity of \textit{Bauman} and the unanimity of \textit{Walden}, neither case assisted with the deeper theoretical dilemmas plaguing jurisdictional doctrine; rather, both holdings are best

\textsuperscript{284} See Kipp, supra note 272, at 7 (“After \textit{International Shoe}, the focus shifted from whether the defendant had been served within the state to whether the defendant’s contacts with the state, in light of the locus of the cause of action, justified the state’s assertion of jurisdiction.”).

\textsuperscript{285} See Rhodes, Nineteenth Century Personal Jurisdiction, supra note 269, at 448 (noting that “the legislative solutions created in the nineteenth century requiring the appointment of an agent for claims related to the nonresident defendant’s forum activities may resolve some of the uncertainty” regarding current jurisdictional doctrine).

\textsuperscript{286} See, e.g., Todd David Peterson, \textit{The Timing of Minimum Contacts After Goodyear and McIntyre}, 80 GEO. WASH. L. REV. 202, 241 (2011) (“After 21 years without hearing a personal jurisdiction case, the Supreme Court had the opportunity this past term to use the \textit{Goodyear} and \textit{McIntyre} cases to answer questions about the minimum contacts requirement that have remained unaddressed for 144 years. . . . Unfortunately, the Supreme Court did not accomplish even the least of these goals.”).
understood as “incompletely theorized agreements”\(^{287}\) that have resulted in new jurisdictional rules without alleviating the underlying conceptual schisms apparent between the justices in their separate opinions three terms ago in *J. McIntyre Machines, Ltd. v. Nicastro*.\(^{288}\) The Court has severely curtailed the availability of both general jurisdiction and effects-test jurisdiction, evincing concern that the defendant’s ability to control the jurisdictional consequences of its actions would otherwise be impaired. This has shifted the pre-existing balance of power to defendants, but there are enough unresolved issues in the doctrine of personal jurisdiction to allow a re-calibration of the jurisdictional framework in a way that better balances the underlying interests of the parties and states without infringing on fundamental liberty interests.

This framework must give due regard to the state’s regulatory and adjudicatory interests. The Roberts Court frequently highlights the need to protect state sovereign regulatory authority from federal intrusions, allowing states to conduct elections without federal preclearance,\(^{289}\) to define marriage,\(^{290}\) and to decide whether to implement a federal program.\(^{291}\) But state sovereign regulatory authority does not only become imperative when threatened by Congress.

The state must have the authority to regulate both conduct occurring within its borders and conduct intended to obtain the benefits and advantages of its laws. Otherwise, the essential element of its sovereignty would have been lost to a greater extent than possible from any potential federal incursion. As the core attribute of internal sovereignty is power over those within the sovereign’s boundaries, a state without such regulatory authority is not truly sovereign. The state’s adjudicative authority should thus encompass those


\(^{290}\) See United States v. Windsor, 133 S. Ct. 2675, 2681 (2013).

circumstances in which it has legislative jurisdiction to prescribe rules of conduct for nonresidents affiliating with the forum. For many years, the Supreme Court has resisted combining the analyses for personal jurisdiction and choice of law, preferring instead to maintain separate doctrines to be evaluated independently. In reality, however, these doctrines are closely connected. The state’s interest in protecting its citizens lies at the heart of the adjudicatory system; jurisdictional limits that counteract the state’s ability to enforce its legislative priorities necessarily erode the judicial safeguards within our federal system. Of course, conflicts may arise that make it unreasonable for a forum to apply its own law; those conflicts, although analytically complex, should be at least considered before the personal jurisdiction determination is made. If the “application of forum law pose[s] an unjustified threat to the regulatory scheme of another jurisdiction” as well as “a concomitant danger to defendants who assumed that their actions would be governed by that regulatory scheme,” then there is little state interest. On the other hand, for defendants establishing those state affiliations that should be expected to implicate the state’s regulatory power, the state’s interest in applying its own law should be sufficient for adjudicative jurisdiction.

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292 See, e.g., Nicastro, 131 S. Ct. at 2790 (“A sovereign’s legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts.”); Shaffer v. Heitner, 433 U.S. 186, 215 (1977) (“[W]e have rejected the argument that if a State’s law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.”); Hanson v. Denckla, 357 U.S. 235, 254 (1958) (“The issue is personal jurisdiction, not choice of law.”).


294 See Miller, supra note 5, at 360 (arguing that “the erecting of procedural stop signs . . . has produced collateral systemic and societal costs that are far too high”).

295 See Stewart E. Sterk, Personal Jurisdiction and Choice of Law, 98 IOWA L. REV. 1163, 1206 (2013) (“A focus on choice of law explains the importance of state lines. If limits on personal jurisdiction reflect concern about intrusion on state sovereignty, the concern is that the result achieved in the forum will upset the ability of another jurisdiction to regulate local activity.”).

296 Id. at 1167.

The state interest, though, should not be defined merely in terms of its legislative adjudicative power, but must also encompass the broader predominant duty of a sovereign — to protect its citizens and other inhabitants. Under the social contract theory that infused early American political thought, the very raison d’être for states was to protect the life, liberty, and property rights of its citizens. Even though in past jurisdictional decisions the Supreme Court has acknowledged non-regulatory state interests, including protecting citizens and visitors from harms suffered within the state and providing a convenient forum for its citizens injured by nonresidents, the Court must now, with the severe constriction of general jurisdiction, truly give effect to these interests when balancing liberty and state adjudicative authority. While these non-regulatory state interests, standing alone, cannot trump the liberty interest of a defendant conducting only a “single or occasional” forum act, as the plaintiff’s contacts alone cannot be decisive, the calculus changes for those defendants conducting systematic, continuous, and substantial forum activities. As such an extensive in-state affiliation by the defendant diminishes its reasonable expectation of avoiding a lawsuit there, the countervailing non-regulatory state and individual interests should weigh more heavily in the balance.

Explicit evaluation of all the various state interests would lead to a more cohesive doctrine overall. A strong state regulatory interest, for example, might counter a dormant commerce clause objection jurisdiction based on the appointment of a registered agent for service of process. Conversely, a weak or nonexistent state interest would make the assertion of jurisdiction based on that same appointment unreasonable, and would provide a ground for contesting the assertion of jurisdiction. The state’s interest, of course, could very well include class action and aggregation policies that make litigation possible for low-value individual claims.

jurisdiction over a defendant creating a “deliberate affiliation with the forum State”).


301 See generally Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 415 (2010) (discussing the substantive and procedural issues bound up in the question of class certification, and concluding that “[a]t the end of the day, one must come face to face with the decision whether or not the state policy (with which a putatively procedural state rule may be ‘bound up’) pertains to a substantive right or
that a state may, in some instances, have a strong enough interest to apply its own law to a nationwide class action.\textsuperscript{302} If the state possesses such an interest and if the defendant’s in-state contacts have caused harm to some (though perhaps not all) of the plaintiffs, then the court should be able to exercise jurisdiction over the case.

Pendent claims would be subject to the same limitation. Thus, when related claims form part of the same constitutional case or controversy, the court would generally be empowered to hear the whole case as long as personal jurisdiction over the defendant was proper for one of the claims.\textsuperscript{303} However, if the case as a whole and the defendant’s activities are connected only tenuously to the forum, such that the state had only a minimal interest in the case, then the court would likely abuse its discretion if it chose to retain jurisdiction.\textsuperscript{304} Likewise, when the jurisdictional justification for the “anchor claim” is itself weak — as when it depends on a marginal claim of “effect” in the jurisdiction — then the case for pendent jurisdiction would be even weaker, and the court should dismiss the case.\textsuperscript{305}

The strength of the state’s regulatory and non-regulatory interests should also be considered in determining the level of “connectedness” or “relatedness” needed to sustain specific jurisdiction. If the state has a regulatory interest in the case because an element of the plaintiff’s claim depends upon the defendant’s purposeful forum activities, the cause of action is sufficiently related to the defendant’s forum contacts for specific jurisdiction. But the state’s regulatory interest should not define the outermost limits of specific jurisdiction over those defendants conducting continuous and systematic activities within the state; here, the state’s other interests in protecting its inhabitants from injury and providing a forum to its citizens should allow a greater

\textsuperscript{302} See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (requiring “that for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair” (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981))).

\textsuperscript{303} See supra Part II.B.

\textsuperscript{304} See, e.g., United States v. Botefuhr, 309 F.3d 1263, 1274 (10th Cir. 2002) (concluding that once anchor claims were dismissed, the district court abused its discretion by retaining the additional claims that lacked an independent basis for specific personal jurisdiction).

\textsuperscript{305} See Fiore v. Walden, 657 F.3d 838, 853, 858 (9th Cir. 2011), superseded by 688 F.3d 558 (9th Cir. 2012), rev’d, 134 S. Ct. 1115 (applying the effects test to gain jurisdiction over a false-affidavit claim).
expanse of relatedness that encompasses claims sufficiently similar to the defendant’s in-state activities.

Finally, any consideration of the state’s interest will also have to consider the context in which the claim arises, and, as the internet takes on an even greater role in commerce and communications, the defendant’s alleged state contacts will include internet contacts. In spite of the Supreme Court’s reluctance to extend its effects-test ruling to internet contacts, there is no reasoned basis to exclude it. Internet activity has been thoroughly integrated into daily life in both the personal and the professional sphere, greatly facilitating commerce but also increasing the likelihood that defamatory or otherwise wrongful speech would cross state boundaries. Importantly, when internet-based activity gives rise to a suit, we cannot predict whether either the plaintiff or the defendant will be a corporate entity, a small business, or an individual. It is increasingly common, for example, that corporations will sue individuals for their negative online reviews; we cannot assume that any defendant will easily have the ability to cross state lines to defend a case or that the plaintiff cannot easily sue in the defendant’s home forum. Jurisdictional rules therefore must not presuppose that either party will have substantial litigation resources or that either party will necessarily be in a more powerful position than the other.

Bauman and Walden’s limitations on adjudicative jurisdiction will thus be the impetus for new directions in jurisdictional doctrine. But for these new directions to accord with the roles of states in our federalist system, the Supreme Court must expand its defendant-centric focus to incorporate a more thorough analysis of the countervailing state regulatory and non-regulatory sovereign interests at issue. The suit involving our Michigan family should be able to proceed in Michigan in light of the minimal burdens on the national resort chain and the

306 Note, No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet, 116 HARV. L. REV. 1821, 1844 (2003) (stating that it is “increasingly difficult to separate Internet activities from activities unrelated to the Internet,” and “the problems the Internet presents for personal jurisdiction doctrine [therefore] become the problems of personal jurisdiction doctrine generally”).

307 See Robertson, supra note 100, at 1353.

308 See id.


310 See Robertson, supra note 100, at 1354.
state sovereign interests at stake. Future judicial decisions must find the doctrinal and normative paths to a result so intuitively fair that the company would not have even challenged jurisdiction before \textit{Bauman}.

\textbf{CONCLUSION}

This term’s decisions in \textit{Bauman} and \textit{Walden} will significantly disrupt personal jurisdiction doctrine as practiced in state and federal courts all over the country. Multistate and multinational corporations conducting significant in-state business will now bring jurisdictional challenges that have not been thought appropriate since before the minimum contacts standard. This doctrinal shift will require courts to confront and resolve the most challenging issues in personal jurisdiction, such as the connectedness requirement for specific personal jurisdiction, pendent personal jurisdiction, the appropriate scope of the effects test, and exacted consent to do business in the state, all without meaningful guidance from the Supreme Court. \textit{Bauman} may therefore become one of the most significant jurisdictional decisions — if not the most significant decision — since \textit{International Shoe}.

But perhaps the initial chaos will stabilize into a new equilibrium, with courts re-calibrating specific jurisdictional doctrine to account for the demise of general contacts jurisdiction and the limitation on effects-test jurisdiction. One method to accomplish this new balance is to recognize that \textit{International Shoe} described two categories of specific jurisdiction, not just one. The balance of individual and state interests should tilt toward authorizing jurisdiction in those situations in which the defendant’s forum activities fall within \textit{Shoe}’s “continuous and systematic” category. In contrast, for adjudicatory jurisdiction in the “single or occasional” acts scenario, the state must have a tighter link to its sovereign regulatory interests. This guidepost preserves defendants’ liberty interests while accommodating countervailing state interests and can assist lower courts in resolving the myriad of new jurisdictional challenges that will arise in the years to come.
A General Look at Specific Jurisdiction

Towards a unified theory of “arising out of” or “related to” jurisdiction where the defendant’s forum conduct contributed to the plaintiff’s claims

Lea Brilmayer†

INTRODUCTION

Success, in domestic and international litigation alike, depends on finding a court with jurisdiction over the defendant. American constitutional law, which governs assertion of jurisdiction even over international defendants in American courts, has developed the subject of personal jurisdiction into a fine art. It’s all a question of whether “minimum contacts” exist between the defendant and the forum, and whether the assertion of jurisdiction satisfies a standard of “fair play and substantial justice.”

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1. See Int’l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice” (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); see also Milliken, 311 U.S. at 462-63 (“Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied.”).
tion is said to be one of specific jurisdiction; if not, the higher threshold for general jurisdiction must be met.\(^2\)

Almost identical logic prevails in the international context. Given the realities of international commerce today, it’s unsurprising that many of the cases at the core of any study of American personal jurisdiction arose out of cross-border transactions. In *Asahi Metal Industry*,\(^3\) a Japanese valve manufacturer sold products to a Taiwanese tire assembler, which then sold its tires all over the world. After an alleged defect in one of the tires caused a motorcycle accident in California, courts had to decide whether the Japanese valve manufacturer was subject to California’s jurisdiction. In *Helicopteros Nacionales de Colombia*,\(^4\) a Colombian corporation contracted with a Peruvian company, which was part of a joint venture based in Texas, to provide helicopter transportation services for the venture. When one of the helicopters crashed in Peru with Americans onboard, courts had to decide whether the Colombian corporation could be sued for wrongful death in Texas. In *J. McIntyre Machinery, Ltd.*\(^5\) a British company manufactured a shearing machine that injured a plaintiff in New Jersey. In *Goodyear Dunlop Tires*,\(^6\) North Carolina residents travelling on a bus in France were harmed by an accident allegedly caused by an international subsidiary of an American corporation. All such cases implicate international law, business, and politics. Where personal jurisdiction is concerned, domestic law has global consequences.

It is clear that assertions of jurisdiction that target international defendants must meet the same contacts requirement as assertions of jurisdiction that target purely interstate defendants. Moreover, the jurisdiction law of foreign nations and international or regional governance institutions in many cases reflects the same or similar concepts.\(^7\) What is called for is a unified theory of specific jurisdiction, relying on concepts of general applicability, to explain the common-

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2. See Hanson v. Denckla, 357 U.S. 235, 252 (1958) (“Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida.”); Int’l Shoe Co., 326 U.S. at 318 (“While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”) (internal citations omitted)).


5. J. McIntyre Machinery, Ltd. V. Nicastro, 564 U.S. 873 (2011) (Discussing the requirement of purposeful availment and its application to a case against an English company).


alities underlying all of these examples of the concept of “arising out of” or “related to” jurisdiction.

If negligent driving causes a car crash in Berlin, Connecticut, and suit is brought in New York, then the question of jurisdiction in the Empire State is one of general jurisdiction and a very substantial connection must be established. For individuals, New York domicile or residence would be enough. For corporations, jurisdiction would exist if the defendant was incorporated or had its principal place of business there. The same substantial connections between New York and the defendant are required if the crash occurred in Berlin, Germany.

If suit was filed in Connecticut, however, it would matter whether this crash occurred in Berlin, Connecticut or Berlin, Germany. If the case were filed in the Nutmeg State, the Berlin, Connecticut suit would be one of specific jurisdiction because the connections to the forum would be “related to” the accident. A smaller number of contacts would be enough. For both interstate and international cases, that is to say, the requirements for general and specific jurisdiction are sufficiently different that this initial categorization is a “make or break” matter in many cases. For both interstate and international cases, it matters whether the suit was filed in the place where the accident occurred.

The matter is clear enough in hypothetical examples, but reality is, as usual, more complex. In close cases, how can we tell whether a dispute “arises out of” some particular contact with the forum? 8 Enter the United States Supreme Court. Existing authority on specific jurisdiction, I argue here, supports the requirement that for “arising out of” or “related to” jurisdiction, the defendant’s forum activities must have somehow contributed to the plaintiff’s claim.

Assertion of personal jurisdiction over nonresidents is not an end in itself. 9 It is a means to the end of promoting the public good in the forum state by supporting socially desirable behavior and discouraging the infliction of harm. It does this, in part, by requiring defendants to compensate those they injured within the forum state, or who were injured by conduct directed at the forum state.

Supreme Court precedents upholding specific jurisdiction all involve forum contacts which made the plaintiff’s injuries possible, or more probable; in such cases, assertion of jurisdiction reinforces the deterrent effect of substantive law. 10 The requirement that specific jurisdiction rest on forum contacts that “contributed to” the plaintiff’s claims is thus a consequence of the rational basis test; state action is constitutional only where it bears a rational relationship to a legitimate state interest. 11

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8. For the few Supreme Court precedents that bear on the issue, see infra text accompanying notes 22-26.
9. See infra text accompanying notes 43-44.
11. Traditional notions of federalism and individual liberty foreclose states’ ability to exercise extraterritorial power (such as one state regulating the national market) from being legitimate. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (“[T]he requirement that a court have personal jurisdiction comes from the Due Process Clause’s protection of the defendant’s personal liberty interest, and . . . the requirement represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”) (internal citation omitted).
The generality of this reasoning is what accounts for the possibility of a unified theory of specific jurisdiction, applicable in both interstate and international cases. The task of developing such a unified theory has fallen to the highest courts of the states in the international system because no international court with the responsibility over international civil cases has been established. The general principle is that a state has no rational basis for adjudicating cases in which the defendant’s behavior in the forum did not contribute to the plaintiff’s injury. A court must ask, “in what way did this forum event, forum person, or forum property contribute to the plaintiff’s alleged harm?” If the answer is that it did not, the forum contacts can be counted only towards general jurisdiction.

I. A REPRESENTATIVE CASE

While obviously important from a theoretical perspective, interest in the issue is not limited to law professors. For lawyers and judges, distinguishing between specific and general jurisdiction is probably the most important single jurisdictional problem remaining to be resolved. At stake in the determination of jurisdiction is more than just litigation convenience; there are also serious choice of law implications. For example, under settled choice of law principles, the forum’s statute of limitations is considered “procedural” and therefore, like other “procedural” rules, applies to all of the cases that are brought there.12 Also at stake are matters such as variation among juror attitudes in different regions of the country; the availability of punitive damages (a “remedial” question); and the differences in choice of law approaches that states in the country employ to decide which substantive law should govern a dispute.

The issue’s practical significance stems from the frequency with which it arises in mass tort litigation against large corporations. One of the standard problems involves product liability disputes against large manufacturers.13 The defendant typically has his or her home base in one state (call it Alpha), and the plaintiff lives and was injured in another (Beta). The defendant’s alleged malfeasance may be limited to Alpha (the defendant’s home base), but for many manufacturers markets are nation- or worldwide, and injuries may occur all around the country and across the globe.

In the hypothetical under construction, I will call the forum – a third state – Gamma. Alpha and Beta both seem like logical places to sue, but what ex-

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12. This practice was upheld against a Due Process Clause challenge in Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

13. The case that the Court agreed to hear on January 19, 2017, involves the pharmaceutical giant Bristol-Myers Squibb (BMS) which owns the patent to, and now manufactures, the blood thinner drug Plavix. At issue in the Plavix litigation is whether BMS can be sued in California for sales and injuries, allegedly caused by the drug all around the nation. The contacts with the California forum were, first, that some fraction of the claims arose in California, and, second, that BMS has offices there to facilitate its California operations. See Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 886 (Cal. 2016) (“In the present matter, there is no question that BMS has purposely availed itself of the privilege of conducting activities in California, invoking the benefits and protection of its laws, and BMS does not contend otherwise. Not only did BMS market and advertise Plavix in this state, it employs sales representatives in California, contracted with a California-based pharmaceutical distributor, operates research and laboratory facilities in this state, and even has an office in the state capital to lobby the state on the company’s behalf.”).
plains the choice of Gamma? Sometimes the defendant has additional activities in Gamma, such as parts of its distribution network or sales of the product to locals. There may also be persons claiming to have been injured who are now living in Gamma. It is not clear what to make of these connections with the forum if the specific plaintiff whose jurisdictional claim is under consideration was not among them. Our plaintiff purchased the drug and was injured at her home in Beta.

Does it matter that there are other plaintiffs who, having been injured in Gamma, are permitted to sue in Gamma? Does it matter that the defendant marketed its products in the forum, when our plaintiff only purchased the product that injured her at her home? Are the defendant’s Gamma-located contacts “related to” the dispute between it and our Beta plaintiff? Does her cause of action “arise out of” the defendant’s Gamma-situated conduct?

Jurisdictional requirements such as the “arising out of” requirement determine the ultimate size of such cases, that is, the number of plaintiffs who are permitted to sue in a particular forum. These cases can be so massive that a loss in the courts would threaten to bankrupt even the very largest defendant. Restrictive jurisdictional rules promise to prevent a case from being financially devastating, even if it remains incredibly expensive. Defendants love them.

One intuition that plaintiffs’ lawyers commonly rely on is that the Beta plaintiff’s case is “related to” the litigation in Gamma because of its substantive similarity to injuries occurring in Gamma. If followed, such intuitions often result in giving the plaintiff – who of course picks the forum that is best from her own point of view – her choice of fifty places to sue.

Appealing as this intuition may sound to plaintiff-friendly lawyers, it is of doubtful constitutional stature under existing Supreme Court precedent. Americans sometimes characterize the jurisdictional practice of other nations as “exorbitant.” But the reach of the American long arm in such cases strikes some commentators as truly scandalous.

II. PROPOSALS FOR A STANDARD

There is little in the way of clear standards for what makes a contact with the forum “related to” the litigation or qualifies a dispute as “arising out of” the defendant’s contacts with the forum. There is no consensus approach – either academic or judicial – and the few writers who have addressed the question

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14. Another common reaction is that Gamma is the logical place to consolidate all of the litigation. The constitutionality of this argument is highly suspect after Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (holding that jurisdiction in a nationwide class action might not be established by considerations of convenience of litigation consolidation.)

15. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (“Due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts with the forum such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (Internal citation omitted)); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-472 (1985).


17. This reaction is not limited to jurisdiction in mass tort cases. For example, the American practice of “tag jurisdiction” has been the subject of considerable condemnation. Id. at 478.
have mostly fallen victim to the lure of “sliding scales” and “nexus tests.” Meanwhile defendants complain bitterly as injured people (and of course their lawyers) energetically shop around for the advantageous place to litigate.

Increasingly, these hunting expeditions zero in on the United States. U.S. domination of the market for international tort litigation supports a new form of imperialism in which economic migrants vie for entry into the most plaintiff favoring forum in the (interstate) market in the most plaintiff favoring (international) state. This does a disservice (defendants argue) to the orderly administration of justice, confirming stereotypes about American lawyers chasing ambulances and holding the Due Process Clause up to ridicule. It creates the unattractive impression that anything less than American justice is a half measure, second best if that.

There is reason to think that time may be running out on this era of laissez faire. On January 19, 2017, the Supreme Court granted certiorari on a case that squarely presents the issue of distinguishing specific from general jurisdiction. Whether or not the Court pays heed to proposals debuted in the academic literature – none of which have been widely adopted – the chances are good that it will somehow clarify the jurisdictional standard in the near future. Here I survey the available models.

A. Substantive Relevance

In earlier articles, I have argued that the test for specific jurisdiction includes a requirement that the contact with the forum be “substantively relevant” to the dispute. Supreme Court cases cited as illustrating this line of reasoning included *Shaffer v. Heitner* and *Rush v. Savchuk*.

The earlier of these cases was *Shaffer*. Ownership of stock in a company incorporated in Delaware was held not to be a sufficient basis for Delaware jurisdiction despite the claim that this property was located in the forum. The Court revolutionized personal jurisdiction doctrine by requiring that to serve as a basis for jurisdiction, property not be “completely unrelated to” the plaintiff’s cause of action:

>[W]here, as in the instant quasi in rem action, the property now serving as the basis for state-court jurisdiction is completely unrelated to the plaintiff’s cause of action,

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18. See, e.g., Bristol-Myers Squibb Co., 377 P.3d at 885.

19. As an example of the attractiveness of a U.S. forum for cases originating outside the United States, see the eagerness of foreign plaintiffs to bring claims under the Alien Tort Statute, largely rejected in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). In the tort context, consider the litigation against Union Carbide arising out of the 1984 chemical spill in Bhopal, India. See generally Mark A. Chinen, *Jurisdiction: Foreign Plaintiffs, Forum Non Conveniens, and Litigation Against Multinational Corporations*, 28 HARV. INT’L L. J. 202 (1986).


22. Shaffer v. Heitner, 433 U.S. 186, 213 (1977) (“Appellants’ holdings in Greyhound do not, therefore, provide contacts with Delaware sufficient to support the jurisdiction of that State’s courts over appellants.”).
the presence of the property alone, i.e., absent other ties among the defendant, the State, and the litigation, would not support the State’s jurisdiction.23

Then three years later, the Court revisited the matter. In *Rush*, the plaintiff was injured in a car accident allegedly caused by the defendant in Indiana. The plaintiff moved to Minnesota, where he proceeded to sue the defendant in Minnesota state court. The plaintiff sought to obtain “quasi in rem” jurisdiction by garnishing the obligation of defendant’s insurance company to defend him in court. This obligation was said to be located in Minnesota, one of the places where the insurance company did unrelated business.

It was arguable that the insurance policy was “related to” the auto accident because it was an auto insurance policy purchased specifically to ensure the legal representation to and indemnification of the defendant in the event of an accident. The Supreme Court, however, put its foot down. Neither Minnesota nor any other state could “constitutionally exercise quasi in rem jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit.”24 *Rush* definitively abolished jurisdiction based on the presence of a third party insurance policy, emphasizing that the policy was not the subject matter of the cause of action:

The insurance policy is not the subject matter of the case, . . . nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court’s jurisdiction unless they demonstrate ties between the defendant and the forum.25

As this line of argument makes clear, *Rush*, like *Shaffer* before it, can be interpreted as an application of the “substantive relevance” standard.26

The fact pattern in *Helicopteros Nacionales de Colombia* illustrates what is at stake.27 The forum, Texas, sought to exercise jurisdiction over legal claims arising out of a helicopter crash in Peru. Texas was the site of some discussions leading up to the signing of the contract arranging the helicopter services in question. The defendant had also purchased helicopters from a manufacturer in Texas. Its personnel occasionally went to Texas for training and some payments had been made from a bank in Houston.

The Court sidestepped the issue of whether these contacts were related to the dispute by asserting that this issue had not been raised by the parties; they had, it wrote, framed the argument in such a way as to concede the non-existence of specific jurisdiction.28 It seems clear, however, that the contacts would not have satisfied the substantive relevance test. The cause of action brought in Texas was not connected to the contract arranging transportation services – a contract to which the plaintiff was not a party. These contacts were

23. *Id.* at 187 (emphasis added).
25. *Id.* at 329.
28. *Helicopteros Nacionales de Colombia*, S.A., 466 U.S. at 415 (“All parties to the present case concede that respondents’ claims against Helicol did not ‘arise out of,’ and are not related to, Helicol’s activities within Texas.”).
alleged not for reasons of their substantive connection to the dispute, but solely as a means of obtaining jurisdiction.

The substantive relevance test has been criticized for its supposed focus on technical pleading requirements.29 As Justice Brennan wrote in his dissent in Helicopteros:

Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant’s contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State. For example, the complaint filed against Helicol in this case alleged negligence based on pilot error. Even though the pilot was trained in Texas, the Court assumes that the Texas courts may not assert jurisdiction over the suit because the cause of action ‘did not “arise out of,” and [is] not related to,’ that training. If, however, the applicable substantive law required that negligent training of the pilot was a necessary element of a cause of action for the pilot error, or if the respondents had simply added an allegation of negligence in the training provided for the Helicol pilot, then presumably the Court would concede that the specific jurisdiction of the Texas courts was applicable.30

The existence of personal jurisdiction, it is argued, should not depend on the formal requirements of the cause of action.

The substantive relevance test need not be interpreted that way, however; other areas of law impose requirements of substantive relevance without facing such objections. One particularly useful example is the evidentiary requirement that, to be admissible at trial, evidence must be legally relevant to the dispute.31 Rule 401 of the Federal Rules of Evidence reflects the common logic underlying the substantive relevance test and (as I will argue below) both the test of but/for causation and the “contributing to” requirement. According to Rule 401, evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Although this rule requires that careful thought be given to the legal prerequisites of the cause of action, it has not been understood to tie evidentiary rulings to technical pleading requirements.32

29. See, e.g., Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, Toward A New Equilibrium in Personal Jurisdiction, 48 U. CAL. DAVIS L. REV. 207, 234 (2014) (“Briefly stated, the substantive relevance test is considered too narrow and dependent upon formal pleading requirements.”). See also Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 427 (1984) (Brennan, J., dissenting) (“Limiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant’s contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State.”); Mary Twitchell, The Myth of General Jurisdiction, 101 HARV. L. REV. 610, 656 (1988) (“Although the substantive relevance standard can eliminate some contacts as clearly not relevant, it is difficult in other cases to know which facts ‘go to make up’ the cause of action, what constitutes a ‘geographical qualification’ of a fact relevant to the merits, when an act is ‘in the forum,’ or when a forum event is sufficiently attributable to the defendant to call it a ‘contact’ at all.”).


31. FED. R. EVID. 402 (“Relevant evidence is admissible . . . Irrelevant evidence is not admissible.”).

32. The Advisory Committee wrote, “[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand.” Notes of Advisory Committee on Proposed Rules. FED. R. EVID. 401 advisory committee’s note.
The substantive relevance test appears, at any rate, to be too restrictive for its critics, who seem to want a more flexible approach that allows consideration of a broader range of forum contacts. Importantly, though critics have not argued that this test is overly inclusive. That is, they have not argued that substantive relevance is insufficient to establish “arising out” of jurisdiction. Substantive relevance is, perhaps, only one way to determine that a dispute meets the constitutional requirements of “arising out of” and “related to” contacts. Although this test satisfies all existing United States Supreme Court authority, other tests may do so as well. The test of “but/for causality” is one of the alternatives.

B. But/for Causality

Another well known test is “but/for” causality. It may be what Justice Brennan had in mind when he wrote in his dissenting opinion in Helicopteros that “[t]he negotiations that took place in Texas led to the contract in which Helicol agreed to provide the precise transportation services that were being used at the time of the crash.” One event is a “but/for” cause of another event if, had the former not occurred first, the latter would not have happened thereafter. It resembles the Rule 401 requirement that an item of evidence must “has[ve] any tendency to make a fact more or less probable than it would be without the evidence.”

The causality test has considerable appeal, and properly understood, leads to almost the same results as “substantive relevance.” The reason is that but/for causation is often interpreted in line with substantive tort law concepts. Jurisdictional causation is thus brought into line with substantive causation, thereby limiting specific jurisdiction to considerably more manageable proportions.

The substantive causation model on which specific jurisdiction might be modeled – the doctrine of “proximate cause” – restricts recovery in tort law to situations where the harm was reasonably foreseeable. Generally, in order to be liable for a tort claim, a defendant must be found to have proximately caused the harm alleged. No one is held liable for everything they cause inadvertently; if the harm they cause is deemed too remote, then defendants generally escape liability. In considering satisfaction of the proximate cause requirement, courts often ask whether the harms a defendant’s conduct caused would have been foreseeable by a reasonable person at the time the defendant acted.

In an opinion by Benjamin Cardozo, that is now a favorite of introductory torts courses, a railroad company was held not liable for all of the harms caused by its employees’ negligent behavior when they helped a person try to mount a moving train. In his haste, the would-be passenger dropped the package he was carrying, which, unbeknownst to the railroad employees helping him, contained

33. See, e.g., O’Connor v. Sandy Lane Hotel Co., Ltd., 496 F.3d 312, 322 (3d Cir. 2007); Mattel, Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 864 (9th Cir. 2003); Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995); Shute v. Carnival Cruise Lines, 897 F.2d 377, 385 (9th Cir. 1990), rev’d on other grounds, Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991); Tatro v. Manor Care, Inc., 625 N.E.2d 549, 553-55 (Mass. 1994). For an overview of the case law, see Rhodes & Robertson, supra note 29, at 232-33.
34. Helicopteros Nacionales de Colombia, S.A., 466 U.S. at 426.
explosives. The package exploded on contact with the ground, causing reverberations around the station. The reverberations in turn caused a heavy set of scales to fall on a bystander at the other end of the station. It was the bystander who sued. As Judge Cardozo wrote:

The conduct of the defendant’s guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest. 35

The same or similar proximate causation limits, unsurprisingly, are placed on “but/for” tests of specific personal jurisdiction. And this is for the same or similar reasons. Were we simply to ask, “but for events taking place in the forum, would the harm have occurred?” we might find that the forum’s jurisdiction had no end. When Ted Kaczynski’s parents married and conceived a child, they set in motion a chain of events that resulted in the murders of three innocent people by letter bombs. For example, if their marital residence was in New Jersey, the families of Kaczynski’s victims would hardly be justified in suing the Unabomber there on the theory that his parents’ marital relationship was a “but/for” cause of the serial killings. 36

C. Similarity

Finally, the similarity test is responsible for much of the “anything goes” nature of some academic commentary. 37 If a defendant ships any comparable goods to a plaintiff favoring state, then all of the claims alleging injury from the product as it has been used anywhere in the world would end up being adjudicated in that state. This would be done under that state’s procedural law and with whatever other advantages to litigating in that particular forum.

The “similarity” test suffers from having no coherent theoretical justification. Why should a manufacturer be subject to jurisdiction in Gamma just because it sent similar articles into the state? If those other, similar articles caused harm, then the proper response is to litigate those injuries in Gamma – not to turn Gamma into a nationwide center for litigation. But if none of those similar articles caused any harm, then the case for jurisdiction in Gamma is even weaker.

37. See, e.g., Benjamin Spencer, Jurisdiction to Adjudicate: A Revised Analysis, 73 U. Chi. L. Rev. 617, 672 (2006) (“So too have plaintiffs languished under a doctrine that closed courthouse doors that more properly should have been open.”); Allan R. Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L. Rev. 781, 783 (1985) (“In the last forty years, an upheaval in the procedural law of private international and interstate disputes has occurred. Every doctrine used to mediate between jurisdictions competing to resolve lawsuits having interstate connections – jurisdiction, venue, and choice of law – has undergone dramatic change. Both jurisdiction and venue have been greatly expanded, and the conflicts rules have become more diverse and manipulable.”)
III. FORUM EVENTS THAT “CONTRIBUTE TO” THE DISPUTE

My approach embodies elements common to the “but/for” and “substantive relevance” tests. In deciding whether specific jurisdiction exists, a court should ask whether the defendant’s forum contacts in some way contributed to the plaintiff’s claim. Specific jurisdiction exists only where something in the forum somehow helped to bring about the plaintiff’s alleged injury. Something happening in the forum must have made the injury more likely, more serious, or more of the defendant’s responsibility. If the defendant’s activities in the forum in no way contributed to the events making up the dispute, they do not support specific jurisdiction.

This test is securely grounded in the language of the Due Process Clause, which has been interpreted to focus on “fair play and substantial justice” – concepts that have as much relevance in the international setting as the interstate setting. If personal jurisdiction was based solely on deference to other sovereigns, then it might make sense to treat international cases differently from interstate cases. Because under the Full Faith and Credit Clause states are not required constitutionally to give the same respect to the laws of foreign countries as to the laws of sister states, a theoretical explanation for personal jurisdiction that implicated only deference to other sovereigns might treat international cases as embodying a lower standard for jurisdiction. Where the explanation rests, instead, on fairness to people it is not surprising that international and interstate cases are treated the same.38

If jurisdiction is based on a factor that does not contribute to the plaintiff’s claim, then jurisdiction is not a function of the merits of the dispute. A single substantive legal fact pattern may result either in jurisdiction, or no jurisdiction, depending on something extrinsic to the merits such as the defendant’s California offices in Bristol-Myers Squibb.39 The jurisdictional result, in other words, does not depend on the merits of the dispute but on this extrinsic variable. If the defendant has no unrelated office in the forum – whether because its unrelated offices are situated elsewhere, or that it has no such unrelated offices anywhere – then there is no jurisdiction; but if it does, then jurisdiction exists. What is jurisdiction, then, a function of? What explains this difference in treatment? No rational basis for the different treatment has been suggested.

A. Foundations of the “Contributed To” Requirement

The legal foundations of this common sense “contributed to” standard reflect both the Constitution’s general disapproval of extraterritoriality as well as its general insistence on a minimum level of rationality. The general disapprov-

38. The question of what individual fairness requires is discussed infra text accompany notes 43-44.
39. In Bristol-Myers Squibb, the defendant had offices in California (the forum) which the California Supreme Court cited as supporting jurisdiction in that state. However, the offices had played no part in the harms that the plaintiff suffered in his home state. Bristol-Myers Squibb Co, 377 P.3d at 879 (“BMS further asserted that its research and development of Plavix did not take place in California, nor was any work related to its labeling, packaging, regulatory approval, or its advertising or marketing strategy performed by any of its employees in this state.”).
al of extraterritoriality, which is manifested in a number of constitutional provisions, is symptomatic of the United States’ federal structure, which respects and preserves states’ rights while protecting states from encroachment by one another.  

The rational basis test of the Fourteenth Amendment Due Process Clause protects individuals from irrational state action.41 The “contributed to” requirement is firmly grounded on explicit constitutional provisions; it is not a purely theoretical construct, and it is as consistent with existing precedents as it is with common sense.

But the constitutional logic on which the due process argument rests is equally convincing as a matter of simple fairness. The concepts of fair process and reasonableness are shared by the interstate and the international context. International and interstate cases are different for some jurisdictional purposes. In Home Insurance Company v. Dick, the plaintiff sought application of Texas law to his dispute with his insurer. 42 All of the relevant connections were with Mexico, however. In declaring the application of Texas law invalid, the Supreme Court rejected the plaintiff’s argument that “the Federal Constitution does not require the States to recognize and protect rights derived from the laws of foreign countries.” This would be relevant, the Court wrote, if the defense against Texas law had been based on the Full Faith and Credit Clause, which does not require deference to the laws of foreign countries. But the Due Process Clause, wrote the Court, extends equally to the international context and it would be a violation of that clause for Texas to apply its law to a case with which it had no contacts.

Due process requires that exercise of state authority be fair and reasonable. These values are as important where aliens’ rights are at stake as when the

40. The chief constitutional limit on extraterritoriality is the Fourteenth Amendment Due Process Clause, U.S. Const. amend. XIV. See, e.g., Home Ins. Co. v. Dick, 281 U.S. 397, 407 (1930) (“The Texas statute as here construed and applied deprives the garnishees of property without due process of law.”). See also U.S. Const. art. IV § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”); U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). The Commerce Clause has also played a role in federal policing of state extraterritoriality. See, e.g., Healy v. Beer Inst., Inc., 491 U.S. 324, 324 (1989) (holding that Connecticut’s beer-price-affirmation statute violates the Commerce Clause).

41. The first section of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

For a foundational case involving rational basis review, see U.S. v. Carolene Products Co., 304 U.S. 144 (1938). See also, U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

target of the forum’s exercise of power is the resident of another state of the Union. “[Due Process Clause] protection” wrote the Court “extends to aliens” and this simple assertion remains unchallenged today, when a case involves the authority of a state court to extend its long arm into the international arena. U.S. legal history of jurisdictional doctrine provides an illustration of how that reasoning plays out in one specific context. As, effectively, one of the highest courts in the international legal system, the United States Supreme Court bears considerable responsibility – and has the greatest opportunity – for developing these standards of general fairness and legitimate state authority.

B. Individual Rights and State Sovereignty

The requirement that the defendant’s forum activities have contributed to the plaintiff’s cause of action is grounded directly in the constitutionally protected values of individual due process and state territorial sovereignty. A preliminary word is necessary to clarify the relationship between these two constitutional values, since that relationship has sometimes been misunderstood.

Deciding an issue of personal jurisdiction does not – despite some suggestions to the contrary – require a court to make a categorical choice between sovereignty and fairness, rejecting one as a basis for the doctrine and adopting the other.43 It is mistaken to conceptualize personal jurisdiction issues as though they could only embody one of these; personal jurisdiction is not a binary matter. Jurisdiction cases implicate both individual rights and territorial sovereignty, and which one prevails in a particular dispute depends on the specific circumstances.

Disputes over personal jurisdiction are legal struggles between a forum attempting to assert the power of the state and a defendant trying to escape its clutches. The former’s rhetorical weapon of choice is state sovereignty and the latter’s, individual fairness. Personal jurisdiction involves an accommodation between these two competing values, both of constitutional stature; in the law of personal jurisdiction, neither is categorically superior. The supposed dilemma of state sovereignty versus individual rights is a false dichotomy.

These two co-equal elements combine in a familiar pattern. Assuming that it employs no invidious criteria, a legal rule need only be supported by a rational relationship to a legitimate state interest. There are at least two components to this elementary principle. First, there must be some legitimate state interest at stake, and second, the rule being challenged must further that objective to some reasonable degree.

In the context of personal jurisdiction, the legitimate interest is found in the state’s right to regulate what happens within its boundaries. The requirement of a rational relationship to that interest – which protects individual fairness – is satisfied only if the state’s assertion of jurisdiction really furthers that goal. A rule of personal jurisdiction meets the rational basis test –furthering the

43. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (“The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”).
objective of territorial regulation – only if it is limited to cases where the defendant’s forum activities “contributed to” the plaintiff’s claim. The same logic is applicable on general fairness grounds in international relations more generally.

C. What Counts as a Legitimate Objective?

The requirement of a rational relationship to a legitimate objective is, admittedly, not difficult to meet. But that does not mean that it is always satisfied, or that a frivolous or circular objective should be rubber stamped as satisfactory. In the present context, it does place limits on what a state might allege as a basis for jurisdiction. In particular, legitimacy must be established by reference to domestic policies; a domestic forum must promote the domestic policy objectives of the people of the state.

Thus, for example, the requirement of a rational connection to a legitimate objective cannot be satisfied by the simple fact that the majority of legislators, and the executive, happened to want the law. The desire to maximally extend state court jurisdiction cannot be the objective cited in support of the adoption of a long-arm statute. If that were sufficient, the Due Process Clause would be either circular or vacuous. A state’s assertion of jurisdiction does not count as an end in itself but must be a means to the end of an interest that is already concededly legitimate. In this regard, a legitimate objective supporting a state’s assertion of power over foreigners is regulation of local activities.

States are entitled to regulate harmful conduct within the state; they are entitled to enforce causes of action arising there. A sovereign (or quasi-sovereign, in the case of a state) has a recognized interest in regulating conduct within its borders. It reflects the state’s obligation to protect its citizens and their interests within the state. These factors come together to support the most recognizable form of personal jurisdiction exercised by states: jurisdiction over conduct of those within its territorial boundaries. They also form the core of the justification for a state’s exercise of power over those who act outside of its boundaries, but whose conduct affects people present or residing there.

The analysis would be different if the defendant was a forum resident. For local defendants, the legitimacy of forum authority stems from the defendant’s right to participate in the forum’s democratic political processes.44 The state is asserting jurisdiction over its own people. This justification for state power gives rise to general jurisdiction. Insiders are subject to jurisdiction over any cause of action regardless of where it arose.

Jurisdiction over foreigners, however, has been designated “specific jurisdiction.” Outsiders are only subject to jurisdiction over causes of actions that “arose inside” or were “related to” events occurring within the state’s borders. And they are subject to jurisdiction in such cases only where territorial sovereignty interests are at stake. The state’s attempt to impose its judicial authority

44. See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (U.S. 2011) (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.”); Brilmayer, How Contacts Count, supra note 21; Brilmayer et. al, A General Look at General Jurisdiction, 66 Tex. L. Rev. 721 (1988).
must bear a reasonable relationship to the regulation of conduct or injuries occurring within the state. The contribution requirement is grounded on that requirement of a rational relationship.

D. Rational Relationships and the “Contributed to” Requirement

The “contributed to” test is motivated, first and foremost, by common sense. As a matter of purely domestic legal reasoning, a state cannot claim to be trying to reduce injuries when it penalizes a defendant whose conduct played no part in causing, aggravating, or intensifying those injuries. Penalizing the defendant for an action that played no role in bringing an injury about is simply not an effective deterrent.

The same principle applies in the interstate context. The state is entitled to discourage harmful behavior that occurs within its territorial boundaries or that is directed at the state and causes harm within those boundaries. But it is completely irrational — and thus a violation of Due Process — to go about this by taking jurisdiction over cases where the purported local aspects in no way contributed to the dispute’s occurrence. And while some states might conceivably have the desire to discourage harmful conduct which is wholly foreign — which occurred in other states and which caused no local injury — this is not a legitimate state interest. Disregard for the limitations on specific jurisdiction thus reveals either an irrational choice of method or an illegitimate choice of objective.

An out-of-state party’s contacts must be related to the plaintiff’s claim because the legitimate objective of promoting domestic policy is not furthered by penalizing defendants for conduct that did not contribute to the plaintiff’s claim. The mere fact that a party has contacts with a state in one area does not give the state the unfettered right to regulate all of that party’s conduct, however unrelated to the state it may have been. Moreover, there is no reason that a state should gain the ability to regulate out-of-state conduct through exposure to litigation simply because the party has parallel or similar contacts with it. The state is certainly permitted to regulate the defendant’s in-state contacts/conduct, but lacks jurisdiction over the defendant for the conduct unrelated to the party’s contacts with the state.

CONCLUSION

The proposal that specific jurisdiction exists only where the defendant’s forum contacts somehow contributed to the plaintiff’s claim is intended to fill a gap in the doctrine, not to change any rules or principles that have already been recognized as law. The reason for proposing this formulation is precisely that the Court has not yet articulated the difference between the two forms of personal jurisdiction in a way that can be applied as a test. This is as true in the international context as in the interstate context. Although the Court has given reasons to assume that it will treat both the same — sometimes simply by citing international and interstate cases interchangeably, without remarking on the equivalence in treatment — it has given few hints about what that common treatment might involve. Current Supreme Court jurisprudence would all re-
main unaltered if this interpretation of the existing case law were adopted. For example, this proposal would not alter the requirement of attribution: the defendant must somehow have “purposefully availed himself” of the benefits of forum law.\textsuperscript{45} The plaintiff would still have to show that the forum contacts are the responsibility of the defendant; for example, the plaintiff’s own unilateral action cannot establish jurisdiction.\textsuperscript{46} The purposefulness requirement has always formed part of a standard that had to be met after the case was made that specific jurisdiction would otherwise be available.\textsuperscript{47} My argument addresses only the logically prior point about specific jurisdiction’s availability. My interpretation, also, would not alter the test for general jurisdiction, which now seems to have been settled by the “at home” formula. The function of this “contribution” formulation is simply to clarify what makes general jurisdiction and specific jurisdiction different.

The significance of the proposal lies in the likelihood that fewer disputes qualify for specific jurisdiction. As a result, more plaintiffs would find general jurisdiction to be the sole remaining alternative. To prove the existence of general jurisdiction, the contacts must be quite extensive, such as a domicile or residence for individuals or place of incorporation or principal place of business for corporations. However, for contacts that bear the appropriate relationship to the plaintiff’s claim, a single contact can be sufficient if it is of the right kind. For this reason, it is natural for plaintiffs to push the boundaries of specific jurisdiction to qualify for a quantitatively less demanding test.

This proposal lends clarity to the concept of jurisdiction by asking whether the defendant’s forum activities contributed to the plaintiff’s claim. But the reasons for adopting this proposal are not merely practical; there is also a strong basis for the “contributes to” standard in constitutional law and, indeed, in legal theory. Defendants’ foreign activities and any foreign injury that they cause do not give rise to a rational basis for imposition of forum authority. If the defendant engaged in conduct in the forum that contributed to the plaintiff’s claim, then the state has a rational basis for asserting jurisdiction as a means of regulating that in-state conduct. If nothing about the defendant’s in-state conduct contributed to the plaintiff’s injury, then the forum has no rational basis for flexing its legal muscles. It is an element of basic fairness, reflected in our constitutional text, that a sovereign must have some rational basis for asserting its power. But our constitutional text incorporates preexisting notions of fair-

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  \item \textsuperscript{45} For cases deploying purposeful availment reasoning, see Burger King Corp., 471 U.S. at 473 (“We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who ‘purposefully directs’ his activities toward forum residents.”); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984) (“The district court found that ‘[t]he general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state.’”); Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (“[The] non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof . . . .”).
  \item \textsuperscript{46} Brilmayer, \textit{How Contacts Count}, supra note 21, at 91-92 (discussing World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)).
  \item \textsuperscript{47} E.g. Burger King Corp., 471 U.S. at 474 (“Notwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established “minimum contacts” in the forum State.”); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 315 (1980) (“It is misleading for the majority to characterize the argument in favor of jurisdiction as one of ‘foreseeability’ alone.”).
\end{itemize}
ness – that is to say, of “fair play and substantial justice” – which are applicable to international authority generally and thus provide the framework for a unified theory of specific jurisdiction.