



2017 FORUM FOR STATE APPELLATE COURT JUDGES

JURISDICTION: DEFINING STATE COURTS' AUTHORITY

STATE COURT JURISDICTION IN THE 21ST CENTURY

*Adam N. Steinman**

Executive Summary

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

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

*In Part III, Professor Steinman discusses the “shakier ground” of general jurisdiction. The Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown* unanimously found that stream of commerce cannot be the sole basis of general jurisdiction—something more is required. After*

* Frank M. Johnson Faculty Scholar and Professor of Law, University of Alabama. B.A., Yale University. J.D., Yale Law School.

Goodyear, the Court left open a question regarding the exercise of general jurisdiction that was not limited to the paradigmatic place of incorporation and principal place of business: where else might a corporation be “essentially at home?” Daimler AG v. Bauman, which denied the exercise of general jurisdiction, supports the notion that a corporation is not “at home” merely because of the magnitude of its in-state contacts. Steinman identifies, and responds to, four questions about the Court’s concept of general jurisdiction:

1. In which place beyond the principal place of business or state of incorporation might a corporation be subject to general jurisdiction?;

2. Are the Goodyear and Daimler decisions limited to international litigation involving foreign defendants?;

3. How to deal with corporations that appoint an in-state agent for service of process?; and

4. How to determine whether a sufficient affiliation exists between the forum and the underlying controversy to move away from general jurisdiction, and to justify specific jurisdiction?

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

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

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Introduction

Since 2011, the Supreme Court of the United States has shown a renewed interest in personal jurisdiction. After more than two decades of silence on the subject, the Court has heard six personal jurisdiction cases in a six-year period.¹ *J. McIntyre Machinery, Ltd. v. Nicastro*² and *Goodyear Dunlop Tires Operations, S.A. v. Brown*³ were decided in 2011. *Daimler AG v. Bauman*⁴ and *Walden v. Fiore*⁵ were decided in 2014. And *BNSF Railway Co. v. Tyrrell*⁶ and *Bristol-Myers Squibb Co. v. Superior Court*⁷ were decided in 2017.

¹ See generally 4 THE LATE CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE & PROCEDURE § 1067.1 (4th ed. 2015 & Supp. 2017). It is perhaps more than a coincidence that this new batch of cases began immediately after Justice Stevens retired from the Court. In two notable cases decided by the early Rehnquist Court, Justice Stevens declined to join either side of competing four-Justice coalitions, leaving important aspects of jurisdictional doctrine unresolved. See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Burnham v. Superior Court*, 495 U.S. 604 (1990). It turned out, however, that Justice Stevens was not wholly to blame for these inconclusive decisions. The Supreme Court’s first decision in this more recent batch of cases also failed to generate a majority opinion. See *infra* notes 54-58 and accompanying text (discussing the *McIntyre* case).

² 564 U.S. 873 (2011).

³ 564 U.S. 915 (2011).

⁴ 134 S. Ct. 746 (2014).

⁵ 134 S. Ct. 1115 (2014).

⁶ 137 S. Ct. 1549 (2017).

⁷ 137 S. Ct. 1773 (2017).

The key issue in all these cases is the constitutionality of state courts exercising personal jurisdiction over out-of-state defendants.⁸ At a very general level, one could argue that these decisions reflect a restrictive attitude toward the jurisdictional reach of state courts. In every decided case, the Court reversed the lower courts' exercise of personal jurisdiction.

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

I. SPECIFIC VS. GENERAL JURISDICTION

The Supreme Court's 1945 decision in *International Shoe v. Washington*⁹ was a paradigm shift in the Court's approach to personal jurisdiction. In the decades prior to that decision, courts and legislatures struggled to fit new social realities—such as “the nation's increasingly industrialized economy, the advent of high speed transportation and communication, and the mobility of the population”¹⁰—into prevailing notions of jurisdiction that fixated on the defendant's “presence” in the territory of the state seeking to assert jurisdiction,¹¹ or the defendant's “consent” to the jurisdiction of that state.¹²

Responsive to these concerns, *International Shoe* articulated a new constitutional standard. Chief Justice Stone declared that even if a defendant is not present in the forum state, due process is satisfied as long as the defendant has “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹³ Even in this seminal decision, the Court recognized that the assessment of a defendant's “contacts” with the forum state might vary depending on whether the lawsuit itself was related to those contacts. For example, the Court contrasted the situation where a lawsuit is based on “dealings

⁸ Although two of these cases—*Daimler* and *Walden*—involved personal jurisdiction in federal district courts, personal jurisdiction was based on Federal Rule of Civil Procedure 4(k)(1)(A), which allows a federal court to exercise personal jurisdiction as long as a state court in the state where the federal district court is located could do so. See FED. R. CIV. P. 4(k)(1)(A) (“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”). Thus the Supreme Court examined whether it would be constitutional for California courts (in *Daimler*) and Nevada courts (in *Walden*) to exercise personal jurisdiction. See *Daimler*, 134 S. Ct. at 753; *Walden*, 134 S. Ct. at 1121.

⁹ 326 U.S. 310 (1945).

¹⁰ See 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1067.

¹¹ See *International Shoe*, 326 U.S. at 316-17.

¹² See *id.* at 318-19.

¹³ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

entirely distinct from” the defendant’s activities in a state,¹⁴ with the situation where the lawsuit is based on “obligations” that “arise out of or are connected with the activities within the state.”¹⁵

In the wake of *International Shoe*—and with a big assist from Professors Arthur von Mehren and Donald Trautman—the Supreme Court’s case law distilled this insight into a distinction between “general jurisdiction” and “specific jurisdiction.”¹⁶ Specific jurisdiction requires “an affiliation between the forum and the underlying controversy”¹⁷—such as “when the suit arises out of or relates to the defendant’s contacts with the forum”¹⁸ or when there is “activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”¹⁹ General jurisdiction allows a court to hear “any and all claims” against a defendant,²⁰ regardless of whether the claim has any connection to the forum state.

Not surprisingly, general jurisdiction imposes a “substantially higher threshold than is required in specific jurisdiction cases.”²¹ The defendant’s contacts must be “so continuous and systematic as to render [it] essentially at home in the forum State.”²² Specific jurisdiction does not require such “continuous and systematic” contacts, but it does require purposeful activity by the defendant directed at the forum—a notion that sometimes goes by the label “purposeful availment.”²³ Even when a defendant has established those minimum contacts with the forum state, specific jurisdiction requires an inquiry into whether jurisdiction would be “reasonable” and comport with “fair play and substantial justice.” Factors relevant to this reasonableness inquiry include the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, and the interstate judicial system’s interest in

¹⁴ *Id.* at 318 (“While it has been held in cases on which appellant relies that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” (citations omitted)).

¹⁵ *Id.* at 319 (“[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”).

¹⁶ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8 & 9. (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966)).

¹⁷ *Goodyear*, 564 U.S. at 919 (quoting von Mehren & Trautman, *supra* note 16, at 1136 (internal quotation marks omitted)).

¹⁸ *Id.* at 923-24 (quoting *Helicopteros*, 466 U.S. at 414 n.8 (internal quotation marks omitted)).

¹⁹ *Id.* at 919.

²⁰ *Id.*

²¹ 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1067.5.

²² *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear*, 564 U.S. at 919).

²³ *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

obtaining the most efficient resolution of controversies.²⁴ The Supreme Court recently clarified that no separate inquiry into these reasonableness factors is necessary where a defendant's contacts are sufficient for general jurisdiction.²⁵

II. MORE SOLID FOOTING: SPECIFIC JURISDICTION

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

The Supreme Court decision that has prompted the greatest concern about the availability of specific jurisdiction is the 2011 decision in *J. McIntyre Machinery, Ltd. v. Nicastro*.²⁶ *McIntyre* presented the scenario that is often referred to as the “stream of commerce.” And the decision has raised questions because a fractured Court—with no majority opinion—found that personal jurisdiction was not proper in the state where the manufacturer's product was ultimately purchased and caused injury. As explained below, however, *McIntyre* need not be read as a fatal obstacle to personal jurisdiction when plaintiffs bring claims in the state where they were injured or suffered damages.

A. Pre-McIntyre Case Law

In 1980, the Court decided *World-Wide Volkswagen Corp. v. Woodson*,²⁷ a case involving plaintiffs who were injured in Oklahoma while driving an automobile they had purchased from a dealership in New York.²⁸ They filed a lawsuit in Oklahoma against several defendants, including the New York car dealership and a New York distributor that served dealers in New York, New Jersey, and Connecticut.²⁹ These two defendants argued that personal jurisdiction was improper in Oklahoma.³⁰

The Supreme Court held that exercising jurisdiction over these defendants in Oklahoma violated the Due Process Clause.³¹ The Court recognized, however, that it would be entirely appropriate for a state to “assert[] personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the

²⁴ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

²⁵ *Daimler*, 134 S. Ct. at 762 n.20 (“True, a multipronged reasonableness check was articulated in *Asahi*, but not as a free-floating test. Instead, the check was to be essayed when specific jurisdiction is at issue. . . . When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous.”).

²⁶ 564 U.S. 873 (2011).

²⁷ 444 U.S. 286 (1980).

²⁸ *Id.* at 288.

²⁹ *Id.* at 288-89.

³⁰ *Id.*

³¹ *Id.* at 295-99.

forum State.”³² More specifically, the Court stated that “if the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve, *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.”³³ Jurisdiction was ultimately denied in *World-Wide Volkswagen* because the two New York defendants had not sought to serve, either directly or indirectly, the market for their product in the forum state of Oklahoma—the local dealer and the regional distributor served the markets in New York and surrounding states.³⁴

The Supreme Court’s next stream-of-commerce case was *Asahi Metal Industry Co. v. Superior Court*.³⁵ In this case a California plaintiff was injured and his wife killed while riding a motorcycle in California.³⁶ The plaintiff filed a lawsuit in California state court against several defendants, including the Taiwanese company (Cheng Shin) that manufactured the motorcycle’s tire tube.³⁷ Cheng Shin then filed a claim seeking indemnification from the Japanese company (Asahi) that manufactured the tube’s valve assembly but had not been named as a defendant.³⁸ After the plaintiff’s claims settled, the only claim remaining in the case was Cheng Shin’s indemnity action against Asahi.³⁹

The Supreme Court concluded that California lacked personal jurisdiction over Cheng Shin’s indemnity action against Asahi, but there was a majority opinion only as to one point—that jurisdiction was foreclosed by the second-prong “reasonableness” factors that apply in specific-jurisdiction cases.⁴⁰ This holding, however, was premised on *Asahi*’s fairly unique posture, particularly the fact that the original plaintiff—who had indeed been injured in the forum state—had settled his claims and was not seeking any relief from Asahi.⁴¹ The more significant question

³² *Id.* at 298.

³³ *Id.* at 297 (emphasis added).

³⁴ *Id.* at 298.

³⁵ 480 U.S. 102 (1987).

³⁶ *Id.* at 105.

³⁷ *Id.* at 105-06.

³⁸ *Id.* at 106.

³⁹ *Id.*

⁴⁰ *See id.* at 113-14 (“We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce.”). Justice Scalia was the only Justice in *Asahi* who did not join the Court’s opinion with respect to the reasonableness factors. *See id.* at 105.

⁴¹ *See id.* at 114 (“[T]he interests of the plaintiff and the forum in California’s assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification asserted by Cheng Shin, a Taiwanese corporation, against Asahi Because the plaintiff is not a California resident, California’s legitimate interests in the dispute have considerably diminished.”); *see also* 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1067.1 (“[T]he Court refused to exercise personal jurisdiction over Asahi because the particular circumstances of the case made jurisdiction unreasonable.”).

going forward, therefore, was whether a defendant in Asahi’s position had established minimum contacts with the forum state. On that issue, the Court generated no majority opinion.

Four Justices, led by Justice Brennan, concluded that Asahi had established minimum contacts with California.⁴² Quoting *World-Wide Volkswagen*, Justice Brennan reasoned that “[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”⁴³ Four Justices, led by Justice O’Connor, concluded that Asahi had not established minimum contacts with California.⁴⁴ Justice O’Connor wrote that “placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”⁴⁵ Rather, she would require “[a]dditional conduct” that would, “indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”⁴⁶ Justice Stevens joined neither of the four-Justice coalitions in *Asahi*. Given the conclusion “that California’s exercise of jurisdiction over Asahi in this case would be ‘unreasonable and unfair,’” he saw “no reason” to endorse any particular “test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts.”⁴⁷ Justice Stevens did, however, note that he was “inclined to conclude” that Asahi’s contacts were sufficient given “the volume, the value, and the hazardous character of the components.”⁴⁸

B. *J. McIntyre Machinery v. Nicastro*

The four-four Brennan-O’Connor split remained the Supreme Court’s last word on this subject for two decades, until the 2011 decision in *McIntyre*.⁴⁹ The plaintiff in *McIntyre*, Robert Nicastro, suffered serious injuries to his hand while operating a metal-shearing machine at Curcio Scrap Metal, the New Jersey company for which he worked.⁵⁰ Mr. Nicastro filed a lawsuit in a New Jersey state court against J. McIntyre Machinery, the British corporation that manufactured the shearing machine.⁵¹ J. McIntyre had entered into an agreement with an Ohio-based company, McIntyre Machinery of America, to sell J. McIntyre’s machines to customers in the United

⁴² *Id.* at 121 (Brennan, J., concurring).

⁴³ *Id.* at 119-20 (Brennan, J., concurring) (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98) (internal quotation marks omitted).

⁴⁴ *See id.* 112-13 (O’Connor, J.).

⁴⁵ *Id.* at 112.

⁴⁶ *Id.*

⁴⁷ *Id.* at 121-22 (Stevens, J., concurring) (quoting *id.* at 116).

⁴⁸ *Id.* at 122.

⁴⁹ 564 U.S. 873 (2011).

⁵⁰ *Id.* at 878 (plurality opinion); *id.* at 895 (Ginsburg, J., dissenting) (“Nicastro operated the [machine] in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey.”).

⁵¹ *Id.* at 878 (plurality opinion); *id.* at 894 (Ginsburg, J., dissenting).

States.⁵² J. McIntyre also helped to facilitate sales of its machines in the United States by sending its officials to U.S. trade shows in “such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco.”⁵³

While *McIntyre* seemed to present an opportunity to clarify personal jurisdiction in the stream-of-commerce context,⁵⁴ it was not to be. The Court split four-to-two-to-three.⁵⁵ Justice Kennedy wrote a plurality opinion rejecting jurisdiction on behalf of himself, Chief Justice Roberts, and Justices Scalia and Thomas.⁵⁶ Justice Ginsburg wrote a dissenting opinion that would have upheld jurisdiction on behalf of herself and Justices Sotomayor and Kagan.⁵⁷ Justices Breyer and Alito tip the scale by providing two more votes against jurisdiction, but their concurring opinion, written by Justice Breyer, rejects the reasoning used by the Kennedy plurality.⁵⁸ As explained below, the legal principles on which Justices Breyer and Alito relied are generally consistent with Justice Ginsburg’s approach, but they voted against jurisdiction based on a narrow view of the factual record in *McIntyre*.

Justice Kennedy’s plurality opinion ranged from the sensible and unexceptional to the deeply troubling and misguided. In the former category, Justice Kennedy made clear that the transmission of goods into the forum state can be sufficient to establish jurisdiction. The requirement that a defendant must “purposefully avail[] itself of the privilege of conducting activities within the forum State,” he explained, can be met by a defendant “sending its goods rather than its agents.”⁵⁹ Thus, Justice Kennedy recognized that jurisdiction is appropriate over a manufacturer or distributor who “‘seek[s] to serve’ a given State’s market.”⁶⁰ Justice Kennedy did clarify that “[t]he defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant

⁵² *Id.* at 878 (plurality opinion) (“[A]n independent company agreed to sell J. McIntyre’s machines in the United States.”); *id.* at 887 (Breyer, J., concurring) (“J. McIntyre Machinery, Ltd. [is] a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States.”); *id.* at 896 (Ginsburg, J., dissenting) (“From at least 1995 until 2001, McIntyre UK retained an Ohio-based company, McIntyre Machinery America, Ltd . . . ‘as its exclusive distributor for the entire United States.’”).

⁵³ *Id.* at 888 (Breyer, J., concurring) (quoting *Nicastro*, 987 A.2d at 578-79); *see also id.* at 2786 (plurality opinion) (“J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre’s machines alongside the distributor. The conventions took place in various States, but never in New Jersey.”).

⁵⁴ *See id.* at 877, 879 (noting that the case “presents an opportunity to provide greater clarity” in light of the “decades-old questions left open in *Asahi*”).

⁵⁵ *See generally* Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 481, 488-91 (2012).

⁵⁶ *Id.* at 877 (plurality opinion).

⁵⁷ *Id.* at 893 (Ginsburg, J., dissenting).

⁵⁸ *Id.* at 887 (Breyer, J., concurring).

⁵⁹ *Id.* at 882 (plurality opinion) (alteration in original) (quotations omitted).

⁶⁰ *Id.* (“[A] defendant may in an appropriate case be subject to jurisdiction without entering the forum—itself an unexceptional proposition—as where manufacturers or distributors ‘seek to serve’ a given State’s market.” (quoting *World-Wide Volkswagen*, 444 U.S. at 295)).

can be said to have *targeted* the forum.”⁶¹ While this was admittedly a new gloss on how to assess jurisdiction in the stream-of-commerce scenario,⁶² whether it represented a significant change would ultimately hinge on what it means to “target[] the forum.”

On this point, the plurality opinion failed to explain coherently *why* these principles supported the conclusion that J. McIntyre had not targeted or sought to serve the New Jersey market.⁶³ Why was it not the case that a manufacturer who sought to serve the U.S. market as a whole necessarily sought to serve the states that comprise the United States? Justice Kennedy’s observations that “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis,” and that “the United States is a distinct sovereign” from New Jersey and each of the 50 states,⁶⁴ missed the point. A defendant necessarily seeks to serve the forum state when it seeks to serve a territorial area that includes the forum state—the whole cannot possibly be less than the sum of its parts.

The plurality opinion contained numerous other fundamental flaws, including (1) a long-rejected attempt to frame the propriety of personal jurisdiction as whether the defendant “manifest[s] an intention to submit to the power of a sovereign,”⁶⁵ and (2) flawed discussions of Justice Brennan’s and Justice O’Connor’s competing opinions in *Asahi*.⁶⁶ These and other aspects of Justice Kennedy’s opinion have been critiqued elsewhere.⁶⁷ For purposes of this paper, the crucial point is that the plurality opinion did not garner the support of five Justices. Moreover, as explained below, the two concurring Justices explicitly disavowed the more troubling aspects of the plurality opinion.

Justice Ginsburg’s dissenting opinion in *McIntyre* did not disagree with the basic premise that a defendant must “purposefully avail[] itself” of the forum state in order to be subject to jurisdiction there.⁶⁸ Unlike Justice Kennedy, however, Justice Ginsburg cogently applied this general principle to the reality of the British manufacturer’s commercial activity: “Given McIntyre UK’s endeavors to reach and profit from the United States market as a whole, Nicaastro’s suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim.”⁶⁹ She continued:

The machine arrived in Nicaastro’s New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged. . . . McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, ‘purposefully availed

⁶¹ *Id.* (emphasis added).

⁶² In his concurrence, Justice Breyer referred to this aspect of Justice Kennedy’s opinion as a “strict no-jurisdiction rule.” *Id.* at 890 (Breyer, J. concurring).

⁶³ *Id.* at 886 (plurality opinion) (“Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey.”).

⁶⁴ *Id.* at 884.

⁶⁵ *Id.* at 882.

⁶⁶ See Steinman, *supra* note 55, at 498-502.

⁶⁷ See, e.g., *id.* at 496-504.

⁶⁸ *McIntyre*, 564 U.S. at 905 (Ginsburg, J., dissenting).

⁶⁹ *Id.* at 898.

itself” of the United States market nationwide, not a market in a single State or a discrete collection of States.⁷⁰

Justices Breyer and Alito joined neither Justice Kennedy’s plurality opinion nor Justice Ginsburg’s dissenting opinion in *McIntyre*. Although they concurred in the ultimate result reached by the plurality,⁷¹ they explicitly rejected the reasoning put forward by Justice Kennedy. In particular, Justice Breyer’s opinion challenged Justice Kennedy’s use of “strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’”⁷² Rather, Justice Breyer recognized (quoting *World-Wide Volkswagen*) that jurisdiction would have been proper if J. McIntyre had “delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.”⁷³

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

(1) The American Distributor on one occasion sold and shipped one machine to a New Jersey customer, namely, Mr. Nicastro’s employer, Mr. Curcio; (2) the British Manufacturer permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them; and (3) representatives of the British Manufacturer attended trade shows in “such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco.”⁷⁴

This narrow understanding of the facts excised completely J. McIntyre’s overarching purpose of accessing the entire U.S. market for its products. Whereas Justice Ginsburg saw a defendant who “engaged” a U.S. distributor in order “to promote and sell its machines in the United States,”⁷⁵ and who took “purposeful step[s] to reach customers for its products anywhere in the United States,”⁷⁶ Justice Breyer saw a defendant who passively “permitted” and “wanted” such sales to

⁷⁰ *Id.* at 898, 905.

⁷¹ *Id.* at 887-88 (Breyer, J., concurring) (“Based on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer), a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.”).

⁷² *Id.* at 890 (quoting *id.* at 882 (plurality opinion)).

⁷³ *Id.* at 889 (rejecting jurisdiction because Nicastro “has not otherwise shown that the British Manufacturer ‘purposefully avail[ed] itself of the privilege of conducting activities’ within New Jersey, or that it delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users” (alteration in original) (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

⁷⁴ *Id.* at 888 (quoting *Nicastro*, 987 A.2d at 578-79).

⁷⁵ *Id.* at 905 (Ginsburg, J., dissenting).

⁷⁶ *Id.* at 898.

occur.⁷⁷ With the record framed as Justice Breyer does, it is hard to see how a jurisdictional standard that hinges on a defendant’s “purpose[.]”⁷⁸ could ever be satisfied.

Justice Breyer’s blinkered view of the factual record also explains how he was able to reach the conclusion that J. McIntyre had not even “delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.”⁷⁹ Indeed, Justice Breyer indicated that a different result could be justified if the record had contained a “list of potential New Jersey customers who might . . . have regularly attended [the] trade shows” that J. McIntyre officials attended,⁸⁰ if the record had contained evidence of “the size and scope of New Jersey’s scrap-metal business”;⁸¹ or if the record revealed more than a single sale to a single New Jersey customer.⁸²

In recognizing that these facts could tip the scale in favor of jurisdiction, Justice Breyer’s opinion fits easily with Justice Ginsburg’s idea that minimum contacts are established when a defendant “seek[s] to exploit a multistate or global market” that includes the forum state.⁸³ Justice Breyer’s logic would merely require a showing that potential customers were likely to exist in the forum state. If the *McIntyre* record had contained (in Justice Breyer’s words) a “list of potential New Jersey customers who might . . . have regularly attended [the] trade shows” that J. McIntyre officials attended,⁸⁴ or evidence of “the size and scope of New Jersey’s scrap-metal business,”⁸⁵ then that could create an expectation of purchases by New Jersey consumers. Either fact would confirm—even before any sales were made—that there was a potential market for J. McIntyre’s products in New Jersey. Even without such facts, however, the consummation of an actual sale to a New Jersey customer would create that expectation going forward.⁸⁶ At that point, J. McIntyre

⁷⁷ *Id.* at 888 (Breyer, J., concurring).

⁷⁸ *Id.* at 891 (noting the “constitutional demand for ‘minimum contacts’ and ‘purposeful[] avail[ment]’” (alterations in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 291, 297)).

⁷⁹ *Id.* at 889 (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

⁸⁰ *Id.* (“He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows.”); *cf. id.* at 895 n.1 (Ginsburg, J., dissenting) (citing a 2011 member directory listing nearly 100 New Jersey businesses as belonging to the industry group that sponsored the trade shows).

⁸¹ *Id.* at 889 (Breyer, J., concurring) (noting these as “other facts that Mr. Nicastro could have demonstrated in support of jurisdiction”); *cf. id.* at 895 (Ginsburg, J., dissenting) (using 2008 data on scrap metal recycling in New Jersey, indicating that New Jersey facilities processed over two million tons of scrap metal in 2008, which was the largest of all the states by a substantial margin).

⁸² *Id.* at 888-89 (Breyer, J., concurring).

⁸³ *Id.* at 910 (Ginsburg, J., dissenting).

⁸⁴ *Id.* at 889 (Breyer, J., concurring).

⁸⁵ *Id.*

⁸⁶ Although Justice Breyer notes that “the relevant facts found by the New Jersey Supreme Court show ‘no regular . . . flow’ or ‘regular course’ of sales in New Jersey,” *id.* he does not state that such a “regular flow” is required for jurisdiction to be proper. A regular flow or course of sales in New Jersey would have been sufficient for jurisdiction, *see id.*, but Justice Breyer makes clear that Mr. Nicastro might also have “*otherwise* shown that the British Manufacturer . . . delivered its goods in the stream of commerce ‘with the expectation that they will be purchased’ by New Jersey users.” *Id.* (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

either would know or should know of the potential New Jersey market for its machines. Once an “expectation” of purchases by New Jersey users exists, the act of “delivering its goods in the stream of commerce” could be sufficient to establish minimum contacts if its goods are then purchased in New Jersey and cause injury there.⁸⁷ For Justice Breyer, however, no such expectation is created when (1) there is only a single sale of the defendant’s product to a customer in the forum state, and (2) there is no other evidence in the record suggesting potential customers in the forum state.

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

This is not to say that the machinery at issue in *McIntyre* presented such a scenario. But if one accepts the premise that the plaintiff bears the burden of establishing personal jurisdiction over the defendant,⁸⁸ it might have to provide evidence to confirm that a potential market exists in the particular state within the United States that seeks to exercise jurisdiction—in order to show that the defendant delivered its goods in the stream of commerce with the expectation that they will be purchased by customers in the forum state.

This sort of approach is not fundamentally inconsistent with the approach outlined by Justice Ginsburg in her dissent. It would simply require the plaintiff to develop a slightly more robust factual record than Justice Breyer was willing to recognize in *McIntyre*. Most importantly, this understanding would not allow distant manufacturers who profit from sales in the forum state to escape jurisdiction in those states when their products cause damage there. And it certainly would not give manufacturers a free pass to avoid jurisdiction in states where their products are sold simply by developing a distribution scheme that seeks out the U.S. market as a whole rather than each individual state.⁸⁹ Although there remains a fair amount of inconsistency in how lower courts

⁸⁷ See *id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

⁸⁸ See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982) (noting the plaintiff’s “burden of proof” with respect to personal jurisdiction). *But see* John Vail, *Six Questions in Light of J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 517 (2012) (arguing that the defendant should bear the burden of proving that a state court’s assertion of jurisdiction is unconstitutional).

⁸⁹ One other recent Supreme Court decision involving specific jurisdiction was *Walden v. Fiore*, 134 S. Ct. 1115 (2014). *Walden* was a lawsuit against a Georgia police officer who had been acting as a deputized DEA agent at the Atlanta airport, arising from his interaction with two Nevada residents changing planes en route from Puerto Rico to Nevada. *Id.* at 1119. The encounter led to the seizure of \$97,000 in cash, and the plaintiffs sued in a Nevada federal court alleging that the officer had helped draft a false affidavit that delayed the return of their funds. *Id.* at 1119-20. Although the Court unanimously concluded that the officer was not subject to personal jurisdiction in Nevada, the case’s unusual facts and the Court’s narrow reasoning make it unlikely to compel a more restrictive approach

have treated stream-of-commerce cases in the wake of *McIntyre*,⁹⁰ there are numerous examples of decisions that illustrate the more sensible reading described above.⁹¹

III. SHAKIER GROUND: GENERAL JURISDICTION

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

A. *General Jurisdiction in the 21st Century*

Before *Goodyear* and *Daimler*, companies with significant sales or activity within a state were often found to be subject to general jurisdiction there—even in cases where the injury did not occur in that state.⁹² The Supreme Court's more recent decisions, however, have undermined this understanding of general jurisdiction.

The 2011 *Goodyear* decision involved a lawsuit brought by parents of two North Carolina teenagers who were killed in a bus accident in Paris, France.⁹³ They sued three foreign Goodyear subsidiaries, who had been involved in manufacturing and distributing the tires on the bus, in North Carolina state court.⁹⁴ Although the defendants (based in Luxembourg, France, and Turkey) made tires primarily for sale in Europe and Asia, a small percentage of their tires were distributed in North Carolina.⁹⁵

to personal jurisdiction in most scenarios. The plaintiffs in *Walden* did, in some sense, suffer damages in Nevada (where they resided and hence were affected by the delay in returning their funds). But the individual officer was not in any sense seeking to serve individuals in Nevada; nor had he otherwise reached out to Nevada through his activities. Importantly, *Walden* explicitly left in place an earlier Supreme Court decision—*Calder v. Jones*, 465 U.S. 783 (1984)—where the Court upheld jurisdiction in California in a defamation action by a plaintiff who resided and worked in California and, therefore, incurred damages as a result of the defendants' defamatory story. *See Walden*, 134 S. Ct. at 1123-24 (discussing *Calder* approvingly).

⁹⁰ *See* 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1067.4.

⁹¹ *See* *Ainsworth v. Moffett Engineering, Ltd.*, 716 F.3d 174 (5th Cir. 2013); *Book v. Doublestar Dongfeng Tyre Co., Ltd.*, 860 N.W.2d 576 (Iowa 2015); *Gerk v. CL Medical SARL*, 175 F. Supp. 3d 1074 (C.D. Ill. 2016); *Hilsinger Co. v. FBW Investments*, 109 F. Supp. 3d 409 (D. Mass. 2015); *Butler v. JLA Indus. Equip., Inc.*, 845 N.W.2d 834 (Minn. App. 2014); *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18 (N.M. App. 2012). One state court opinion that rejected personal jurisdiction based on a needlessly restrictive view of personal jurisdiction in the stream-of-commerce context was *Hinrichs v. General Motors of Canada, Ltd.*, 222 So.3d 1114 (Ala. 2016). The U.S. Supreme Court recently denied certiorari. *See* 137 S. Ct. 2291 (2017).

⁹² *See generally* 4A WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1069.2.

⁹³ *Goodyear*, 564 U.S. at 918.

⁹⁴ *Id.*

⁹⁵ *Id.* at 920-21.

The Supreme Court unanimously found that general jurisdiction could not be based solely on sales to the forum state through the stream of commerce.⁹⁶ In reaching this conclusion, Justice Ginsburg wrote that general jurisdiction requires that the defendant’s “affiliations with the State” must be “so continuous and systematic as to render them essentially at home” there.⁹⁷ The Court noted: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”⁹⁸

Goodyear recognized a corporation’s place of incorporation and principal place of business as “paradigm bases for the exercise of general jurisdiction,”⁹⁹ but it did not address where else a corporation might be deemed to be “essentially at home.” Insofar as the (rejected) basis for general jurisdiction in *Goodyear* was merely the fact that the defendant’s products reached the forum state through the stream of commerce, *Goodyear* seemed to leave open the possibility that a defendant with significant physical operations in the forum state could be deemed to be “essentially at home” there—and hence subject to general jurisdiction. The Court’s 2014 *Daimler* decision, however, rejected an attempt to assert general jurisdiction over a foreign defendant, even where a defendant has fairly significant physical operations in the forum state.

The plaintiffs in *Daimler* had brought claims against Daimler AG, a German company headquartered in Stuttgart, for human rights and other violations committed by Daimler’s Argentinian subsidiary during the “dirty war” of the 1970s and 1980s.¹⁰⁰ The Ninth Circuit had held that Daimler was subject to general personal jurisdiction in California based on the activities of its American subsidiary, MBUSA. Writing for the Court once again, Justice Ginsburg first rejected the Ninth Circuit’s conclusion that MBUSA’s contacts could be attributed to Daimler for jurisdictional purposes.¹⁰¹ More significantly, however, Justice Ginsburg then concluded that general jurisdiction would not be proper in California even if MBUSA’s contacts were attributable to Daimler. Even with that assumption, California would not be one of the paradigm fora for general jurisdiction (place of incorporation or principal place of business).¹⁰² The *Daimler* Court acknowledged that a corporation could be subject to general jurisdiction in places other than these

⁹⁶ See *Goodyear*, 564 U.S. at 930 n.6 (“[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”).

⁹⁷ *Id.* at 919.

⁹⁸ *Id.* at 924.

⁹⁹ *Id.* (citing Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)).

¹⁰⁰ *Daimler*, 134 S. Ct. at 750-51. The *Daimler* case was brought under the Alien Tort Statute, see *id.* at 751 (discussing 28 U.S.C. § 1350), which has been the jurisdictional basis for a variety of claims based on international human rights obligations. See, e.g., *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Krishanti v. Rajaratnam*, 2014 WL 1669873 (D.N.J. 2014).

¹⁰¹ See *Daimler*, 134 S. Ct. at 759.

¹⁰² See *id.* at 760 (“With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.” (citations and internal quotation marks omitted)).

two “exemplar bases *Goodyear* identified.”¹⁰³ But a corporation was not necessarily subject to general jurisdiction “in every State in which a corporation engages in a substantial, continuous, and systematic course of business.”¹⁰⁴ General jurisdiction does not exist simply because of “the magnitude of the defendant’s in-state contacts.”¹⁰⁵ Rather, a court must appraise the defendant’s activities “in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them.”¹⁰⁶

B. Open Questions Regarding General Jurisdiction

Four important questions remain in the wake of the Court’s *Goodyear* and *Daimler* decisions. The first is: in which places *beyond* a corporate defendant’s principal place of business or state of incorporation might a corporation be subject to general jurisdiction? At this point, there are very few examples of lower courts finding general jurisdiction outside these “exemplar” locations, and many of those decisions have been called into question by subsequent decisions. In *Tyrrell v. BNSF Railway Co.*,¹⁰⁷ the Montana Supreme Court found general jurisdiction based on BNSF having over 2,000 miles of railroad track, employing more than 2,000 workers, maintaining facilities, having a telephone listing, and doing direct advertising in Montana. But the U.S. Supreme Court recently reversed the Montana court’s assertion of jurisdiction, concluding that BNSF was not “so heavily engaged in activity in Montana as to render it essentially at home in that State.”¹⁰⁸ In *Aspen American Insurance Co. v. Interstate Warehousing, Inc.*, an Illinois appellate court based general jurisdiction on the defendant having two warehouses in Illinois and being authorized to do business in Illinois since 1988.¹⁰⁹ But the Illinois Supreme Court reversed, finding that the defendant could not be subject to general jurisdiction under *Daimler*.¹¹⁰

¹⁰³ *Id.* (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”).

¹⁰⁴ *Id.* at 761 (“That formulation, we hold, is unacceptably grasping.”).

¹⁰⁵ *Id.* at 762 n.20.

¹⁰⁶ *Id.*

¹⁰⁷ 373 P.3d 1 (Mont. 2016).

¹⁰⁸ *BNSF*, 137 S. Ct. at 1559. The *BNSF* decision also found that § 56 of the Federal Employers Liability Act (FELA) did not create an independent basis for personal jurisdiction in any state where an employer is “doing business.” *See id.* at 1553 (“We hold that § 56 does not address personal jurisdiction over railroads.”). Had this statutory issue come out the other way, the constitutional analysis might have been more friendly toward allowing personal jurisdiction, because arguably any constitutional constraints would flow from the Fifth Amendment rather than the Fourteenth Amendment. *See BNSF* Respondents’ Brief at 36 (“[A]ny due process limitations that apply to congress’s jurisdictional choices stem not from the Fourteenth Amendment, but from the Fifth Amendment as it applies to exercises of federal authority.”). Under the Fifth Amendment due process analysis, it is the defendant’s contacts with the United States as a whole—rather than particular states—that are relevant. *See, e.g., Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997); 4 WRIGHT, MILLER & STEINMAN, *supra* note 1, at § 1068.1.

¹⁰⁹ 57 N.E.3d 656, 667 (Ill. App. 2016).

¹¹⁰ ___ N.E.3d ___, 2017 IL 121281 (Ill. 2017). Another example is *Barriere v. Juluca*, 2014 WL 652831 (S.D. Fla. 2014), which found an Anguillan corporation subject to general jurisdiction in

A second question is whether the Court’s *Goodyear* and *Daimler* decisions might be limited to international litigation involving foreign defendants. *Daimler*, certainly, was a remarkable case—neither the litigants nor the facts giving rise to the claims bore any connection to the United States. *Goodyear*, at least, involved plaintiffs from North Carolina, although the accident and the defendant’s relevant conduct all occurred abroad. It is worth considering, however, whether the narrow view of general jurisdiction expressed by the Supreme Court in these decisions should apply with equal force to *domestic* defendants where jurisdiction is sought in a U.S. state on a general jurisdiction theory. There are some lower court decisions suggesting that domestic defendants might be treated differently in this regard,¹¹¹ although one of these is the Montana Supreme Court’s decision in the *BNSF* case—which the U.S. Supreme Court recently reversed.¹¹² There is language in the U.S. Supreme Court’s *BNSF* decision suggesting that the *Goodyear/Daimler* approach to general jurisdiction applies across the board,¹¹³ although the Court did not directly address any potential distinction between foreign and domestic defendants.

A third issue regarding general jurisdiction involves corporations that register to do business in the forum state and appoint an in-state agent for service of process. There is a line of authority providing that such defendants consent to general jurisdiction in that state.¹¹⁴ As a threshold matter, the viability of this jurisdictional theory seems to depend on the particulars of state law. Indeed, there have been several recent decisions finding that the relevant state law registration statutes do not authorize general jurisdiction over registered corporations.¹¹⁵ In states where such registration

Florida based on the fact that it maintained a sales office in Florida, had its assets managed by a Florida based agent, and had contracted with an American business with sales offices in Florida to promote its properties and to provide reservation services. This decision seems in tension, however, with a more recent Eleventh Circuit decision, *Carmouche v. Tamborlee Management, Inc.*, 789 F.3d 1201 (2015), which found in a very similar factual situation that the Supreme Court’s *Daimler* decision foreclosed general jurisdiction.

¹¹¹ See *Tyrrell*, 373 P.3d at 6 (emphasizing that “*Daimler* addressed ‘the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.’”); State ex rel. Ford Motor Co. v. McGraw, 788 S.E.2d 319 (W. Va. 2016) (“*Daimler* involved an unusual fact setting with no connection whatsoever to the United States. . . . Notably, *Daimler*, *Goodyear*, and *Helicopteros* all involved international considerations. . . . In the instant matter, we are not confronted with issues of international rapport, friction, or comity.”).

¹¹² See *supra* note 108.

¹¹³ See *BNSF*, 137 S. Ct. at 1559 (“*Daimler*, however, applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued.”).

¹¹⁴ See, e.g., *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196 (8th Cir. 1990) (applying Minnesota law); *Bane v. Netlink, Inc.*, 925 F.2d 637 (3d Cir. 1991) (applying Pennsylvania law); *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 438 (D.N.J. 2015); *Rich Products Corp. v. Bluemke*, 2013 WL 2105953 (W.D.N.Y. 2013).

¹¹⁵ See, e.g., *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570 (9th Cir. 2011) (interpreting Montana law); *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992) (interpreting Texas law); *WorldCare Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 356 (D. Conn. 2011); *Genuine Parts Company v. Cepec*, 137 A.3d 123, 139 (Del. 2016).

does purport to create general jurisdiction, it remains to be seen whether the Court’s recent case law on general jurisdiction will be interpreted to forbid the practice on constitutional grounds.¹¹⁶

A final question relating to general jurisdiction is how to determine whether there is a sufficient “affiliation between the forum and the underlying controversy” to justify *specific* jurisdiction¹¹⁷—and thereby to avoid the stringent requirements for general jurisdiction indicated by *Goodyear*, *Daimler* and *BNSF*. This issue was at the heart of the Supreme Court’s recent *Bristol-Myers Squibb* (BMS) in California state court for injuries relating to its blood-thinning drug Plavix. Although only 86 of these were from California, all plaintiffs asserted identical theories of liability.¹¹⁹ The California Supreme Court found that even the non-California plaintiffs’ claims “related to” BMS’s contacts with California, because of “BMS’s extensive contacts with California as part of Plavix’s nationwide marketing, its sales of Plavix in this state, and its maintenance of research and development facilities here.”¹²⁰ It also endorsed “a sliding scale approach to specific jurisdiction,” under which “the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.”¹²¹

By an 8-1 vote, the Supreme Court concluded that “the California courts cannot claim specific jurisdiction” with respect to the non-California plaintiffs.¹²² Justice Alito’s majority opinion rejected the California Supreme Court’s “sliding scale” approach, which he called “a loose and spurious form of general jurisdiction.”¹²³ Regarding the presence of California plaintiffs in the Plavix litigation, Justice Alito wrote that “[t]he mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’

¹¹⁶ See, e.g., *Acorda Therapeutics Inc. v. Mylan Pharmaceuticals Inc.*, 817 F.3d 755, 770 (Fed. Cir. 2016) (O’Malley, J., concurring) (arguing that the constitution permits general jurisdiction via corporate registration); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 637 (2d Cir. 2016) (arguing that *Goodyear* and *Daimler* “suggest[] that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate ‘consent’—perhaps unwitting—to the exercise of general jurisdiction by state courts, particularly in circumstances where the state’s interests seem limited.”); *Genuine Parts Company v. Cepec*, 137 A.3d 123, 127 (Del. 2016) (finding that the Delaware Supreme Court’s earlier decision that Delaware’s registration law authorized general jurisdiction “collides directly with the U.S. Supreme Court’s holding in *Daimler*”); *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428 (D.N.J. 2015) (“*Daimler* did not discuss in-state service and there was no indication in *Daimler* that the defendant had registered to do business in the state or been served with process there. . . . The Court therefore does not find *Daimler* instructive in the present situation, which principally concerns establishing jurisdiction through consent to service.”).

¹¹⁷ See *supra* notes 17-19 and accompanying text.

¹¹⁸ *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

¹¹⁹ See 377 P.3d 874, 877-78 (Cal. 2016).

¹²⁰ *Id.* at 890-91.

¹²¹ *Id.* at 889 (citation and internal quotation marks omitted).

¹²² *Bristol-Myers*, 137 S. Ct. at 1782.

¹²³ *Id.* at 1781.

claims.”¹²⁴ He explained: “[A] defendant’s relationship with a third party, standing alone, is an insufficient basis for jurisdiction.’ This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents.”¹²⁵ It was also irrelevant “that BMS conducted research in California on matters unrelated to Plavix” because “[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”¹²⁶ Here, “the relevant plaintiffs are not California residents and do not claim to have suffered harm in that State,” and “all the conduct giving rise to the nonresidents’ claims occurred elsewhere.”¹²⁷

One unfortunate consequence of the *Bristol-Myers* decision is that, in many cases, it will compel an inefficient splitting of related claims and a needless waste of judicial resources. As Justice Sotomayor observed in her dissenting opinion, the majority’s approach “will make it profoundly difficult for plaintiffs who are injured in different States by a defendant’s nationwide course of conduct to sue that defendant in a single, consolidated action,”¹²⁸ and “may make it impossible to bring certain mass actions at all.”¹²⁹ While a nationwide group of plaintiffs might still bring a consolidated lawsuit in a state court where the corporate defendant is incorporated or has its principal place of business,¹³⁰ this option would not be available for foreign defendants,¹³¹ or in cases brought against multiple domestic defendants who do not share a principal place of business or state of incorporation.¹³²

That said, *Bristol-Myers* did not impose “a rigid requirement that a defendant’s in-state conduct must actually cause a plaintiff’s claim.”¹³³ Thus, it still seems to be the case that where the plaintiff suffered injury or damages in the forum state, the defendant’s contacts would be assessed as a

¹²⁴ *Id.*

¹²⁵ *Id.* (quoting *Walden*, 134 S. Ct. at 1123) (internal ellipses omitted).

¹²⁶ *Id.*

¹²⁷ *Id.* at 1782. A case that appeared to present issues similar to those addressed in *Bristol-Myers* is *M.M. ex rel. Meyers v. GlaxoSmithKline LLC*, 61 N.E.3d 1026 (Ill. App. 2016), where the state appellate court upheld personal jurisdiction in Illinois even as to non-Illinois plaintiffs. The Illinois Supreme Court denied review, *see M.M. v. GlaxoSmithKline LLC*, 65 N.E.3d 842 (Ill. 2016), and the defendants filed a U.S. Supreme Court petition for certiorari prior to the Court’s *Bristol-Myers* decision. The U.S. Supreme Court ultimately denied certiorari, leaving the lower court’s decision in place notwithstanding *Bristol Myers*. *See GlaxoSmithKline LLC v. M.M. ex rel. Meyers*, ___ S. Ct. ___, No. 16-1171, 2017 WL 1153625 (U.S. 2017) (denying petition for certiorari).

¹²⁸ *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

¹²⁹ *Id.*

¹³⁰ *See id.* at 1783 (majority opinion) (“Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware.”).

¹³¹ *Id.* at 1789 (Sotomayor, J., dissenting) (“What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States?”).

¹³² *Id.* (“[I]t is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are ‘at home,’ and so no State in which the suit can proceed.”).

¹³³ *Id.* at 1788.

matter of specific jurisdiction rather than general jurisdiction. Also, it remains unclear whether the majority’s reasoning in *Bristol-Myers* would apply with equal force to class actions, for which—as Justice Sotomayor observed—“[n]onnamed class members may be parties for some purposes and not for others.”¹³⁴

CONCLUSION

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

¹³⁴ *Id.* at 1789 n.4 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002)) (“The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”).