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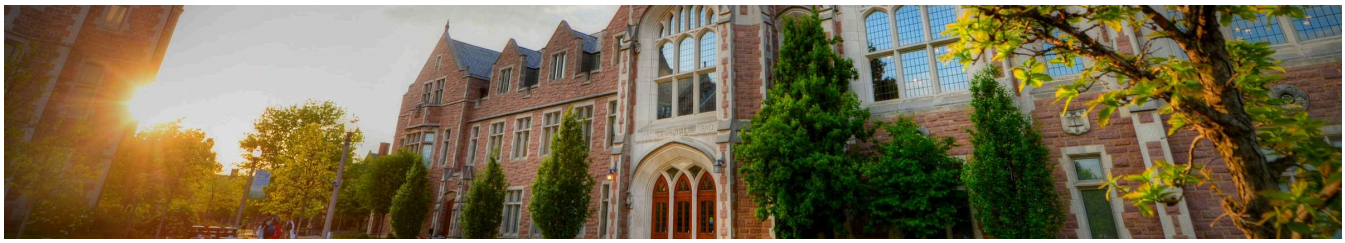

The Future of Jurisdiction

by Paul Schiff Berman

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Abstract

A new paradigm for conceptualizing the doctrine of personal jurisdiction is long overdue. In the nineteenth century, the U.S. Supreme Court established a firm territorialist approach to jurisdiction befitting a geographically spread-out country with many local micro-economies. The more flexible "minimum contacts" test articulated in 1945 by International Shoe v. Washington *ushered in a twentieth-century vision responding to increased automotive transportation and national industrial production. But now, at least three decades into the Internet and information economy era, the U.S. Supreme Court has yet to land on a coherent jurisdictional framework for the new century.*

It's not for want of trying. Since 2010, the Supreme Court has decided at least seven major jurisdiction cases. But all seven have resulted in conceptually problematic resolutions, and in two of them—including the most recent, Mallory v. Norfolk Southern Railway *—the Court could not even muster a true majority rationale. Indeed, even the basic purpose of jurisdictional law—is it to ensure fairness to defendants or is it to prevent states from encroaching on other states?—has remained murky since the very beginning. And as* Mallory *makes clear, the Court's confused and bifurcated approach regarding the purpose of jurisdictional law can lead to very different outcomes in particular cases.*

Fundamentally, we need to recognize that "minimum contacts" has become an unsatisfying approach in a twenty-first century dominated by virtual social life, deterritorialized goods and effects, and the ability of both large industrialists and individuals to reach consumers anywhere anytime. In such a world, "contacts" with a territorially-based entity does not capture the reality of the underlying transaction.

Instead, this Article proposes a distinct framework for analyzing jurisdiction cases, one based on community affiliation. The real question underlying jurisdiction, I argue, is whether a legal dispute sufficiently implicates a community such that it is appropriate for that community to assert dominion over the dispute without unduly encroaching on the interests of other communities. And though the answer to that question is surely not always beyond dispute, it at least focuses attention on the core issues that should determine a jurisdictional inquiry.

My argument in favor of this approach proceeds in four Parts. Part One focuses on the problem of territoriality as the basis for jurisdiction, emphasizing the various ways in which a territorialist approach fails to capture the reality of twenty-first-century social life and commercial activity. Part Two examines the U.S. Supreme Court's conceptual confusion about the purpose of jurisdictional doctrine and argues for an approach based on the connection between the case and the community, rather than the due process rights of defendants. Part Three traces the development of the Supreme Court's general vs. specific jurisdiction dichotomy and argues for a less categorical approach. Finally, Part Four sets forth a set of principles that should guide the future of jurisdiction. And while these principles do not "solve" all difficult jurisdictional issues, they do provide a more coherent analytical framework for courts as they wrestle with jurisdictional conundrums in the twenty-first century.

Introduction

A new paradigm for conceptualizing the doctrine of personal jurisdiction is long overdue. In the nineteenth century, the U.S. Supreme Court established a firm territorialist approach to jurisdiction befitting a geographically spread-out country with many local micro-economies.[2] The more flexible "minimum contacts" test articulated in 1945 by *International Shoe Co. v. Washington*[3] ushered in a twentieth-century vision responding to increased automotive transportation and national industrial production. But now, at least three decades into the Internet and information economy era, the U.S. Supreme Court has yet to land on a coherent jurisdictional framework for the new century.

It's not for want of trying. Since 2010, the Supreme Court has decided at least seven major jurisdiction cases.[4] But all seven have resulted in conceptually problematic resolutions, and in two[5] of them—including the most recent, *Mallory v. Norfolk Southern Railway Co.*[6]—the Court could not even muster a true majority rationale. Indeed, even the basic purpose of jurisdictional law—is it to ensure fairness to defendants or is it to prevent states from encroaching on other states?—has remained murky since the very beginning. And as *Mallory* makes clear, the Court's confused and bifurcated approach regarding the purpose of jurisdictional law can lead to very different outcomes in particular cases.[7]

Fundamentally, we need to recognize that we are living through a period of large-scale societal transition, requiring a shift in jurisdictional law. Just as the pure territorialist nineteenth-century vision of jurisdiction espoused in *Pennoyer v. Neff*[8] gave way to the *International Shoe* "minimum contacts" test,[9] so too "minimum contacts" has become an unsatisfying approach in a twenty-first century dominated by virtual social life, deterritorialized goods and effects, and the ability of both large industrialists and individuals to reach consumers anywhere anytime. In such a world, "contacts" with a territorially-based entity does not capture the reality of the underlying transaction. Indeed, although the U.S. Supreme Court has not directly addressed a jurisdiction case involving only Internet-based interaction, the Court's oral arguments[10] and even opinions[11] in this area frequently invoke hypotheticals regarding online activity, with the Justices recognizing that the Internet poses distinctly difficult problems that hover in the background of every jurisdiction case the Court faces.

But instead of shying away from online interaction or treating it as an unsolvable conundrum to be addressed in some other future case, the Court needs a new framework that will allow it to tackle the reality of the twenty-first century and the way in which social life and commercial activity actually operate. Doing so requires jettisoning the relentless focus of personal jurisdiction law on factors such as convenience of the parties or contacts with a territorially based location.

Instead, this Article proposes a distinct framework for analyzing jurisdiction cases, one based on community affiliation. The real question underlying jurisdiction, I argue, is whether a legal dispute sufficiently implicates a community such that it is appropriate for that community to assert dominion over the dispute without unduly encroaching on the interests of other communities. And while the answer to that question is surely not always beyond dispute, it at least focuses attention on the core issues that should determine a jurisdictional inquiry.

In contrast, our current jurisdictional regime has long been tethered to the Due Process Clause of the Fourteenth Amendment.[12] This has meant that the focus has not been on the connection between the case and the community, but on fairness to the defendant. In the nineteenth century, such an emphasis was perhaps justifiable. It did indeed feel unfair for a defendant to be sued far away from home when traveling to the jurisdiction might involve considerable expense and take days or weeks. And even corporations were generally local businesses with limited scope, scale, and resources.

But due process is an unhelpful rubric today, when travel is relatively inexpensive and easy, when online communications allow for depositions and even trials to be conducted from a distance, and when it is not at all difficult for corporations to hire local counsel in any state in the union and defend suits there. Indeed, the very idea that personal jurisdiction is really any more about the fairness of forcing a defendant to travel to a far-off jurisdiction is laughable. After all, when large corporations challenge personal jurisdiction, they are almost never doing so because it is truly inconvenient or burdensome for them to defend a suit there. Rather, they are contesting whether it is appropriate for that community to exercise dominion over them or apply its community norms to their activities. Those are difficult questions, to be sure. But at least they are the right questions to be asking.

The emphasis on due process also leads to another conceptual difficulty. If jurisdiction is an individual right, then it can be waived just like almost every other individual right. And we do allow parties to waive their right to contest jurisdiction.[13] Indeed, under the Federal Rules of Civil Procedure, if a party does not contest jurisdiction in its first filing, it will be deemed to have waived jurisdiction automatically.[14]

But treating jurisdiction as a waivable due process right opens up two problems. First, plaintiffs with no connection to a community may travel there and bring suit despite their lack of connection.[15] Second, potential defendants can be forced to waive personal jurisdiction in advance by any state that aggressively requires such a waiver as the price of traveling to or doing business in the state.[16] Both sorts of waiver open the door for lawsuits to proceed even if those suits have minimal or no connection to a

community. In contrast, an approach focused on community affiliation asks the right questions: What is the connection between the dispute and the state, and will a state's exercise of regulatory power unduly infringe upon the prerogatives of other states or upon interstate commerce more generally? Indeed, it is significant that Justice Alito, writing separately in *Mallory*, suggested that the Dormant Commerce Clause[17] might be the better analytical framework for jurisdiction questions, rather than the Due Process Clause.[18]

In addition, the U.S. Supreme Court has also encountered difficulties because it has mistakenly embraced an unduly categorical distinction between so-called general (or all-purpose) jurisdiction and specific (or case-linked) jurisdiction. In truth, there is not a clear dividing line between these categories; it is far more helpful to think of them along a continuum. The more interaction a party has with a given community, the more affiliated that party is with the community and therefore the more justifiable it is that a party could sue or be sued in that community, even if the topic of the particular suit is less related to the community. Conversely, a party with only one interaction with a community might still be able to sue or be sued in that community if the one interaction is precisely what the suit is about. Thus, the amount of interaction with a community and the degree to which the lawsuit is related to that interaction operate along a spectrum.

Instead, the Court has cleaved a wedge into the continuum and attempted to create a fixed category known as "general jurisdiction," under which a party can be sued in a single state about any activity anywhere in the country, and perhaps anywhere in the world.[19] This is potentially too broad. But conversely, if a lawsuit rests solely on "specific jurisdiction," then jurisdiction fails if the lawsuit is deemed "unrelated" to the contacts, even if the community affiliation is massive.[20] This has led to legal decisions denying jurisdiction over companies that conduct millions of dollars' worth of business in a state.[21] Viewing degree of community affiliation and extent of relatedness between the affiliations and the lawsuit as a continuum helps avoid these distortions.[22]

In short, the U.S. Supreme Court has placed itself in a series of unsatisfying conceptual boxes of its own making. But the world no longer fits those boxes, if it ever did. This Article, therefore, aims to chart a path toward a more conceptually satisfying rubric for personal jurisdiction. This approach has the following principles at its core:

- Personal jurisdiction should not be based on physical contacts with a territory, but on affiliation with a community. This is especially important in a world where physical location is sometimes difficult (or impossible) to pinpoint and often largely irrelevant to the reality of the underlying transaction being analyzed. In addition, it

means that the effects of activities can sometimes provide a plausible basis for the assertion of jurisdiction, even without a direct territorial nexus.
- The relevant inquiry for personal jurisdiction is the degree to which a community can legitimately exercise dominion over a lawsuit rather than whether the exercise of jurisdiction is unfair to the defendant or whether a party (plaintiff or defendant) has waived a personal jurisdiction defense. This also means that online terms of service or other contracts of adhesion that purport to limit jurisdiction based on waiver or consent should not be determinative.
- The community affiliations of both the plaintiffs and the defendants should be relevant to the personal jurisdiction inquiry.
- Trying to serve a market is a more relevant jurisdictional hook than targeting a territory. Thus, a company seeking to sell or distribute a product nationwide should be deemed to have affiliated with any community where that product is sold, regardless of whether or not the company has targeted a particular state.
- The location of online servers or data and the place of incorporation of a corporation may be relevant to the jurisdictional calculus, but should not be determinative, given that such factors often are arbitrary, manipulable, and divorced from the substantive connections that should be the focus of the jurisdictional inquiry.
- The size, sophistication, and economic breadth of an actor is relevant to the jurisdictional inquiry. This is particularly important in an online environment where it is not only large corporations that can cause impacts from far away.

My argument in favor of these principles proceeds in four Parts. Part One focuses on the problem of territoriality as the basis for jurisdiction, emphasizing the various ways in which a territorialist approach fails to capture the reality of twenty-first-century social life and commercial activity. Part Two examines the U.S. Supreme Court's conceptual confusion about the purpose of jurisdictional doctrine and argues for an approach based on the connection between the case and the community rather than the due process rights of defendants. Part Three traces the development of the Supreme Court's general vs. specific jurisdiction dichotomy and argues for a less categorical approach. Finally, Part Four sets forth a set of principles that should guide the future of jurisdiction. And while these principles do not "solve" all difficult jurisdictional issues, they do provide a more coherent analytical framework for courts as they wrestle with jurisdictional conundrums in the twenty-first century.

I. Jurisdiction and the Deterritorialization of Social Life

Legal jurisdiction is more than simply a set of technical rules about where a lawsuit can be brought. Rather, the assertion of jurisdiction is fundamentally the mechanism by which a community attempts to assert dominion over an act or actor. As such,

jurisdictional rules inevitably reflect social conceptions of space, place, distance, and the tie between community definition and physical geography.

Accordingly, it is not at all surprising that the jurisdictional rules of nineteenth-century America would have been strongly based on a territorialist conception of community power. As historian Robert Wiebe has famously observed, "America during the nineteenth century was a society of island communities."[23] With weak communication and limited interaction, these "islands" felt widely dispersed, and it is not surprising that local autonomy became "[t]he heart of American democracy."[24] Even though France had long since developed a centralized public administration, Wiebe argues that Americans still could not even conceive of a distant managerial government. In such a climate, geographical loyalties tended to inhibit connections with a whole society. "Partisanship . . . grew out of lives narrowly circumscribed by a community or neighborhood. For those who considered the next town or the next city block alien territory, such refined, deeply felt loyalties served both as a defense against outsiders and as a means of identification within."[25]

As the nineteenth century progressed, massive socioeconomic changes brought an onslaught of seemingly "alien" presences into these island communities. Immigrants were the most obvious group of outsiders, but perhaps just as frightening was the emergence of powerful distant forces such as insurance companies, major manufacturers, railroads, and the national government itself. Significantly, these threats appear to have been conceived largely in spatial terms. According to Wiebe, Americans responded by reaffirming community self-determination and preserving old ways and values from "outside" invasion.[26]

Given such a social context, it is no surprise that jurisdictional rules of the period emphasized state territorial boundaries. Indeed, it is likely that the burdens of litigating in another state far exceeded simply the time and expense of travel, substantial as those burdens were. Just as important was the *psychic* burden of being forced to defend oneself in a foreign state, which may have felt little different from the idea of defending oneself in a foreign country. An 1874 Pennsylvania state court decision illustrates the idea of this psychic burden.[27] In that case, a resident of New York had contested jurisdiction in Pennsylvania. The court acknowledged that the Pennsylvania courthouse was only "a few hours' travel by railroad" from New York, but nevertheless ruled that the defendant could not be sued personally, in part because "nothing can be more unjust than to drag a man thousands of miles, perhaps from a distant state, and in effect compel him to appear."[28] The court disregarded the relatively slight literal burden in the case at hand, and instead focused on the specter of being "dragged" to a "distant state" located "thousands of miles" away. Indeed, the decision explicitly equated other states with

foreign countries, referring to a "defendant living in a remote state or foreign country . . . [who] becomes subject to the jurisdiction of this, to him, foreign tribunal."[29] These passages indicate that the psychic significance of defending oneself in another state was at least as important as the literal difficulties of travel.

It was against this backdrop that the U.S. Supreme Court decided *Pennoyer v. Neff*,[30] the case that first established the Due Process Clause of the Fourteenth Amendment as the constitutional basis for jurisdictional rights.[31] In *Pennoyer*, the Court adopted a rigidly territorialist understanding of jurisdiction: States possess complete jurisdictional power over anyone or anything physically located within their borders, but no jurisdictional power over anything beyond.[32] In crafting this approach, the Court drew from public international law principles of nation-state sovereignty. Referencing Joseph Story's treatise on international conflicts of law, the *Pennoyer* Court stated categorically that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [But] no State can exercise direct jurisdiction and authority over persons or property without its territory."[33] And this rigid analytical framework carried important practical consequences because under the U.S. Constitution's Full Faith and Credit Clause, a judgment in one state is automatically enforceable in all other states,[34] but only if the first state had proper jurisdiction to render the judgment initially.[35]

In the succeeding decades, both the literal and psychic burdens associated with out-of-state litigation changed as a result of the urban industrial revolution at the turn of the twentieth century, a revolution that profoundly altered American social space. Increasingly, economic and governmental activities were administered from afar by impersonal managers at centralized locations. In such a world, another state was likely to be viewed less as a foreign country and more as yet another distant power center, just one of many "anonymous, bureaucratic, regulatory bodies in an increasingly complex society."[36]

In addition, advances in transportation and communications helped to weaken territoriality as the central category in which Americans understood their space. "As long as daily lives were focused to a large extent on the local, a state boundary symbolized the edge of the world and everything outside that boundary was alien and foreign."[37] With increased mobility, however, Americans regularly crossed state boundaries by train, by car, and later by airplane, which inevitably diminished the sense that other places were alien. The rise of radio and television meant that events in other states could become a regular part of one's daily consciousness. "Physical distance as a social barrier began to be bypassed through the shortening of communication 'distance.'"[38] These communication and transportation advances reinforced the

functional interdependence that began to characterize the United States in the first half of the twentieth century. As a result, people came to be regularly affected by people, institutions, and events located far away.

In this altered social space, the call to defend a lawsuit in the courts of another state remained an imposition, but the burdens were no longer perceived in stark territorial terms. Thus, it is not surprising that, although courts continued to use *Pennoyer*'s territorial framework, they repeatedly created legal fictions to respond to these social changes and provide mechanisms for states to assert jurisdiction over physically absent defendants.[39]

These responses took two principal forms. First, courts developed the idea of corporate presence. Given that *Pennoyer* had said that presence in a state was sufficient for jurisdiction, judges faced with increasingly nationalized corporate activity determined that doing business in a given state could be sufficient to make corporations *constructively* present there, even if the corporation's headquarters or place of incorporation were elsewhere. Thus, a series of cases emerged where the jurisdictional calculus was based on whether the corporation did enough business in a state to be deemed present there.[40]

Simultaneously, courts also expanded the idea of consent, which the *Pennoyer* Court had suggested, in dicta, could be a valid basis for the assertion of jurisdiction.[41] Indeed, the U.S. Supreme Court explicitly blessed the consent approach in the 1917 case of *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,[42] where the Court found that a Missouri statute requiring foreign insurance companies to acquire a license to do business in Missouri and submit to jurisdiction in Missouri was enforceable even absent actual presence in the state.[43] Six years later, the Court went further and ruled that even without actual consent a defendant could be deemed to have *implicitly* consented to a state's exercise of jurisdiction, at least so long as the suit involved activity in the state. In *Hess v. Pawloski*, a Massachusetts law stated that by driving in the state, out-of-state citizens automatically consented to the appointment of the Massachusetts registrar of motor vehicles as their agent for any suit involving the motor vehicle.[44] The Court upheld the use of such statutes, despite the fact that no actual consent was involved.[45]

Thus, by 1940, the seemingly restrictive territorial approach of *Pennoyer* had been expanded considerably. Courts used the legal fictions of corporate presence and implied consent to create more scope for a state's exercise of jurisdiction over out-of-state defendants. And instead of a test based on mere territorial presence in the state, the inquiry under these legal fictions had shifted to the more fundamental question of

whether the defendant had sufficient connections to the state asserting jurisdiction or whether the particular lawsuit concerned activity that had occurred in the state.

The stage was therefore set for the Supreme Court's watershed opinion in *International Shoe Co. v. Washington*,[46] which sought to do away with the post-*Pennoyer* fictions altogether. Instead, Justice Stone's opinion made clear that the strict territorialist framework for jurisdiction was no longer workable in the twentieth century, a century now dominated by both national corporate activity and expanded transportation and communication technologies.[47] Given that people and states were more likely to be affected by distant acts or actors, the Court constructed a new, more flexible, framework for analyzing jurisdiction, one focused on contacts with a state rather than territorial presence there. In the Court's famous formulation, states were no longer constrained only to assert jurisdiction over actors within their territorial borders. Instead, the defendant need only have sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[48]

Although the flexibility of the *International Shoe* test is perhaps its greatest virtue, the "minimum contacts" inquiry is nevertheless sufficiently vague that the U.S. Supreme Court has been called upon again and again since 1945 to try to apply the test to various new contexts. And significantly, those new contexts often reflected changes in technology, the expanded scope of corporate activity, the increasing use of global supply chains, and so on.[49] Thus far, the Court has continued to use *International Shoe* as the touchstone for jurisdictional analysis, but the sheer number of jurisdiction cases reaching the Court, the conceptual confusion evidenced at oral argument in these cases, and the inability of the Court to reach consensus on how to apply that test to various specific factual scenarios together suggest that *International Shoe*, like *Pennoyer* before it, is under pressure and may have become outmoded.

To some degree, these conceptual difficulties predate the Internet. For example, in the 1980 case of *Asahi Metal Industry Co. v. Superior Court of California*,[50] the justices faced the reality of global supply chains and the so-called "stream of commerce" problem. An allegedly defective valve was manufactured in one country, incorporated into a tire in another country, and then was shipped with a motorcycle to the United States, where it allegedly caused harm in California.[51] In such circumstances, did the valve manufacturer have sufficient "minimum contacts" with California to be sued there? On the one hand, the valve manufacturer did not have any direct contacts with either California specifically or the United States generally. But on the other, if the valve manufacturer did indirectly derive substantial revenue from those motorcycle sales in the United States as a regular component of its business model, and if the valve caused

harm in the United States, shouldn't a U.S. plaintiff be able to sue the manufacturer at home? The justices could not muster a majority for either of these two positions. Ultimately, the Court was able to leave this difficult question undecided because as it happened the U.S. plaintiff in the case had already settled, and so the remaining lawsuit was only between the foreign tire manufacturer and the foreign valve manufacturer.[52] Accordingly, all the justices agreed that there was no reason for that particular suit to be heard in a U.S. court.[53] But the core question of how to deal with harms caused through the cross-border "stream of commerce" remained unresolved.

Fast forward to 2012, when the U.S. Supreme Court faced another stream of commerce case. In *J. McIntyre Machinery, Ltd. v. Nicastro*, a UK manufacturer selling through a distributor in the United States sold a machine in New Jersey that allegedly caused harm there.[54] At least two factors made this a stronger case for jurisdiction than in *Asahi*. First, the New Jersey plaintiff was still in the case. Second, the UK manufacturer deliberately intended to sell throughout the United States and even used a U.S. distributor to do so.

Nevertheless, the U.S. Supreme Court again ruled that the foreign corporation could not be subjected to jurisdiction. And again, there was no majority rationale. Justice Kennedy, writing for a four-justice plurality, determined that there was no jurisdiction in New Jersey because, although the company had deliberately attempted to sell in the United States as a whole, it had not specifically targeted New Jersey sufficient to indicate that it had subjected itself to the sovereignty of that particular state.[55] In contrast, the three dissenting justices contended that targeting the United States as a whole was sufficient to subject a large multinational industrialist to jurisdiction in any state where its product was sold.[56]

The controlling concurrence by Justice Breyer, joined by Justice Alito, explicitly wrestled with the difficulty of applying the minimum contacts test in an era of global supply chains and Internet sales. Justice Breyer rejected the plurality's focus on whether the defendant "inten[ded] to submit to the power of a sovereign."[57] Instead, the concurrence reasonably asked:

But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?[58]

At the same time, however, Breyer and Alito were not prepared to potentially allow for jurisdiction in all fifty states over any foreign defendant that targets the United States as a whole, especially based on the premise that in this case only one of defendant's product had actually been sold in New Jersey.[59] Again, Breyer expressed concern about categorical rules, given the variety of types of sales possible in the new Internet era:

[M]anufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.[60]

McIntyre is not the only U.S. Supreme Court case in which the specter of Internet-based contacts has hovered in the background. In *Walden v. Fiore*, the Court explicitly took pains to avoid speaking to the question of online contacts, noting that the "case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State."[61] And in *Ford Motor Co. v. Montana Eighth Judicial Court*, both the majority[62] and one of the concurring opinions[63] went out of their way to discuss a hypothetical scenario presented by Chief Justice Roberts at oral argument involving Internet-based sales. Chief Justice Roberts posited a "retired guy in a small town" in Maine who "carves decoys" for ducks and uses "a site on the Internet" to sell them.[64] Chief Justice Roberts asked, "Can he be sued in any state if some harm arises from the decoy?"[65] As in *Walden*, the majority distinguished the case before it and therefore seemed pleased to kick the Internet-contacts can down the road to a future case.[66] Meanwhile, Justice Gorsuch in concurrence, joined by Justice Thomas, used the Internet sales hypothetical as a reason for eschewing the *International Shoe* test altogether and perhaps returning to the *Pennoyer* framework.[67] According to Justice Gorsuch, "today, even an individual retiree carving wooden decoys in Maine can 'purposefully avail' himself of the chance to do business across the continent after drawing online orders to his e-Bay 'store' thanks to Internet advertising with global reach."[68]

Thus, it seems clear that the globalization of business and the rise of online commercial activity is at the very least complicating the jurisdictional inquiry. There are six principal reasons that online interaction destabilizes jurisdictional regimes that have historically been based either on physical presence in a territory (*Pennoyer*) or on contacts with a territory (*International Shoe*).

First, it is now far easier for an individual or corporation in one physical location to affect people in a different physical location, even without direct physical contacts with a territory. As a thought experiment, one can imagine an "effects map," in which one identifies a territorial locality and plots on a map every action that has an effect on that locality.[69] Five hundred years ago, such effects would almost surely have been clustered around the territory, with perhaps some additional effects located in a particular distant imperial location. One hundred years ago, those effects might have begun spreading out. But today, while locality is surely not irrelevant, the effects would likely be diffused over many corporate, governmental, and technological centers.

Second, because of the ease of interaction at a distance, an individual or small corporation can now have a broad reach without also having the resources usually associated with large national or multinational firms. It is worth noting that in 1945, International Shoe was one of the largest corporations in America,[70] and underlying the U.S. Supreme Court's decision in that case was surely the assumption that any company capable of having such a large footprint in a distant state probably was also a company with sufficient resources to litigate in that state.[71] In short, geographical scope could function as a rough proxy for size and resources. That equivalence no longer holds. Now, a lone artisan selling out of a garage through Amazon or Etsy or eBay can have a global reach without having much (or any) institutional support. This difference complicates the jurisdictional calculus along with the idea of what constitutes a "burden" on a defendant.

Third, for many online transactions, it is difficult to assign the transactions to a particular physical location. Where is a website? Where is a social media post? Where is an email message? Where does a Zoom call take place? Where is an AI algorithm located? Obviously, the law could develop ways of answering those questions, but are those answers likely to be satisfying? For example, we could focus on where the data underlying these transactions is stored. But the territorial location of data is often arbitrary and substantively unimportant. If I, as a United States citizen based in Maryland, have a g-mail account, and Google, a U.S. corporation, decides to store my archived emails in Ireland or France or Indonesia (or indeed to split up the data fragments that make up each email message among data warehouses in all three countries), that decision seems irrelevant to any question of whether I have somehow affiliated myself with any of those communities or governments for purposes of jurisdictional analysis.

Fourth, as the g-mail example makes clear, even if we can somehow territorialize these deterritorialized transactions, the result is likely to be both arbitrary and easily manipulable. For example, if jurisdiction depends on where a company locates its

servers, then the company has carte blanche to choose its place of jurisdiction simply by deciding where to place its servers, even though the server location may have nothing to do with the transactions the company is undertaking. In addition, to the extent data is stored by third parties in the data warehouses that collectively make up what we colloquially refer to as the "cloud," the decision about the data's location may be made by a totally separate entity from the one actually engaging in the transaction. In either case, trying to localize these transactions can result in deliberately manipulated or nonsensical outcomes.

Fifth, to the extent the due process inquiry revolves around the presumed burden on the defendant, that inquiry is radically destabilized in a world of online interaction. As noted above, the presumption that a company with a global reach must be a large company with plenty of resources is no longer true. But it is also the case that depositions, and even trials, can be held online, document discovery has been largely automated, and lawyers can do almost all of their work without being in the physical jurisdiction where a case is pending (so long as they nominally affiliate with local counsel, which is itself an archaic vestige of an earlier, more territorial, era). Thus, most defendants are not truly burdened by defending a lawsuit in a distant state. And while there may still be reasons that defendants should not be subject to jurisdiction everywhere, those reasons are more productively expressed based on principles other than the purported burden on the defendant to litigate far from "home."

All these complexities reflect an obvious truth: physical location and physical distance are simply not as significant to our social identity as they once were. Indeed, the radical shift to online interaction fundamentally reshapes the relationship of people to their geography.[72] As Joshua Meyrowitz observed nearly forty years ago, electronic media create "a nearly total dissociation of physical place and social 'place'" because "where we are physically no longer determines where and who we are socially."[73] Meyrowitz pointed out that, historically, communication and travel were synonymous, and it was not until the invention of the telegraph that text messages could move more quickly than a messenger could carry them.[74] Thus, "informational differences between different places began to erode."[75] Obviously, that process of deterritorialization has accelerated in the four decades since Meyrowitz wrote. For better or worse, our sources of information, our online communities, our cultural influences, and even our health risks are all increasingly divorced from physical location.

So, how should law respond to these tectonic shifts in social life? At least since 1995, scholars who focused on Internet jurisdictional issues have fallen into two camps. On one side are the cyberspace "unexceptionalists," who argue in various contexts that the online medium does not significantly alter the legal framework to be applied.[76] On the

other, cyberspace "exceptionalists" argue that the medium itself creates radically new problems that require new analytical work to be done.[77]

Regarding jurisdiction in particular, the exceptionalists argue that the rise of online interaction requires new rules for legal jurisdiction by upsetting old assumptions about the general tie between legal effects and territorial location. In response, unexceptionalists insist that online activity creates no fundamentally new legal problems and that "well-settled" principles in existing jurisdictional doctrines are adequate to address any issues that may arise.[78]

The problem with the unexceptionalist position, however, is that it assumes that there actually *are* well-settled "general" principles of law that can simply be applied to new legal settings without alteration. And yet it is the nature of law that it changes over time, particularly in common law systems.[79] Thus, what is "well-settled" for one generation (or in one century) is apt to be very different from what is well-settled for the next. Even more importantly, new technologies that alter the culture are precisely the sorts of changes that tend to result in shifts to well-settled legal principles.[80]

Indeed, as discussed above, in the nineteenth century "well-settled" U.S. legal principles saw jurisdiction as rooted almost exclusively in the territorial power of the sovereign.[81] Each sovereign was deemed to have jurisdiction, exclusive of all other sovereigns, to bind persons and things present within its territorial boundaries. By the early twentieth century, growth of interstate commerce, transportation, and cross-border corporate activity put pressure on the idea that a state's judicial power extended only to its territorial boundary. In particular, the invention of the automobile and the development of the modern corporation meant that far-away entities could inflict harm within a state without actually being present there at the time of a lawsuit. Not surprisingly, by the end of the twentieth century, it had become "well-settled" in U.S. jurisdiction jurisprudence that a state may at least sometimes assert jurisdiction over a defendant if the effects of the defendant's activities are felt within the state's borders, even if the defendant had not literally set foot there.[82] And, of course, these new "well-settled" rules felt as commonsensical and obvious to most judges, lawyers, and observers as the more territorialist view felt in the nineteenth century.

Now, it seems safe to say that jurisdictional rules are in flux again, at least in part because of online interaction. Indeed, as discussed above, the idea of basing jurisdiction on where effects are felt is difficult to apply to online interaction because our social lives are increasingly spread out in many different locations, anywhere our data is stored, used, or viewed, and we are potentially affected by activity taking place anywhere, without regard to physical territory.

The answers that law will ultimately evolve to address these sorts of problems are difficult to predict, and scholars and judges will no doubt have differing approaches to specific questions of jurisdiction regarding online interaction, virtual worlds, data storage, digital currencies, autonomous entities, artificial intelligence, and the like. Suffice to say that however one resolves the issues, "well-settled" principles of law are unlikely to be very helpful because such principles are themselves always in flux, often precisely because of the pressures placed on such principles by new communications technologies such as the Internet and new ways in which social lives become deterritorialized. Thus, in some sense, a pure unexceptionalist position is difficult to maintain.

But if unexceptionalists have relied too much on the application of mythical well-settled principles, the exceptionalists, at times, have tended to the opposite extreme, assuming that the rise of online interaction, data storage, and the like upend nearly all extant ideas about law and the role of the state. But that has not proven to be true. And indeed, so far courts have managed to use *International Shoe*—at least nominally—as the rubric for analyzing jurisdiction.

In the end, I think it is most accurate to say that we are at the very least in a period of change, when judges are still using the *International Shoe* formulation, even while recognizing that the test does not really reflect the changing social reality. Thus, just as in the period of legal fictions between *Pennoyer* and *International Shoe*, we are in an era of transition, and it may finally be time for the U.S. Supreme Court to articulate a new framework for analyzing jurisdiction that takes better account of the new reality.

II. Grounding Jurisdictional Rules in the Dormant Commerce Clause Rather than the Due Process Clause

While the increasing deterritorialization of social life poses perhaps the greatest challenge to current jurisdiction doctrine, it is not the only source of conceptual confusion. An added complication is the fact that the U.S. Supreme Court's personal jurisdiction doctrine has repeatedly vacillated between two different concerns: (1) protecting the due process rights of litigants, and (2) addressing issues of interstate federalism and protecting the sovereignty of states.[83] In the nineteenth century, these two concerns often were indistinguishable from each other, as states were conceptualized as akin to separate countries. Thus, states not only had very separate sovereign interests, but travel from one to the other was also difficult, both psychically and logistically. But over the course of the twentieth and now twenty-first centuries, these two rationales have diverged, creating difficulties for modern jurisdiction jurisprudence. This Part surveys this history and argues that the U.S. Supreme Court's

current due process framework for jurisdiction is increasingly unsatisfying. Indeed, the key issue in most contemporary jurisdictional debates is no longer the burden on the defendant but the core question of whether a community has sufficient connection to a dispute that it is appropriate for that community to assert dominion and impose its norms on an out-of-state defendant. This inquiry is far more akin to the Court's jurisprudence surrounding the "Dormant" Commerce Clause[84] than it is to due process.[85]

As discussed in Part I,[86] *Pennoyer v. Neff*[87] established for the first time that the entire jurisdictional inquiry was grounded in the Fourteenth Amendment's Due Process Clause.[88] Yet, the Court's jurisprudence on personal jurisdiction contained a paradox right from the beginning, because the core justification for limits on personal jurisdiction articulated by the *Pennoyer* Court was not principally focused on ideas about fairness to the parties, but instead about the essential attributes of state sovereignty.[89] Indeed, as noted above,[90] the *Pennoyer* Court closely tracked Justice Story's treatise that built conflicts of law theory from conceptions of nation-state sovereignty. Quoting Story, the Court emphasized:

The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals."[91]

Yet, contrary to the idea that jurisdiction involved core limitations on a state's power to encroach upon the sovereignty of another state, the *Pennoyer* Court also stated that, consistent with the idea of an individual right, that right could always be waived.[92] Moreover, according to the Court, a state could even go so far as to *require* an individual doing business in a state to appoint an agent there and effectively waive a jurisdiction defense,[93] regardless of how much that might encroach on the sovereignty of other states.

This tension between an individual right and a state sovereignty principle came to the fore in subsequent cases applying *Pennoyer*. As discussed in Part I,[94] in the succeeding decades courts used the due process rationale to allow states to assert jurisdiction based on expanded conceptions of consent. The U.S. Supreme Court permitted states to condition the operation of a business in the state on consent to jurisdiction and even

allowed states to assert jurisdiction based on the idea that defendants had implicitly consented to jurisdiction even without knowledge that they had done so.[95]

Nevertheless, in at least one case, *Davis v. Farmers Cooperation Equity Co.*, the Court made clear that this consent idea did *not* extend to cases where the transaction at issue was *unrelated* to the state asserting jurisdiction, regardless of consent.[96] And significantly, the Court based its decision in *Davis* solely on the Commerce Clause, without considering the Due Process Clause at all.[97]

In the 1940 jurisdiction case of *Milliken v. Meyer*,[98] however, the Court returned to the Due Process Clause and more explicitly connected jurisdiction to an inquiry focused on fairness to the defendant. Here, the Court considered whether service at the in-state domicile of a defendant temporarily absent from the state was sufficient to establish jurisdiction. The Court concluded that as long as the service is "reasonably calculated to give [the defendant] actual notice," it is sufficient to create jurisdiction because "the traditional notions of fair play and substantial justice implicit in due process are satisfied."[99] *Milliken* therefore anticipated the fairness approach of *International Shoe* just a few years later, albeit in the relatively uncontroversial context of a state asserting jurisdiction over one of its domicilliaries.

Although the *International Shoe* Court rightly recognized the need to replace the fictions of expanded presence and consent with a new paradigm for assessing jurisdiction, the decision unfortunately continued *Milliken*'s focus on the Due Process Clause rather than the Commerce Clause. Indeed, the famous formulation of the *International Shoe* test emphasizes that it is the due process requirement alone that requires a defendant "not present within the territory of the forum . . . [to] have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[100] And of course the idea of "traditional notions of fair play and substantial justice," taken from *Milliken*, suggests that the inquiry is about fairness to the defendant more than it is about the sovereignty of states. The Court further indicated that "[a]n 'estimate of the inconveniences'" to the defendant was relevant to the analysis,[101] further cementing that the new jurisdictional test would emphasize the burden on the defendant.

In the decades following *International Shoe*, the Court vacillated again between a due process conception of jurisdiction and one based more on federalism concerns. In *McGee v. International Life Insurance Co.*,[102] the Court clearly read *International Shoe* as an invitation to use the Due Process Clause to increase a state's jurisdictional reach in order to respond to the increasing cross-border nature of business activities. According to the Court,

a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[103]

Thus, *McGee* focused on the burden to the defendant, consistent with a due process approach, but observed that the burdens on a corporate defendant were far less than in an earlier era.

The due process approach has also meant that consent is almost always sufficient to justify the assertion of jurisdiction over *plaintiffs*, regardless of whether or not the plaintiff has any connection to the forum. For example, in *Keeton v. Hustler Magazine, Inc.*,[104] the Court of Appeals had ruled that New Hampshire could not exercise jurisdiction over the suit because the plaintiff had no ties to New Hampshire and therefore the state had insufficient interest in the suit.[105] This ruling reflected an approach that focused on the community affiliation between the state and the suit. The U.S. Supreme Court, however, appeared to reject that approach, transforming it into one that focused only on the defendant, not the plaintiff's ties (or lack of ties) to the state. Thus, the Court stated, "[w]e agree that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether *respondent's* activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities."[106] But of course the appeals court had based its judgment about lack of state interest *not* on the activities of Hustler Magazine, the respondent, but on *Keeton*'s lack of ties to the forum.

In this sleight of hand, the Court sidestepped even a discussion of whether a plaintiff's lack of ties to a forum should be relevant. And subsequently, courts have tended to assume that a plaintiff is automatically subject to jurisdiction because by filing a suit in a state the plaintiff has voluntarily waived any jurisdictional objection.[107] Likewise, a defendant who chooses to show up to defend a suit is deemed to have waived jurisdictional objections, regardless of that defendant's ties or lack of ties to the state.[108] And the Court has likewise generally viewed any type of contractual consent to be sufficient to support jurisdiction.[109] Such voluntary waiver and contractually based consent are only possible, of course, if the right not to be haled into court in a foreign jurisdiction is conceptualized as an individual due process right.

Since *McGee*, outside of the waiver/consent context, the U.S. Supreme Court has mostly been pulling back from *McGee*'s expansive reading of the *International Shoe* framework. Indeed, although the minimum contacts test was almost certainly intended to provide a more robust basis for plaintiffs to assert jurisdiction over out-of-state defendants, the test has more often been used since *McGee* to *deny* plaintiffs jurisdiction. And interestingly the language of state sovereignty has crept back in to the Court's opinions, often to justify refusing jurisdiction.

For example, in *Hanson v. Denckla*,[110] the Court called personal jurisdiction "more than a guarantee of immunity from inconvenient or distant litigation," and instead seemed to view jurisdiction as "a consequence of territorial limitations on the power of the respective States."[111] Therefore, "however minimal the burden of defending in a foreign tribunal," the defendant bank was not deemed subject to jurisdiction in the state where its customer had died.[112] Likewise, in *World-Wide Volkswagen Corp. v. Woodson*,[113] the Court denied the state of Oklahoma jurisdiction over a New York car dealer and regional distributor because Oklahoma, where the car exploded, was not a state where those defendants sold or distributed cars. Even though it was entirely foreseeable that a car sold in New York could be driven to Oklahoma, and even though there was no burden on these defendants because the manufacturer of the automobile almost certainly would have taken the laboring oar in the litigation, the Court ruled that jurisdiction was improper. And though the Court reiterated that the *International Shoe* test "protects the defendant against the burdens of litigating in a distant or inconvenient forum,"[114] it also emphasized that the test "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[115] Thus, although the burden on these defendants was minimal, the Court focused on state sovereignty and determined that defendants could not be sued in a state where those defendants conducted no business at all and where their only contact with the state was the consumer's unilateral decision to bring the product there.

Turning to the twenty-first century, the Court remains divided and uncertain regarding the rationale underlying the jurisdictional analysis. As discussed in Part I, the Court could not muster a majority rationale in the 2011 case of *J. McIntyre Machinery, Ltd. v. Nicastro*.[116] Writing for four Justices, Justice Kennedy took a position far closer to a sovereignty rationale than one based on due process:

Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of 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 activities within the forum State, thus invoking the benefits and protections of its laws.[117]

Kennedy's vision of jurisdiction seems to require some explicit invocation of the sovereign power of a state before jurisdiction is appropriate, regardless of the burden on the defendant (or lack of it) and regardless, it seems, of how many products manufactured by McIntyre had actually been sold in the state or how much revenue McIntyre had derived from those sales. In contrast, Justice Ginsburg's dissent, joined by Justices Sotomayor and Kagan, argued that "there should be no genuine debate" that "the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."[118] And, focusing on due process considerations alone, she concluded that a large industrialist seeking to sell throughout the United States should be subject to jurisdiction wherever the product ended up being sold.

In 2021, the Supreme Court explicitly acknowledged the duality at the heart of its jurisdiction jurisprudence. Writing for the Court in *Ford Motor Co. v. Montana Eighth Judicial District Court*, Justice Kagan forthrightly proclaimed that jurisdictional "rules derive from and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism.'"[119] She acknowledged that, alongside the due process interests of defendants is a separate set of interests: "those of the States in relation to each other."[120] Thus, because "[o]ne State's 'sovereign power to try' a suit . . . may prevent 'sister States' from exercising their like authority," jurisdictional principles seek "to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy."[121]

Finally, we come to the Court's fractured opinion in *Mallory*.[122] Here, the question was whether Pennsylvania could assert jurisdiction over an out-of-state defendant in a suit concerning activity unrelated to Pennsylvania based solely on the fact that the defendant had consented to jurisdiction as a condition of doing business there.[123] Reaching back to pre-*International Shoe* caselaw, five justices agreed that jurisdiction, because it is based in due process, is waivable and that the defendant therefore could be forced to consent to jurisdiction, even regarding unrelated suits.[124] As Justice Jackson emphasized in concurrence, "the due process 'requirement of personal jurisdiction' is an individual, waivable right" and so any subsidiary "interstate federalism concerns informing that right" do not constitute an independent constraint on the assertion of jurisdiction.[125] Instead, she argued that those sovereignty concerns are "'ultimately a function of the individual liberty interest' that this due process right preserves."[126]

Four justices dissented, arguing that allowing this sort of blanket waiver of jurisdiction, even over conduct unrelated to the state, would effectively eviscerate all limits on the assertion of jurisdiction.[127] Thus, states that would not have jurisdiction under *International Shoe* and its progeny could simply manufacture jurisdiction through a broad consent statute.

Justice Alito concurred only in part.[128] He provided the fifth vote for the idea that the defendant's due process right was waivable,[129] but he argued that the assertion of jurisdiction should independently be analyzed under the dormant Commerce Clause.[130] Citing *Davis* (a case ignored by the majority),[131] Alito suggested that Pennsylvania should not be able to assert jurisdiction over an out-of-state corporation regarding an out-of-state dispute, despite the fact that the company had, in theory, consented to Pennsylvania jurisdiction as a condition of doing business there.[132] According to Alito, for Pennsylvania to assert jurisdiction in such circumstances would be a form of extraterritorial regulation that might infringe upon the sovereignty of other states in violation of the Commerce Clause.[133]

It should be clear even from this brief survey that whatever the relative merits of any given decision based on any given set of facts, there is a fundamental confusion lying at the heart of U.S. jurisdictional law. Indeed, the U.S. Supreme Court has embraced diverging justifications for jurisdictional doctrine over time, and as the fractured opinions in *Mallory* suggest, one's perspective on the constitutional basis for jurisdictional rules can result in different outcomes.

Yet, due process is an increasingly anachronistic framework for understanding the nature and purpose of jurisdictional rules. As discussed above,[134] the burdens of distant litigation are now far less than in a previous era, and defendants are rarely truly arguing about the burden of litigating when they raise jurisdictional defenses. Instead, the real question is whether the community asserting jurisdiction has a sufficient connection to the events underlying the lawsuit or to the litigants to justify exercising dominion over the dispute. Indeed, it is worth noting that European jurisdictional law has long been focused on the court's connection to a dispute, rather than the rights of the defendant.[135]

Significantly, the due process framework results in both overly broad and overly narrow assertions of jurisdiction. By conceiving of jurisdiction as a waivable right, the due process inquiry sometimes allows plaintiffs to bring suits in states with which they have no community affiliation at all.[136] It also means that states can draft broad consent statutes that potentially subject defendants to suits about events that have no connection to the state. And contractual forum selection clauses, often embedded in

contracts of adhesion or online terms of service,[137] can channel suits to states that have little connection to a dispute.[138] On the other hand, an approach emphasizing the rights of the defendant can result in the denial of jurisdiction over an absent defendant even when that defendant has caused significant harm in a community.

Justice Alito's approach in *Mallory* points toward a more fruitful alternative framework. If jurisdictional assertions must be analyzed under the U.S. Constitution, the dormant Commerce Clause at least focuses courts on the core questions that should undergird the jurisdictional inquiry: Does this community have sufficient connections with the dispute to justify the assertion of dominion? Will a community's exercise of dominion unduly infringe on the ability of other communities to regulate? Will the assertion of jurisdiction result in intolerable inconsistent regulation for a defendant that operates in multiple states? Moreover, these questions raise the possibility that courts might use choice of law to mitigate concerns about broader assertions of jurisdiction. This is because a court asserting jurisdiction over an out-of-state actor could choose to apply the law of the defendant's home state in order to address potential dormant Commerce Clause problems.

Using the dormant Commerce Clause to analyze jurisdiction is not a panacea, of course, and jurisdictional questions will still often be difficult and context-specific. But at least courts will be analyzing the actual core question of whether a community's assertion of jurisdiction is appropriate, rather than engaging with largely fictional arguments about the burden on defendants or ignoring the inquiry altogether by relying on consent (which itself is often not true consent) in order to dissolve jurisdictional questions. And as we will see in Part IV, a focus on community affiliation also allows courts to better approach issues of jurisdiction in the Internet era.

III. Conceptualizing General and Specific Jurisdiction as a Continuum

One final conceptual confusion surrounding jurisdiction must be addressed in order to begin to construct a twenty-first century approach. In analyzing jurisdiction, the U.S. Supreme Court has unfortunately adopted a categorical divide between what it sees as two distinct forms of jurisdiction. General, or all-purpose, jurisdiction involves a state's assertion of jurisdiction concerning a dispute unrelated to the defendant's connections to the state.[139] In contrast, specific, or case-linked, jurisdiction is when the suit is related to the defendant's contacts with the state.[140] The problem is that the boundaries between these two categories have always been fuzzy, but by developing a completely different jurisdictional inquiry for each category, the Supreme Court has made the distinction between the two categories far more consequential than it should be. This, in turn, has led to unnecessarily contorted caselaw, as the general versus

specific distinction has come to assume talismanic significance.[141] This Part discusses the history of the distinction and argues against the Court's current categorical approach.

In many ways, *International Shoe Co. v. Washington*[142] was an easy case for jurisdiction. The International Shoe Corporation shipped shoes into Washington regularly and derived substantial ongoing revenue from customers there; its contacts with the state were what the Supreme Court described as "continuous and systematic."[143] In addition, the lawsuit at issue concerned unemployment insurance taxes the state wished to collect based on the salespeople that International Shoe employed in the state.[144] Thus, the case featured a company with a large *number* of contacts with the state asserting jurisdiction, and those contacts were directly *related* to the underlying lawsuit.

The obvious question left unresolved by *International Shoe*, therefore, was how to analyze jurisdiction in more difficult cases, when either (1) the number of contacts were fewer, or (2) the lawsuit was more tangential to those contacts.

McGee v. International Life Insurance Co.,[145] addressed the first of these questions. In *McGee*, a Texas insurance company had only one insured in California, but the lawsuit concerned that particular insurance policy. The U.S. Supreme Court determined that even the one contact between the defendant and California was sufficient for California to assert jurisdiction because "the suit was based on a contract which had substantial connection with [the forum]."[146]

Meanwhile, as to the second question, it is significant that the Court in *International Shoe* had left the door open for a contextual approach, noting that "there 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." [147] *Perkins v. Benguet Consolidated Mining Co.* continued in this same flexible vein.[148] The case involved a suit against a Philippines corporation based on activities in the Philippines, but the suit could not be brought there because of the Japanese occupation of the Philippines in World War II.[149] During that time, Benguet's president kept an office in Ohio where he conducted basic business operations, such as sending correspondence, distributing salary checks, and supervising the company's limited wartime functions.[150] The Court concluded that these contacts were sufficient to warrant jurisdiction over the company in Ohio, even though the dispute was unrelated to Ohio.[151]

World-Wide Volkswagen,[152] discussed in Part II,[153] aptly demonstrates how the sheer number of contacts a defendant has with a state could be sufficient to justify jurisdiction. As discussed previously, the U.S. Supreme Court ruled that there was no jurisdiction in Oklahoma over the local New York car dealer and regional distributor of the allegedly defective car because they had no contacts with Oklahoma other than the fact that the consumer drove the car there.[154] But what about the car manufacturer, Audi, or the national importer, Volkswagen of America? Significantly, those two parties did not even contest personal jurisdiction in Oklahoma,[155] presumably because they believed they had no legitimate jurisdictional defense.[156] Why? Because it is highly likely that there were hundreds or thousands of Audi cars sold in Oklahoma and regularly driving on roads there. And though none of those cars sold in Oklahoma happened to be the precise car that crashed, the fact that the manufacturer and importer had so many contacts with Oklahoma was thought to be sufficient to subject them to jurisdiction in Oklahoma even regarding a car that had been sold outside the state. As the *World-Wide Volkswagen* Court noted in dicta,

[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] 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.[157]

Thus, by the 1980s a rough continuum seemed to be emerging. The fewer contacts a defendant had with a state the more important it was that those contacts be directly related to the lawsuit (with *McGee* as the extreme case of just a single, highly related contact). On the opposite end of the spectrum, the more contacts a defendant had with a state the less important it was that those contacts be related to the particular suit. Here, the extreme case would be a suit brought in the defendant's state of citizenship, which might well justify jurisdiction over any suit, whether related to that state or not.

In a 1984 case, *Helicopteros Nacionales de Colombia S.A. v. Hall*,[158] the Court for the first time explicitly named these two types of jurisdictional assertions, drawing on a law review article by Arthur T. von Mehren and Donald T. Trautman.[159] The Court stated that, "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum . . . a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction."[160] This, the Court, following von Mehren and Trautman, called specific jurisdiction.[161] However, according to the Court, "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's

subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation."[162] This was general jurisdiction.

Simply naming the two categories of jurisdiction "general" and "specific" was not a problem, in and of itself, so long as it continued to be understood that these two types of jurisdiction operated along a spectrum from greater to fewer contacts and from more to less relatedness between those contacts and the underlying lawsuit. But perhaps inevitably, the categories hardened, narrowed, and became more formulaic.

Thirty years after *Helicopteros*, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[163] the Court tightened the test for general jurisdiction. Instead of conceptualizing the relationship between the number and the relatedness of contacts as points on a continuum, the Court now stated more categorically that "[a] court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them *essentially at home* in the forum State."[164] Further, the Court noted in a parenthetical that "domicile, place of incorporation, and principal place of business [are] 'paradig[m]' bases for the exercise of general jurisdiction."[165] It is worth noting the linguistic sleight of hand here. The *International Shoe* Court had referred to the general proposition that continuous and systematic activity could sometimes be sufficient to render a defendant subject to jurisdiction even over unrelated conduct.[166] But the *Goodyear* Court transformed that formulation into one that required not just continuous and systematic activity, but continuous and systematic activity such as to render the defendant "essentially at home."[167]

The full implications of this shift became clear in 2014, when the Court decided *Daimler AG v. Bauman*.[168] Here, the Court confirmed that in almost all circumstances general jurisdiction would be limited *only* to the defendant's place of incorporation and principal place of business.[169] The Court referred to those locations as the places where the defendant was "essentially at home,"[170] likely adding the word "essentially" only so that it did not have to overrule *Perkins*.[171] The Court reasoned that limiting general jurisdiction to two places would promote simplicity in jurisdictional rules and was easily ascertainable, while affording at least one forum where a plaintiff could bring any claim.[172] Moreover, the Court made clear that "engag[ing] in a substantial, continuous, and systematic course of business" in a state would not on its own be enough to justify general jurisdiction over a claim unrelated to that state.[173] Subsequently, in *BNSF Railway Co. v. Tyrrell*,[174] the Court refused to allow a state to exercise general jurisdiction over an out-of-state rail corporation, despite the fact that the company

maintained 2,000 miles of railway track in the state and employed more than 2,000 people there.[175]

These three cases together have created a sea-change in the U.S. Supreme Court's approach to jurisdictional law. *International Shoe* seemed to establish an inquiry that viewed the relationship between contacts and relatedness along a continuum. But now the Court has created an artificially sharp border between cases involving related and unrelated contacts. As a result, many jurisdictional determinations will now turn entirely on whether a lawsuit is deemed to be related or unrelated to contacts in a state, thereby landing the suit in the general jurisdiction or specific jurisdiction category.

The problem, of course, is that "relatedness" is often indeterminate and subject to definitional conundrums. And yet because of the Supreme Court's unfortunate new taxonomy, defining a suit as "related" or "unrelated" to contacts in a state is often the only relevant question.

To see the consequences of the Court's overly formalistic definition of general jurisdiction, one need only look to two recent cases. First, in *Bristol-Myers Squibb Co. v. Superior Court of California*, [176] the U.S. Supreme Court analyzed a suit brought in California by eighty-six California residents and 592 residents from thirty-three other States against a large drug company.[177] The California court undisputedly asserted proper jurisdiction over the claims of the California residents, but with regard to the out-of-state residents, Bristol-Myers Squibb challenged jurisdiction.[178]

At first blush, jurisdiction over the defendant in California concerning all the claims—by the California and the non-California residents alike—might seem eminently reasonable. Although Bristol-Myers Squibb is not a citizen of California, it is a very large company that had conducted a nationwide marketing and distribution campaign regarding Plavix, the particular drug at issue.[179] Moreover, it had worked with a California distributor to distribute the drug[180] and had distributed millions of Plavix pills in California and earned $900 million from Plavix sales in the state.[181] Finally, given that California's jurisdiction over Bristol Myers-Squibb regarding the Plavix sales to the California residents was uncontested, the company could not credibly claim that it was in any way inconvenient or burdensome for it to litigate in California.[182] At most, there might have been choice-of-law questions about the proper law for the California court to apply to the claims of the non-California residents, but that would not, in and of itself, defeat jurisdiction.

However, given that Bristol-Myers Squibb was not a citizen of the state, the California courts could not invoke general jurisdiction—regardless of the company's extensive

contacts with the state—because of the U.S. Supreme Court precedents described above.[183] So, the California Supreme Court instead tried to use a continuum approach as part of the specific jurisdiction inquiry regarding how related the contacts were to the lawsuit.[184] Under this approach, according to the California court, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."[185] "Applying this test, the state court concluded that 'BMS's extensive contacts with California' permitted the exercise of specific jurisdiction 'based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required.'"[186]

The U.S. Supreme Court reversed.[187] The majority rejected the California court's sliding scale approach, calling it "a loose and spurious form of general jurisdiction," rather than a proper specific jurisdiction analysis.[188] For specific jurisdiction, according to the U.S. Supreme Court, there needed to be a more particularized link between the claim and the defendants' activities in California.[189] But in this case, "the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California."[190] Accordingly, while the company's state of citizenship meant that there could be no assertion of general jurisdiction, the claims of non-California residents were deemed not to sufficiently relate to California to justify specific jurisdiction either.[191]

Regardless of whether or not one agrees with the outcome of this particular case, it makes clear that the U.S. Supreme Court's categorical bifurcation of the jurisdiction inquiry has put enormous pressure on the question of whether a claim is related or unrelated to the defendant's contacts with the state. Yet, as this case also makes clear, a lot turns on how one defines "relatedness." After all, as the dissent pointed out, this was not a claim that Bristol-Myers Squibb had improperly maintained the sidewalk outside its corporate headquarters in New York, a claim that would clearly be unrelated to its activity in California.[192] Instead, the case concerned a drug actively marketed and sold in California in large numbers.[193] In such a case, whether the claim is sufficiently related to justify jurisdiction seems at least somewhat indeterminate; yet in the Court's categorical approach, it is the crux of the entire jurisdictional inquiry.

Not surprisingly, the outcome in *Bristol-Myers Squibb* encouraged further litigation regarding the question of relatedness. In *Ford Motor*,[194] suits had been brought in two states concerning automobile crashes that occurred in-state.[195] But significantly, the allegedly defective cars that had crashed had not been bought in those states; they had been bought elsewhere and had been driven to the state prior to the crashes.[196] So, Ford tried to use *Bristol-Myers* to argue that, although *other* identical cars were sold in those states, the *particular* cars at issue were not.[197] According to Ford, just as the

Plavix pills ingested by non-California residents were not sufficiently related to California, so too cars bought outside a state were not sufficiently related to that state.[198]

The U.S. Supreme Court, however, was not willing to extend the logic of *Bristol-Myers Squibb* that far. In particular, these suits involved residents of the forum states, and the car crashes at issue took place in the forum states,[199] unlike the non-resident plaintiffs in *Bristol-Myers Squibb*.[200] Thus, the Court ruled that the suits were more connected with the states that were asserting jurisdiction.[201] That determination is surely sensible, but note that it does not truly depend on the factors that are supposedly relevant to the Court's stated test for relatedness, which purports to look at the relatedness of the claim to the *defendant's* contacts in the state. That is because in *Ford Motor* the location of the accident and the residence of the plaintiffs are actually irrelevant to the defendant's contacts. In response to that concern, the Court recounted Ford's extensive contacts in the states at issue: its many dealerships, its advertising campaigns, and so on. But those facts do not really distinguish the case from Bristol-Myers Squibb, which likewise advertised Plavix and sold massive numbers of Plavix pills in the state. Perhaps not surprisingly, three of the eight justices who heard this case concurred only in the judgment, arguing that the majority's test for relatedness was too broad and might open the floodgates to more expansive assertions of jurisdiction all over again.[202]

Meanwhile, the Court's dicta may also enable still other types of assertion of jurisdiction. In describing the scope of general jurisdiction, the Court stated that in suits brought in a defendant's state of citizenship, the "claims need not relate to the forum State or the defendant's activity there; they may concern events and conduct *anywhere in the world*."[203] Such a statement seems to suggest that even purely local claims occurring abroad can nevertheless be brought in U.S. courts in the home state of the defendant.[204]

Thus, the U.S. Supreme Court's insistence on cleaving a sharp divide between general and specific jurisdiction has resulted in conceptual confusion regarding both how broadly general jurisdiction extends and what exactly makes a claim relate to the defendant's contacts for purposes of specific jurisdiction. But both confusions only arise because the Court has unwisely jettisoned the continuum approach by trying to adopt clear divisions between general and specific jurisdiction. Instead, the Court would be wise to simply say that the more contacts a defendant has with a state the less related the claim has to be. So, of course a suit brought in a defendant's home state, where the defendant presumably has numerous contacts, would support jurisdiction over most claims (though perhaps not purely local issues occurring in other countries). Likewise, a

suit brought in a state where a defendant has numerous contacts but is *not* a citizen might nevertheless be sufficiently related to justify jurisdiction, but the amount of relatedness could be less than in a case like *McGee*, where the defendant had only one customer in the state.[205] In the one-customer case, in contrast, the suit would need to be very directly tied to the defendant's only contact.

This is not to say that every decision would be easy, and certainly various contextual factors would still matter. But at least judges would not tie themselves in knots trying to fit every lawsuit into only two boxes: general or specific. And, as we will see, such an approach will help courts focus less on counting contacts with a territorial entity and more on the question that really should guide all jurisdictional analysis: Whether there is sufficient affiliation between the suit, the parties, and the community asserting jurisdiction.

IV. A New Approach to Jurisdiction

How might we build an approach to jurisdiction that better reflects a world of online interaction and deterritorialized data? How can we build a vision that takes account of changing social reality without either starting from scratch and throwing out all extant jurisdictional principles on the one hand, or simply assuming current doctrine will suffice on the other? In short, how can we meld exceptionalist and unexceptionalist positions to develop workable provisional compromises to govern the ubiquitous virtual worlds of the twenty-first century?

As a true believer in common law case-by-case adjudication,[206] I cannot provide a comprehensive code that anticipates all permutations of human activity and provides a single definitive answer. Indeed, one of the important lessons of conflicts of law, it seems to me, is that there is no single unifying grand theory that can provide an authoritative answer to every possible dilemma or account for the infinite variety of human interaction that may arise. And even if we could, such a grand theory would instantly become obsolete as new advances in technology, science, communications, and transportation keep galloping on ahead of the lumbering efforts of law to catch up.

Thus, all I can offer is a set of provisional principles that might guide the future of jurisdiction. These principles, at most, provide a framework for analyzing the knotty jurisdictional problems that online interaction, deterritorialized data, and global supply chains create.

A. Community affiliation is a more plausible basis for analyzing legal jurisdiction than contacts with a territorially based sovereign.

A new concept has begun to creep into the U.S. Supreme Court's jurisdiction lexicon: the idea of community affiliation. Prior to 2011, the language of community affiliation was rarely used. But in *Goodyear*, the Court for the first time defined both general and specific jurisdiction in terms of affiliation. According to the Court, general jurisdiction over defendants requires that they have "*affiliations* with the State" that are "so continuous and systematic as to render them essentially at home in the forum State," whereas "specific jurisdiction requires an "*affiliation* between the forum and the underlying controversy."[207] That same year, in *McIntyre*, Justice Ginsburg's dissent argued that "[a]djudicatory authority is appropriately exercised where actions by the defendant . . . give rise to the *affiliation* with the forum."[208] Three years later, the Court in *Daimler* repeated the affiliation language from *Goodyear* and emphasized that under *Goodyear*, "only a limited set of *affiliations* with a forum" allow the forum state to exercise general jurisdiction.[209]

In *Bristol-Myers Squibb*, the Court again emphasized affiliation, but this time focused not so much on the *defendant's* affiliation with the forum, but on the need for "an affiliation between the forum and the underlying controversy."[210] And in *Ford Motor*, the Court picked up on the affiliation language in *Goodyear*, *Daimler*, and *Bristol-Myers Squibb*, quoting each of these cases and four times referring to the idea of affiliation, before concluding that "each of the plaintiffs brought suit in the most natural State—based on an 'affiliation between the forum and the underlying controversy.'"[211]

Finally, in *Mallory*, the Court added the word "community" into the mix, justifying the assertion of jurisdiction in Pennsylvania, based in part on the fact that the defendant had "proclaimed itself a proud part of 'the Pennsylvania Community.'"[212]

Although this new language may or may not signal an intentional shift in the Court's views of jurisdiction, I believe the concept of community affiliation offers a preferable rubric for analyzing jurisdiction in a world where counting contacts with a physical territory is no longer a reliable metric.[213]

Consider a website or a social media account. Such online presences are viewable in multiple jurisdictions. As such, they could potentially create harm in multiple jurisdictions. In the early days of the Internet, judges viewed websites as akin to twenty-four-hour television commercials, continuously beaming into multiple communities in multiple physical locations.[214] That approach quickly proved unworkable because it would subject anyone who posts anything online to potential jurisdiction anywhere and everywhere.

At the other extreme, one could say that jurisdiction is only appropriate in the physical location where the content creator uploads the content. This approach also has multiple difficulties. First, content posted in one location can create real harms elsewhere, and it is untenable for communities to be denied jurisdiction just because the defendant did not create the harm there. That would return us to the *Pennoyer* world where someone could cause harm in a state but avoid local jurisdiction by remaining physically outside the borders. Second, such an approach allows a potential defendant to manipulate jurisdiction based on where that defendant chooses to upload content. Third, what does it mean anyway to try to physically locate precisely where content is uploaded? Is it where the content creator is at the time the upload button is pressed? Is it the content creator's place of residence or place of business? Is it the location where the website or social media account is registered? Is it the location of the third-party company that hosts the website or runs the social media platform? Is it the location where the data that collectively constitute the content are stored?

Perhaps instead of focusing on the physical place where content is uploaded, we could construct an approach focused on the location of the viewers of the website or the followers of the social media account. That approach, however, starts moving back toward jurisdiction anywhere and everywhere, particularly if one has many viewers/followers in multiple physical locations. It also means that a potential plaintiff can manufacture jurisdiction by encouraging just one (or a handful) of people in a state to view the online content. And again, is it enough that a viewer who is a resident of the state accesses the content, or must the viewer be physically located in the state at the time the content is accessed?

To some degree, all of these questions turn on what is at root level a nonsensical metaphysical question. Can we really effectively conceptualize online interaction either as if the content "enters" the homes of the viewers, or as if viewers "travel to" the website? The problem is that neither of these formulations captures the nature of the interaction, and yet because of our historical need to tie legal jurisdiction to physical territory, these sorts of spatial metaphors are the only ones we have.

In contrast, a community affiliation analysis asks a more fundamental question: Does the community asserting dominion have sufficient connection to the parties or the dispute so as to justify that assertion? This can be difficult to answer, of course, but at least this analytical framework focuses on the question that should be at the heart of jurisdictional analysis.

Consider, for example, a Fourth Circuit case from 2003,[215] involving the ownership rights to the domain name barcelona.com. Joan Nogueras Cobo ("Nogueras"), a Spanish

citizen, registered barcelona.com with the Virginia-based domain name registrar, Network Solutions.[216] Subsequently, Nogueras formed a corporation in Virginia under U.S. law, called Bcom, Inc.[217] Despite the U.S. incorporation, however, the company had no offices, employees, or even a telephone listing in the United States.[218] Nogueras (and the Bcom servers) remained in Spain.[219]

The Barcelona City Council asserted that Nogueras had no right to use barcelona.com under Spanish trademark law and demanded that he transfer the domain name registration to the City Council.[220] When Nogueras refused, the City Council filed a complaint with the World Intellectual Property Organization (WIPO).[221] Several months later, the WIPO panelist ruled in favor of the City Council.[222] Instead of transferring the domain name, however, Bcom filed suit in U.S. federal court in Virginia, seeking a declaratory judgment that the registration of barcelona.com was not unlawful.[223]

Should such a case be heard in Virginia under U.S. trademark law? I think not. After all, the dispute was fundamentally between a Spanish citizen and a Spanish city concerning the ownership of a domain name associated with that Spanish city. In such an instance, the assertion of jurisdiction by a Spanish court applying Spanish trademark law seems most appropriate given that Spain was the relevant community affiliation of the parties. In contrast, the registration of the domain name and the incorporation of Bcom in Virginia was a purely paper transaction, as the company had no offices, employees or activities related to the United States.

Likewise, consider *Young v. New Haven Advocate*.[224] Two Connecticut newspapers featured stories about Connecticut prisoners who had been transferred to a prison in Virginia and then had been subjected to poor treatment there.[225] The Virginia prison warden sued for defamation in Virginia.[226] Should the newspapers be subject to jurisdiction there? From a pure minimum contacts point-of-view, perhaps yes. After all, the article concerned a Virginia prison. If defamatory, the harm to the warden was largely to be felt in Virginia, and there were a handful of Virginia-based subscribers to the newspapers.[227] In addition, the website with the article was certainly accessible in Virginia[228] and was surely accessed in the state by at least a few people.

The Fourth Circuit nevertheless appropriately ruled that the newspapers could not be sued in Virginia because the "content of [the] websites [was] decidedly local."[229] According to the court, "these newspapers maintain their websites to serve local readers in Connecticut, to expand the reach of their papers within their local markets, and to provide their local markets with a place for classified ads. The websites are not designed to attract or serve a Virginia audience."[230] And although the article was about

the Virginia prison, it focused on the prison not as part of an article that was principally about Virginia prisons or even prison conditions nationally. Instead, the newspapers were focused on the fact that Connecticut prisoners had been transferred there.[231] Thus, the link to Connecticut was the relevant community affiliation.

In contrast, if a company *does* actively attempt to access a market, that should be sufficient evidence of community affiliation, regardless of whether or not the company has physical contacts with that state. So, for example, *The New York Times*, *Washington Post*, or *Wall Street Journal*, despite the geographic specificity of their names, are clearly attempting to function as national (or international) companies serving a wide audience. Accordingly, jurisdiction over those publications regarding an article on Virginia prison conditions could justifiably be treated differently from the far more local Connecticut newspapers in the *Young* case.

Using similar logic, if an Internet service provider, such as Yahoo or Microsoft or Google is making a sustained effort to access a commercial market as part of its global or national business strategy, the company is purposely affiliating itself with those markets, and regulation by those communities is justifiable, regardless of physical contacts. Of course, in a world of deterritorialized data and multinational corporate activities, it can be difficult to determine when a corporation has truly affiliated with a particular jurisdiction. But it seems odd if a desire to access a global market would allow a company to *avoid* jurisdiction in each individual location just because no single jurisdiction was explicitly targeted.

Turning to physical goods, if a company chooses to seek access to the U.S. national market, it is deliberately affiliating with all fifty states and should therefore potentially be subject to jurisdiction wherever its product is sold and causes harm, regardless of whether or not it targeted that state in particular. This is especially true if the defendant is foreign and therefore not subject to general jurisdiction anywhere in the United States.[232] Thus, under a community affiliation approach the plurality opinion in *McIntyre v. Nicastro*[233] is unsupportable. According to the plurality, the UK corporation had not explicitly targeted New Jersey,[234] but as the dissent pointed out, the company was aiming to exploit a national market, and so the fact that it wasn't targeting any particular state should not deny the state a basis for asserting jurisdiction.[235] In the case of a product offered on an undifferentiated basis to a widespread set of markets it can be difficult to determine whether the product is truly being targeted anywhere, but that fact alone should not protect the company from jurisdictional assertions if its product causes harm within a particular community.

B. The relevant inquiry for personal jurisdiction is the degree to which a community can legitimately exercise dominion over a lawsuit, rather than whether the exercise of jurisdiction is an unfair burden on the defendant.

Another benefit of a community affiliation analysis is that it would allow the U.S. Supreme Court to pivot from viewing jurisdiction as a question of due process to one focused on the dormant Commerce Clause. The analysis would therefore turn not on the burden placed on an out-of-state defendant, but on whether a community has sufficient ties to a dispute that it is competent to impose regulatory penalties on the defendant without unduly encroaching on the sovereignty of other states and without unduly interfering with interstate commerce.

As discussed earlier, the due process inquiry no longer captures the essence of the jurisdiction question. Indeed, it is rare that a defendant contests personal jurisdiction because defending a lawsuit is truly a burden.[236] Transportation and communication technologies have advanced numerous times since *Pennoyer v. Neff* first grounded the jurisdictional inquiry in the Due Process Clause. As a result, the burdens of foreign litigation have dramatically decreased, and yet judges continue to recite the fictional idea that they are assessing the "burden" a defendant faces from the assertion of jurisdiction in another state.

Of course, a person or corporation operating solely in one state might still object to being sued in some other state with which they are unaffiliated. One need only look at the abortion landscape of the United States since the U.S. Supreme Court's cataclysmic decision in *Dobbs v. Jackson Women's Health Organization*[237] to see that, for example, doctors performing an abortion in a pro-access state might worry about being sued in an anti-abortion state.[238] But that sort of objection is not based on the claim that it is actually a burden to defend a suit in the other state. Instead, the real argument is whether the distant state should be able to assert dominion or exercise regulatory authority over the defendant. And that is a question of extraterritorial regulation, federalism, and sovereignty that is best analyzed through the rubric of the dormant Commerce Clause, not the Due Process Clause.

Using the dormant Commerce Clause rather than the Due Process Clause will sometimes allow more expansive assertions of jurisdiction, but sometimes will limit the scope of jurisdiction. For example, so-called stream-of-commerce jurisdiction, where a product is sold into a state indirectly through a distribution or supply chain would be much more justifiable under a dormant Commerce Clause approach. Although the unilateral act of a consumer to bring a product into a community is probably still not sufficient to justify an assertion of jurisdiction, if a product passes through a regular

commercial supply chain and then harms people in a community, it is likely that the company has sufficiently harmed that community to justify the assertion of jurisdiction, especially if the allegedly responsible entity indirectly derives substantial revenue from sales in the state.

On the other hand, as Justice Alito's concurrence in *Mallory* suggests,[239] a dormant Commerce Clause analysis would likely prevent states from using expansive consent statutes to justify jurisdiction over disputes with no connection to the state. That is because if jurisdiction is analyzed through the dormant Commerce Clause rather than the Due Process Clause, jurisdiction ceases to be a personal right held by the defendant that can simply be waived through a consent statute.

In addition, if jurisdiction is no longer a waivable right, then it is also more difficult for corporations to try to dodge assertions of jurisdiction by imposing contractual forum selection clauses on end users. This is particularly important in the modern world where most forum selection clauses are not true bargained-for exchanges, but are instead contracts of adhesion that are buried in Terms of Service Agreements, those "click through" contracts that most users never read, but simply agree to in order to gain entrance to the site they are accessing.[240] Or they are embedded in form contracts that again are rarely read and are never subject to bargaining.[241] But if jurisdiction is no longer a waivable right, then those supposed contractual agreements cannot, in and of themselves, settle the jurisdictional question. Instead, a court would examine any such agreement to ensure that the contractually mandated forum has a sufficient relevant connection to the underlying transaction so as to justify jurisdiction. Thus, the existence of a forum selection clause remains a relevant factor, but a truly unfair or unrelated forum can be resisted, regardless of the contractual language. To be sure, courts can do that now, but doing so usually requires invoking consumer protection laws or common law doctrines such as unconscionability that are generally used sparingly. If jurisdiction is no longer a waivable right, then this sort of inquiry becomes automatic.[242]

Finally, it is worth noting that if jurisdiction is no longer a waivable due process right, then courts should examine the community affiliation of *both* plaintiffs and defendants. Accordingly, in a case such as *Keeton v. Hustler Magazine, Inc.*,[243] the plaintiff could not simply choose to sue in New Hampshire just because she preferred that state's statute of limitations. Instead, she would need to show why either she or the harm she suffered had sufficient affiliation with New Hampshire to justify the assertion of jurisdiction there. *Keeton* concerned a defamation claim, so the plaintiff could perhaps argue that she was harmed every time a reader in New Hampshire opened the magazine and read the alleged defamatory content. In contrast, had she been an employee of Hustler working elsewhere and was simply suing for breach of her employment contract or for

sexual harassment at her place of work, or a slip and fall case in Hustler's corporate offices, it would be more difficult to establish a community affiliation with New Hampshire, regardless of how many copies of the magazine were sold there. In any event, the key point is that jurisdiction over a plaintiff would not simply be assumed; the plaintiff would need to show a sufficient affiliation or a connection between the suit and the community in which the plaintiff filed.

C. General and Specific Jurisdiction should be conceptualized not as discrete categories, but as points along a continuum that compares the number of contacts with a community against the relatedness of those contacts to the lawsuit.

As discussed in Part III, the U.S. Supreme Court's jurisdiction jurisprudence over the past twenty years has unfortunately imposed two overly rigid categories onto what should be seen as points along a continuum. The Court could rectify this wrong turn by doing away with the categories of general and specific jurisdiction and simply making it clear that the greater the defendant's affiliation with a community, the more different types of suits against such a defendant that can be brought in that community. Thus, if a defendant is intimately tied to a community, even if it is not the defendant's state of citizenship, suits that are more tangentially related to the community could still be brought there.

This more flexible inquiry would make cases such as *Ford Motor* and *Bristol-Myers Squibb* both more intellectually satisfying and easier to resolve. For example, because of the rigidity of the general jurisdiction category, the Court in *Ford Motor* could not assert general jurisdiction because Ford was not a citizen of the forum states.[244] As a result, the Court's multiple decisions were left to battle about whether the lawsuit "arose out of" or were "related to" Ford's contacts in the relevant states, leading to confusing hair-splitting over whether "arising out of" and "relating to" are two different categories or only one.[245] The Court was also forced to confront questions about whether the inquiry about related contacts should be based on the overall number of cars Ford sold in the forum state, or whether only cars of the same model as the car that crashed should count, or whether (as Ford argued) it was only relevant whether the *particular* car that crashed had been sold in the state.[246]

A continuum approach does not render these issues completely irrelevant, but it means that far less turns on the resolution of each question, so courts can do less hair-splitting and instead use a more flexible, common-sense analysis. For example, in the *Ford Motor* case itself, the Court could simply have noted the significant affiliation Ford had with the state: its ubiquitous advertising, its many dealerships, the number of Ford cars on the roads, the large volume of sales, the revenue produced by customers from the state, and

so on. Given the large amount of community affiliation, the precise relationship between the suit and Ford's contacts need not be so exact or specific. Thus, the mere fact that the crashes occurred in the states was probably more than enough to justify jurisdiction given such significant affiliation. On the other hand, if a solo artisan craftsperson with no connection to a state (like the duck decoy manufacturer in Chief Justice Roberts' hypothetical example[247]) happens to sell a product into a state through Etsy or Amazon, that tenuous affiliation could at most justify jurisdiction over a suit only about a problem directly related to that individual product.

With regard to Bristol-Myers Squibb, the same inquiry would likely result in assertion of jurisdiction in California, over all of the plaintiffs, whether those plaintiffs were California citizens or not. Certainly, the affiliation of Bristol-Myers Squibb with California was approximately as extensive as Ford's with Montana and Minnesota. Bristol-Myers Squibb generated a large number of sales, and even a large number of Plavix sales specifically, in California,[248] and it even distributed Plavix nationally through a California-based distributor.[249] In addition, it was undisputed that California could assert jurisdiction over the eighty-six California plaintiffs,[250] so the extent of Bristol Myers Squibb's affiliation with California seems sufficient to allow jurisdiction over the non-California plaintiffs as well, especially given that the same drug with the same formulation was distributed nationwide, so the issues were identical. Although the claims of the non-California plaintiffs should perhaps be decided based on the law of their home states, there is no reason that a California court could not assert jurisdiction and apply foreign law.

But, one might ask, what about the idea, discussed above, that the personal jurisdiction inquiry should also ask whether plaintiffs have sufficient community affiliation? If the out-of-state plaintiffs in *Bristol-Myers Squibb* neither purchased nor ingested their Plavix in California and did not suffer harm there, perhaps those plaintiffs have insufficient affiliation with California to justify jurisdiction, even if Bristol-Myers Squibb has a substantial community affiliation with the state. To my mind, this is a difficult question to resolve, and if this were a case where a single plaintiff from outside California tried to sue in California, I think even the large number of contacts Bristol-Myers Squibb had with California would be insufficient to justify jurisdiction, not because of the defendants' lack of community affiliation, but because the plaintiff would be insufficiently affiliated. Nevertheless, in the *Bristol-Myers Squibb* case itself there were so many plaintiffs from so many states that it would not be problematic for a case to go forward in California where the defendants had substantial affiliation and where a large percentage of the plaintiffs were located. Otherwise, as Justice Sotomayor pointed out in dissent,[251] there would never be any state other than the corporation's state of

citizenship where such a suit could proceed, and it is unclear why the defendant should be able to impose its home state's jurisdiction on plaintiffs who were harmed elsewhere.

D. The territorial location of data or servers is irrelevant.

In an era of cloud computing, data can be anywhere. Even a simple email message can be stored in a location completely unrelated to the sender or recipient, or even the home of the company that controls the storage. Further, the message might not even be stored in one location; its component data parts could be split among data warehouses within multiple territorial sovereignties. And not only is the location arbitrary, but it is malleable. The data can easily be shifted from place to place instantly and algorithmically, with no human being even making a conscious decision to relocate. Finally, it is the service provider, not the end user, that ultimately controls the data location. Even if an individual lives all her life in one territorial location and deposits money in her local branch of a multinational financial institution, data related to that account could move anywhere, all based on the data storage scheme of the financial institution.

The arbitrary and malleable nature of data storage wreaks havoc on jurisdictional systems that rely on territorial location. In response, some countries have pursued legislation that would require the localization of data.[252] Under these statutes, data related to an individual must remain stored within the home country of that individual.

This strikes me as the wrong way to go about solving the problem. It seems to me that, if jurisdictional rules do not map well onto the reality of human activity, it's a sign that jurisdictional rules need to change, not that we need to squelch or limit that human activity. For example, as discussed in Part I, the strict territorial conception of jurisdiction that held sway in the United States in the nineteenth century—states have complete power over individuals within their borders but no power outside their borders—could not keep up with technological innovations such as the automobile. Courts quickly came to realize that a driver could enter a state, injure a pedestrian in that state, and then drive out of the state, thus depriving the state of jurisdiction over the driver in a case involving the accident. This was untenable, and not surprisingly jurisdictional doctrine evolved over several decades until it was ultimately replaced by a legal framework that would allow jurisdiction even over absent parties who had created harm within the state, at least under certain circumstances.

But imagine what would have happened if instead courts and legislators had tried to insist that human activity conform to jurisdictional rules, rather than vice versa. We might have seen rules limiting automobile travel or corporate activity to the confines of

one state. Such rules clearly would have stunted the development and utility of the automobile or the corporation. Likewise, restrictions on data's movement could easily make data storage less efficient or more costly, thus decreasing utility for all.

Instead, as with the automobile, it is our jurisdictional scheme that should change, not the social reality of ubiquitous data storage. And the change would not even be that complicated; all that is required is for courts to ignore data location in their jurisdictional calculus. That means, for example, that the jurisdictional decision must be made independent of the location of the underlying data. Likewise, servers or other computing equipment that enable transactions are often physically located in places unrelated to the underlying transaction or the principal activities of the intermediary. Basing a jurisdictional determination on that location, therefore, potentially allows the intermediary to choose its own jurisdiction simply by making a decision to deploy the equipment in one place versus another.

E. The place of incorporation of a corporation is potentially relevant to the jurisdictional calculus, but should not be determinative.

Even those who accept that data and server location should not determine jurisdiction may balk at the idea that place of incorporation should similarly not be determinative. After all, we may think that a corporation should be free to choose the state or country by which it is regulated. And certainly sometimes the place of incorporation signals both a substantive affiliation with that jurisdiction and a willingness to submit to that jurisdiction's laws.

Yet, sometimes place of incorporation is just as arbitrary and manipulated as data or server location. As the *Barcelona.com* case illustrates, individuals with no connection with the United States can easily create a U.S. company and then claim the jurisdiction of U.S. courts even though nothing about the dispute really evinces a connection with the United States. Likewise, corporations can incorporate in a state while maintaining nothing but a post office box there. If jurisdiction is automatically tied to place of incorporation without any further analysis of the underlying social or economic reality, therefore, distortions may result.

F. The size, sophistication, and economic breadth of an actor is relevant to the jurisdictional inquiry.

Since the very first Internet jurisdiction cases in the mid-1990s, courts and commentators have struggled with what seem to be two unpalatable jurisdictional options: Either jurisdiction is only legitimate where the operator of the website is

located, or jurisdiction is potentially appropriate wherever the website is viewable. The first option allows for regulatory evasion, and the other pushes toward potential assertions of jurisdiction anywhere and everywhere.

But there is no necessary reason that the case of an individual posting on a personal website or social media page needs to be treated the same as a major news organization posting an article on its home page. Likewise, there is no reason that an individual artisan duck decoy manufacturer needs to be treated the same as Ford Motor Company. Indeed, as Justice Breyer recognized in his concurrence in *McIntyre*, the possible types of Internet transactions are so varied that it is difficult to create one overarching rule.[253] He posits a coffee farmer in Kenya selling artisanal coffee online in small quantities through third parties, and he contrasts that scenario with a large multinational industrialist selling thousands of units per year through a dedicated distributor.[254] Even if both potentially produce a product that causes harm abroad, there is no reason that both defendants need to be treated identically for jurisdictional purposes. It is also worth noting that, as a practical matter, such small foreign sellers are unlikely to have significant U.S. assets, making a lawsuit in the United States to recover damages unavailing without additional (costly) efforts to enforce the judgment abroad.[255]

Community affiliation analysis provides a way out of this seeming conundrum. A large industrialist seeking to sell multiple units on a regular basis as part of a global business plan, or a large news organization deliberately disseminating content to a global audience are trying to access a market and affiliate with a community in a way that is very different from the Kenyan coffee farmer or a solo professor posting thoughts on a personal webpage or social media site. Of course, the artisanal product can cause harm, and the professor's thoughts may constitute hate speech or libel or copyright infringement in some other jurisdiction. And that might cause a court to look at how intentional the acts of the defendant were. For example, if the professor knew she was writing controversial gossip about a person in a particular community, it might be appropriate to say that the professor has deliberately affiliated herself with that community and should be subject to jurisdiction there. Likewise, if the duck decoy artisan receives an order from someone in another state and deliberately ships to that person, and it is that precise product that causes harm, jurisdiction where the product was shipped may likewise be appropriate. But to use the facts from *Ford Motor*, assume our duck decoy artisan sells and ships a product to California, and then the receiver in California subsequently sells the product to someone else who brings it to Montana. That does not mean that the artisan has any affiliation with Montana. And by using a combination of community affiliation analysis and a continuum approach to general and specific jurisdiction, it is easy to see why Ford should be treated differently from the duck decoy artisan. Moreover, this framework does not require mental gymnastics of

the sort the Court engaged in to try to show that the car crashes in that case were sufficiently related to Ford's contacts with the forum.[256] Instead, we need only look at the degree of community affiliation Ford has with those states as compared to the artisan.

G. The effects of activities can provide a plausible basis for the assertion of jurisdiction, even without a territorial nexus.

Finally, we must recognize that, notwithstanding community affiliation (or the lack of it), there might be some extreme cases where a community might justifiably wish to assert jurisdiction over a distant act or actor based on the egregious impact of the act within the local community. Harm from pollution is the example that immediately springs to mind. It is easy to imagine a company in one state dumping toxic waste into a river, which then flows downstream and causes harm to communities in a different state. In such a circumstance, one can readily imagine the downstream community wishing to assert jurisdiction, based not on a contact with the jurisdiction, but because the company has effectively formed an affiliation with the downstream community by harmfully impacting that community.

The tricky question is how far this sort of effects-based conception of community affiliation should extend. Taken to an extreme, it could swallow up all the other rules and lead to potential jurisdiction anywhere and everywhere, because an act in one place could always potentially cause harm somewhere else. So, any assertion of purely effects-based jurisdiction should also consider all the other factors described: community affiliation, effort to exploit a market, size of the company, extent of the harm, foreseeability of the harm, amount of purposeful conduct causing the effect, and so on. And although it is impossible to predict all the potential factual settings in which this question may arise, the point is that these factors should at least temper the potential problems associated with jurisdiction based only on effects.

Conclusion

The seven principles offered above could usefully form the basis of a new jurisdiction jurisprudence, one that builds on existing precedent, but points the way to a twenty-first century conception that more accurately reflects the deterritorialization of social life and the realities of commercial activity, both online and off. Of course, these principles do not "solve" all jurisdiction questions. Nor should they. Human interaction is simply too multifaceted and varied for wooden formalistic rules based on fixed, unchanging definitions. Indeed, the whole reason the rigid territorialism of *Pennoyer v. Neff* first came under pressure was that its approach did not usefully respond to changes in

technology, transportation, and commercial activity. As social life shifts, as our sense of space, distance, and place shifts, as our understanding of community affiliation shifts, jurisdictional law must shift also.

Over the past thirty years, human society has been transformed by waves of innovation and transformation: online interaction, ubiquitous mobile phone technology, social networking, nearly unlimited data storage, digital currencies, artificial intelligence, and on and on. In the face of these cataclysmic changes, it would be astonishing if jurisdictional law didn't shift as well.

Accordingly, this Article points toward a possible future for jurisdictional law. It offers a set of principles and inquiries that eschew rigid categories tied to territorial location and an outmoded sense of what it means to provide fair process to the parties in the lawsuit. Instead, courts should ask whether the community asserting jurisdiction has sufficient affiliation with the parties or the dispute such that it is appropriate for that community to exercise dominion over the suit. To answer that question, the analysis should consider the community's connection to the lawsuit, as well as the extent of the affiliation both the plaintiff and defendant have to that community. And courts should not allow arbitrary and easily malleable factors such as server and data location or corporate citizenship to determine the outcome without further inquiry into true substantive affiliation and foreseeable effects.

Most importantly, an embrace of these principles will help us jettison legal fictions related to supposed burdens on defendants from litigating in a territorially distant location, or claims that defendants (or plaintiffs) consented to jurisdiction through contractual agreements or coerced consent, or asserted territorial connections—such as data location—that bear no relation to the reality of the interaction at issue, or hair-splitting distinctions between supposedly related and supposedly unrelated contacts. Jurisdictional contestation is inevitable, but at least the debates about them should be oriented around the actual substantive ties between a dispute and a community. We need a true twenty-first century approach to jurisdiction, and as we continue to navigate wave upon wave of technological innovation and societal change, it is ever more apparent that a new paradigm is long past due.

1. * Walter S. Cox Professor of Law, The George Washington University Law School. Special thanks to William S. Dodge for useful comments on an earlier draft. Thanks too to Alex Grayson and Maeve McBride for excellent assistance in the development of this article. ↕
2. . Pennoyer v. Neff, 95 U.S. 714 (1878). ↕
3. . 326 U.S. 310 (1945). ↕

4. . Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023); Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351 (2021); Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255 (2017); BNSF Ry. Co. v. Tyrrell, 581 U.S. 402 (2017); Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011). ↕
5. . *McIntyre*, 564 U.S. at 877; *Mallory*, 600 U.S. at 125. ↕
6. . 600 U.S. at 125. ↕
7. . *See id.* at 152–54 (Alito, J., concurring). ↕
8. . 95 U.S. 714, 724–25 (1878). ↕
9. . 326 U.S. 310 (1945). ↕
10. . *See, e.g.*, Transcript of Oral Argument at 39, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351 (2021) (No. 19-368). ↕
11. . *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 892 (2011) (Breyer, J., concurring); *Ford Motor*, 592 U.S. at 366 n.4 (discussing whether an individual living in Maine who carves and sells small wooden duck decoys over the Internet could be sued in any state if harm arises from the decoy). ↕
12. . *See Pennoyer*, 95 U.S. at 733. One could, of course, question why the issue of personal jurisdiction needs to be constitutionalized at all. But, as I will argue, if limitations on assertions of jurisdiction are to be found in the U.S. Constitution, those limitations are more logically grounded in the Commerce Clause. *See infra* Part II. ↕
13. . *See* Adam v. Saenger, 303 U.S. 59, 67–68 (1938). ↕
14. . Fed. R. Civ. P. 12(h)(1)(B). ↕
15. . *See, e.g.*, Keeton v. Hustler Mag., Inc., 465 U.S. 770, 779 (1984) (observing that personal jurisdiction is appropriate even when the plaintiff's contacts with the forum state are "entirely lacking"). ↕
16. . *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 130, 139 (2023); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315 (1964); Wuchter v. Pizzutti, 276 U.S. 13, 18–19 (1928). ↕
17. . *Mallory*, 600 U.S. at 150 (Alito, J., concurring). ↕
18. . *Id.* at 156–57. ↕
19. . Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 358 (2021). ↕
20. . *See* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255, 259–64 (2017) (holding that California did not have specific jurisdiction over Bristol-Myers Squibb even though Bristol-Myers Squibb sold almost 187 million pills there, because the pills involved in the lawsuit were not bought, sold, or ingested in California). ↕
21. . *See id.* at 259. ↕
22. . It is possible that the current Court is moving in this direction. The decision in *Ford Motor* possibly broadened the range of what counts as related contacts by emphasizing that the specific jurisdiction inquiry can take account of any contacts

that *either* "arise out of" *or* "relate to" the cause of action. 592 U.S. at 359. However, that decision still did not challenge the categorical general v. specific jurisdiction typology. *See id.* at 358–60. ↕

23. . Robert H. Wiebe, The Search for Order: 1877–1920, at xiii (1967). ↕

24. . *Id.* ↕

25. . *Id.* at 27. ↕

26. . *Id.* at 52–58. For a fictional account of this period that gives texture to this description, see Willa Cather, My Ántonia (Houghton Mifflin Co. eds., 1918). ↕

27. . *See* Coleman's Appeal, 75 Pa. 441 (1874). ↕

28. . *Id.* at 457. ↕

29. . *Id.* ↕

30. . 95 U.S. 714 (1878). ↕

31. . *Id.* at 733. ↕

32. . *See id.* at 722–24. ↕

33. . *Id.* at 722 (citing Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic ch. 2 (Boston, Hilliard, Gray, & Co. 1834)). ↕

34. . U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). ↕

35. . *See* Durfee v. Duke, 375 U.S. 106, 110 (1963) ("[A] judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment."). ↕

36. . Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 Rutgers L.J. 627, 651 (1991) (citation omitted). ↕

37. . *Id.* at 652. ↕

38. . Joshua Meyrowitz, No Sense of Place: The Impact of Electronic Media on Social Behavior 116 (1985). ↕

39. . *See* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, From* Pennoyer *to* Denckla*: A Review*, 25 U. Chi. L. Rev. 569, 585–86 (1958) (describing the difficulty in applying *Pennoyer*'s principles to a world facing changes in economic activity, means of transportation, and communication). ↕

40. . *See, e.g.*, St. Louis Sw. Ry. Co. of Tex. v. Alexander, 227 U.S. 218, 226 (1913) (collecting cases); Pa. Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407, 413–15 (1905); Conn. Mut. Life Ins. Co. v. Spratley, 172 U.S. 602, 610 (1899); St. Clair v. Cox, 106 U.S. 350, 355 (1882). ↕

41. . *See* 95 U.S. 714, 733 (1878). ↕

42. . 243 U.S. 93 (1917). ↕

43. . *Id.* at 95. ↕

44. . 274 U.S. 352, 354 (1927). ↕

45. . *Id.* at 356–57. ↕
46. . 326 U.S. 310 (1945). ↕
47. . *See id.* at 316–17. ↕
48. . *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). ↕
49. . *See, e.g.*, *infra* text accompanying notes 49–67 (discussing cases). ↕
50. . 480 U.S. 102 (1987). ↕
51. . *Id.* at 105–06. ↕
52. . *Id.* at 106. ↕
53. . *See id.* at 105, 114. ↕
54. . 564 U.S. 873 (2011). ↕
55. . *Id.* at 885–86 (plurality opinion). ↕
56. . *Id.* at 905–06 (Ginsburg, J., dissenting). ↕
57. . *Id.* at 882 (plurality opinion). ↕
58. . *Id.* at 890 (Breyer, J., concurring). ↕
59. . Although there was some confusion concerning the precise number of the defendant's machines that were in New Jersey, *see id.* at 878 (plurality opinion) (referring to "no more than four machines" in New Jersey), Justice Breyer's opinion was premised on only a single sale, *see id.* at 888 (Breyer, J., concurring) ("The American Distributor on one occasion sold and shipped one machine to a New Jersey customer . . . ."). ↕
60. . *Id.* at 892. ↕
61. . 571 U.S. 277, 290 n.9 (2014). ↕
62. . 592 U.S. 351, 364 n.4 (2021). ↕
63. . *Id.* at 376 (Gorsuch, J., concurring in the judgment). ↕
64. . Transcript of Oral Argument, *supra* note 9, at 39. ↕
65. . *Id.* ↕
66. . *Ford Motor*, 592 U.S. at 364 n.4; *see also* Scott Dodson, *Personal Jurisdiction, Comparativism, and* Ford, 51 Stetson L. Rev. 187, 195–96 (2022) ("The Internet remains the elephant in the room, and [personal jurisdiction] doctrine will not truly be settled until the Court considers how it applies to virtual contacts."). ↕
67. . *Ford Motor*, 592 U.S. at 379 (Gorsuch, J., concurring in the judgment). ↕
68. . *Id.* at 382–83. ↕
69. . *See* David G. Post, *Against "Against Cyberanarchy,"* 17 Berkeley Tech. L.J. 1365, 1381–83 (2002) (articulating this thought experiment). ↕
70. . Richard A. Rochlin, *Cyberspace,* International Shoe*, and the Changing Context for Personal Jurisdiction*, 32 Conn. L. Rev. 653, 665–66 (2000). ↕
71. . *See id.* at 667. ↕
72. . Some have conceptualized this shift as a change in the way we experience and represent space and time. *See, e.g.*, Anthony Giddens, The Consequences of Modernity 64 (1990) (describing the problem of today's higher level "time-space

distanciation" which has stretched local and distant social forms); John Tomlinson, Globalization and Culture 4–5 (1999) (describing the way airline journeys transform "spatial experience into temporal experience"). In that regard, it is interesting to link this change to shifts in the arts. For example, in visual arts, Friedland and Boden have observed that the fall of the linear perspective of early Renaissance painting occurred along with the rediscovery of Euclidean geometry and the emergence of spatial representation, such as maps. Roger Friedland & Deirdre Boden, *NowHere: An Introduction to Space, Time and Modernity*, *in* NowHere: Space, Time and Modernity 1, 2 (Roger Friedland & Deirdre Boden eds., 1994) (citing Denis Cosgrove, *Prospect, Perspective, and the Evolution of the Landscape Idea*, 10 Transactions Inst. Brit. Geographers 45, 46–48 (1985)). In the late nineteenth century, the impressionists "fragmented light (and thus time)." *Id.* Then, postimpressionists such as Cézanne built "a new language, abandoning linear and aerial perspective and making spatial dispositions arise from the modulations of color." *Id.* at 2 (citing Charles Taylor, Sources of the Self: The Making of the Modern Identity 468 (1989)). The cubists went still further, "providing simultaneous images of the same moment from different points in space and multiple views of a single scene at various points in time." *Id.*; *see also* Stephen Kern, *Cubism, Camouflage, Silence, and Democracy: A Phenomenological Approach*, *in* NowHere: Space, Time and Modernity, *supra*, at 163, 167 (describing how artists such as "Picasso and Braque gave space the same colors, textures and substantiality as material objects and made objects and space interpenetrate so as to be almost indistinguishable"). Likewise, the development of the modern novel—with books such as Marcel Proust, Remembrance of Things Past (C.K. Scott Moncrieff & Terence Kilmartin trans., 1954); James Joyce, Finnegans Wake (1939); and Virginia Woolf, Mrs. Dalloway (1925)—also mined changes in the equation between space and time. ↕

73. . Meyrowitz, *supra* note 37, at 115. ↕

74. . *See id.* at 116 (describing the impact of telegraphic technology). ↕

75. . *Id.* ↕

76. . *E.g.*, Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 Ind. J. Glob. Legal Stud. 475 (1998); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 Int'l L. 1167 (1998). More recently, a similar position has been taken by Andrew Woods. *See, e.g.*, Andrew Keane Woods, *Against Data Exceptionalism*, 68 Stan. L. Rev. 729 (2016). ↕

77. . *E.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996); Post, *supra* note 68; Dan L. Burk, *Federalism in Cyberspace*, 28 Conn. L. Rev. 1095 (1996). More recently, a similar position has been taken by Jennifer Daskal. *See, e.g.*, Jennifer C. Daskal, *Borders and Bits*, 71 Vand. L. Rev. 179 (2018); Jennifer Daskal, *The Un-Territoriality of Data*, 125 Yale L.J. 326 (2015). For a discussion of the connections between the older and

newer versions of these debates, see Paul Schiff Berman, *Legal Jurisdiction and the Deterritorialization of Data*, 71 Vand. L. Rev. En Banc 11, 13–20 (2018), https://scholarship.law.vanderbilt.edu/vlreb/vol71/iss1/2/ [https://perma.cc/BG72-5TSV]. ↑

78. . *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199 (1998). ↑

79. . Given that jurisdiction in the United States has been constitutionalized, it is worth noting that constitutional law doctrines are likewise often subject to common law style interpretation and change over time. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 877 (1996) ("[W]hen people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years."). *But see, e.g.*, Adrian Vermeule, Essay, *Common Law Constitutionalism and the Limits of Reason*, 107 Colum. L. Rev. 1482, 1484 (2007) ("The institutional context of constitutional adjudication is decisively different than that of ordinary common law adjudication."). That has certainly been true of personal jurisdiction law, which has been refined many times by the U.S. Supreme Court from the nineteenth century to the present. ↑

80. . These cultural shifts are discussed in more detail in Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (2012). ↑

81. . *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1878). ↑

82. . *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). ↑

83. . *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021) (acknowledging that the Court's jurisdictional rules "derive from and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism'" (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980))); *see also* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 144 (2023) (plurality opinion) ("Some of our personal jurisdiction cases have discussed the federalism implications of one State's assertion of jurisdiction over the corporate residents of another. But that neglects an important part of the story. . . . After all, personal jurisdiction is a personal defense . . . ." (emphasis omitted) (citations omitted)). *But see id.* at 147 (Jackson, J., concurring) (conceptualizing the "interstate federalism concerns" as only "'a function of the individual liberty interest' that this due process right preserves" (quoting Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982))). ↑

84. . Deriving from Chief Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the U.S. Supreme Court's dormant Commerce Clause jurisprudence rests on the notion that the grant of power to Congress to regulate interstate commerce in Article I section 8 necessarily implies that the states *cannot* regulate interstate commerce. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas,

588 U.S. 504, 514–15 (2019) (tracing the dormant Commerce Clause's roots to *Gibbons*). ↕

85. . *See, e.g.*, Alan B. Morrison, *Safe at Home: The Supreme Court's Personal Jurisdiction Gift to Business*, 68 DePaul L. Rev. 517, 540–41 (2019) ("[A]lthough subjecting a business to suit in the courts of a state in which it is not regularly doing business is not generally described as the state attempting to 'regulate' the conduct of that business, that is the impact of a judgment against an out-of-state defendant in a lawsuit: The state is effectively ordering the defendant to conduct its business in a certain manner or, as in most tort cases, to pay damages for failing to have done so."). ↕

86. . *See supra* text accompanying notes 29–32. ↕

87. . 95 U.S. 714 (1878). ↕

88. . *Id.* at 733. ↕

89. . Indeed, it is worth noting that Justice Field's opinion in *Pennoyer* focused on the Due Process Clause not so much as providing the content of jurisdictional law, but only as a mechanism for challenging enforcement of a prior decision under the Full Faith and Credit Clause. *See* Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. Rev. 729, 732 (2012) ("[A]lthough Justice Field invoked the Fourteenth Amendment as a tool for challenging a judgment rendered without jurisdiction, the Court nowhere suggested that the Due Process Clause provided the substantive criteria for jurisdiction."). ↕

90. . See *supra* text accompanying note 32. ↕

91. . *Pennoyer*, 95 U.S. at 722–23 (quoting Story, *supra* note 32, § 539). ↕

92. . *See id.* at 735–36 ("It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." (citation and internal quotation marks omitted)). ↕

93. . *Id.* at 735 ("Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State."). ↕

94. . *See supra* text accompanying notes 40–44. ↕

95. . *See* Hess v. Pawloski, 274 U.S. 352, 356–57 (1927). ↕.
96. . Davis v. Farmers Coop. Equity Co., 262 U.S. 312, 317 (1923) (deciding there was no personal jurisdiction in Minnesota over a Kansas railroad that had submitted to suit by statute in Minnesota because the transaction giving rise to the suit was entirely in Kansas). ↕.
97. . *Id.* at 318. ↕.
98. . 311 U.S. 457 (1940). ↕.
99. . *Id.* at 463 (citations omitted). ↕.
100. . Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting *Milliken*, 311 U.S. at 463). ↕.
101. . *Int'l Shoe*, 325 U.S. at 324 (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)). ↕.
102. . 355 U.S. 220 (1957). ↕.
103. . *Id.* at 222–23. ↕.
104. . 465 U.S. 770 (1984). ↕.
105. . Keeton v. Hustler Mag., Inc., 682 F.2d 33, 35–36 (1st Cir. 1982), *rev'd and remanded*, 465 U.S. 770 (1984). ↕.
106. . *Keeton*, 465 U.S. at 775–76 (emphasis added). ↕.
107. . *See, e.g.*, Adam v. Saenger, 303 U.S. 59, 67–68 (1938) ("The plaintiff 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. It is the price which the state may exact as the condition of opening its courts to the plaintiff."); Grupke v. Linda Lori Sportswear, Inc., 174 F.R.D. 15, 17 (E.D.N.Y. 1997) ("In the vast majority of cases a plaintiff, by virtue of bringing suit, waives venue and personal jurisdiction objections to a defendant's counterclaims.") (citing *Adam*, 303 U.S. 59); Viron Int'l Corp. v. David Boland, Inc., 237 F. Supp. 2d 812, 818 (W.D. Mich. 2002) ("A court may lack personal jurisdiction over a defendant, but never over a plaintiff, who consents to such jurisdiction by filing suit."). ↕.
108. . Fed. R. Civ. P. 12(h)(1)(B). ↕.
109. . *See, e.g.*, Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 314 (1964); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991); *see also* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703–04 (1982). ↕.
110. . 357 U.S. 235 (1958). ↕.
111. . *Id.* at 251. ↕.
112. . *Id.* ↕.
113. . 444 U.S. 286 (1980). ↕.
114. . *Id.* at 292. ↕.
115. . *Id.* ↕.
116. . 564 U.S. 873, 878 (2011). ↕.

117. . *Id.* at 880 (internal quotation marks omitted). ↑
118. . *Id.* at 899 (Ginsburg, J., dissenting). ↑
119. . Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021) (quoting *World-Wide Volkswagen*, 444 U.S. at 293). ↑
120. . *Ford Motor*, 592 U.S. at 360. ↑
121. . *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 293). ↑
122. . Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023). ↑
123. . *Id.* at 127–28. ↑
124. . *Id.* at 144. ↑
125. . *Id.* at 147 (Jackson, J., concurring) (quoting Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982)). ↑
126. . *Id.* (Jackson, J., concurring) (quoting *Ins. Corp. of Ir.*, 456 U.S. at 703 n.10). ↑
127. . *Id.* at 178–89 (Barrett, J., dissenting). ↑
128. . *Id.* at 149–63 (Alito, J., concurring in part). ↑
129. . *Id.* at 144. ↑
130. . *Id.* at 157–63. ↑
131. . Davis v. Farmers Coop. Equity Co., 262 U.S. 312 (1923); *see supra* text accompanying notes 95–96 (discussing *Davis*). ↑
132. . *Mallory*, 600 U.S. at 159–61 (Alito, J., concurring in part). ↑
133. . *See id.* ↑
134. . *See supra* Part I. ↑
135. . *See, e.g.*, Gerlinde Berger-Walliser, *Reconciling Transnational Jurisdiction: A Comparative Approach to Personal Jurisdiction over Foreign Corporate Defendants in US Courts*, 51 Vand. J. Transnat'l L. 1243, 1252–54 (2018) (describing the European approach to jurisdiction as based on whether the jurisdiction "has the authority to decide an international case, or whether the courts of another country are better suited to adjudicate"). ↑
136. . *See, e.g.*, Keeton v. Hustler Mag., Inc., 465 U.S. 770 (1984). Of course, this sort of waiver might make sense in cases when a plaintiff chooses to file suit in the home state of the defendant, even if the plaintiff has no other ties there. But that was not the case in *Keeton.* ↑
137. . For a discussion of the problems of contracts of adhesion and online terms of service, see generally Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013). ↑
138. . *See, e.g.*, Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d 524, 527 (1st Cir. 1985) (stating that a court "need not decide whether Beneficial also had 'minimum contacts' with the [forum state] to justify the assertion of personal jurisdiction" when there is a valid forum selection clause); H.H. Franchising Sys., Inc. v. Brooker-Gardner, No. 14–CV–651, 2015 WL 4464774, at *3 (S.D. Ohio July 21, 2015) ("The presence of a valid and enforceable forum-selection clause obviates the

need to conduct a due-process and minimum-contacts analysis because such a clause acts as consent to jurisdiction in the contracted-for forum."); Koninklijke Philips Elecs. v. Digit. Works, Inc., 358 F. Supp. 2d. 328, 333 (S.D.N.Y. 2005) ("A valid forum selection clause establishes sufficient contacts with New York for purposes of jurisdiction and venue."). ↕

139. . Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). ↕

140. . *Id.* ↕

141. . *See, e.g.*, Morrison, *supra* note 84, at 531 ("In an effort to clarify and perhaps simplify the doctrine, the Court has recently divided the world of personal jurisdiction into two rigid categories—general and specific—which has created far more problems than it has solved." (footnote omitted)). ↕

142. . 326 U.S. 310 (1945). ↕

143. . *Id.* at 315, 317. ↕

144. . *Id.* at 311–12. ↕

145. . 355 U.S. 220 (1957). ↕

146. . *Id.* at 223. ↕

147. . *Int'l Shoe*, 326 U.S. at 318. ↕

148. . Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952). ↕

149. . *Id.* at 439. ↕

150. . *Id.* ↕

151. . *Id.* at 447. ↕

152. . 444 U.S. 286 (1980). ↕

153. . *See supra* text accompanying notes 112–14. ↕

154. . *World-Wide Volkswagen*, 444 U.S. at 295. ↕

155. . *See id.* at 288. ↕

156. . Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 661 n.224 (1998). ↕

157. . *World-Wide Volkswagen*, 444 U.S. at 297. ↕

158. . 466 U.S. 408 (1984). ↕

159. . *Id.* at 414 nn.8–9 (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966)). ↕

160. . *Helicopteros*, 466 U.S. at 414 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). ↕

161. . *Id.* at 414 n.8 ("It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant."). ↕

162. . *Id.* at 414. The Court cited von Mehren & Trautman for this definition. *Id.* at 414 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said

to be exercising 'general jurisdiction' over the defendant." (citing von Mehren & Trautman, *supra* note 158)). ↕

163. . 564 U.S. 915 (2011). ↕

164. . *Id.* at 919 (emphasis added) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)). ↕

165. . *Id.* at 924 (second alteration in original) (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 728 (1988)). ↕

166. . *Int'l Shoe*, 326 U.S. at 318. ↕

167. . *Goodyear*, 564 U.S. at 924. ↕

168. . 571 U.S. 117 (2014). ↕

169. . *Id.* at 137. ↕

170. . *Id.* at 139 (internal quotation marks omitted) (quoting *Goodyear*, 564 U.S. at 924). ↕

171. . Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952). ↕

172. . *Daimler AG*, 571 U.S. at 137. ↕

173. . *Id.* at 138 (internal quotation marks and citation omitted). ↕

174. . 581 U.S. 402 (2017). ↕

175. . *Id.* at 414. ↕

176. . 582 U.S. 255 (2017). ↕

177. . *Id.* at 259. ↕

178. . *Id.* ↕

179. . *Id.* ↕

180. . *See id.* at 268 ("The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State."). ↕

181. . *See id.* at 259 ("Between 2006 and 2012, [Bristol-Myers Squibb] sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales."). ↕

182. . *Id.* at 263–65. ↕

183. . *See supra* text accompanying notes 157–74. ↕

184. . *Bristol-Myers Squibb*, 582 U.S. at 260. ↕

185. . *Id.* (internal quotation marks omitted) (quoting Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 377 P.3d 874, 889 (2016)). ↕

186. . *Id.* (quoting *Bristol-Myers Squibb*, 377 P.3d at 889). ↕

187. . *Id.* at 269. ↕

188. . *Id.* at 264. ↕

189. . *Id.* ↕

190. . *Id.* ↕

191. . *Id.* at 265. ↕

192. . *Id.* at 273 (Sotomayor J., dissenting). ↕

193. . *See supra* note 180 and accompanying text. ↕

194. . 592 U.S. 351 (2021). ↕

195. . *Id.* at 356. ↕
196. . *Id.* at 356–57. ↕
197. . *Id.* ↕
198. . *Id.* ↕
199. . *Id.* ↕
200. . Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255, 259 (2017). ↕
201. . *See Ford Motor*, 592 U.S. at 369–70 (comparing the facts in *Ford Motor* with those in *Bristol-Myers Squibb*). ↕
202. . *Id.* at 372 (Alito, J., concurring in the judgment); *id.* at 375 (Gorsuch., J., concurring in the judgment). ↕
203. . *Id.* at 358 (majority opinion) (emphasis added). ↕
204. . Of course, such foreign claims might presumably still be dismissed based on the controversial doctrine of forum non conveniens, *see* Piper Aircraft Co. v. Reyno, 454 U.S. 233 (1981) (dismissing a suit brought by Scottish citizens against U.S. corporations regarding an airplane crash in Scotland), a subject the *Ford Motor* Court did not address. ↕
205. . *See supra* text accompanying notes 144–45. ↕
206. . Although beyond the scope of this article, case-by-case common law adjudication can allow for long-term democratic dialogue among litigants and judges, *see, e.g.*, James Boyd White, *Constituting a Culture of Argument*, *in* When Words Lose their Meaning: Constitutions and Reconstitutions of Language, Character, and Community 231, 274 (1984) ("The case establishes an essential equality between people . . . and it proceeds by a method of argument and conversation that both recognizes the individual's view of his own situation and complicates that view by forcing him to recognize the claims of another."), as they evolve a set of norms over time, balancing fidelity to the past with innovation to respond to societal change. *See, e.g.*, Ronald Dworkin, *How Law Is Like Literature*, *in* A Matter of Principle 146, 158–61 (1985) (likening common-law adjudication to the writing of a chain novel). Further, although common law adjudication necessarily entails some uncertainty, relatively stable compromises can evolve over time. *See generally, e.g.*, Benjamin N. Cardozo, The Nature of the Judicial Process (1921) (arguing that the judicial process involves a set of techniques that render common law adjudication less ad hoc and unpredictable than it might appear from the outside). ↕
207. . Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (emphasis added) (internal quotation marks and citations omitted). ↕
208. . J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 905 (2011) (Ginsburg, J., dissenting) (emphasis added) (internal quotation marks omitted) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)). ↕
209. . Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (emphasis added). ↕

210. . Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255, 262 (2017) (internal quotation marks omitted) (quoting *Goodyear*, 564 U.S. at 919). ↕
211. . Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 369 (2021) (quoting *Bristol-Myers Squibb*, 582 U.S. at 262). ↕
212. . Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 143 (2023) (citation omitted). ↕
213. . My focus on community affiliation is perhaps akin to Jesse M. Cross's notion of "protective sovereignty." *See* Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 Minn. L. Rev. 679, 684 (2020) (arguing that the sovereign state should not be defined "simply as an entity possessing exclusive power over a territory," but should instead be "understood as an entity that, by definition, is tasked with a specific mission: namely, to protect a community"). ↕
214. . *See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp 161 (D. Conn. 1996) (asserting jurisdiction over an out-of-state defendant because its website was viewable in the forum state). ↕
215. . Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617 (4th Cir. 2003). ↕
216. . *Id.* at 620. ↕
217. . *Id.* ↕
218. . *Id.* ↕
219. . *Id.* ↕
220. . *Id.* ↕
221. . *Id.* at 621. Every domain name issued by Network Solutions is issued under a contract, the terms of which include a provision requiring resolution of disputes through the Uniform Domain Name Dispute Resolution Policy (UDRP) promulgated by the Internet Corporation for Assigned Names and Numbers. *Id.* The WIPO complaint was filed in accordance with the terms of the UDRP. *Id.* ↕
222. . *Id.* ↕
223. . *See id.* ↕
224. . 315 F.3d 256 (4th Cir. 2002). ↕
225. . *Id.* at 259. ↕
226. . *Id.* ↕
227. . *See id.* at 261–62. ↕
228. . *See id.* ↕
229. . *Id.* at 263. ↕
230. . *Id.* ↕
231. . *See id.* at 263–64. ↕
232. . *See, e.g.*, Doe v. WebGroup Czech, A.S., 93 F.4th 442, 452 (9th Cir. 2024) (allowing a California court to assert specific jurisdiction over foreign defendants not subject to general jurisdiction in the United States because their pornography websites were "expressly aimed" at users in the United States). *See generally* William S. Dodge &

Scott Dodson, *Personal Jurisdiction and Aliens*, 116 Mich. L. Rev. 1205 (2018) (arguing that the jurisdictional inquiry regarding aliens should permit consideration of all contacts with the United States, rather than only contacts with a particular state). ↕

233. . 564 U.S. 873 (2011) (plurality opinion). ↕

234. . *See id.* at 886. ↕

235. . *See id.* at 893 (Ginsburg J., dissenting). ↕

236. . In those rare cases where an individual or small business might legitimately argue that being sued in a state poses a burden to them—such as the duck decoy manufacturer or the Egyptian shirtmaker or the Kenyan coffee maker discussed earlier—that concern could be addressed by consideration F, which allows courts to consider the size, sophistication, and economic breadth of the party resisting jurisdiction. *See also infra* note 254 and accompanying text (observing that small foreign entities will often not have significant assets in the United States and so are unlikely to be sued there). ↕

237. . 597 U.S. 215 (2022). ↕

238. . For a discussion of such issues, see Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. Pa. L. Rev. 399 (2024). ↕

239. . Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 150–63 (2023) (Alito, J., concurring in part). ↕

240. . *See generally* Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. Inst. & Theoretical Econ. 142 (2004) (discussing how contracts of this sort replace the legal regimes of the state). ↕

241. . *See generally* Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013) (describing how boilerplate—the fine-print terms and conditions that we become subject to when we click "I agree" online, rent an apartment, enter an employment contract, sign up for a cellphone carrier, or buy travel tickets—pervades all aspects of modern life). ↕

242. . I recognize that sophisticated parties to a commercial contract might sometimes wish to choose an adjudicatory forum precisely because it is *not* connected to the contract (and therefore is less likely to favor either party). Or, they may choose a forum in order to take advantage of the forum's expertise in such contracts or simply because it has become customary in an industry to adjudicate disputes in a particular forum. For example, N.Y. Gen. Oblig Law § 5-1402 (McKinney 2024) allows parties to a contract worth more than $1 million to choose New York courts even if they have no connection to the forum. Likewise, the European Union permits parties to choose EU courts even if neither party is domiciled there. *See* 2012 O.J. (L. 1215) 351, https://eur-lex.europa.eu/LexUriServ /LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF [https://perma.cc/RN5T-

NQRZ]. To the extent that such contracts are true bargained-for exchanges among sophisticated business entities and do not unduly deprive other jurisdictions of the ability to speak to a suit in which they have a strong interest, such a contract may well be deemed enforceable even using the analytical framework I propose. This is especially true if the other jurisdictions would have applied New York law to the dispute anyway, thus indicating a lower level of state interest in the case. But in any event, such contracts are a far cry from the contracts of adhesion that are a common part of modern life, or the enforced "contract" Pennsylvania imposed on Norfolk Southern in *Mallory* as a condition of operating in the state. ↕

243. . 465 U.S. 770 (1984). ↕

244. . Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 358 (2021). ↕

245. . *Compare id.* at 362 ("[Specific jurisdiction] demands that the suit 'arise out of *or relate to* the defendant's contacts with the forum.' The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." (citation omitted)), *with id.* at 373 (Alito, J., concurring in the judgment) (criticizing the majority opinion for reading the "arise out of or relate to" language as if it were a statute and thereby recognizing "a new category of cases in which personal jurisdiction is permitted: those in which the claims do not 'arise out of' (i.e., are not caused by) the defendant's contacts but nevertheless sufficiently 'relate to' those contacts in some undefined way"), *and id.* at 375–76 (Gorsuch J., concurring in the judgment) (criticizing the majority opinion for interpreting the "relate to" language as distinct from a strict causal test for specific jurisdiction). ↕

246. . *See id.* at 365–66 (majority opinion) (distinguishing a case "in which Ford marketed the models in only a different State or region" and addressing Ford's contention that it is relevant for jurisdictional purposes "that the company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents"). ↕

247. . *See id.* at 366 n.4 (discussing this hypothetical scenario); *id.* at 377–78 (Gorsuch J., concurring in the judgment) (same). ↕

248. . Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 582 U.S. 255, 259 (2017) ("Between 2006 and 2012, [Bristol-Myers Squibb] sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales."). ↕

249. . *See id.* at 268. ("The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State."). ↕

250. . *See id.* at 259 (noting that Bristol-Myers Squibb only challenged jurisdiction with regard to the non-resident plaintiffs). ↕

251. . *See id.* at 278 (Sotomayor J., dissenting) ("The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is 'essentially at home.' Such a rule hands one more tool to corporate

defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be farflung jurisdictions." (citation omitted)). ↑

252. . *See generally* Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 Emory L.J. 677 (2015) (describing this trend). ↑

253. . *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 890 (2011) (Breyer J., concurring in the judgment) ("[W]hat [does the plurality's approach] mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through popup advertisements that it knows will be viewed in a forum?"). ↑

254. . *See id.* at 892 ("[M]anufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good."). ↑

255. . *See* Dodge & Dodson, *supra* note 231, at 1246–47 (making this argument). As Dodge & Dodson acknowledge, "[m]any foreign jurisdictions will recognize and enforce U.S. default judgments," but they note that "the cost and uncertainty of this additional step will make it unattractive to bring suit against many smaller alien defendants who lack U.S. assets." *Id.* at 1247. ↑

256. . *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 367 (2021) (suggesting that even though the plaintiffs bought the cars out-of-state they might theoretically have been incentivized to buy Ford cars based on the existence of Ford advertisements, dealerships, and service centers in the state). ↑

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