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Personal Jurisdiction and National Sovereignty

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Abstract

State sovereignty, once seemingly sidelined in personal jurisdiction analysis, has returned with a vengeance. Driven by the idea that states must not offend rival states in their jurisdictional reach, some justices have looked for specific targeting of individual states as individual states by the defendant in order to justify an assertion of personal jurisdiction. To allow cases to proceed based on national targeting alone, they argue, would diminish the sovereignty of any state that the defendant had specifically targeted.

This Article looks for the first time at how this emphasis on state sovereignty limits national sovereignty, especially where alien defendants are involved. By requiring an antecedent "top of mind" focus on the forum state when actions that lead to litigation are taken, the Court would exclude from U.S. litigation activities that bear a close relationship to the forum and that would provide a basis for jurisdiction in many, if not most, other nations. This matters especially because the U.S. conducts so much of its national regulation through litigation in state courts and through litigation based on state causes of action. This Article gives fresh emphasis to the notion that states are members of a shared sovereignty, and that state actions implicate national sovereignty as much as actions by the federal branch of government.

The problem is compounded by the incoherency of the Court's "our federalism" state sovereignty analysis. Other commentators

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have not focused on how the Court's assumption in recent personal jurisdiction cases that states are in purely rivalrous relationships contrasts with reality, which is increasingly recognized to involve overlapping, reinforcing, sometimes coordinated spheres of jurisdiction. Rather than treating the states as rivals involved in a zero-sum game, where an assertion of power by one undercuts the power and dignity of another, this Article looks at the polycentric, pluralistic nature of U.S. governance, where state members of a "more perfect union" coordinate, collaborate, pursue shared goals independently, and only sometimes compete.

State sovereignty ultimately is national sovereignty. To exaggerate concepts of state rivalry and exclusiveness in a modern age of legal pluralism serves only to diminish the regulatory reach of individual states, and, ultimately, the nation as a whole. The Court's narrow focus on sovereignty threatens to make the scope of U.S. jurisdiction far narrower than that of other nations, and by Constitutionalizing that scope to make adjustments in rapidly changing circumstances difficult.

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I. Introduction

State sovereignty, once seemingly sidelined in personal jurisdiction analysis, has returned with a vengeance. Driven by the idea that states must not infringe upon the territorial sovereignty of sister states when asserting personal jurisdiction, some Justices have looked for proof that the defendant targeted a state individually and specifically, and not as part of a group, in order to justify an assertion of personal jurisdiction.[1] To do otherwise, they argue, would diminish whichever other state the plaintiff chose to have a direct relationship with.[2] In some cases, the targeting has not been found.[3] The Court applies this logic even when the defendant is foreign, and despite targeting of the nation as a whole by a foreign defendant.[4] Cases with a close connection to forum state compensatory and regulatory interests have been dismissed.[5]

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1. *See infra* notes 147–157 and accompanying text.

2. *See* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (reasoning that "each State has a sovereignty that is not subject to unlawful intrusion by other States").

3. *See id.* at 886 (finding that petitioner did not engage in conduct purposefully directed at New Jersey).

4. *See id.* ("[I]t is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.").

5. For example, in *Nicastro* the plurality acknowledged New Jersey's

The problem is that this emphasis on *state* sovereignty limits *national* sovereignty, at least where alien defendants are involved.[6] By requiring an antecedent "top of mind" focus on the forum state when actions that lead to litigation are taken, the Court can exclude from U.S. litigation—and hence from U.S. after-the-fact regulation via litigation—activities that bear a close relationship to the forum and that would provide a basis for jurisdiction in many, if not most, other nations.[7]

The problem is compounded by the incoherency of the Court's "our federalism" analysis.[8] If the Court is serious about "our federalism," the analysis employed must focus realistically on how our government actually functions under the Constitution. First, rather than looking at states as unconnected sovereigns, the analysis should take into account that states are members of a shared sovereignty, and that state actions implicate national sovereignty as much as actions by the federal branch of government.[9] Next, rather than treating the states as rivals

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strong interest in protecting its citizens, 564 U.S. at 887, and the dissent argued that, of all states, New Jersey's connections made it the best suited state for trial of the matter, 564 U.S. at 898.

6. *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1208 (2018) (arguing for a reconsideration of the conventional personal jurisdiction approach to alien defendants).

7. *See id.* at 1239 ("[I]t is unclear why a particular state could not legitimately exercise jurisdiction on behalf of the United States based on national contacts.").

8. "Our federalism" most often is used to refer to the distribution of power and responsibilities between the states and the federal government. *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (explaining that Our Federalism is grounded in "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"). In the recent personal jurisdiction cases, the Court uses "our federalism" to discuss sovereignty conflicts amongst states, but without engaging in an analysis of the horizontal federalism issues involved. *See infra* Part III.

9. *See* David Brian Robertson, *Federalism and American Political Development*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 346 (Richard M. Valelly et al. eds., 2016) ("The framers resolved these conflicts with a series of political compromises that required the national government and the states to *share* government sovereignty. James Madison described this system as 'partly federal, partly national' or as a 'compound republic.'" (emphasis in original)); VINCENT OSTROM & BARBARA ALLEN, THE POLITICAL THEORY OF A COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT 88 (3d ed. 2008) (illustrating that the form of government is a collaborative one "by which several smaller *states* agree to become members of a

involved in a zero sum game, where an assertion of power by one undercuts the power and dignity of another, the Court should recognize the polycentric, pluralistic nature of U.S. governance, where state members of a "more perfect union" coordinate, collaborate, pursue shared goals independently, and only sometimes compete.[10] Finally, while there are legitimate horizontal federalism concerns to consider even in a pluralistic state, the analysis employed should look directly and sensitively to those concerns, rather than letting the antecedent state of mind of a defendant control.[11]

II. Personal Jurisdiction and Regulatory Scope over Aliens

Personal jurisdiction matters.[12] Jurisdiction unlocks the power of courts to adjudicate.[13] More than in most world jurisdictions, in the United States the power to adjudicate translates to the power to regulate.[14] Much U.S. regulation takes place through after-the-fact litigation.[15] Since the power to

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larger *one*" (emphasis in original)).

10. *See* Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 868 (2006)

> Ongoing debates over federalism, for example, seem trapped in unnecessarily binary conceptions of the vertical allocation of power. Yet, a third way for the resolution of federalism questions—and one more closely comporting with the realities of day-to-day governance—might well be found in the overlap and dependence of intersystemic and dialectical regulation.

11. *See* Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After* Walden v. Fiore, 19 LEWIS & CLARK L. REV. 769, 786 (2015) ("The problem is that the Court is trying to squeeze a 'which governments' federalism question into the framework of individual rights, where it does not fit comfortably and creates confusion.").

12. *See* Austen Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97, 100 (2019) (describing personal jurisdiction as "one of the doctrinal plains upon which broader and more salient debates related to global governance, international law, and sovereign authority are waged").

13. *See Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining jurisdiction as a "court's power to decide a case or issue a decree").

14. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES 8 (2010) (noting that American civil litigation "contrast[s] sharply with European practices").

15. *See id.* ("[I]mplementation of regulatory commands through private lawsuits can effectively encourage and induce compliance behavior by the

regulate, and the accompanying power to protect citizens and markets, is an important element of sovereignty, cutting off jurisdiction can limit sovereignty.[16] Personal jurisdiction can only be understood in the context of the broader regulatory setting.

A. After-the-Fact Regulation

In the U.S. system, litigation plays a special role, far broader than resolving disputes between individual parties.[17] To some, the U.S. seems to have a relatively weak regulatory capacity.[18] In reality, taking into account the broader nature of what constitutes regulation, much of the regulatory work of both state and federal governments takes place through the judicial system.[19]

As one scholar has put it: "What is distinctive about the United States is the extent to which we regulate not entry but consequences. There is a significant difference between an unregulated market and a deregulated market featuring low entry costs but careful scrutiny after the fact."[20] In some cases, this after-the-fact regulation has been the result of deliberate choices

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regulated population . . . .").

16. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 324–25 (Black, J., concurring) (stressing the importance of states' ability to exercise judicial authority).

17. *See* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1660 (2016) ("Litigation is often conflated with dispute resolution and law declaration (or adjudication), but it has its own independent contribution to make to the American system of government.").

18. *See* FARHANG, *supra* note 14, at 19–59 (examining the relationship between the United States's weak administrative state and its large private enforcement regime); Colin D. Moore, *Bureaucracy and the Administrative State*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 328 (Richard M. Valelly et al. eds., 2016) ("Compared to the robust and centralized states of France and Germany, America's bureaucracies appeared stunted, undistinguished, and strangely impotent.").

19. *See* FARHANG, *supra* note 14, at 6 ("'Regulation,' as used here, to borrow a definition from Christopher Foreman, refers to 'any governmental effort to control behavior by other entities, including small business firms, subordinate levels of government, or individuals.'"). *See generally* ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE (2d ed. 2012).

20. Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007).

by legislatures.[21] Private rights of action have been created as integral parts of new regulatory programs, enabling individual litigants to enforce the regulatory demands.[22] In other cases, as with the tort system, it has arisen from the country's common law tradition, but often interacting with statutes which may define duties or adjust incentives to litigate.[23]

This system—described as "adversarial legalism"—shifts to the court system governance issues that in other countries may be handled through bureaucratic structures.[24] This approach vests private parties, acting through their lawyers and the courts, with an important regulatory role.[25] The courts, in short, are a vital part

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21. *See* Thomas F. Burke, *The Rights Revolution Continues: Why New Rights Are Born (and Old Rights Rarely Die)*, 33 CONN. L. REV. 1259, 1259–60 (2001) ("[T]hough the origins of regulation by litigation are usually traced to avaricious trial lawyers and ambitious attorneys general, in fact, regulation by litigation has deep roots in the structure of American government and American political culture.").

22. *See* FARHANG, *supra* note 14, at 3 ("The existence and extent of private litigation enforcing a statute is to an important degree the product of legislative choice over questions of statutory design.").

23. *See* Stephan Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061, 1064 (2014) (tracing the role of juries as regulators in common law settings and arguing that new torts, such as insurance bad faith, empower juries to address regulatory gaps in the modern era); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1038 (2004) (viewing institutional reform lawsuits as nodes of a national network that develop and spread best practice standards nationally).

24. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 47 (2003) ("In sum, whereas European polities generally rely on hierarchically organized national bureaucracies to hold local officials accountable to national policies, the U.S. Congress mobilized a distinctly American army of enforcers—a decentralized, ideologically motivated array of private advocacy groups and lawyers."); Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Regulation*, 165 U. PA. L. REV. 1495, 1496 (2017) ("Research in multiple disciplines has established that the role of litigation and courts in the creation and implementation of public policy in the United States has grown dramatically."); Richard L. Marcus, *Reining In the American Litigator: The New Role of American Judge*s, 27 HASTINGS INT'L & COMP. L. REV. 3, 7 (2003) ("A final feature of the American experience that bears on this overall picture of the crusading pursuer of right is the distinctive American reliance on private enforcement of public norms."). *See also* Landsman, *supra* note 23, at 1107 (arguing that court-made torts fill regulatory gaps).

25. *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 648–61 (2013) (analyzing the structure of private enforcement); J. Maria Glover, *The Structural Role of Private*

of the governance process.[26] As one scholar has noted: The United States more often relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental officials accountable, and resolving business disputes.[27]

The role of the courts and litigation in policy making goes beyond federal programs such as employment discrimination and civil rights, although these are important and a large source of federal judicial business.[28] In state courts as well as federal courts, the role of the courts reaches regulation of product safety, protection of the financial markets, and protection of the public health.[29] As summarized by one leading procedural scholar:

> The efforts of public interest attorneys go well beyond the classic civil rights and legislative reapportionment battles. Asbestos is held in check by the private bar. Tobacco is cabined by the private bar. Defective pharmaceuticals such as diet drugs, Vioxx, and other products are removed from our midst. Illicit financial and market practices of companies such as Enron are halted by the private bar. Today, a number of attempts are underway to hold accountable some of those responsible for the recent financial crisis. Fewer Americans die or become incapacitated by defective products or toxic substances, and important social and economic policies are enforced because of the work of these lawyers.[30]

Enforcement Mechanisms in Public Law, 53 WM. & MARY L. REV. 1137, 1217 (2012) ("[T]here is a decidedly public dimension, both structural and functional, to private regulation of wrongdoing."); *but see* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 2–3 (2017) (examining conservative counterrevolution implemented through courts against private enforcement).

26. *See* KAGAN, *supra* note 24, at 5 (describing litigation "not merely as a method of solving legal disputes but as a mode of governance").

27. *Id.* at 110–11.

28. *See* FARHANG, *supra* note 14, at 3 (noting that job discrimination lawsuits are generally one of the largest categories of litigation in federal courts).

29. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 291 (2013) (illustrating the "tremendous range" of matters resolved through litigation).

30. *Id.* at 299–300.

1. Regulation Through Deterrence

The net of all this is that the American governance and regulation system relies on litigation in a way not common in other countries.[31] Functions are shifted from bureaucratic agencies to the courts.[32] This works, in theory and practice, because participants in the American system recognize that they can be held to account through litigation, and so modify their behavior in order to avoid legal damages.[33]

This deterrence function does not, of course, take place with the mathematical rigor of the simplified economic models, but it does take place.[34] Intermediaries such as corporate compliance departments and insurance underwriters play a role in translating legal requirements into behavioral norms.[35]

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31. *See supra* note 24 and accompanying text. For a detailed comparative discussion in one setting, see Robert L. Rabin & Stephen D. Sugarman, *Perspectives on Policy: Introduction*, *in* REGULATING TOBACCO 3 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

32. *See* KAGAN, *supra* note 24, at 3 (explaining that the United States "relies on adversarial legalism far more than other economically advanced democracies").

33. *See* Lahav, *supra* note 17, at 1658 (explaining that the regulatory function of litigation causes "individuals and organizations [to] anticipate or learn from the results adjudication and adjust their behavior accordingly"); *see also* FARHANG, *supra* note 14, at 8–9

> Studies have found, ranging across such policy domains as job discrimination, sexual harassment, labor, playground safety, antitrust, and police brutality, that implementation of regulatory commands through private lawsuits can effectively encourage and induce compliance behavior by the regulated population, whether they be private entities or governmental subunits. The findings have established both "specific deterrence" and "general deterrence" effects, where specific deterrence refers to the effects of enforcement against a particular violator on that violator's future conduct, while general deterrence refers to effects of visible enforcement efforts in the legal environment on other would-be violators who have yet to actually be the targets of enforcement, and hope never to be.

34. *See* KAGAN, *supra* note 24, at 16 (describing the American court system as "extremely inefficient").

35. *See id.* at 130–31 (explaining how the U.S. tort law system operates as a "collective responsibility/social insurance model" which dictates to what extent and by whom victims of harm are compensated).

2. Litigation as Creating Legal Rules

Litigation provides more than just deterrence.[36] In the U.S., with its common law tradition, litigation directly leads to new laws.[37] As higher courts decide issues raised in litigation, those decisions become binding precedent, confining the actions of lower courts and later editions of the same court.[38] As a result, the development of U.S. legal doctrine depends directly on the flow of cases.[39]

3. Compensation in the Place of Social Insurance

Operating without the kind of pervasive governmental health insurance and welfare net common in some Organization for Economic Co-operation and Development (O.E.C.D.) countries, the U.S. turns to litigation for compensation when individuals are injured.[40] With government benefits comparatively scant, payments from those who caused the injury help fill the gap.[41] This also represents a governmental interest that is addressed through litigation rather than other governmental means.[42]

4. Regulation Through Litigation as More Favorable to Rapid Innovation

Litigants in the U.S. moan, unsurprisingly, about the burdens of regulatory litigation, but in doing so pass by the benefits that

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36. *See* Lahav, *supra* note 17, at 1658 (explaining that litigation is typically understood as serving more than one function).

37. *See id.* (describing litigation as "a system for law declaration").

38. *See* FARHANG, *supra* note 14, at 3–4 (discussing, for example, how private lawsuits shaped the legal landscape of Title VII of the Civil Rights Act of 1964).

39. *See id.* at 4 (noting that legislators deliberately choose to delegate their lawmaking authority to the courts).

40. *See* KAGAN, *supra* note 24, at 126, 130 (comparing the U.S. regime for compensating injured persons with those in the Netherlands and New Zealand).

41. *See id.* at 126 (describing the process in which a worker harmed by asbestos can bring a tort suit and obtain money damages for pain and suffering).

42. *See id.* at 127 ("In the early 1980s Congress considered but failed to create a fund that would compensate asbestos victims without the need for costly civil litigation.").

accrue from shifting regulation to an ex post facto basis.[43] Compared to many other countries, the U.S. imposes lower upfront barriers to market entry.[44] Legal entities such as corporations can be quickly formed; products can be brought to market with no regulatory approval in a wide range of settings.[45]

In other jurisdictions, entry into markets can be more actively controlled.[46] A country might only allow companies to be publicly listed after approval by a government ministry,[47] or might control private activity through direct intervention by government bureaucrats.[48] The U.S. engages to some degree in this kind of regulation—notably with regard to drugs and medical devices—but compared to other countries, it relies much more on private litigants to bring lawsuits which serve as after-the-fact regulation when problems arise.[49] For example, rather than

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43. *See* Issacharoff, *supra* note 20, at 382 (highlighting the indispensable role of private litigation in ex post accountability).

44. *See id.* at 377 (dubbing the United States as "Exhibit A" in terms of relaxed market entry).

45. *See id.* at 376–77 (explaining that when a government removes barrier to entry, it "is well advised to interfere minimally with privately generated growth").

46. *See id.* at 375 ("Prior to Putin-era reforms, for example, a typical business in Russia needed to acquire between 300 and 500 different permits before opening.").

47. *See* Chen Yang & Zhi Bin, *China*, *in* THE INITIAL PUBLIC OFFERINGS LAW REVIEW 24 (David J. Goldschmidt ed., 3d ed. 2019)

> IPO listings in China are subject to regulatory approval by the CSRC [China Railway Signal & Communication Corp.]. Therefore, the approval system in China differs from the registration system in Hong Kong, the United States and other capital markets. The CSRC determines whether a prospective issuer provided accurate and adequate disclosure in accordance with listing requirements. In practice, applicants may face long waiting periods (sometimes two to three years or even more), due to administrative backlog and repeated requests for information.

48. *See* FARHANG, *supra* note 14, at 6–7 (describing the Weberian ideal of the modern state, which measures state capacity by bureaucratic size and involvement, as the traditional understanding of a "strong state").

49. *See* Issacharoff, *supra* note 20, at 382 ("[T]he idea that a sufficient level of state or federal regulation could effectively displace private litigation is almost inconceivable."); Landsman, *supra* note 23, at 1062–64 (explaining how litigation addresses regulatory gaps caused by regulatory capture or political influence); Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 LOY. U. CHI. L.J. 669, 674–75 (2014) (noting regulatory value of private securities litigation).

requiring active up or down approval before a company can go public or a potentially unsafe product can be sold, enforcement is substantially shifted to the courts if and when a problem arises.[50] In order to make this practical, private litigants are given investigatory and factual exploration powers that in other countries are given only to government agencies.[51] This approach calculates that companies faced with the cost of such suits will engage in voluntary self-regulation, and so be deterred from unreasonably dangerous activities.[52]

This preference for after-the-fact regulation provides many significant advantages in today's economy.[53] Innovation can proceed at the speed of the most innovative businesses, rather than being held to the pace of government bureaucracies.[54] To enter a market costs less, given the absence of required prior approvals, thus allowing the entry of innovators who might be kept out of the

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50. *See* Patrick Luff, *Risk Regulation and Regulatory Litigation*, 64 RUTGERS L. REV. 73, 75–76 (2011) (discussing the use of regulatory litigation—both statutory and litigant driven—to fill regulatory gaps).

51. *See* KAGAN, *supra* note 24, at 15 (explaining that the U.S. system deprives the government "of direct controls over the economy that, for good or for ill, many governments elsewhere in the world employ").

52. *See* Issacharoff, *supra* note 20, at 379–81 ("The ex post regulatory model is premised on the idea that parties should be able to internalize the risk of liability—perhaps even for punitive damages—and regulate themselves accordingly.").

53. *See* Burbank, Farhang, & Kritzer, *supra* note 25, at 662

> On the positive side of the ledger, relative to administrative implementation, private enforcement regimes can: (1) multiply resources devoted to prosecuting enforcement actions; (2) shift the costs of regulation off of governmental budgets and onto the private sector; (3) take advantage of private information to detect violations; (4) encourage legal and policy innovation; (5) emit a clear and consistent signal that violations will be prosecuted, providing insurance against the risk that a system of administrative implementation will be subverted; (6) limit the need for direct and visible intervention by the bureaucracy in the economy and society; and (7) facilitate participatory and democratic governance.

See also Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107 (2005) (discussing three salient advantages of private enforcement).

54. *See* Burbank, Farhang & Kritzer, *supra* note 25, at 664 (reasoning that private enforcement regimes encourage legal innovation because private litigants "are more likely to press for innovations in legal theories and strategies").

market by the costs of entry in other systems.[55] Time to market shrinks to the extent governmental processes are not part of the timeline, which can allow companies to seize first mover advantage.[56] After-the-fact regulation can even diminish corruption, by removing gatekeepers who might demand payoffs before a market is opened.[57]

Effective after-the-fact regulation does require, however, that litigation works as a check on behavior.[58] If laws are not enforced or are only sporadically enforced through litigation, the regulatory grip is reduced.[59] Personal jurisdiction thus can play a critical role in making sure that regulation through courts is effective.

B. After-the-Fact Regulation of Aliens in The Age of Globalization

In a globalized world, after-the-fact regulation can only be effective if companies selling into or otherwise impacting the U.S. can be held effectively to account through litigation. Narrow jurisdictional rules reduce the grip of the U.S. regulatory system on those whose behavior is sought to be regulated. This is aggravated when jurisdictional rules are readily manipulated—as when the analysis looks not to effects or foreseeable consequences, but to evidence of the defendant's state of mind with regard to the forum at some time before the litigation arises. Defendants' intent on avoiding exposure can endeavor to build a "purposeful availment" narrative that distances them from responsibility in the U.S., while benefiting fully from the U.S. market.[60]

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55. *See id.* at 663 (noting that private enforcement regimes impose lower costs because legislators can implement policy at a lesser cost than with administrative implementation).

56. *See* Issacharoff, *supra* note 20, at 385 (showing how a private enforcement regime makes it easier to bring a product to market and makes the U.S an attractive place to do business).

57. *See id.* at 375 (noting that "heavier regulation of entry is generally associated with greater corruption").

58. *See* Burbank, Farhang & Kritzer, *supra* note 25, at 667 (showing how private enforcement regimes can lead to fragmented and incoherent policy).

59. *See id.* at 669 ("The legislative and executive branches have less continuing control over policy when private enforcement is relied on for implementation . . . .").

60. *See* Peter Hay, *Judicial Jurisdiction over Foreign-Country Corporate Defendants—Comments on Recent Case Law*, 63 OR. L. REV. 431, 433 (1984)

On the other hand, there are clear costs to unbridled regulatory reach. Excessive or "exorbitant" claims of power can cause conflict with other nations.[61] In addition, opening the doors too widely can burden the U.S. courts with litigation in which the U.S. has little stake or interest.

In recent years, the scope of U.S. personal jurisdiction has shrunk.[62] While eliminating bases for legitimate concerns about exorbitant jurisdiction, it also raises concerns about whether U.S. jurisdiction remains broad enough to allow effective regulation to protect U.S. consumers and markets.[63]

C. The Shrinking Reach of U.S. Personal Jurisdiction

Not so long ago, the reach of U.S. personal jurisdiction was extremely broad, leading to a fair concern that the U.S. suffered from "exorbitant jurisdiction" that overreached.[64] In recent years, however, the scope of U.S. personal jurisdiction against both domestic and foreign defendants has been dramatically narrowed.[65] Coinciding with this, but not entirely driving it, has been a renewed emphasis on limits on state power, with concerns expressed by some justices that states not overstep and interfere

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(noting the possibility that foreign country defendant could structure activities to avoid jurisdiction through devices such as channeling all sales through local subsidiary or shipping F.O.B. foreign location); Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 773 (1984) ("[A]lien businesses may be able to structure their commercial dealings in the United Sates to avoid establishing sufficient contacts with any one state and thus to avoid jurisdiction in this country.").

61. *See* Kevin M. Clermont & John R. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 473, 476 (explaining that identifying jurisdiction as exorbitant is "to condemn it as inappropriate from an international standpoint").

62. *See* Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 505 (2018) (arguing that the Supreme Court's personal jurisdiction cases since 2011 constitute a "stealth" narrowing of personal jurisdiction).

63. Personal jurisdiction is just one doctrine that has changed in a way that limits U.S. regulatory reach. *See generally* Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

64. *See generally* Clermont & Palmer, *supra* note 61.

65. *See* Hoffheimer, *supra* note 62, at 502–03 (discussing how recent restrictions on jurisdiction have made it difficult for plaintiffs to find available courts).

with other states.[66] Interestingly, even though some of the defendants in the landmark cases have been from outside the U.S., the Court has seemed to draw no operative distinction between domestic and foreign defendants.[67] The net result has moved the U.S. to a place where its jurisdictional scope is narrower, not broader, than other countries, which is of special concern because the U.S. delegates so much more regulatory enforcement and law creation to its court system.[68]

1. The Retreat from Exorbitant Jurisdiction

Recent years have seen dramatic limitations on the scope of U.S. personal jurisdiction.[69] Most clearly with regard to disputes that have no relation to the forum, but also to those with some connection to the forum, the Supreme Court has rolled back jurisdictional reach.[70]

The rollback has not been complete, and in some limited ways the reach of U.S. courts goes beyond international norms.[71] For example, the U.S. allows "tag" jurisdiction based on nothing more than the voluntary bodily presence of a human being in a jurisdiction, even if the dispute is otherwise utterly unrelated to the forum.[72] The U.S. will also find consent to personal jurisdiction based on boilerplate forum selection clauses in form contracts of

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66. *See infra* Part III.

67. *See id*. ("[T]he assumption seems to be that, so long as subject matter jurisdiction is present, alien defendants may be sued in the same manner as citizens in both state and federal courts.").

68. *See* Hoffheimer, *supra* note 62, at 505 (arguing that the Court has exhibited "radical" changes in the area of personal jurisdiction).

69. *See supra* note 65 and accompanying text (discussing recent restrictions on personal jurisdiction).

70. *See* Bristol-Myers Squibb v. Superior Court of Cal., 137 S. Ct. 1773, 1781 (2017) (rejecting the California Supreme Court's "sliding scale approach" for specific jurisdiction and explaining that "a defendant's general connections with the forum are not enough" for specific jurisdiction).

71. *See* Clermont & Palmer, *supra* note 61, at 477 ("[C]ourts in the United States shock the world by asserting jurisdiction over a defendant based merely on the defendant's transient physical presence.").

72. *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 610 (1990) (stating that personal jurisdiction can be established by service on a human being voluntarily present in the jurisdiction, despite a lack of minimum contacts).

adhesion, even when it seems certain that the term was not actively negotiated and most likely not actually read.[73]

The practical, commercial scope of these remaining exceptions to high dollar, financially significant corporate settings is somewhat limited, however. Jurisdiction based on bodily presence does not apply to corporate defendants.[74] Unread boilerplate consent clauses can apply to corporate defendants, but it seems less likely that consent will be imposed, unread, on corporations negotiating a significant transaction than on consumers making an online purchase.[75]

a. The Narrowing of Dispute-Blind "General" Jurisdiction

By way of contrast, the narrowing of dispute-blind "general jurisdiction" promises to have an enormous practical impact. Most U.S. personal jurisdiction relies on a "minimum contacts" test, which asks whether the defendant's contacts with the jurisdiction are sufficient to allow jurisdiction to be asserted consistent with due process concerns.[76] The contacts can be so systematic and continuous as to give rise to so-called "general jurisdiction,"[77] which allows assertion of personal jurisdiction against a corporate defendant even for disputes unrelated to the forum.[78] More limited

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73. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596 (1991) (determining consent to exclusive forum in a form contract of adhesion upheld); *see generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 135–38 (2013).

74. *See* Martinez v. Aero Caribbean, 764 F.3d 1062, 1071 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015) (holding that personal jurisdiction cannot be obtained by service on an officer of a corporation who is present in the jurisdiction without minimum contacts for the corporation).

75. *See* RADIN, *supra* note 73, at 135 (noting that forum selection clauses in boilerplate are limited by the U.S. constitutional guarantee of due process).

76. *See* Int'l Shoe Co. v. Washington, 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, have certain minimum contacts with it . . . ."); *see generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067 (4th ed.).

77. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

78. *See id.* at 919 (stating that for general jurisdiction, a court may hear any

contacts can give rise to so-called "specific jurisdiction," which looks only to contacts related to the dispute at bar.[79]

Not so long ago, many and probably most U.S. lawyers understood general jurisdiction to lie when a party had any substantial "systematic and continuous" contacts with the forum state.[80] While the Supreme Court had provided little guidance on what might provide adequate contacts in this setting, litigants and judges apparently understood the test to be looking for exactly what the terms imply—systematic and continuous operations within the state.[81] Because many large corporations have systematic and continuous operations at some level in many jurisdictions, the assertion of a personal jurisdiction defense by large, domestic companies was not often successfully asserted.[82] Under the understanding that governed for decades, a company that had operated a large factory in the forum state, or that maintained multiple offices that engaged in significant amounts of business, might be understood to be subject to general personal jurisdiction.[83]

The practical impact of such a broad understanding was significant. General jurisdiction provides U.S. personal jurisdiction (and hence often a forum) for any dispute, worldwide,

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and all claims against the corporation).

79. *See generally* WRIGHT & MILLER, *supra* note 76, at § 1067.5.

80. *See* Judy M. Cornett & Michael M. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 104 (2015) ("Despite the Court's assurance that its decisions are guided by tradition, *Daimler* departs from settled law under which corporations have been subject to jurisdiction for all claims in states where they maintained a sufficient permanent presence or engaged in a comparable substantial level of business.").

81. *See* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U.L. REV. 1, 24 (2018) ("Prior to Goodyear, the common understanding was that companies doing substantial business in all fifty states—Daimler, Goodyear, Walmart, and the like—would have been subject to general jurisdiction in every state.").

82. Often, it was not tried because of the seeming futility. *See* Cassandra Burke Robertson, *Personal Jurisdiction in Legal Malpractice Litigation*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 15 (2016) (noting that under continuous and systematic standard many defendants did not challenge jurisdiction).

83. *See* Dodge & Dodson, *supra* note 6, at 1218–19 ("The test distilled from these two cases (and 'taught to generations of first-year law students') was that general jurisdiction could be based on 'continuous and systematic general business contacts.'").

where general jurisdiction can be established in the U.S.[84] Even for domestic companies, general jurisdiction offers additional forum shopping opportunities, with more chances to find a locale hostile to the defendant.[85] With globalization and the concentration of economic wealth in major corporations, a situation arose where many companies, domestic and foreign, engaged in systematic and continuous contacts in many locations, if not almost everywhere.[86] Because general jurisdiction requires no connection to the dispute itself, this meant for many companies, personal jurisdiction for disputes worldwide could be had in any number of U.S. locations.[87]

The potential impact of such a broad understanding of general jurisdiction was to put pressure on the U.S. to become a default forum for any dispute, arising anywhere, that involved a defendant doing regular systematic and continuous business in the U.S.[88] While other doctrines such as *forum non conveniens* exist to limit the scope of U.S. judicial power in a given case,[89] and statutes such as the Alien Tort Claims Act[90] can be interpreted to limit statutory reach,[91] even deciding whether to entertain such cases was a

84. *See* Bristol-Myers Squibb v. Superior Court of Cal., 137 S. Ct. 1773, 1780 (2017) ("A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State." (emphasis in original)).

85. *See* Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1037 (2004) (explaining that general jurisdiction offers plaintiffs the opportunity to forum shop to "capture the most favorable substantive law or statute of limitations").

86. *See* Daimler AG v. Bauman 571 U.S. 117, 156 (2014) (Sotomayor, J., concurring) (reasoning that today's global economy has caused large corporations to feel "essentially at home" in multiple States).

87. *See* Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 159 (2001) ("The Supreme Court case law, the Restatements and the academic literature largely agree that foreign corporations doing a sufficient volume of business are subject to general in personam jurisdiction even though they are neither incorporated nor have their principal place of business within the forum state.").

88. *See* Heiser, *supra* note 85, at 1037 (showing how general jurisdiction is controversial for international litigation where foreign defendants with contacts in the United States "fear they will be forced into a court in the United States").

89. *See id.* at 1040–42 (discussing application of reasonableness branch of minimum contacts and *forum non conveniens* as factors limiting the reach of general jurisdiction).

90. 28 U.S.C. § 1350 (2018).

91. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013) (applying a presumption against extraterritorial application).

potentially burdensome business for U.S. courts to be in. What's more, the broad assertion of judicial power, subject only to prudential narrowing doctrines, put the U.S. in an exceptional position versus other sovereign nations, whose conceptions of jurisdiction generally were narrower than entertaining all claims, worldwide, against any company doing regular and substantial business in a jurisdiction.[92]

The potential breadth of general jurisdiction was illustrated by the Court's even choosing to hear and analyze at length the *Helicopteros Nacionales de Colombia, S.A. v. Hall*[93] case rather than disposing of it by summary reversal. In this case, it is not remarkable that the court found that one trip to Texas by a foreign corporation's chief executive officer, the acceptance of checks drawn on a Texas bank, the purchase of a helicopter and equipment from a Texas manufacturer, and related training trips did not rise to the level of systematic and continuous contacts required to create dispute blind personal jurisdiction for claims arising anywhere.[94] Rather, what is remarkable is that the Court found it necessary to discuss for ten pages in the U.S. reports how close to the lines this scanty conduct was. Had the Court found general jurisdiction, similarly light contacts would have provided personal jurisdiction over foreign corporations on a dispute-blind basis for claims unrelated to those U.S. activities.

In light of lower courts' understanding of general jurisdiction at the time, however, *Helicopteros* was not as exceptional as it seemed in the post-*Daimler* era. Lower courts at that time had found general jurisdiction where companies had made multiple sales of rare coins to customers in the state,[95] used the highways

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92. This unusual breadth posed difficulties when an effort was made to reach an international treaty on recognizing judgments, which necessarily involved issues of appropriate jurisdiction. *See* Heiser, *supra* note 85, at 1037–38 (arguing that general jurisdiction became a major obstacle in negotiating treaty).

93. 466 U.S. 408 (1984).

94. *See id.* at 418 (concluding that the defendant's minimum contacts with the State did not allow the State court to assert personal jurisdiction for a claim not arising within that State).

95. *See* Dillon v. Numismatic Funding Corp., 231 S.E.2d 629, 633 (N.C. 1977) (finding jurisdiction over out-of-state defendant for sales to a then resident of South Carolina where it had solicited business in North Carolina and made $50,000 in sales); Mary Twitchell, *Why We Keep Doing Business With Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 176 (2001) ("Our courts have exercised general jurisdiction over defendants with no physical presence in

of the state in connection with a trucking business,[96] operated a seven-employee office and had another employee who spent much of his working time in the state (all on activities unrelated to the claim),[97] and where a rock promoter had run rock concerts in the state.[98] Such decisions, which were not far outside the mainstream, went far toward making the U.S. at least jurisdictionally open to all kinds of claims worldwide.[99]

The Court backed away from this problem by effectively rewriting the scope of general jurisdiction. Somewhat obscurely in *Goodyear Dunlop Tire Operations, S.A. v. Brown*,[100] and then very explicitly in *Daimler AG v. Bauman*,[101] the Court made clear that general jurisdiction was much narrower than the previous understanding. Rather than lying wherever systematic and continuous activities can be found, the Court explained, general jurisdiction lies only when a defendant can be said to be "at home" in the jurisdiction.[102] The Court identified two situations where companies generally were at home.[103] One was the state of incorporation, under whose laws the company's existence

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the forum—whose only contacts are purchases from forum sellers, sales to forum customers through third parties, or even purchases by web site or mail order—sometimes using this same reciprocal benefits rationale.").

96. *See* Carter v. Massey, 436 F. Supp. 29, 31 (D. Md. 1977) (asserting personal jurisdiction in Maryland over trucking company for accident in Delaware unrelated to any Maryland activities because the company, after the accident, had done trucking business in Maryland).

97. *See* St. Louis-S.F. Ry. v. Gitchoff, 369 N.E.2d 52, 53 (Ill. 1977) (discussing how defendant has a seven employees sales office plus one logistics employee who often worked in Illinois).

98. *See* North Dakota v. Newberger, 613 P.2d 1002, 1005 (Mont. 1980) (allowing suit in Montana for contract breach in North Dakota because California based concert promoter had held concerts in Montana). For more examples, see Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 633–36 (1988).

99. As might be expected, such potentially broad assertions of jurisdiction were controversial internationally. *See* Heiser, *supra* note 85, at 1036 ("General jurisdiction [pre-*Daimler*] is particularly controversial in international litigation involving foreign defendants who do business in the United States.").

100. 564 U.S. 915 (2011).

101. 571 U.S. 117 (2014).

102. *See id*. at 139 (concluding that the general jurisdiction did not exist where the defendant was not at home in California).

103. *See id*. (explaining the conditions for general jurisdiction of a corporate defendant).

derives.[104] The second was the state where the company has its principal place of business.[105]

The narrowing of the jurisdictional reach was made clear through the facts in *Daimler*, where no attempt had been made in the lower courts or at the Court itself to vigorously argue that general jurisdiction did not lie in California for Daimler's U.S. subsidiary.[106] Mercedes Benz automobiles have been a fixture in California virtually since the invention of the automobile, and various Daimler subsidiaries had maintained for generations extensive operations supporting substantial sales.[107] Under the prior understanding of general jurisdiction, there is little question that the U.S. subsidiary would have qualified for general jurisdiction. Under *Daimler*, however, because neither its headquarters nor principal place of business were there, those actions did not suffice to create general jurisdiction even against the subsidiary.[108] The Court left open the possibility of other settings for general jurisdiction, but the facts of *Daimler* make clear that the other settings will involve unusual if not unique circumstances.[109]

Daimler has enormous practical impact. Prior to *Goodyear* and *Daimler*, the operating assumption of many lawyers was that personal jurisdiction, at least, would lie in any U.S. setting where the defendant had ongoing and significant operations—and perhaps even where the activities, like those in *Helicopteros*, were

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104. *See id.* (noting that the defendants, Daimler and MBUSA, were not incorporated in California).

105. *See id.* (stating the defendant did not have its principal place of business in California and was therefore not amenable to suit there). While *Daimler* represented a shift within U.S. law, placing general jurisdiction where a defendant has its domicile has ancient roots, going back at least to Justinian's code. *See* Juenger, *supra* note 87, at 143 (citing Justinian's Code, cod 3.19.3, 3.13.2).

106. *See* Daimler AG v. Bauman 571 U.S. 117, 143 (2014) (Sotomayor, J., concurring) (discussing how the defendant conceded that the California courts could exercise general jurisdiction over its U.S. subsidiary).

107. *See id*. at 123 (stating that the defendant "is the largest supplier of luxury vehicles to the California market").

108. *See supra* notes 101–105 and accompanying text (discussing the requirements for general jurisdiction over a corporation).

109. *See Daimler*, 571 U.S. at 139 (reasoning that general jurisdiction could exist where the corporation's contacts with a State are so substantial that it is essentially at home).

much slimmer. Today, as a practical matter, general jurisdiction is likely to be found only in two locations—in the state under whose law a corporation is created, and in the state where it maintains its headquarters.[110]

In many cases—and in all cases involving foreign defendants—this shifts the inquiry away from whether a corporation maintains a regular presence in a state to whether specific contacts related to the litigation can be found.[111] In many garden variety settings, a different result can be obtained. For example, prior to *Daimler*, personal jurisdiction could be expected to lie against any bank conducting regular business in financial centers such as New York, enabling both the attachment of assets and the initiation of discovery.[112] After *Daimler*, general jurisdiction lies only in the state of incorporation and the principal place of business.[113] For an alien, neither of those locations will be within the U.S., and so general jurisdiction will never apply.[114]

The *Gucci* litigation provides a concrete example of where this could happen.[115] In *Gucci*, the claim was that a Chinese company

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110. *See supra* notes 107–109 and accompanying text (discussing the requirements for general jurisdiction over a corporate defendant).

111. *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977) ("[T]he relationship among the defendant, the forum, and the litigation . . . became the central concern of the inquiry into personal jurisdiction.").

112. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) ("[T]here have been instances in which 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.").

113. *See supra* notes 107–108 and accompanying text (discussing general jurisdiction of a corporate defendant under *Daimler*).

114. *See* Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 646 (2015) (addressing the importance of the issue in transnational litigation and arguing for a broader specific jurisdiction analysis against nonparties such as foreign banks in such situations, balanced with comity concerns with regard to interests of the foreign jurisdiction).

115. *See* Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974(RJS), 2011 WL 6156936, at *6 (S.D.N.Y. Aug. 23, 2011) (arguing that bank account information in China could be subpoenaed because the bank has United States branches that transfer money between branches in New York and China); *see also* Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974(RJS), 2012 WL 5992142, at *9 (S.D.N.Y. Nov. 15, 2012) (concluding that the Bank of China was held in civil contempt for failing to produce documents relating to bank accounts in China following a court order to do so).

was engaged in trademark violations that were enabled by the bank's processing of payments.[116] Finding general jurisdiction, prior to *Daimler*, the district court required the Bank of China to produce banking records of the alleged infringer so as to reveal the scope of income potentially related to the trademark violations.[117] The District Court imposed heavy daily cash fines to ensure compliance, despite claims that compliance would violate Chinese law.[118]

On appeal, the Second Circuit looked to *Daimler*, and found that general jurisdiction did not exist.[119] It then remanded for a determination of whether specific jurisdiction could be demonstrated.[120] On remand, the District Court found specific jurisdiction did lie, but the nature of the inquiry was different and depended on the specific facts.[121] On similar facts involving two banks doing regular business in the local jurisdiction, the Seventh Circuit found that in the absence of Iranian assets in the jurisdiction neither general nor personal jurisdiction could be established so as to enforce a subpoena that would require the banks to reveal whether and where they held Iranian assets—perhaps a different result than would have been likely before *Daimler*.[122]

It is perhaps worth noting that a case such as *Gucci* in the post-*Daimler* era leaves plaintiffs with a harder task establishing personal jurisdiction than they would have had either in the

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116. *See Gucci*, 2011 WL 6156936, at *1 (alleging that defendants were offering counterfeit versions of plaintiff's products on the internet).

117. *See id.* at *13 (ordering the defendant to produce all information requested by the subpoena).

118. *See Gucci*, 2012 WL 5992142, at *7 (arguing that a party could still be held in contempt even if compliance could result in a violation of foreign law).

119. *See* Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 135 (2d. Cir. 2014) (concluding that the district court may not exercise general personal jurisdiction over the defendant based on *Daimler*).

120. *See id.* at 138 (stating that the district court should develop a record sufficient to establish specific jurisdiction).

121. *See* Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87, 101 (S.D.N.Y. 2015) (concluding that exercise of personal jurisdiction over the defendant was reasonable and comported with due process).

122. *See* Leibovitch v. Islamic Republic of Iran, 852 F.3d 687, 690 (7th Cir. 2017) (finding that specific jurisdiction did not lie where banks in Chicago did not hold any assets of the Iranian government).

Pennoyer[123] era or in most of the *International Shoe*[124] era.[125] Under *Pennoyer*, quasi in rem jurisdiction could easily have been established over a bank with substantial assets in the jurisdiction,[126] as well perhaps as "presence" through a "doing business" analysis of the kind that prevailed before *International Shoe*.[127] After *Shaffer v. Heitner*,[128] however, quasi in rem jurisdiction is functionally unavailable where there are no minimum contacts.

After *Daimler*, general jurisdiction no longer provides a justification for claiming that the U.S. exercises exorbitant jurisdiction. With limited general jurisdiction and with a specific jurisdiction analysis that is more narrow than most other nations employ, the U.S. seems as narrow, if not more narrow, in its jurisdictional assertions than most other nations.[129]

b. The Potential Narrowing of Specific Jurisdiction

General jurisdiction is not the whole story, moreover. The court, less definitively, has also seemed to narrow the scope of specific jurisdiction, although fractured and fact bound holdings make the outcome less clear. For decades, the touchstone for specific, or dispute-related, personal jurisdiction has been whether

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123. Pennoyer v. Neff, 95 U.S. 714 (1877).

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

125. It has been argued that minimum contacts analysis in general as currently applied gives states less ability to bring in out-of-state defendants than Pennoyer's territorial model. *See* Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1595 (2018) ("Second, I show that the post-*Shoe* era has not expanded the reach of personal jurisdiction and, instead, has contracted state power into a husk of what would have been available before *Shoe*.").

126. *See* Harris v. Balk, 198 U.S. 215, 227–28 (1905) (holding that the presence of intangible financial interest in state sufficient to establish quasi in rem jurisdiction).

127. *See* Phila. & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917) ("A foreign corporation is amenable to process . . . if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there.").

128. 433 U.S. 186 (1977).

129. For a discussion of comparative jurisdictional regimes, see generally CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2d ed. 2015).

the defendant "purposefully availed" itself of a connection with the forum state.[130] Situations where a connection with the forum were imposed upon the defendant are not enough;[131] even when it is foreseeable that a company's defective product might have ended up in the forum, courts have demanded more.[132]

The *J. McIntyre Mach., Ltd. v. Nicastro*[133] case illustrates this narrowing.[134] In *Nicastro*, the plaintiff was injured by an industrial metal shredding machine at his workplace in New Jersey.[135] No one disputed that New Jersey had an interest in regulating the safety of industrial machinery in its state, nor that New Jersey has

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130. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 790 (1984) ("In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984) (concluding personal jurisdiction existed where activities were purposefully directed at the state); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 482 (1985) (finding that the defendant purposefully availed himself of benefits of state's laws).

131. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958)

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

132. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (noting that foreseeability "alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause").

133. 564 U.S. 873 (2011).

134. The *Nicastro* opinion has been much criticized by commentators. *See, e.g.*, Patrick J. Borchers, J. McIntyre Machinery, Goodyear*, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245 (2011) (calling the decision a "disaster"); Wendy Collins, *What's Sovereignty Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 729 (2012) ("[M]ay set a new low . . . ."); John N. Drobak, *Personal Jurisdiction in a Global World: A Comment on the Supreme Court's Recent Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90 WASH. L. REV. 1707, 1729 (2013) ("[T]he worst result in any personal jurisdiction case decided by the Supreme Court in the modern era."); Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in* J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341, 345 (2012) ("[E]xacerbated rather than ameliorated the doctrinal confusion . . . ."); John T. Parry, *Introduction: Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on* J. McIntyre Machinery v. Nicastro, 16 LEWIS & CLARK L. REV. 827, 841 (2012) ("[C]ompounds . . . uncertainty . . . .").

135. *See Nicastro*, 564 U.S. at 878 (discussing how plaintiff filed a products liability suit for a machine produced by the defendant in England).

an interest in seeing that its citizen was able to obtain compensation for an industry.[136] Equally, it was a given that the manufacturer of the machine actively sought to sell machinery throughout the U.S. market, which includes New Jersey.[137] Nonetheless, personal jurisdiction was found lacking.[138]

A plurality opinion by Justice Kennedy looked at the forum specific contacts of the defendant.[139] The defendant, J. McIntyre Machinery Co., had engaged in a long-term course of action in which it marketed its products to the U.S. as a whole.[140] In connection with that, it had contracted with an affiliated U.S. company to handle sales in the U.S., advertised, attended trade shows, and otherwise sought to make sales in the U.S. market.[141]

None of those activities, so far as is clear from the record, took place in the forum state of New Jersey, however.[142] What's more, while J. McIntyre had had some success in selling to the US, the limited market for large metal shredders left it without large numbers of sales in New Jersey—it was possible that the machine that caused the injury was the only one in the state, and at most one of no more than four.[143]

On these facts, Justice Kennedy and the plurality found evidence that New Jersey specifically had been targeted to be lacking, and found that to be a fatal flaw for the assertion of personal jurisdiction within New Jersey.[144] Because, in Kennedy's

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136. *See id*. at 887 (noting that the interest of New Jersey in protecting its citizens from defective products was strong, but jurisdiction was restrained by due process).

137. *See id*. at 878 (stating that an independent company had agreed to sell the defendant's machines in the United States).

138. *See id*. at 887 (concluding that the defendant did not intend to "invoke or benefit" from the protection of New Jersey laws and that exercising jurisdiction would violate due process).

139. *See id*. at 886 (focusing on defendant's sales in the United States, attendance of trade shows in the United States, and presence of defendant's machines in New Jersey).

140. *See id*. at 879 (noting that the defendant's U.S. distributor advertised the defendant's machines in the United States at the direction of the defendant).

141. *See id*. at 886 (discussing the defendant's contacts with the forum).

142. *See id*. (demonstrating the lack of contacts that the defendant had with New Jersey).

143. *See id.* (noting that the defendant neither advertised, nor sent employees to New Jersey).

144. *See id*. at 887 ("At no time did petitioner engage in an any activities in

view, personal jurisdiction requires a "forum by forum" analysis,[145] and because there was no evidence in the record that New Jersey was targeted individually as opposed to as part of a whole, personal jurisdiction did not lie.[146]

> Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state." App. to Pet. for Cert. 130a. These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.[147]

Justice Kennedy's analysis suggests a roadmap for defendants—especially foreign defendants—to avoid personal jurisdiction. Avoiding contacts with any one state might suffice to defeat personal jurisdiction anywhere. Indeed, the simple expedient of appointing a nationwide distributor might be enough to create a barrier to personal jurisdiction.[148]

New Jersey that reveal an intent to invoke or benefit from the protection of its laws.").

145. *Id*. at 884.

146. *See id*. ("The question is whether a defendant has followed a course of conduct directed at the society or economy existing with the jurisdiction of a given sovereign . . . .").

147. *Id*. at 886.

148. *See* Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1201–02 (2013)

> Until J. McIntyre, no one would have supposed that the German manufacturer of the Robinsons' allegedly defective Audi could have escaped jurisdiction in Oklahoma by giving an importer the exclusive right to distribute Audi automobiles throughout the United States. Yet Justice Kennedy's opinion implicitly suggests that unless Audi specifically targeted Oklahoma in its marketing, the Oklahoma courts might not have jurisdiction, no matter how many Audis were sold in the United States.

In a robust dissent, Justice Ginsburg proposed quite a different approach. Noting that New Jersey had a legitimate interest in addressing injuries to its citizen, and in regulating the safety of industrial products within its borders, she began with the recognition that New Jersey was neither a random nor a detached forum for the litigation.[149] In terms of targeting, she looked to the national targeting, and was content that sales to New Jersey were an included and natural component of that broader targeting effort.[150]

Justice Ginsburg also noted that the jurisdiction New Jersey sought to exercise was not, under international norms, excessive or extravagant:

> The Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction "in matters relating to tort ... in the courts for the place where the harmful event occurred." Council Reg. 44/2001, Art. 5, 2001 O.J. (L.12) 4. The European Court of Justice has interpreted this prescription to authorize jurisdiction either where the harmful act occurred or at the place of injury. *See* Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S. A., 1976 E.C.R. 1735, 1748–1749.[151]

The controlling opinion in the case was a concurrence by Justice Breyer, in which Justice Alito joined. Seemingly deliberately fact bound, the concurrence looked at the few sales made into New Jersey, and found it below the standard of ongoing

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149. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 894–98 (2011) (Ginsburg, J., dissenting) (discussing the instances of purposeful contact with United States by the defendant to promote sales of its product). As we will see *infra*, in many other nations the presence of an injured national within the forum combined with marketing that foreseeably and directly led to the presence of the allegedly defective product in the forum would be sufficient for an exercise of jurisdiction.

150. *See id*. at 898 (reasoning that defendant's regular attendance of conventions and exhibitions in the United States expressed an intent to target customers anywhere in the country).

151. *Id*. at 909.

connection that had been found sufficient in prior cases.[152] The concurrence, however, posited a broad range of different circumstances that might lead to different concerns and different results, and argued for more case development before hard and fast rules of either the kind proposed by Kennedy or urged by Ginsburg were adopted.[153]

Nicastro, while split and confusing, made clear that at least a substantial portion of the Court would insist on state specific targeting, even by foreign corporations marketing to the U.S. as a whole.[154] If adopted by a majority, this would further restrict the availability of specific jurisdiction for all defendants. The special impact state by state targeting has on foreign defendants requires a look.

2. The Not-So-Special Case of International Defendants

The Court has paid surprisingly little heed to the issue of whether defendants from outside the United States should be treated differently from domestic defendants when assessing personal jurisdiction.[155] This reticence to engage the issue has

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152. *See id.* at 889 (Breyer, J., concurring) (showing that the facts presented demonstrate "no 'regular flow' or 'regular course' of sales in New Jersey").

153. *See id.* at 889–90 (referencing Justice Ginsburg's opinion to show that other facts could have established jurisdiction). For an argument that lower courts have not chosen to follow Kennedy's plurality but apply an analysis closer to the state court that was reversed, see Frank Deale, *J. McIntyre and the Global Stream of Commerce*, 16 CUNY L. REV. 269, 302 (2013) ("[W]hat is especially noteworthy is the infrequency with which courts follow the Kennedy plurality in circumstances where doing so will require a plaintiff injured in the United States to institute litigation in a foreign jurisdiction."). This survey of lower court cases took place before *Bristol-Myers* reaffirmed the state sovereignty language of Kennedy's opinion, and in any event the freedom of lower courts to take this approach depends, of course, on which tack the Supreme Court takes in future rulings that may generate a majority. *See also* Jack B. Harrison, *Here and There and Back Again: Drowning in the Stream of Commerce*, 44 STETSON L. REV. 1, 29–39 (2014) (analyzing lower court applications of *Nicastro*).

154. *See supra* notes 133–152 and accompanying text (discussing the split opinions of the justices in *Nicastro*).

155. *See* Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1237 (1998) ("[T]he Court has never articulated a discrete approach to international jurisdiction."). *But see* Austen Parrish, *Personal*

come despite a substantial body of scholarship that engages the issue, and has proposed several justifications for treating alien defendants differently,[156] and that even questions whether foreign

Jurisdiction: The Transnational Difference, 59 VA. J. INT'L L. 97, 100 (2019) (arguing that the recent cases involving international defendants should be understood as involving special issues because of the international element and that their relevance to domestic cases should not be overstated).

156. *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 43 (1987) ("In state law international cases, the Due Process Clause should require consideration of foreign defendants' national contacts [and] their contacts with the forum state. In federal question cases, a pure national contacts test, looking solely to the defendant's contacts with the United States as a whole, should be used."); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1592 (1992) (arguing for national contacts test for aliens in state and federal courts if certain protections to assure fairness were met); Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 799–800 (1988) (arguing for national contacts approach to alien defendants in state and federal courts); Dodge & Dodson, *supra* note 6 (arguing for national contacts approach for aliens in state and federal court); Robin J. Effron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MLR ONLINE 123, 129–30 (2018) (suggesting a national contacts test for both state and federal cases); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85 (1983) (arguing for national contacts approach to alien defendants in federal court); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006) (arguing that due process does not apply to alien defendants and hence national contacts can be aggregated); Bradley W. Paulson, *Personal Jurisdiction over Aliens: Unraveling Entangled Case Law*, 13 HOUS. J. INT'L L. 117 (1990) (arguing for amendment to Federal Rules of Civil Procedure to provide national aggregation of minimum contacts for alien defendants); Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. L. REV. 455, 470 (2004) (arguing that for aliens "it is constitutional under the Fifth Amendment for U.S. courts to assert personal jurisdiction solely on the basis of effects in the U.S., without any requirement of 'purposeful availment'"); Taylor Simpson-Wood, *In the Aftermath of* Goodyear Dunlop*: Oyez! Oyez! Oyez! A Call for a Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 139 (arguing that, in both federal and state court, "premising a finding of jurisdiction by aggregating the contacts of the foreign defendant with the U.S. resulting from its participation in a distribution system is inherently fair and reasonable"); Toran, *supra* note 60, at 770–88 (arguing for national contacts approach to alien defendants); *see also* Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1490 (2013) (arguing for allowing personal jurisdiction when the defendant has received constitutionally adequate notice, the state has a "constitutionally sufficient" interest in applying its law or resolving a dispute involving its domiciliaries, and policies of other nations are considered and would not be

defendants are entitled to any Due Process protections.[157]

There are two differences implicit in the Court's cases to date. First, and perhaps most importantly, is the change effected by the restriction of general jurisdiction in *Daimler* and *Goodyear*.[158] Before those cases, a foreign corporation with systematic and continuous operations in a U.S. state would be seen by most U.S. courts as being subject to general jurisdiction in that location—even for cases arising in distant parts with no connection to the U.S. operations.[159] As the facts of *Daimler* suggest, where California was sought as a forum to address charges of human rights violations in Argentina with no U.S. nexus, this broad of an approach had the possible effect of opening U.S. courts to all kinds of cases against multinational corporations with a significant U.S. presence—which is to say, against almost all major multinational corporations.[160]

Daimler put that approach to bed, and in its approach created an implicit distinction between domestic and alien corporations.[161]

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adversely affected); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373 (1995) (arguing for applying international law of jurisdiction when alien defendants are involved). For a discussion of issues involving plaintiffs, see Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 61–76 (2003) (looking at the issue of binding international plaintiff class members in transnational class actions). *But see* Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 549–55 (2019) (arguing that no special standard should exist for alien defendants).

157. *See* Parrish, *supra* note 156, at 59 ("The jurisdictional standards derived from the due process clause have blithely been assumed to apply to foreign defendants. No coherent explanation, however, exists for why nonresident, alien defendants are entitled to constitutional protections in the jurisdictional context.").

158. *See supra* notes 102–104 and accompanying text (explaining how these cases narrowed the definition of general jurisdiction to apply only in situations where a defendant can be said to be "at home" in the jurisdiction).

159. *See supra* note 83 and accompanying text (recalling a time when general jurisdiction could be based simply on "continuous and systematic general business contacts").

160. *See supra* notes 83–87 and accompanying text (explaining how the effects of globalization and the concentration of economic wealth in major corporations create a world where many multinational companies engage in systematic and continuous contacts in many locations in the United States).

161. *See* Daimler AG v. Bauman, 571 U.S. 117, 122 (2014) (emphasizing that a U.S. court may exercise jurisdiction over a foreign corporation only when it can

Domestic corporations are likely to have both a principal place of business and a state of incorporation within the U.S., making them subject to suit somewhere in the U.S. under general jurisdiction.[162] Alien corporations, by definition, will have neither, and so will not be subject to general jurisdiction within the U.S.[163]

Another distinction, which is less automatic, dates back to *Asahi Metal Industry Co. v. Superior Court*.[164] In *Asahi*, the Court faced a situation where all that remained of a tort case was an impleader claim filed by a foreign defendant against another foreign defendant.[165] The Justices split 4–4 on whether minimum contacts existed where the stream of commerce had brought the offending product into the U.S.[166] An eight-justice majority did conclude, however, that it would not be "reasonable" to exert jurisdiction over a foreign defendant where the remaining center of gravity of the case lay elsewhere.[167]

The reasonableness test employed by the Court in *Asahi* looked at multiple factors, including "the burden on the defendant, the interests of the forum State, . . . the plaintiff's interest in

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be rendered essentially "at home" in the forum State).

162. *See id.* at 137 (defining a corporation's domicile, where it is subject to general jurisdiction, to include either its place of incorporation or principal place of business).

163. This leaves aside the issue of whether the general jurisdiction of a U.S. subsidiary can be imputed to the overseas parent, an issue briefed but not reached in *Daimler*. *See* Qingxiu Bu, *Extraterritorial Jurisdiction vis-à-vis Sovereignty in Tackling Transnational Counterfeits: Between a Rock and a Hard Place*, 100 J. PAT. & TRADEMARK OFF. SOC'Y 69, 74 (2018) (discussing post-*Daimler* lower court cases involving separate legal entities within a corporate structure).

164. 480 U.S. 102 (1987).

165. *See id.* at 106 ("[Claims against] the other defendants were eventually settled and dismissed, leaving only [the Taiwanese tube manufacturer]'s indemnity action against [the Japanese tire valve manufacturer].").

166. *Compare id.* at 112 ("[Asahi's] placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."), *with id.* at 122 (Stevens, J., concurring) (arguing Asahi "engaged in a higher quantum of conduct" than simply a placement of a product into a stream of commerce), *and id.* at 117 (Brennan, J., concurring) (arguing that jurisdiction premised solely on the placement of a product into the stream of commerce is consistent with the Due Process Clause).

167. *See id.* at 115 ("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.").

obtaining relief[,] . . . 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies.'"[168] Applying this test to the facts of *Asahi*, the Court found alienage highly relevant to the reasonableness test, and placed major reliance on "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system."[169]

The Court's reliance on alienage in *Asahi* was one factor in what must be a multi-factor balancing system, and stops far short of establishing an absolute rule or even a presumption that personal jurisdiction against an alien defendant will not be reasonable. That said, some scholars have viewed reasonableness as being especially directed at alien defendants,[170] and a study of specific personal jurisdiction cases examining use of the reasonableness test found that courts were far more likely to dismiss on reasonableness (rather than minimum contacts) grounds when the defendant was an alien.[171]

A more subtle issue with foreign defendants has to do with the rules related to jurisdictional challenges. Unlike as is true in most motions to dismiss, the court should not accept the plaintiff's allegations with regard to personal jurisdiction as true; rather, the plaintiff has the burden of establishing a factual basis for personal jurisdiction.[172] With regard to a foreign defendant selling

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168. *Id.* at 113 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

169. *Id*. at 114.

170. *See* Dodge & Dodson, *supra* note 83, at 1207 (discussing the differences in the treatment of aliens and domestic defendants in personal jurisdiction matters).

171. *See* Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE J. COMP. & INT'L L. 405, 408 (2017) ("[C]ourts in practice only dismiss on reasonableness grounds where the defendant is foreign, whereas they effectively never dismiss domestic defendants on grounds of reasonableness."); *see generally* Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441 (1991) (discussing generally the application by lower courts of the reasonableness factors).

172. *See* Charles W. Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 257 (2014) ("For purposes of jurisdiction, in particular, it is error to accept the plaintiff's

nationally in the U.S., even though it may be clear that the U.S. market was targeted, whether a specific state was targeted may not be clear from publicly available information.[173] While, in theory, jurisdictional discovery could solve this problem, other nations often have no equivalent of U.S. private discovery, and actually getting discovery information from an overseas defendant can be a challenge.[174] As a practical matter, establishing the factual predicates for personal jurisdiction over foreign defendants, especially if the proof required must establish granular targeting of a kind that cannot be deduced from the regular presence of the product in the stream of commerce, can make it more difficult to bring foreign defendants into court.[175]

Despite these structural differences, the Court's analysis of cases, such as *Nicastro*, that involved foreign defendants have stayed far away from taking into express account the non-U.S. nature of these defendants.[176] This is curious for a number of reasons, especially as state-versus-state sovereignty concerns

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allegations as true."); Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301, 1330 (2012) ("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.").

173. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 886 (2011) (Kennedy, J., plurality) (finding no conclusive proof that defendant had engaged in conduct purposefully directed at New Jersey when 1) defendant agreed to sell machines in the United States, 2) attended trade shows in several other states, and 3) four machines ended up in New Jersey).

174. *See, e.g.*, Ray Worthy Campbell & Ellen Claar Campbell, *Clash of Systems: Discovery in U.S. Litigation Involving Chinese Defendants*, 4 PEKING U. TRANSNAT'L L. REV. 129, 161 (2016) (discussing a case where jurisdictional discovery was only obtained after the trial judge issued an order banning the Chinese defendant from doing any business in the United States) (citing Germano v. Taishan Gypsum Co., No. 2047, 2014 U.S. Dist. LEXIS 183686, at *5 (E.D. La. July 17, 2014)); *id.* at 144 (describing a case where jurisdictional discovery against a third party had to be compelled with punitive fines) (citing Gucci Am., Inc. v. Huoqing, No C-09-05969, 2011 U.S. Dist. LEXIS 783, at *58–59 (N.D. Cal. Jan. 3, 2011)).

175. *See* Campbell & Campbell, *supra* note 174, at 150–54 (emphasizing the differences in discovery procedures internationally and the difficulty of merging them with the U.S. approach).

176. *See Nicastro*, 564 U.S. at 881 (applying the "purposeful availment" test to foreign and domestic defendants alike without differentiation).

move back into the analysis.[177] There is some question as to whether nonresident alien defendants can even invoke the constitutional liberty interest viewed in older cases as being at the core of the doctrine.[178]

It matters because U.S. citizens might be sent to a foreign forum. As the Court noted in *Asahi*, litigating in a foreign land under strange laws can be a burden.[179] In some cases, this may be the fate to which U.S. citizens are consigned as U.S. courts are closed, as they might be if the test requires a relationship with a specific state. Even if a domestic U.S. forum exists for the alien defendant, it will not be the home forum for the defendant.[180] If the defendant is domestic, a U.S. state might have an arguable interest in the litigation involving its citizen; when the defendant is foreign, with the relationship created solely by the defendant's state of mind, the alternative U.S. forum may have no real interest in the litigation.[181] It may be a state like Ohio would have been in *Nicastro*, with no connection with the dispute except that at one time the defendant through one sided actions "purposefully availed" itself of a relationship with the forum by using Ohio as the state of entry for its products.[182] In such a situation, while personal

177. *See infra* Part III.A.

178. *See* Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325, 329 (2018) ("The Court has assumed, but never held, that foreign parties enjoy Due Process jurisdictional protections—an assumption in tension with the general rule that foreign parties acquire constitutional rights in proportion to their connections to the United States."); *see also* Drobak, *supra* note 134, at 1739–40 (arguing that non-resident aliens have no due process protections); Parrish, *supra* note 156, at 28–32 (suggesting Due Process protections do not apply to alien defendants).

179. *See* Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.").

180. *See* Daimler AG v. Bauman, 571 U.S. 117, 122 (2014) (emphasizing that a U.S. court may exercise jurisdiction over a foreign corporation only when it can be rendered essentially "at home" in the forum State).

181. *See, e.g.*, *Asahi*, 480 U.S. at 113–16 (noting the minimal interest the forum of California has in asserting jurisdiction over the foreign defendant in a context where the only relationship with the forum hinges on the defendant purposefully engaging in forum activities).

182. *See Nicastro*, 564 U.S. at 896 (Ginsburg, J., dissenting) ("From at least 1995 until 2001, [defendant] retained an Ohio-based company, [McIntyre America], as its exclusive distributor for the entire United States.") (internal

jurisdiction might exist, the suit might be subject to dismissal under state forum non conveniens doctrine, leaving the U.S. plaintiff, again, with no U.S. forum.[183]

The Court's failure to treat alien defendants differently—or even to consider whether it should treat alien defendants differently—contrasts with a body of scholarship that argues for different treatment.[184] Recognizing that international marketers may not target local markets, and that connections with any one state may be attenuated in a national marketing scheme, several scholars have called for an approach that aggregates national contacts.[185]

Curiously, in *Nicastro*, Justice Kennedy's plurality posited that Congress might be able to base personal jurisdiction on national contacts with regard to federal court, but that in state courts the only relevant contacts were those connected to the state, even for foreign defendants.

> In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts . . . . Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.[186]

If adopted by the entire court, Justice Kennedy's requirement of a state-by-state focus creates a disconnect between regulatory realities and personal jurisdiction. While, as Justice Kennedy noted, some foreign companies might indeed engage in state-by-state targeting,[187] it seems just as likely that with regard

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quotations omitted).

183. *See* Dodge & Dodson, *supra* note 83, at 1231–32 (stating that suit in unrelated forum would "almost certainly" be dismissed on grounds of forum non conveniens).

184. *See, e.g.*, Degnan & Kane, *supra* note 156, at 799–800 (arguing for a national contacts approach to alien defendants in state and federal courts).

185. *See id.* at 820 (proposing that the court, in assessing a foreign defendant's contacts, should consider their aggregate strength).

186. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885–86 (2011) (Kennedy, J., plurality).

187. *See id.* at 884–85 ("Furthermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those

to geography, the U.S. market as a whole would be the target.[188] Brands may be developed globally, and probably will be for major companies.[189] For products, advertising venues, national trade shows, and online retailers all present products to national rather than local audiences, and in at least some cases those venturing into the U.S. market will hope to capture as wide an audience as possible.[190] Others, looking for niches, might define those niches by categories other than state boundaries.[191] Under Justice Kennedy's formulation, only those who develop sufficient contacts with one or

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forums.").

188. *See* Harrison, *supra* note 153, at 2 ("[I]n today's global economy a manufacturer's specific intentional contact with an individual state is a rarity."); Hay, *supra* note 60, at 434 ("[T]he foreign-country manufacturer deals with the United States as a single market. Its concern is presumably less with whether the defendant is subject to suit in state X or state Y, but rather whether it is subject to suit in the United States at all."); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1385–86 (2006)

> [M]ost products are mass produced and mass distributed, without any clear sense of where in the national market they might end up . . . . The upshot is that most manufacturers design and market uniform products rather than different products for each state and, correspondingly, design their products to the specifications of the largest states or to the jurisdiction with the most stringent liability standards . . . .

189. Justice Kennedy's analysis reveals a critical lack of awareness of how consumers are targeted by brands, and not just by efforts to sell particular products. Important brands today are global, with marketing campaigns designed to establish the brand across not just state but national borders. *See* BARBARA E. KAHN, GLOBAL BRAND POWER: LEVERAGING BRANDING FOR LONG TERM GROWTH 1 ("Brands today must be *global* . . . . [A] strong global brand must express the same core meanings regardless of the market it is in."). While brand holders selling specific products will necessarily adapt branding and sales techniques to fit local cultures and communities, there is no particular reason to think that those adaptations will follow state lines—that, for example, a foreign manufacturer will present its brand and products differently in New Jersey than in Delaware. *See* Issacharoff, *supra* note 188, at 1385–86 (explaining how mass production requires goods to be produced for potential distribution and sale anywhere demand might arise, without a particular location in mind).

190. *See* Harrison, *supra* note 153, at 2 (explaining how manufacturers use national and international marketing campaigns or the assistance of the Internet to make entire nations the target audience for its products).

191. For example, while it markets somewhat differently in the U.S. than in other countries, the targeting for the Estee Lauder Origins brand in the U.S. turns on demographics rather than geography. *See* KAHN, *supra* note 189, at 34–35 ("[T]oday's Origins brand is more tightly focused on a key target segment in the United States, the 35- to 45-year-old woman who is concerned with health and with the products she chooses to put on her face.").

more particular states would be subject to jurisdiction in U.S. state courts, notwithstanding the success of their marketing efforts.[192]

D. Current U.S. Personal Jurisdiction in Comparative Context

At one time, U.S. jurisdiction could with some fairness be accused of being exorbitant.[193] Before *Daimler*, general jurisdiction as it was commonly understood allowed assertion of claims, regardless of connection with the forum, in any location where the defendant maintained sufficient continuous and systematic contacts.[194] As a practical matter, operation of a significant operation in a given location made it a forum suitable for any claim from anywhere in the world, so far as personal jurisdiction was concerned.[195] (There were, of course, other obstacles to having the suit proceed in that location, such as forum non conveniens).[196]

That changed after *Daimler*.[197] Except in rare and so far unseen circumstances, general jurisdiction can be found only where a company is headquartered or has its principal place of business.[198] For foreign corporations, that will be nowhere in the United States.[199]

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192. *See Nicastro*, 564 U.S. at 885–86 (emphasizing that petitioner's purposeful contacts with New Jersey, not with the United States, are the only relevant contacts in establishing personal jurisdiction).

193. *See supra* Part II.C.

194. *See* Cornett, *supra* note 80, at 104 ("*Daimler* departs from settled law under which corporations have been subject to jurisdiction for all claims in states where they maintained a sufficient permanent presence or engaged in a comparable substantial level of business.").

195. *See* Dodson, *supra* note 81, at 24 (explaining the common understanding that companies doing substantial business in all fifty states would have been subject to general jurisdiction in every state).

196. *See* Heiser, *supra* note 85, at 1050–56 (discussing application of the forum non conveniens doctrine in limiting the reach of general jurisdiction).

197. *See generally* Cornett, *supra* note 80.

198. *See* Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (defining a corporation's domicile, where it is subject to general jurisdiction, to include either its place of incorporation or principal place of business).

199. *See* Cornett, *supra* note 80, at 152 ("Where the manufacturer is a foreign national corporation with its principal place of business outside the United States, the corporation may evade general jurisdiction in any U.S. court.").

After *Nicastro* and *Bristol-Myers Squibb Co. v. Super. Court of Cal.*,[200] while some doubt remains, it seems that specific jurisdiction may also require the clearing of a high hurdle.[201] Each claim by each plaintiff against each defendant must be assessed for forum specific contacts related to that claim.[202] That each claim must be assessed is clear from the nature of specific jurisdiction, which bases personal jurisdiction on only those contacts that are related to the claim.[203] That each defendant must be assessed separately was made clear in cases such as *Rush v. Savchuk*,[204] where personal jurisdiction against some defendants did not bleed over to other defendants.[205] That each plaintiff must be assessed separately, even when there is an ongoing case that the defendant must defend, is clear from *Bristol-Myers*.[206]

In a complex case, that personal jurisdiction exists for a claim by one plaintiff against one defendant does not guarantee that personal jurisdiction exists for other claims and other parties that are part of the same case.[207] To help illuminate the situation,

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200. 137 S. Ct. 1773 (2017).

201. *See supra* Part II.C(1)(b).

202. *See, e.g.*, *Bristol-Myers*, 137 S. Ct. at 1781–82 (emphasizing that each individual plaintiff must have minimum contacts with the forum and finding that the nonresident plaintiffs' connections with the applicable forum did not warrant jurisdiction on this claim).

203. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 899 (2011) (Ginsburg, J., dissenting) (explaining that the Court agrees that specific jurisdiction turns on an affiliation between the forum and the underlying controversy).

204. 444 U.S. 320 (1980).

205. *See id.* at 331–32 (characterizing an attempt to aggregate the defendants' forum contacts "plainly unconstitutional"). This was also the case in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In *World-Wide Volkswagen*, it seems likely under the law of the time that the existence of general jurisdiction against the German parent and the U.S. importer was assumed due to the high level of activity each had in Oklahoma. *See World-Wide Volkswagen*, 444 U.S. at 297 (stating that if the sale of a product is not an isolated occurrence, but arises from the efforts of the manufacturer to serve the market, directly or indirectly, for its product in other States, it is not unreasonable to subject the manufacturer to suit in one of those states). After *Daimler*, it is clear that general jurisdiction would not exist against those defendants. *See* Cornett, *supra* note 80, at 105–06 (describing *Daimler* as a "game changer" in restricting the existing law of personal jurisdiction).

206. *See Bristol-Myers*, 137 S. Ct. at 1781–82 (stating that each individual plaintiff must have minimum contacts with the forum).

207. *See, e.g.*, *id.* at 1781 (explaining that the nonresident defendants'

consider a case similar to the well-known civil procedure standard of *Gray v. American Radiator & Standard Sanitary Corp*.[208] Imagine that in Hubei province, China, a company makes a valve designed to be used in water heaters. Since, in China, an export license must be acquired for goods to be sold abroad, the seller is aware that the product will head overseas, and given the flow of world trade is most likely generally aware that some will end up in the United States. In addition, as a practical matter, the manufacturer may have taken steps to qualify under international quality assurance protocols such as ISO 9001, again indicating an awareness of export markets. In our hypothetical, the valve is sold to a water heater manufacturer in Guangdong Province, which includes it in products that have been designed for, among other markets, sale in the United States. Using an export company that provides the necessary export license, these water heaters are then sold in massive quantities to a distributor in Hong Kong, which in turn sells them in massive quantities to markets in the United States.

On these facts, general jurisdiction clearly does not exist.[209] Quite possibly, neither does specific jurisdiction, especially if the state-by-state targeting imagined by the plurality in *Nicastro* is required.[210] Even if the water heater manufacturer explicitly dealt with the export agent and the Hong Kong distributor in order to get access to the U.S. market, and even if the product was specifically designed for the U.S. market (say, for example, by being designed to use 110 volt power instead of the internationally more common 220 volt), evidence of state-specific targeting is likely to be lacking at the manufacturer level. Even for the Hong Kong distributor—which is not likely to have been responsible for either defective design or defective manufacturing, and may be

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relationship with the defendants who were California residents was insufficient basis for the nonresidents to establish personal jurisdiction for a claim before the California courts).

208. 176 N.E.2d 761 (1961).

209. *See Daimler*, 571 U.S. at 137 (defining a corporation's domicile, where it is subject to general jurisdiction, to include either its place of incorporation or principal place of business). Here, the hypothetical valve company is not incorporated, nor does it have a place of business, in the United States.

210. *See supra* notes 186–187 and accompanying text (discussing Justice Kennedy's proposal of a state-by-state, as opposed to national, focus for contacts determining personal jurisdiction in state courts).

equally unaware of any problems, and so may not be liable in any event[211]—evidence of state-by-state targeting may not exist if the distributor dealt with a national retailer or national distributor to the plumbing trade.

Consider the situation in the reverse, assuming a valve manufactured in Ohio, incorporated in a water heater in Illinois, then shipped to China. In China, as in many civil law countries, jurisdiction lies not just where the defendant is domiciled but where the tort took place.

According to the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, Art. 24, "places where the tort occurs" include the places where the tort is committed and the places where the result of a tort occurs.[212] In the hypothetical case, the hazardous products have caused bodily damages and property damages in China. Therefore, the results of the tortious acts happen within Chinese territorial boundaries, permitting a Chinese court to exercise jurisdiction.[213] Put differently, if the plaintiff is injured by

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211. In many cases, so-called "seller's exception statutes" will release an innocent seller or distributor who was not aware of the alleged defect. *See, e.g.*, Nicholas Owen McCann, *The "Seller's Exception" Defense to Product Liability Actions*, 103 ILL. B.J. 40 (2015) (discussing application of Illinois statute). The application of these statutes is complex, however, because of varying exceptions allowing the retailer to be sued, including in some cases where the manufacturer is immune to service of process. *See, e.g.*, Ashley L. Thompson, Note, *The Unintended Consequence of Tort Reform in Michigan: An Argument for Reinstating Retailer Product Liability*, 42 U. MICH. J.L. REFORM 961 (2009) (arguing that liability over retailers should be reinstated because foreign manufacturers could evade jurisdiction). For a more general discussion of reseller liability, see Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1081–1120 (2003) (discussing shortcomings in existing seller liability statutes and proposing a statutory solution). In addition, some major online marketplaces disclaim liability, claiming that when they only serve as a listing service they have no exposure. In one such case, Amazon paid only a $5000 nuisance settlement when a motorcycle helmet fraudulently listed as compliant with regulations failed, causing death. *See* Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL STREET J. (Aug. 23, 2019 8:56 AM ET), https://perma.cc/M8M7-JM9H (last visited Oct. 14, 2019) (on file with the Washington and Lee Law Review).

212. The Supreme People's Court, Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China, Art. 24 (Jan. 30, 2015), https://perma.cc/P9RH-QDXD (PDF).

213. *See id.* at Art. 26 (granting jurisdiction to the court in the location where the tort was committed in any lawsuit filed in connection with property or

the failure of a product in China, a Chinese court would most likely assert jurisdiction.

China's approach is not exceptional, but tracks the approach of many, if not most, civil law countries.[214] Rather than engaging in an analysis of what expectations or intentions the defendant had at the time the product was designed or marketed, the analysis looks to where the tortious act occurred—which is to say, where the product failed and where injury occurred.[215] Arguments that the forum is not an appropriate forum for the litigation must follow a different path than arguing that the country lacks power to hear a case where a citizen was injured within its borders by a malfunctioning product.[216]

This approach avoids some of the complications of the U.S. approach. Jurisdiction is not a defendant-by-defendant or claim-by-claim analysis, but an inquiry into whether the court has a reasonable relationship with the case.[217] The failure of a product in the forum country combined with an injured plaintiff in the forum provides a sufficient relationship.[218] There is no suggestion that anyone look at whether the valve manufacturer sought to have a relationship with the Guangdong or Hubei provinces, or even if any particular awareness of China's domestic subparts was ever a consideration.

The net is that U.S. courts in the post-*Daimler*, post-*Nicastro*, post-*Bristol-Myers* era seem in garden variety products liability cases, among others, to assert a much shorter jurisdictional reach

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personal damage arising from inferior quality of manufactured products or services). The European Union has a similar rule. Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 012) 1 (EC).

214. *See* Ryngaert, *supra* note 129 (discussing the approach of other civil law countries).

215. *Id.*

216. *Id.*; *see also* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled*, 52 DEPAUL L. REV. 319, 328–31 (2002).

217. Ryngaert, *supra* note 129.

218. *Id.*

than other countries.[219] Claims that would proceed without undue worry in other countries fail in the United States.[220]

This failure matters, in particular, because the U.S. conducts so much of its regulatory activity and consumer protection through the court system.[221] Closing the U.S. courts to such claims therefore, to an extent much greater than in other countries, also cancels U.S. regulatory protections. The inability of U.S. courts to effectively regulate and protect its citizens and markets implicates its national sovereignty.[222] The degree to which specific jurisdiction will be narrowed depends in large part on how the justices approach the ideas of federalism and state sovereignty expressed in the *Nicastro* plurality and repeated in the *Bristol-Myers* holding.[223] Those ideas deserve unpacking.

III. The Supreme Court's Flawed Approach to Horizontal Rivalrous State Federalism

In *Nicastro* and *Bristol-Myers*, the Justices' foreclosing assertions of specific personal jurisdiction relied on a shorthand invocation of "our federalism" as the basis.[224] For those used to the

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219. *See, e.g.*, Fed. Home Loan Bank of Bos. v. Moody's Corp., 821 F.3d 102, 106–07 (1st Cir. 2016) (failing to find personal jurisdiction for defendant under *Daimler* standard); Sonera Holding B.V. v. Cukurova Holding A.S., 750 F.3d 221, 223 (2d Cir. 2014) (interpreting *Daimler* to reaffirm the extension of general jurisdiction beyond an entity's state of incorporation and principal place of business to only exist in "exceptional" cases and declining to find the defendant "at home" in New York).

220. The injury in *Nicastro*, for example, would in most other countries be viewed as a tort occurring within the jurisdiction, allowing an assertion of court power. *See, e.g.*, Interpretation of the Supreme People's Court, *supra* note 212, at Art. 26. Similarly, much of the angst over stream-of-commerce products liability would be unnecessary.

221. *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES 19–59 (2010).

222. *See* Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RES. L. REV. 769, 800 (2016) (explaining how "if a state lacked the power to regulate in-state conduct in a way that caused extraterritorial effects, state sovereignty would be eviscerated in our modern interconnected nation").

223. *See infra* Part III.

224. *See, e.g.*, Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1776 (2017) (asserting that despite all other interests being in favor of granting jurisdiction, "interstate federalism, may sometimes act to divest the State of its

debates over state and federal power in the standard back and forth over vertical federalism, the kind of federalism asserted in *Nicastro* and *Bristol-Myers* is a curious kind of federalism.[225] It is all the more curious because while invoking "our federalism" in both *Nicastro* and *Bristol-Myers*, the Justices have shown no interest in explaining how they understand and wish to apply "our federalism."[226]

In the academic world, at least, federalism comes in more flavors than can be found at a well-stocked gelato stand. There is state sovereignty federalism,[227] nationalist federalism,[228] political process federalism,[229] competitive federalism,[230] cooperative

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power" (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980))).

225. *See id.* at 1780–81 (discussing federalism in the context of jurisdiction analysis); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884–885 (2011) (Kennedy, J., plurality) (same).

226. *See Bristol-Myers*, 137 S. Ct. at 1780 (lacking any explanation of "federalism interests" other than as a restriction imposed by the sovereignty of other states on the sovereignty of each individual state); *Nicastro*, 564 U.S. at 884–85 (stating simply that "if another state were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States").

227. *See* MARTIN DIAMOND, THE FOUNDING OF THE DEMOCRATIC REPUBLIC 124–25 (1981) ("Modern federalism is a system of divided sovereignty; the whole unseparated governing authority respecting certain matters given to the national government, and the whole unseparated governing authority respecting others given to the states. . . . [T]he American system is the very model of a modern federal system[.]"). Diamond proceeds to a more nuanced discussion of how federalism operates in the modern era. *Id.*

228. For a discussion of this and a helpful review of federalism literature, see generally Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695 (2017). *See also* Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 997 (2015) (characterizing the debate between nationalists and state sovereignty federalist like a boxing match between "aging boxing club members" who know each other's moves).

229. *See, e.g.*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (arguing that the national political process of the United States today, especially the role of states in selecting the federal government, continues to be well-adapted to promoting federalism).

230. *See generally* THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990) (proposing, as a solution to governmental abuse of power, the encouragement of rivalry among state and local governments to offer taxpayers the best array of public services at the lowest costs).

federalism,[231] dual federalism,[232] new nationalism federalism,[233] horizontal federalism,[234] diagonal federalism,[235] polyphonic federalism,[236] foreign affairs federalism,[237] and many more. These tags represent serious work at understanding how our compound government does and should work, both based on the text of the Constitution and digging deep into how it functions on the ground

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231. *See* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) ("In contrast to a dual federalism, cooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law.") For a critique of cooperative federalism, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 938–44 (1998) (proposing a functional theory of cooperative federalism as an alternative to the theory of nationalistic dual federalism).

232. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 1–4 (1950) (discussing the United States' acceptance of a shift toward consolidation of national power in the 1950s, moving away from a system in which power is divided between the federal and state governments in clearly defined terms).

233. *See* Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1892–94 (2014) (describing how federalism may serve national ends and promote a well-functioning national democracy).

234. *See, e.g.*, JOSEPH F. ZIMMERMAN, HORIZONTAL FEDERALISM: INTERSTATE RELATIONS (2011); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008).

235. *See* Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 267–88 (2011) (describing a multidimensional approach to federalism that incorporates actors at all vertical levels of government and involves coordination among these actions through horizontal relationships).

236. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 92–120 (2009) (proposing a model of federalism that emphasizes the interaction of state and federal law and more accurately reflects the intersecting realities of local and national power); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) (arguing for a "polyphonic" view of federalism); Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115 (2007) [hereinafter Schapiro, *Intersystemic Governance*] (outlining the concept of polyphonic federalism and applying it to issues of governmental legitimacy).

237. *See generally* MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY (2016) (examining the role cities and states play directly in foreign affairs); *see also* Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185 (2008).

as our culture and economy have changed. Kennedy's wave of the hand at "our federalism" engaged not at all with this dialogue.[238]

To a significant, but not exclusive, degree, the federalism debate addresses the split of power between the federal government and the states.[239] State sovereignty federalists argue for more autonomy for states; nationalists argue for the primacy of the federal government.[240] Cooperative federalists note that, in the modern era, state and federal regulatory programs are effectively intertwined, albeit with the federal branch holding a dominant position.[241]

In the common parlance of federalism, the discussion is largely one about state power versus federal power.[242] From the vantage

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238. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (mentioning briefly that "ours is a 'legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it'" (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995))).

239. *See* New York v. United States, 505 U.S. 144, 155 (1992) ("[W]hile the Tenth Amendment makes explicit that 'the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people'; the task of ascertaining the constitutional line between federal and state power has given rise to many [difficult Supreme Court] cases.").

240. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 11 (1995) (describing those who advocate strong central authority as nationalists and those who advocate substantial diffusion of authority between the federal government and the states as federalists).

241. *See* Weiser, *supra* note 231, at 665 ("In contrast to a dual federalism, cooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law."). The standard argument is that cooperative federalism emerged from the regulatory programs of the New Deal. *See id.* at 669 ("Although these [New Deal] programs involved the sharing of funding, as opposed to regulatory authority, they put the concept of cooperative federalism on the map."). However, there is also an argument that Gilded Age reforms laid the foundation. *See* KIMBERLEY S. JOHNSON, GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877–1929, at 6 (2007) (tracing the emergence and development of cooperative federalism back to Gilded Age congressional policies).

242. *See* Heather K. Gerken, *The Taft Lecture: Living Under Someone Else's Law*, 84 CIN. L. REV. 377, 380 (2016) ("If you were to read the U.S Reports, you'd probably miss the fact that 'Our Federalism' encompasses relations among the states as well as relations between the states and federal government. Vertical federalism *is* federalism as far as most people are concerned."); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 59 (2014) ("[C]ourts and scholars have neglected federalism's

point of traditional federalists, states should have more power, not less, and not be shunted aside by federal power.[243] That, most definitely, is not the effect of "our federalism" asserted in *Nicastro*.[244] In *Nicastro*, a state court sought to entertain a tort action on behalf of one of its own citizens who had suffered a terrible injury.[245] The federal government, acting through its judicial branch, stepped in to foreclose this exercise of state power.[246] Rather than being enhanced, state power was eviscerated.[247]

A. The Revival of State Sovereignty as a Concern

Curiously, this limiting of state regulation has arisen because the Court has in recent years developed a tender regard for protecting state sovereignty. The Court starts from a premise that sees states as rivals, and the assertion of one state's power as diminishing the power of a sister state.[248]

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horizontal dimensions.").

243. *See* Holtzblatt, *supra* note 242, at 104 ("Sovereignty fans who write about vertical federalism look to the judiciary to preserve states' ability to serve as rivals and competitors to the national government.").

244. One explanation, of course, is that any abstract consideration of federalism is trumped by the Justice's view of the desirability of civil litigation. *See* Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307 (2014) (arguing that the Justices' views in cases involving access to state courts reflect their views on civil litigation). *But see* Cassandra Burke Robertson & Charles W. Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 776–77 (2017)

> We find little evidence that the Court was motivated by a desire to favor business interests . . . . [I]t appears the Court was driven more by a commitment to formalist evaluation of individual cases and a generalized resistance to allowing United States courts to serve as a magnet forum for transnational litigation.

245. *See Nicastro*, 564 U.S. at 879 ("[T]he New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over [defendant] without contravention of the Due Process Clause.").

246. *See id.* at 887 (failing to find the New Jersey courts to have jurisdiction over defendant).

247. *See id.* ("New Jersey is without power to adjudge the rights and liabilities of [defendant], and its exercise of jurisdiction would violate due process.").

248. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be

State sovereignty was built into the U.S. approach to personal jurisdiction from the beginning.[249] In the landmark case of *Pennoyer v. Neff*,[250] state jurisdiction was tied to the state's territorial limits.[251] Each state had "exclusive" jurisdiction over persons and property within its borders.[252] The Court's power could be viewed as being very much like a magic wand—capable of pulling into court anything within the state boundaries, but utterly without effect on the other side of the territorial line.[253]

As was apparent even within *Pennoyer*, the absolute and exclusive sovereignty approach did not quite work.[254] As the *Pennoyer* Court went to pains to make clear in dicta, citizens of a state remained under the power of the state's courts no matter where they resided, even if that residence gave other states parallel and competing power over them; some proceedings such as divorce also required extraterritorial reach if a recalcitrant spouse refused to travel back to the state, again even though other states might also be able to exercise jurisdiction over the matter.[255]

The territorialism issue became more problematic as the shift to a national, industrialized economy brought out-of-state corporations into the state to do business.[256] Since corporations

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deemed . . . an illegitimate assumption of power, and be resisted as mere abuse." (citing D'Arcy v. Ketchum, 52 U.S. 165, 175 (1851))).

249. *See id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.").

250. 95 U.S. 714 (1878).

251. *See id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.").

252. *Id.* Even in *Pennoyer*, territorial exclusivity was not quite pure—an exception allowed for extraterritorial jurisdiction over citizens and over proceedings such as dissolution of a marriage formed in the state. *Id.* at 734–35.

253. *See id.* at 722–23 (explaining the elementary principle laid down by jurists that "no tribunal established by [a State] can extend its process beyond that territory so as to subject either persons or property to its decisions").

254. *See id.* at 732 ("[A]s contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it.").

255. *See id.* at 734–35 (enumerating the exceptions allowing for extraterritorial jurisdiction).

256. *See, e.g.*, Green v. Chi., Burlington & Quincy Ry., 205 U.S. 530, 532–33 (1907) (addressing the question of jurisdiction in a situation involving an

have no corporeal presence, the issue arose as to when a corporation could be deemed present in a state.[257] This led to an increasingly awkward series of decisions in which activities in the state were assessed in order to determine "presence."[258] A major conceptual shift occurred with the landmark case of *International Shoe Co. v. Washington*.[259] Discarding the fictions of presence, the court looked to the core due process issue, and grounded its analysis in whether the contacts with the state were such as to make pulling a defendant into court consistent with the fundamental fairness concerns embodied in due process.[260] The emphasis shifted away from a preoccupation with presence within the borders of the state and toward a functional analysis based on fairness to the defendant.[261]

For a while after *International Shoe*, it looked as if this approach might lead to something like national service of process.[262] Jurisdiction was found even when the contacts with the state seemed attenuated.[263]

The Court pushed back against this, however, in a series of decisions that reasserted the importance of specific ties to the

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interstate railroad).

257. *See id.* at 532 ("[The exercise of personal jurisdiction's] validity depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there.").

258. *See, e.g.*, *id.* at 533–34; Int'l Harvester Co. v. Kentucky, 234 U.S. 579, 585–86 (1914).

259. 326 U.S. 310 (1945).

260. *See id.* at 316–17 ("[T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.").

261. *See id.* ("[The demands of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.").

262. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957) ("Looking back over this long history of litigation [since *Pennoyer*] a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.").

263. *See, e.g.*, *id.* at 223–25 (finding jurisdiction even where defendant had not solicited or done any insurance business in the State apart from the policy involved).

forum.[264] In *Hanson v. Denckla*,[265] a battle between competing court systems for control over an estate plan was resolved by finding that a trustee could not be pulled into court in a state where the only link was that the trust donor had chosen after the establishment of the trust to move there.[266] "Thrust upon" contacts were not enough.[267] In *World-Wide Volkswagen Corp. v. Woodson*,[268] foreseeability that a car could wind up in Oklahoma was not enough to subject a local dealer to personal jurisdiction there.[269]

In *World-Wide Volkswagen*, Justice White's majority opinion had language that seemed to suggest that state sovereignty and associated territoriality were central to the analysis. White wrote:

> But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.[270]

This seemed a major shift from an approach centered on fairness to the defendant that had dominated since *International Shoe*.[271]

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264. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 253 (1958) (failing to find sufficient ties to the forum and emphasizing that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws").

265. 357 U.S. 235 (1958).

266. *See id.* at 252 ("In contrast [with the facts of *McGee*], this action involves the validity of an agreement that was entered without any connection with the forum State.").

267. *See id.* at 251 ("We fail to find such [minimum] contacts in the circumstances of this case.").

268. 444 U.S. 286 (1980).

269. *See World-Wide Volkswagen*, 444 U.S. at 298 ("It is foreseeable that the purchasers of automobiles sold by [defendant] may take them to Oklahoma. But the mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'" (quoting *Denckla*, 357 U.S. at 253)).

270. *Id.* at 293.

271. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) ("To require the corporation in such circumstances to defend the suit away from its home or

In a subsequent decision, however, another opinion by Justice White rejected the idea of state sovereignty as driving the analysis, and centered it clearly on an individual liberty interest protected by the Due Process clause.

> The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'"[272]

In a footnote, the Court went on to be explicit that liberty interests alone underpinned personal jurisdiction doctrine:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.[273]

As a personal right, the Court went on to hold, personal jurisdiction could be waived by the individual, which is not the case when the limitation goes to the power of a branch of government.[274] The Court thus drew a sharp distinction between subject matter jurisdiction, which is based on the limitations inherent in the Constitution on one branch of government (the federal courts), and personal jurisdiction, which it held goes not to institutional

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other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.").

272. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 (1982) (internal citations omitted).

273. *Id.* at 703 n.10.

274. *See id.* at 703 ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

limitations and rivalries but only to the liberty interest of an individual.[275]

Even without an explicit focus on sovereignty as an underpinning of personal jurisdiction, the holdings in *Hanson* and *World-Wide Volkswagen* underscored that borders were not irrelevant and that national jurisdiction was not in the cards[276]—the inquiry remained one that looked at the defendant's relationship with the forum state.[277] The inquiry, however, seemed focused on the defendant's relationship with the forum state, and not on concerns related to state rivalry.[278]

For a time that seemed to be the end of it—personal jurisdiction was rooted in individual liberty, and not issues of rival state sovereignty, while paying due regard to the defendant's connections with the forum state.[279] As the *Insurance Corp. of Ireland*[280] decision noted, that was consistent with a number of decisions about personal jurisdiction that had come down over the years.[281] Plaintiffs filing a claim would submit to personal jurisdiction on counterclaims even if they had no connection with the jurisdiction other than filing suit,[282] contracting parties not

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275. *Id.* at 704 ("[U]nlike subject-matter jurisdiction, which even an appellate court may review sua sponte, under Rule 12(h), Federal Rules of Civil Procedure, '[a] defense of lack of jurisdiction over the person . . . is waived' if not timely raised in the answer or a responsive pleading." (citing FED. R. CIV. P. 12(h))).

276. *See World-Wide Volkswagen*, 444 U.S. at 293 ("Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

277. *See id.* at 292 (explaining that "[t]he relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there'" (citing *Int'l Shoe*, 326 U.S. at 317)).

278. *See id.* (omitting any discussion of state rivalry and instead emphasizing "the shared interest of the several States in furthering fundamental substantive social policies").

279. *See supra* notes 273–278 and accompanying text (arguing that personal jurisdiction goes not to state power limitations and rivalries, but ultimately is defined as a function of the liberty interest of an individual under the Due Process Clause).

280. 456 U.S. 694 (1982).

281. *See id*. at 702–03 (citing precedent and noting that "[the personal jurisdiction requirement] represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty").

282. *See, e.g.*, Adam v. Saenger, 303 U.S. 59, 67–68 (1938) ("The plaintiff

imminently expecting litigation could submit to personal jurisdiction in a forum where they might not be subject to personal jurisdiction,[283] and litigants would waive any right to assert personal jurisdiction if they were not timely in asserting the defense.[284]

If the stakeholder in a personal jurisdiction dispute was a state, jealously preserving its power against rival states seeking to usurp its sovereignty, none of these results are self-evident.[285] Indeed, in the realm of subject matter jurisdiction, where the issue clearly is delimiting federal versus state judicial power, none of these results would hold—individuals are powerless to consent to subject matter jurisdiction because the concern has to do with institutional limitations.[286] These results do make sense in the context of a doctrine concerned with the defendant's liberty interests, with the stakeholder free to waive a doctrine that exists for her benefit.[287]

The same can be said of the touchstone of minimum contacts analysis when looking at specific jurisdiction, which is whether the defendant purposefully availed itself of a connection with the

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having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.").

283. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (validating a forum selection clause that limited choice of forum to a Florida district court that would not otherwise have personal jurisdiction over the plaintiff).

284. *See* FED. R. CIV. P. 12(b)(2), 12(h)(1) (providing the manner in which personal jurisdiction can be waived by a defendant).

285. *But see* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 65 n.261, 95 n.365 (2010) (arguing that under a nuanced view of jurisdiction, taking horizontal federalism concerns into account, a defendant could waive some bases for objecting to an assertion to jurisdiction (e.g., a liberty interest) while being unable to waive others (e.g., comity interests arising from state versus state conflicts)). As the law exists, however, the defendant's waiver controls.

286. *See id*. at 12 (distinguishing discretionary decisions made by state courts from the "antecedent question of whether the Constitution limits the state's discretion to make *any* forum available in suits against a particular defendant").

287. *See* FED. R. CIV. P. 12(b)(2), 12(h)(1) (permitting waiver by a defendant); *see also Ins. Corp. of Ir.*, 456 U.S. at 702 (stating that "the personal jurisdiction requirement recognizes and protects an *individual* liberty interest" (emphasis added)).

forum state.[288] From the perspective of whether a forum is reasonable and fair, whether the defendant chose to have a relationship makes obvious sense. From the perspective of rivalrous state power, it is less self-evident that the test should be what jurisdiction a defendant had in mind when taking actions that later give rise to claims.

Then came *Nicastro*.[289] Justice Kennedy's plurality opinion gave short shrift to the long line of cases focused on individual liberty and asserted instead a theory of personal jurisdiction rooted in state sovereignty.[290] He acknowledged the history, but used a bootstrap approach to reinvigorating sovereignty concerns:

> Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.[291]

Kennedy's view of state sovereignty adopted White's earlier view that states are primarily rivals, and that assertion of jurisdiction by one state denigrates the sovereignty of others: "[a]nd if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."[292]

Despite reinvigorating sovereignty as a basis for limitations on personal jurisdiction, Kennedy continued to base his analysis on the familiar touchstone of purposeful availment. As he explained:

> Freeform fundamental fairness notions divorced from traditional practice cannot transform a judgment rendered without authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting

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288. *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

289. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

290. *See id.* at 880–84 (identifying the competing concerns of sovereign authority over fairness and foreseeability from past case law).

291. *Id.* at 884 (quoting Ins. Corp. of Ir. v. Compagnie Des Bauites De Guinee, 456 U.S. 694, 702 (1982)).

292. *Id.*

> activities within the forum State, thus invoking the benefits and protections of its laws."[293]

Under Kennedy's approach, while not fully developed, it appears that the proper state to exercise jurisdiction over McIntyre was not New Jersey, where the machine was located and used, where the accident occurred, and where the injured claimant lived, but Ohio.[294] Ohio was the state through which McIntyre imported its machines, and therefore a state which the British manufacturer had in mind when sending its machines to America.[295] As a result, there presumably existed purposeful availment with regard to Ohio, a state with no other apparent connection to the controversy. In Kennedy's view, it appears that the defendant's purposeful availment of Ohio, and not New Jersey, made any assertion of power by New Jersey an encroachment upon Ohio's sovereignty.[296]

Kennedy's approach was vigorously rejected in a dissent by Justice Ginsburg. She argued:

> New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State. Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim.[297]

Justice Ginsburg also noted that the jurisdiction New Jersey sought to exercise was not, under international norms, excessive or extravagant.

> The Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all

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293. *Id.* at 880 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

294. *See id.* at 886–87 (remarking that "these facts may reveal an intent to serve the U.S market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market").

295. *Id.* at 898.

296. *See id.* at 884 ("[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.").

297. *Id*. at 899.

> exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction "in matters relating to tort . . . in the courts for the place where the harmful event occurred." The European Court of Justice has interpreted this prescription to authorize jurisdiction either where the harmful act occurred or at the place of injury.[298]

Nicastro involved only a plurality decision, but similar state sovereignty language was adopted by a solid eight justice majority in *Bristol-Myers Squibb Co. v. Superior Court*. In this case, a national class action sought to address claims that a pharmaceutical product was defective.[299] The case was filed in California, where Bristol-Myers was not subject to general jurisdiction post-*Daimler* as California was neither its state of incorporation nor the site of its headquarters.[300]

The largest proportion of the plaintiff group was California residents.[301] For them, as sales and marketing had taken place in California, specific jurisdiction existed.[302] To this group, plaintiffs wished to add plaintiffs from multiple other states.[303] In those cases, so far as the record showed, none of the actions giving rise to their alleged injuries were connected to California.[304] The lawsuit therefore was one with a legitimate connection to California, but with additional plaintiffs with no California nexus.[305] Put differently, unlike *Daimler*, this was not a case where

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298. *Id*. at 909 (quoting 2001 O.J. (L 12) 4 (citing Case 21/76, Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735)); *see also id.* at 1780 (labeling state sovereignty a primary consideration in determining whether personal jurisdiction is present).

299. Bristol-Myers Squibb Co. v. Super. Ct. of Cal, 137 S. Ct. 1773, 1778 (2017).

300. *See id.* at 1781 ("Our settled principles regarding specific jurisdiction control this case."); *see also* Daimler AG v. Bauman, 571 U.S. 117, 119 (2014) ("The paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business." (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011))).

301. *Bristol-Myers*, 137 S. Ct. at 1778.

302. *See id.* at 1781 (acknowledging that California could assert specific jurisdiction on behalf of the in-state residents).

303. *Id.*

304. *See id.* at 1781 (noting the absence of a relevant link between California and the nonresident's claims).

305. *See id.* (identifying a connection between defendant's conduct and the

general jurisdiction brought a case with no California connection into a California court, but one with a connection to California and with defendants with significant connections to California who would have to defend an identical suit in California in any event, but connections that did not specifically include the out-of-state plaintiffs.[306]

The greatest danger of general jurisdiction—that ongoing contacts with a state would make it a forum for unrelated litigation from across the globe with no relationship to the forum—was not raised by the facts in *Bristol-Myers*.[307] The defendant had an ongoing connection with the forum that all agreed justified some kind of lawsuit in the forum, and the additional claims were factually and legally related to the claims that arose in California.[308] Personal jurisdiction aside, the liberal joinder rules common in the U.S. clearly allow and even encourage the additional plaintiffs to join litigation so all claims could be tried in one proceeding.[309]

On these facts, the lower court had applied a so-called "sliding scale" of specific jurisdiction, finding that since Bristol-Myers had engaged in extensive activities in California, a lesser level of nexus was required.[310] The court rejected this as a back door approach to reviving the kind of broad "continuous contacts" general jurisdiction rejected in *Daimler*.[311] The Court then looked to the

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California residents).

306. *Compare id.* (examining California's exercise of jurisdiction over California residents and nonresidents), *with Daimler*, 571 U.S. at 117 (considering a claim brought by twenty-two Argentinian nationals in California).

307. *See generally Bristol-Myers*, 137 S. Ct. at 1773.

308. *See id.* at 1781 (stating that the ability of third parties—the California residents—to bring similar claims is irrelevant).

309. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966), *superseded by statute*, 28 U.S.C. § 1367 (2018) (identifying the broad scope of joinder of claims and explaining that "[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties . . . .").

310. *See* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 377 P.3d 874, 889 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017) (applying California's sliding-scale test, which provides that extensive forum contacts will relax the requirements for demonstrating a connection to the forum).

311. *See* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1781 (2017) (limiting systematic activity of a corporation to questions of specific jurisdiction); *see also* Daimler AG v. Bauman, 571 U.S. 117, 119 (2014) (cabining the "continuous and systematic" inquiry to the exercise of specific jurisdiction

connection with the forum for the non-California plaintiffs, and, finding none, concluded that their lawsuit must be brought elsewhere.[312]

Justice Alito's opinion on behalf of an eight-justice majority staked its approach on sovereignty and territoriality concerns.[313] Quoting from *Hanson* and *World-Wide Volkswagen*, it reiterated that a state was diminished if another court asserted jurisdiction that went beyond its powers.[314] The terms "liberty interest" and "fairness," in contrast, appear nowhere in Justice Alito's opinion.[315]

The result in *Bristol-Myers* was, while not preordained, nonetheless not surprising. The plaintiffs dismissed from the action had no connection to California, and had their cases been brought as standalone cases there would have been no real argument that California was an appropriate setting for the litigation, whether as a matter of jurisdiction or of other doctrines such as venue.[316] It was a short step to expand previous rulings requiring personal jurisdiction with regard to each defendant to requiring personal jurisdiction for each plaintiff. Moreover, to have held otherwise would have opened defendants up to nationwide classes in any location where some local plaintiffs could be found, which would have the effect (if the plaintiffs' attorneys did their work properly) of locating all claims nationwide in an unfriendly forum.[317]

(citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945))).

312. *See Bristol-Myers*, 137 S. Ct. at 1782 (concluding that California courts cannot claim specific jurisdiction).

313. *See id*. at 1780 ("The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980))).

314. *See id.* at 1780–81 (explaining that assertions of jurisdiction rooted in convenience result in the reciprocal divestment of another State's power).

315. *Id.* at 1777–84.

316. *Id*. at 1782.

317. While many cases and commentators tend to pose the liberty interest issue with regard to an improper forum in terms of convenience, the real issue for corporate defendants may be that of multiplication of possible forums, with the resulting likelihood that litigation can be located in unfriendly venues. For an international company capable of doing business worldwide, it seems unlikely that suit in one state versus another would be so inconvenient from a logistics standpoint as to matter, especially in today's digital, globalized, outsourced world. Vendors will be found to handle document production and discovery; files will be exchanged, almost all electronically. Resolution will come in time. There is a

Somewhat surprisingly Justice Alito grounded the opinion in terms of state sovereignty.[318] The kind of due process, fundamental fairness analysis employed up until *Nicastro* could have identified a lack of fundamental fairness in exposing a defendant to a national class action in an unfriendly state because of contacts with just one state.[319] The shift to an emphasis on sovereignty, supported by eight justices, was a different and not inevitable path.

A vigorous dissent from Justice Sotomayor questioned the majority's reliance on territorial based sovereignty:

> The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do—trump even concerns about fairness to the parties. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which "the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State . . . the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation" but personal jurisdiction still will not lie.[320]

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palpable unfairness, however, to being required to stand trial at whichever venue is the most unfriendly to the defendant, whether or not that venue has any relationship at all to the dispute. Choice of law rules might—or might not—protect against local laws that are skewed against the defendant, but that does not address the issue of unfriendly jury or judicial venires, and experienced trial lawyers are quick to claim that the composition of the jury can be outcome determinative. Expanding the choice of forums systematically disadvantages defendants positioning litigation—and the opportunity for making precedents—in particularly unfriendly forums. *See* Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 247–48 (2014) (discussing issue of local bias); Stephen E. Sachs *How Congress Should Fix Personal Jurisdiction*, 108 NW. L. REV. 1301, 1324 (2014) (discussing "judicial hellholes"); *see also* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 U. S. CAL. L. REV. 241, 250–70 (2016) (discussing use of Eastern District of Texas as a preferred plaintiffs' forum for patent disputes).

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

319. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (grounding personal jurisdiction considerations in "traditional notions of fair play and substantial justice" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

320. *Bristol-Myers*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980)).

Seeing little reason to apply this principle against a large corporate defendant for conduct that was national in nature and scope, Sotomayor then went on to put her finger on the key question that was unasked by the majority: "What interest could any single State have in adjudicating respondents' claims that the other States do not share?"[321]

The view taken in the *Nicastro* plurality and *Bristol-Myers* masks this issue by viewing states primary as rivals and competitors.[322] By focusing on rivalry, rather than shared interests, the sovereignty analysis as it is being developed sees states not as partners in a common scheme of governance but as adversaries jealous of their rights and prerogatives.

After *Nicastro* and *Bristol-Myers*, state sovereignty seems clearly to be resurrected as a central consideration where personal jurisdiction is concerned.[323] Viewing states first and foremost as rivals, and eager to protect against the implicit diminution that might come from another state asserting jurisdiction, the Court has proved willing to engage in the explicit diminution of telling states that they cannot entertain actions they would be willing to hear.[324] The current status shows at least a portion of the Court very concerned with this view of sovereignty: a view which abstractly protects state privileges while actively and directly eviscerating the power of a state judicial system to act.

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321. *Id.*

322. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880–81 (2011) (likening the exercise of personal jurisdiction to the exercise of state authority); Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1780 (2017) (majority opinion) ("The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980))).

323. *See* Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 83 (2018) ("*Bristol-Myers Squibb* is a particularly important case because it continues *Walden*'s erosion of more relaxed relationships between the forum, the claim, and the defendant and because it seems to validate the *Nicastro* plurality's reinvigoration of state sovereignty.").

324. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) ("[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.").

B. "Purposeful Availment" as an Inherently Flawed Analytical Approach Towards State Sovereignty Concerns

The particular justification for this evisceration in Justice Kennedy's opinion was that the interests of another, unnamed state might be impaired if New Jersey were allowed to overreach.[325] While, in theory, this can make sense, it has a curious flavor on the facts of *Nicastro*. In *Nicastro*, after all, the tort occurred in New Jersey, and the party injured was a New Jersey citizen.[326] As Justice Ginsberg noted, most courts worldwide would not hesitate to assert jurisdiction on similar facts.[327]

Animating Justice Kennedy's concern, it appears, is a kind of "horizontal" federalism that looks to relationships among the states.[328] Horizontal federalism, while perhaps less categorically articulated in the cases than the familiar vertical federalism, is indeed inherent in the Constitution and built in to the way the various components of the federal government work.[329] That states are limited in their reach by their territory—or more broadly, by some interest or set of consequences related to the state territory—is an animating assumption of the federal system.[330]

The concern that one state not interfere with the territorial sovereignty of another is not entirely misplaced, of course. For example, if Illinois were to routinely send its highway patrol across the border into Indiana to enforce, say, driving while intoxicated laws, Indiana would have a legitimate grievance, even if such enforcement could be shown to stop drunken drivers before they could cross into Illinois.

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325. *See Nicastro*, 564 U.S. at 884 (noting that the federal balance depends upon each State's undisturbed sovereignty).

326. *Id*. at 877.

327. *Id.* at 909 (quoting 2001 O.J. (L 12) 4) (citing Case 21/76, Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735).

328. *See, e.g.*, Erbsen, *supra* note 234, at 494 (defining "horizontal federalism" as the coordination of the boundaries of coequal states).

329. *Id.* at 497 (describing "horizontal federalism" as a "potentially coherent field of law lurking amidst [the Constitution's] components usually viewed in isolation").

330. *Id*. (discussing the ways in which the Constitution creates inherent limits on state power).

Extending horizontal federalism concerns to the courts also is neither new nor inherently troubling. If states are limited in their reach outside their community, it makes sense for litigation—and regulation by litigation—to be included in those limits. Theories of regulatory legitimacy require some connection between the community imposing its standards and those subject to the imposition.[331]

Where it becomes odd, and it becomes very odd, is when a rival state is viewed as the principal stakeholder, and the inquiry is grafted into an analytical structure that for the past half century has claimed to largely be about individual liberty interests.[332] Purposeful availment makes sense as the motivating engine of minimum contacts when the core of the inquiry is the defendant's liberty interest, and the test is whether it is fair and reasonable to drag that defendant into a distant forum.[333] If the defendant has chosen in some knowing way to build a relationship with a forum, it can hardly seem unfair or unreasonable to make him answer in court for violations related to that relationship and those contacts.[334]

However, in Justice Kennedy's opinion in *Nicastro* and Justice Alito's in *Bristol-Myers* purposeful availment continued to be the touchstone for an analysis that seemed to be motivated less by concern about liberty interests than about rivalrous state power.[335] States have a structural interest in other states not overreaching

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331. *See* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 689 (1987) (asserting that legitimate exercises of jurisdiction should reflect the general limits of state sovereignty).

332. *See, e.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest.").

333. *See id.* at 703 (requiring "the maintenance of suit . . . not offend traditional notions of fair play and substantial justice" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).

334. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that the privilege of conducting certain activities within a state may justifiably give rise to obligations in connection with those activities).

335. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885 (2011) (characterizing inappropriately exercised state sovereignty as an upset to the federal balance); Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1780 (2017) (including state sovereignty as a "primary concern" in determining whether personal jurisdiction is present).

their proper space,[336] but Kennedy tried to set the boundaries between states based on a test that in the end focuses on little more than the defendant's antecedent state of mind.[337]

The focus on "purposeful availment" shifts the exercise of this kind of horizontal federalism away from a state's structural interest vis-à-vis other states, and onto the unpredictable and inherently unprincipled question of "what state was the defendant thinking about when it put a product into the stream of commerce?"[338] If one is looking to balance the interests of two states with regard to which should be able to host a lawsuit involving an injury, which state a foreign defendant years or decades before purposefully wanted a relationship with seems an odd way to draw the boundary. It substitutes inherently subjective thought processes on the part of potential defendants[339] for structural concerns when deciding which state, under the federal scheme, has the most connection to the lawsuit, and whether any other states have a reason to resist the assertion of jurisdiction.[340]

In *Nicastro*, for example, a New Jersey resident was injured by a machine sold into New Jersey and operated in New Jersey.[341] What trumped New Jersey's power to litigate a New Jersey centric dispute over whether the machine was safe, in the eyes of the plurality, were marketing plans made decades before by the British manufacturer.[342] Because there was no showing that the

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336. Some commentators agree, and agree with the notion that rival states are aggrieved. *See* Erbsen, *supra* note 285, at 38–60 (arguing for state interest and importance of state borders); Parry, *supra* note 134, at 855 (protecting individual interests in personal jurisdiction analysis also protects the sovereign interests of other states); Stein, *supra* note 331, at 710–11 ("It remains offensive to the federal system, and accordingly to the individual defendant, for a state without a legitimate regulatory claim to assert authority.").

337. *See* Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RES. L. REV. 769, 769 (2016) (arguing that Justice Kennedy would have found jurisdiction over the defendant in *Nicastro* only if J. McIntyre had specifically targeted New Jersey).

338. *See Nicastro*, 564 U.S. at 885 (requiring defendant engage in conduct directed at a specific state).

339. *See* Schmitt, *supra* note 337, at 769 ("The purposeful availment requirement, for example, is tied to the subjective intentions of the defendant rather than the sovereign power of the states.").

340. *See supra* note 11 and accompanying text.

341. *Nicastro*, 564 U.S. at 878.

342. *See id.* at 886 (requiring a showing that the manufacturer purposefully

British defendant, who all agreed was targeting the entire U.S. market, happened to attend a trade show in New Jersey, or buy an advertisement specifically aimed at New Jersey, or otherwise evince an interest in New Jersey greater than in other states, New Jersey was shunted aside in its power to hear the dispute in favor of those other states with no current connection to the dispute, but whose territories were actively in the mind of the defendant as it prepared to sell into the U.S. market.[343]

To the extent the concern is horizontal federalism, moreover, it's not clear why the Court treats personal jurisdiction as a perfect proxy for the state comity concerns that can arise under horizontal federalism.[344] If a state could have objections to another state hearing a lawsuit in which it has an interest, it would seem likely that personal jurisdiction is only one of many situations where that might arise. Imagine, for example, a case in which a New York state court is asked to hear a case that will require analysis of an unresolved issue of Delaware corporate law, with both the plaintiff and defendant being Delaware domiciliaries, and with the defendant having expressly waived personal jurisdiction and venue defenses. Delaware might care more about keeping interpretation of its legal code in its own courts than it does about inconvenience to its domiciliary, but no likely vehicle exists for asserting that interest.

In other cases—and *Nicastro* seems a prime example—the "other" state that can claim purposeful availment may have little interest in the litigation at all. Imagine a case with facts like *Nicastro*, where the defendant is not now and never has been domiciled in its state, its own law will under no circumstances be applicable, and its superior claim to the lawsuit exists only because of a purpose formed, perhaps unbeknownst to the forum state, through the thoughts and unilateral actions of the defendant, with no state involvement. In such a case, however, as in *Nicastro*, if the defendant asserts its rights, "our federalism" takes the case away

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availed itself of the New Jersey market).

343. *See id.* ("[I]t is [the manufacturer's] purposeful contacts with New Jersey, not with the United States, that alone are relevant.").

344. *See* Erbsen, *supra* note 285, at 89–96 (discussing the utility of a comity rule within jurisdictional inquiries).

from the site of the tort and the home of the plaintiff to a state with at best a glancing connection to the dispute.

These are not the kinds of issues Justice Kennedy examined in waving a hand towards our federalism. Indeed, exactly how purposeful availment relates to horizontal allocation of state power was not a topic Justice Kennedy addressed. He was clear, however, that the lack of such subjective focus on the state was sufficient to strip a state of its adjudicative power, and to make illegal any judgment rendered.[345]

To the extent the Court's sudden emphasis on state sovereignty reflects just another zig in the Court's zigzagging search for a rationale underlying personal jurisdiction, binding only until the next case takes a different tack, perhaps it is of little consequence.[346] As one scholar has noted:

> The Supreme Court has similarly been unable to articulate a stable method for addressing disputes about personal jurisdiction. Doctrine vacillates along multiple dyads: sometimes emphasizing state sovereignty and other times emphasizing individual rights, sometimes focusing on a state's power over actors and other times on power arising from the local effects of their actions, and sometimes relying on a rule's historical pedigree and other times discounting it. Likewise, the Court has unhelpfully opined that the forum state's interests in providing a forum matter except when they don't, that burdens on nonresident defendants are material except when they aren't, and that the plaintiff's interest in finding a convenient forum is important except when it isn't.[347]

To the extent the Court seriously intends going forward to assert a horizontal state sovereignty version of "our federalism" while still employing a purposeful availment analysis—and *Bristol-Myers* suggests that this is exactly where the court is headed—it raises serious questions about how the Court views federalism. In addition, the emphasis on protecting states from

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345. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883–85 (2011) (drawing no connection between purposeful availment the and the federalist system of government).

346. *See* George Rutherglen, *Personal Jurisdiction and Political Authority*, 32 J.L. & POL. 1, 1 (2016) ("This ambiguity in theory has led to deleterious consequences in practice by forcing together the disparate elements of sovereignty and individual rights into the more specific tests for personal jurisdiction.").

347. *See* Erbsen, *supra* note 285, at 4–5.

concurrent exercises of power by other states with a connection to the matter suggests a view of state relations drawn primarily from international relations among independent sovereigns, a view that is at fundamental odds with the "more perfect union" created by the Constitution.[348]

A certain level of concurrency is built into the Constitutional system. At one level, of course, citizens are subject to both state and federal power.[349] Beyond that, it is not exceptional for more than one state to be able to exercise over a party based on one pattern of conduct.[350] For example, that one state brings criminal charges does not prevent another state with a nexus from bringing charges that would be barred in the original state by the double jeopardy charge.[351] Similarly, a citizen travelling or even residing outside her home state might be subject to both home state and host state regulation, even if the applicable rules conflict.[352] While the boundaries of concurrent assertions of power depend on the facts and can be open to debate, there is no question that overlapping assertions of power are a basic feature of the federal system.[353]

The approach adopted by the plurality in *Nicastro* and the Court in *Bristol-Myers*, however, argues that states are diminished when other states exercise concurrent power.[354] This concern

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348. U.S. CONST. pmbl.

349. *See supra* note 9 and accompanying text.

350. *See, e.g.*, Heath v. Alabama, 474 U.S. 82, 93 (1985) ("A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws." (emphasis in original)).

351. *Id.*

352. *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity*, 150 U. PA. L. REV. 855, 856 (2002) (arguing that states have the presumptive power to regulate the activity of their citizens).

353. *See id.* ("Such diversity among polities is one of frequently heralded benefits of our federal system." (citing Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1558 (2000))). Some scholars, such as Professor Brilmayer, argue for Constitutional rules that limit concurrency in at least some settings. *See* Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 876 (1993) ("[T]he structure of our federal system clearly compels the priority of the territorial state, and . . . this priority typically invalidates the residence state's claim to regulate."). Others, such as Rosen, argue for accepting concurrency as a feature of the system.

354. *See Nicastro*, 564 U.S. at 884 (2011) ("[I]f another State were to assert

inspires the Court to strip states of power to adjudicate, even when the litigation has some real relationship to the forum.

At one level, if this kind of horizontal federalism is to become the driving concern behind personal jurisdiction doctrine, the test and the analysis should fit the focus. Rather than looking at which jurisdiction a defendant preferred to have a relationship with, an inherently defendant-focused inquiry, the emphasis should shift to which state has the best claim—or least a justifiable claim—to host the litigation. In this regard, what state the defendant proposed to have a relationship with will not be the only interest, or the best guide.[355] Beyond that, however, is the question of whether horizontal federalism as it operates really is a zero-sum game.

C. The Reality of Cooperative, Polycentric Federalism

In assessing the Court's summary invocation of "our federalism," a fundamental question of whether the Court's view of jealous rivals who are best viewed as independent sovereigns is the best approach. Even giving horizontal federalism full due, and even assuming that a Court bent on making horizontal federalism the core concern of personal jurisdiction can come up with a better test than purposeful availment, the situation is not so simple as two unconnected sovereigns living side by side. As a matter of fundamental law, states are not independent sovereigns, but members of a common union.[356] As a practical matter, it would do Illinois no good, and much harm, if Indiana were to become a

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jurisdiction in an inappropriate case, it would upset the federal balance. . . ."); Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1778 (2017) (discussing how the sovereignty of each state limits the sovereignty of other states).

355. Some scholars, in line with this, see the Dormant Commerce Clause, rather than Due Process, as the most appropriate source of Constitutional power to limit assertions of personal jurisdiction. *See* Chad DeVeaux, *Lost in the Dismal Swamp: Interstate Class Actions, False Federalism, and the Dormant Commerce Clause*, 79 GEO. WASH. L. REV. 995, 999 (2011) ("The dormant Commerce Clause, not due process, is offended by [state overreaching].").

356. *See* Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 523 (1935) ("The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

lawless jungle. The repose of the citizens of any state depends substantially on the stability and orderliness of its neighboring states. Put differently, putting the Indiana courts out of business on the theory that they might intrude on legitimate Illinois assertions of sovereignty is not inexorably to Illinois's benefit.

Beyond that, "our federalism" as it has evolved shows neighboring states pursuing largely parallel and consistent systems of law.[357] A car fit to drive in Indiana—with working headlights and tail lights, for example—is likely to be fit to drive under the laws applicable in Illinois. Both states have adopted versions of the Uniform Commercial Code to govern the sale of goods, leading to largely consistent if not identical rules.[358] Doctrines such as full faith and credit assume, and succeed, because notwithstanding some differences, the legal regimes in the various sovereign states follow a largely common model and pursue largely compatible ends. [359] Beyond that, to the extent the question boils down to one of community, and the legitimacy of applying a community's rules to an outsider, it should be remembered that all states ultimately are members of the same sovereignty and same overarching community, that of the United States, and due weight should be given to that integrated community before sending litigants to wholly foreign legal systems.

Differences exist from state to state, of course, but when the result of the Supreme Court's denying jurisdictional reach is perhaps to force litigants to pursue claims against overseas defendants in overseas jurisdictions, these differences should not be exaggerated. A foreign country is, indeed, a separate sovereign, perhaps operating under a very different system of laws. Another state is a co-equal member of the same federal union and of the same sovereign community, applying laws that spring from the same sources and that for a number of reasons tend to be more

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357. *See* Andrew Karch, *The States and American Political Development*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 365, 378 (Richard Valelly et al. eds., 2016) (highlighting the fundamental similarities of states).

358. *See Table of Jurisdictions Listing Uniform Acts Adopted*, *in* Directory of Uniform Acts and Codes U.L.A. 9, 31 & n.1 (1994 Pamphlet).

359. *See* ZIMMERMAN, *supra* note 234, at 1 (identifying constitutional doctrines that unite the states).

alike than not.[360] Indirect means such as standardization, horizontal diffusion of law, adoption of common model codes, as well as direct means such as compliance with federal standards, tend to spread a base level of commonality across states.[361] While differences are real, and can matter, the tendency of lawyers and law professors to spot distinctions and draw lines should not obscure the degree to which those distinctions reside in largely parallel systems that exist within a shared political community.[362]

While each state has an interest in maintaining a zone of sovereignty, it also has an interest—an interest implicit in the very "more perfect union"[363] asserted in the preamble as the reason for the Constitution and in the political community created by that Constitution—in acting in ways that cooperate with[364] and reinforce governance norms in neighboring states.[365] States can and do differ, and differ in consequential ways, but at least as importantly they function in mutually reinforcing ways.[366]

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360. *See* Coyle v. Smith, 221 U.S. 559, 567 (1911) ("'This Union' was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.").

361. *See* Karch, *supra* note 357, at 376 ("In devising social policies, the states interact not only with the national government but also with each other. Observers have long marveled at the spread of innovative programs from state to state.").

362. *See* Charles D. Tarlton, *Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation*, 27 J. POL. 861, 861 (1965) (discussing the symmetrical characteristics of the federal system).

363. U.S. CONST. pmbl.

364. The Court identified an example of this in *Keeton*, where it noted that the "single publication rule" involved cooperation and shared interests across multiple states. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984) ("New Hampshire also has a substantial interest in cooperating with other States, through the 'single publication rule,' to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding.").

365. *See* Gerken & Holtzblatt, *supra* note 242, at 112 ("[M]ost interstate interactions involve cooperation, not conflict."); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 199–200 (1996) (arguing that states cooperate as well as compete, with compliance with norms being a winning strategy in a reiterated prisoner's dilemma game); *see generally* Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842 (1989) (discussing formal and informal cooperation between state officials such as attorney generals).

366. *See* ZIMMERMAN, *supra* note 234, at 1 ("These horizontal relations may be cooperative as manifested by interstate compacts, uniform state laws, reciprocity statutes, administrative agreements, and regional and national associations of

Governance works not just through coercive power, but through voluntary adoption of common norms.[367]

To some degree, the commonality is required by the Constitution.[368] The Supremacy Clause requires states to yield to federal power when there is a conflict in an area where the federal government is empowered and has chosen to act.[369] In this regard, states often have little choice but to cooperate with federal programs and initiatives. The incorporation of most of the Bill of Rights against the states creates other areas of commonality.[370] Notwithstanding state preferences, the Constitutional mandate demands compatible rules.

Congressional actions can also lead to convergence of state laws and policies. Federal preemption can override areas where states choose divergent paths, and so the threat of preemption can nudge states toward consistent policies.[371] In other areas, states adopt local versions of federal laws (such as Little FTC Acts or state antitrust acts), with the common federal template leading to similarity.[372]

But beyond that there is much voluntary commonality.[373] The nearly universal adoption of the Uniform Commercial Code is not

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state government officers.").

367. *See* Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 MO. L. REV. 1149, 1150 (2008) ("[R]ational choice understandings of how international law works or pure theory debates about sovereignty are limited because they focus too heavily on coercive power, thereby giving insufficient attention to the role of rhetorical persuasion, informal articulations of legal norms, and networks of affiliation that may not possess literal enforcement power.").

368. *See* ZIMMERMAN, *supra* note 234, at 1 (listing constitutional doctrines that compel commonality between the states).

369. *See* U.S. CONST. art. VI, cl. 2 (commanding that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) (identifying the ways in which the express will of Congress preempts state action).

370. *See* McDonald v. City of Chicago, 561 U.S. 742, 746 n.12, 764–65, 765 n.13 (2010) (providing the incorporated provisions of the Bill of Rights).

371. *See* ZIMMERMAN, *supra* note 234, at 212 ("If states fail to exercise their reserved powers in a cooperative manner to replace the labyrinth of conflicting laws impeding commerce by harmonizing their civil statutes, Congress will continue to preempt their regulatory authority.").

372. *Id.*

373. *See* Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights,*

required by any federal mandate, but it allows each state to operate effectively in national commerce.[374] To the extent there are local flavors—and there are—they exist within a common structure that has been voluntarily adopted.[375] The UCC is just one of many uniform statutes with national and near national reach.[376] Beyond the UCC, state courts choose to follow the Restatements, or adopt legal rules first advanced by sister states.[377]

Formal and informal organizations also lead to diffusion of policies across state lines.[378] Organizations such as the National Association of Attorney Generals or the Conference of Chief Justices establish relationships across state lines, which in turn can lead to influence. Nongovernmental organizations, such as the

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De-essentializing Jurisdictional Divides, and Temporizing Accommodations, *in* FEDERALISM AND SUBSIDIARITY 403–05 (James E. Fleming & Jacob T. Levy eds., 2014) (discussing how translocal organizations of government actors coordinate formally and informally to homogenize policy); Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 710 (2008) (discussing cooperative state and local action on climate change issues).

374. *See* Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 132 (1996) (observing that State laws tend to be uniform where uniformity serves economic efficiency, but in some cases economically inefficient laws gain adoption due to authority of process); John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387, 1392 (2003) (arguing that "economic analysis supports public policy in favor of unification of law if certain conditions, outlined in the article, are met"); *see generally* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002) (exploring "friction" costs of changing legal rules).

375. *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1557 (describing state authority as subject to yet distinct from national authority).

376. *See Uniform Commercial Code*, UNIFORM LAW COMMISSION, https://perma.cc/27NA-TECD (last visited Feb. 12, 2020) (providing background on the adoption of the Uniform Commercial Code) (on file with the Washington and Lee Law Review).

377. *See* Karch, *supra* note 357, at 376 (describing the interactions between states in devising new policy).

378. It has been argued that at an international level, the diffusion of concerns and answers across decentralized networks of regulators facing similar concerns plays a key role in international cooperation. *See* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 4 (2002).

American Law Institute, can play a similar role, even absent formal actions.[379]

There is so much consistency across state lines, and so much consistency that by its nature provides no cause for controversy or litigation, that it can be easy to overlook the deep structural importance of this commonality.[380] It is worth remembering that one legal issue on which the states differed deeply, the legality of human chattel slavery, created unsustainable divisions in a structure that implicitly assumes high levels of common cause.[381]

Given this deep similarity, one has to ask, as Justice Sotomayor asked: how much is a state injured if another state enforces a legal duty very much like that carried on the state's own books?[382] Even if one could identify the state deprived of its right to host a lawsuit, does it care? Should it care?

Even if a state might care about another state's hosting of a lawsuit, the question remains whether constitutionalized intervention by the federal judicial branch is the best way to address the issue. Constitutionalizing due process standards in a

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379. *See* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 44 (2007)

> These various organizations, including the National League of Cities, the United States Conference of Mayors, the National Conference of State Legislatures, the National Governors' Association, the National Commissioners on Uniform State Laws, and the National Conference of Chief Justices of State Courts, are conduits for border crossings, both state-to-state and internationally.

Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 477–78 (1996)

> Be it state compacts, *ad hoc* regulatory arrangements of a group of states (sometimes prompted by or in response to federal regulation), mechanisms to adopt uniform laws, or the creation of new organizations to affect national political and legal life, actors—in and out of government—are trying an array of arrangements to respond to both new and old problems.

380. *See* Resnik, *supra* note 373, at 373 (describing the United States as "exemplifying" federalism symmetry).

381. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 237 (1996) (discussing how federalism not only protected slavery but went on to perpetuate racial segregation and discrimination).

382. *See* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1788 (2017) (Sotomayor, J., dissenting) (identifying no unique interest among the states potentially interested in this litigation).

rapidly evolving world places issues beyond political debate. Given that states have shown that they know how to cooperate and how to seek political help when cooperation fails, it's not clear that the Court's tender concern about hypothetical conflicts serves anyone's interests.[383]

These issues are heightened when the defendant comes from outside the borders of the United States, but has chosen to act within the U.S.[384] In a case such as *Nicastro*, should hypothetical internal rivalries result in cancelling assertions of U.S. sovereignty against foreign defendants?[385] In some cases, the state specific targeting required under Justice Kennedy's approach in *Nicastro* would leave a foreign defendant immune from suit—and hence beyond U.S. regulation via litigation—anywhere in the United States.[386]

The analysis is not helped by the Court's summary invocation of sovereignty with no exploration of what that entails. Sovereignty, as quickly becomes apparent after even the briefest examination of the literature, is a slippery and difficult term. Even in the context of free-standing international states, what exactly we mean by sovereignty quickly proves elusive.[387]

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383. *See* Gerken & Holtzblatt, *supra* note 242, at 111–12

> [T]he social science confirms what politics has shown. In many areas, there are robust, cooperative networks among federal, state, and local officials that can and do safeguard horizontal federalism. The horizontal parts of these networks provide the fora needed for states to work out the conflict for themselves. And the vertical dimensions of these networks allow state and local officials in conflict to pull in a national referee when they need one without regularly resorting to the courts.

384. *See* Lilly, *supra* note 156, at 85–86 ("The concerns of interstate federalism that apparently motivate strict limits upon state adjudicatory power are most questionable when invoked by an alien defendant.").

385. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

386. *See* Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 418 (2017) ("[S]ome foreign defendants can benefit commercially from the U.S. market yet avoid suit in any U.S. court . . . .").

387. *See* ROBERT JACKSON, SOVEREIGNTY: EVOLUTION OF AN IDEA xi–xii (2007) ("The idea of sovereignty is a big idea. It defies academic attempts to pin it down and fit it into tidy analytical categories. When we think we have managed that feat we discover another angle or dimension of the subject that we have not considered."); Hent Kalmo & Quentin Skinner, *Introduction, A Concept in Fragments*, *in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 1 (Hent Kalmo & Quentin Skinner eds., 2010) ("The

That problem of elusiveness only becomes more pronounced in the context of the U.S. federal system.[388] As the Constitutional preamble reminds us, the U.S. government is at its core a union—a coalition, a joining of forces and interests.[389] In that union, states retain some elements of independent sovereignty while simultaneously being full constituent parts of the sovereign union.[390]

The sovereignty discussion has tended to focus attention on the degree to which states retain independent control.[391] In some ways this makes sense—litigation tends to focus on boundary situations where there is some rivalrous contesting for control, whether between a state and the federal government, or between two states.[392] The legal academy's focus on reported cases tends to center interest on those aspects of sovereignty that are legally actionable.[393]

But, in other ways, this discussion obscures a deeper reality of sovereignty in our federal system. As noted above, portraying the states as jealous adversaries presents at best an incomplete picture of how they relate—much as focusing exclusively on the squabbles of married couples would obscure that they are nonetheless partners in a common enterprise. That they fight for more control of the sheets does not change the fact that they are lying in the same bed.

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status of sovereignty as a highly ambiguous concept is well established."); HIDEAKI SHINODA, RE-EXAMINING SOVEREIGNTY: FROM CLASSICAL THEORY TO THE GLOBAL AGE 1 (2000) ("Since the end of the Cold War, academics as well as practitioners have identified the concept of sovereignty as one of the most critical and elusive topics.").

388. Notwithstanding, concepts of sovereignty were discussed, at high levels of sophistication, at the outset of the events that led to the Revolution. *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 68–104 (2010).

389. U.S. CONST. pmbl.

390. *See* Erbsen, *supra* note 233, at 494 (describing the allocation of power in a federalist system).

391. *See, e.g.*, *id.* at 510 (noting the inevitable friction between fifty "mini-spheres" of sovereignty).

392. *See* KAGAN, *supra* note 24, at 3 (identifying the United States' reliance on adversarial legalism).

393. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodsen, 444 U.S. 286, 293 (1980) (rooting the permissible exercise of jurisdiction in considerations of sovereignty).

Their sovereignty, such as it is, derives not from their international standing but from the terms of the marriage compact that is the Constitution.[394] Every legitimate state action involves the assertion of a sovereignty based on the sovereign union.[395] Put differently, while there may have been a time when New Jersey could have elected to be an independent sovereign, since 1788 its every sovereign act has been as part of a national union. That it is allocated areas of exclusive control within that union does not change the fact that, no less than the federal government, states have only those powers given to them or preserved under the Constitution, and exercise them not as independent sovereign states but as part of a compound republic.[396]

State power may differ from federal power, and may differ from the power of another state, but all ultimately arise under the Constitution.[397] The national power of the compound republic is expressed in different settings, and these different settings include state assertions of power just as much as federal assertions of power.[398] All are expressions of the national power and sovereignty of the United States.[399]

For the most part, the union exists not as the additive whole of separate and exclusive sovereignties, but as an even more complex brew of overlapping and often duplicative governments. The Court's failure to take into account the actual nature of this complex sovereignty fatally handicaps its sovereignty analysis.

D. State Sovereignty and Horizontal Federalism in the Age of Legal Pluralism

It is somewhat ironic that the Supreme Court started worrying about jurisdictional monogamy, protecting rivalrous states from

394. *See* Erbsen, *supra* note 233, at 509 (noting the Constitution's grant of power to the several states).

395. *Id.*

396. ROBERTSON, *supra* note 9, at 346 (quoting THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison)).

397. *See id.* at 347–48 (describing areas of authority left to the states).

398. *See id.* (identifying areas of convergence).

399. *See id.* (noting that the national government and the states share governmental sovereignty).

competing assertions of power, just at that time that others worldwide have recognized that we live in an age of legal pluralism—an age where in any given space the players are subject to multiple formal and informal legal orders.[400] The notion that a single sovereign would have exclusive power over its citizenry has never held true in the compound republic of the United States, and holds even less true today as globalization, the rise of non-state rule making bodies, and inherently non-territorial environments such as the internet further complicate the situation.[401]

As one scholar has noted:

> [Today a] single act or actor is potentially regulated by multiple legal or quasi-legal regimes. Law often operates based on a convenient fiction that nation-states exist in autonomous, territorially distinct spheres and that activities therefore fall under the legal jurisdiction of only one regime at a time. Thus, traditional legal rules have tied jurisdiction to territory: a state could exercise complete authority within its territorial borders and no authority beyond it. In the twentieth century, such rules were loosened, but territorial location remained the principal touchstone for assigning legal authority. Accordingly, if one could spatially ground a dispute, one could most likely determine the legal rule that would apply.[402]

In the modern world, however, the autonomous nation-state with exclusive sway over its territory has less purchase. Technological changes such as rapid movement of people and

400. *See generally* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012) [hereinafter, BERMAN, GLOBAL LEGAL PLURALISM]; TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015); MICHAEL D. MCGINNIS, POLYCENTRICITY AND LOCAL PUBLIC ECONOMIES: READINGS FROM THE WORKSHOP IN POLITICAL THEORY AND POLICY ANALYSIS (1999); OSTROM & ALLEN, *supra* note 9; FRANCIS SNYDER, THE EU, THE WTO AND CHINA: LEGAL PLURALISM AND INTERNATIONAL TRADE REGULATION 29–88 (2010); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 490 (2002); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008).

401. For a review of the literature and tracing of the development of the field, see Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009).

402. BERMAN, GLOBAL LEGAL PLURALISM, *supra* note 400, at 4.

products, placeless technologies such as internet clouds and satellites, international treaty organizations and non-governmental standard setting organizations, along with traditional nonstate players such as religious communities, all play a role alongside sovereign states.

In this world:

> [A] simple model that looks only to territorial delineations among official state-based legal systems is now simply untenable (if it was ever useful to begin with) . . . . [N]ation-states must work within a framework of multiple overlapping jurisdictional assertions by state, international, and even nonstate communities. Each of these types of overlapping jurisdictional assertions creates a potentially hybrid legal space that is not easily eliminated.[403]

Even at the national level, legal pluralism cannot be wished away, and trying to protect states from insults to their sovereignty should another entity have some type of jurisdiction is doomed to failure.[404] In many if not most cases, there is no single proper forum; in many if not most cases, states are not injured if others have a claim to participate.[405] The proper question is whether a forum has sufficient connection to a dispute to legitimately exercise power.[406]

This cannot be a question solely based on territorial lines. Horizontal limits are primarily a function of community rather than just geography.[407] The question is not where geographically a defendant may be compelled to appear, but which communities should have the power to make him appear and to render

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403. *See id*. at 5.

404. *See id*. at 14 ("[H]ybridity is a reality we cannot escape . . . .").

405. *See* Bristol-Meyers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1788 (2017) (Sotomayor, J., dissenting) (implying that states share parallel interests in adjudicating certain claims).

406. *Id.*

407. *See* Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 1 (2007) ("[J]urisdiction entails more than territorial and formalistic inquiries into applicable law and the authority of a given court in a particular dispute. These authors have instead engaged it as a 'locus for debates about community definition, sovereignty, and legitimacy.'").

judgment. This is less a question of location and convenience than of political legitimacy.[408]

Particularly when international defendants are involved, and when the alternative may be for a U.S. plaintiff to seek redress in an alien jurisdiction, it is worth remembering that that all U.S. states are members of the same political community. Each state expresses, and can only express, a facet of U.S. political power. To send plaintiffs altogether out of that community because of overly fine concerns about where internal lines might be drawn weakens and offends, rather than preserves, the political community created by "our federalism."[409]

The defendant's *ex ante* "availment" and state of mind are unlikely to prove an exclusive guide to political legitimacy, because the defendant is not the only actor in the play. An unrelated forum—such as California would have been in the *Daimler* litigation—raises deep legitimacy issues, but a related forum that was not at the top of the defendant's mind at the time crucial actions were taken is, in other nation-states, recognized as a legitimate forum.[410] If a state has a regulatory or compensatory interest, and must live with the consequences of the defendant's misconduct, it's hard to see why the defendant's projections about where its actions might have an impact should stifle further analysis.

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408. *See* Sachs, *supra* note 317, at 1312 ("But we shouldn't be surprised that personal jurisdiction implicates the allocation of power across nations and across states—or that our intuitive answers might actually depend on complex theories of political authority or international law.").

409. *See* Dodge & Dodson, *supra* note 6, at 1229 ("[T]he burdens on the plaintiff of being forced to bring suit in a foreign country counterbalance any assertions of unfairness by an alien in having to defend in the United States."); Erbsen, *supra* note 285, at 26

> [E]ven if the burdens of litigating in a particular forum would be severe for the defendant, the burdens of not litigating in that forum would often be equally severe for the plaintiff. Jurisdictional dismissals redistribute burdens rather than eliminate them: refusing to force a defendant to travel *to* the forum can force the plaintiff to travel *from* the forum.

410. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro 564 U.S. 873, 909 (2011) (Ginsburg, J., dissenting) ("The European Court of Justice has interpreted this prescription to authorize jurisdiction either where the harmful act occurred or at the place of injury." (citing Case 21/76, Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735)).

Still more importantly, one state's assertion of power should not be viewed as another state's loss. On the ground, rather than existing in separate pseudo-Westphalian silos states and the federal government, whether one looks horizontally or vertically, states engage in regulatory dialogues, putting resources where others have not, and acting consciously or unconsciously in concert.[411] On the ground, regulatory reality is more muddled and intermingled than subject to the bright lines beloved by legal minds.[412]

In a deeply pluralistic system where national and international actors can expect to be regulated and held to account by multiple jurisdictions, and in a national system where the laws if not identical are least of the same legal family, Justice Sotomayor's question in *Bristol-Myers* deserves thoughtful consideration: What unique interest in a litigation does a state have that might not be shared by others?[413] In the case of *Bristol-Myers*, all states had similar interests in regulating identical products.[414] In other cases, it may be that a state has a unique and special regulatory interest that it would want to vindicate directly. Again, however, this special regulatory interest is unlikely to be revealed by the defendant's ex ante thought processes.

It must be recognized that assertions of state power are ultimately assertions of national power—states have separate spheres, to be sure, but they are intertwined parts rather than independent free agents.[415] Curtailing state power also curtails national power.[416] Especially where foreign defendants are involved, shutting down a legitimate state forum limits the reach of national after-the-fact regulation.[417] Given that most such litigation as regulation occurs in state, not federal, courts, and that

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411. *See* Ahdieh, *supra* note 10, at 865–68 (discussing cooperative regulation).

412. *See id.* at 865 ("In such regimes, discrete sets of regulatory rules may collapse into a collective whole.").

413. *Bristol-Meyers*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting).

414. *Id.*

415. *See* BERMAN, GLOBAL LEGAL PLURALISM, *supra* note 400, at 4 (labeling the concept of states as distinct spheres a "convenient fiction").

416. *See, e.g.*, *Nicastro*, 564 U.S. at 873 (Kennedy, J., plurality) (foreclosing reach of domestic courts in exercising jurisdiction over a foreign defendant).

417. *Id.*

states are entitled to assert such regulatory power, cutting off state power to adjudicate must be recognized as the insult to national sovereignty that it is.[418]

IV. Conclusion

State sovereignty ultimately is national sovereignty. To exaggerate concepts of state exclusiveness in a modern age of legal pluralism serves only to diminish the sovereignty of individual states, and, ultimately, the nation as a whole by constricting how legitimate U.S. regulatory power can be exercised through litigatory regulation.

Texas and Massachusetts, however different they are, are more like each other than either is like China. Massachusetts is not Scandinavia; Texas is not Chile. While there are fiercely contested intramural differences, and while contesting those intramural differences has consequences both locally and in terms of national development,[419] paying due regard to differences should not lead to ignoring the profound commonalities amongst states bound together in one union and one political community.

The problem comes into sharper focus when the defendant is an alien. Requiring an alien to target an individual state, rather than the nation as a whole, leaves the U.S. with a narrower jurisdictional reach than other countries, and risks driving U.S. citizens to a foreign jurisdiction to seek redress. The loss of sovereignty is that of the United States as a nation.

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418. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 608 (1981) (discussing the ways in which the Constitution channels the adjudication of federal questions to state courts).

419. *See* ROBERTSON, *supra* note 9, at 348 ("[M]ost of the contentious policy conflicts in American history originated at the state and local levels of government.").