

**A NEW GUARD AT THE COURTHOUSE DOOR: CORPORATE
PERSONAL JURISDICTION IN COMPLEX LITIGATION AFTER
THE SUPREME COURT’S DECISION QUARTET**

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ABSTRACT

*In a quartet of recent decisions, the Supreme Court substantially reshaped the analysis of due process limits for a state’s exercise of personal jurisdiction over corporations for the first time since its groundbreaking 1945 decision in *International Shoe Co. v. Washington*. The Court’s decision quartet recasts the *International Shoe* continuum of corporate contacts for which it would be “reasonable” for the state to exercise jurisdiction based on “traditional notions of fair play and substantial justice” into a more rigid bright-line dichotomy between “general” and “specific” jurisdiction: for a state to exercise general (or all-purpose) jurisdiction over any suit, regardless of the suit’s connection to the state, the company must be essentially “at home” in the jurisdiction, generally requiring that the company be incorporated or have its principal place of business there. Otherwise, the court must have “specific” jurisdiction, in which the claims of each plaintiff must “arise out of or relate to” the company’s contacts with the state. Justice Sotomayor issued concurring and dissenting opinions warning that the Court’s new approach could seriously curtail nationwide*

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class action and mass tort litigation involving corporate wrongdoing, particularly in cases involving foreign country corporations, multiple corporate defendants, and smaller claimants.

Given the critical importance of personal jurisdiction as a gatekeeper for access to our courts, this Article analyzes the changes to International Shoe introduced by the decision quartet as applied to class actions, mass actions, and other large-scale litigation. It concludes that the Supreme Court's decision quartet will reduce forum shopping, that there should continue to be meaningful access to the courts for nationwide or multi-state aggregate litigation, and that other options, such as state-wide-only suits brought in states in which plaintiffs are injured, together with nationwide federal Multidistrict Litigation ("MDL") centralization and federal/state court coordination, will also still be available and will often present a better alternative given choice-of-law and other challenges with nationwide and multi-state actions. However, this Article also addresses the very real threats that some courts may too narrowly apply the decision quartet's new tests or apply the tests so as to insulate foreign country companies from jurisdiction. To address these threats, more flexible approaches are proposed for deserving cases with respect to both the decision quartet's "at home" requirement for general jurisdiction and the quartet's "arising out of or related to" requirement for specific jurisdiction. It is also proposed that for nationwide or multistate class actions, courts should apply a presumption that considers only the claims of the named plaintiffs for the specific jurisdiction claim-connectedness requirement, rather than the claims of each absent class member, which is similar to how federal diversity jurisdiction is already tested only for the named plaintiffs in class actions, although defendants should be permitted to rebut the presumption by showing that the forum state bears insufficient connection to absent class members to satisfy the reasonableness requirement for the assertion of specific jurisdiction on a class-wide basis. Finally, addressing a troublesome topic concerning which the Supreme Court appears closely divided, it is proposed that a foreign company's systematic "fifty-state" sales targeting be treated as a "purposeful" jurisdictional contact with any state where substantial injury is caused to the plaintiff by the targeting.

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INTRODUCTION

The Supreme Court's recent quartet of unanimous and nearly unanimous decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,¹ *Daimler AG v. Bauman*,² *BNSF Railway Co. v. Tyrrell*,³ and *Bristol-Myers Squibb v. Superior Court of California*⁴ have substantially recalibrated the analysis of Fourteenth Amendment due process limits for a State's exercise of personal jurisdiction over corporations established more than eight decades ago in *International Shoe Co. v. Washington*.⁵ The Court's more divided 4-2-3 decision in *J. McIntyre Machinery, Ltd. v. Nicastro*⁶ during the same period has heightened concern about the realities of establishing jurisdiction over foreign companies in an increasingly global marketplace. Other scholars have written about one or more of these decisions,⁷ and important suggestions have been proffered for Congressional legislation or Federal Rules amendments to create nationwide personal jurisdiction for federal district court cases, all in an effort to correct perceived limitations in the Supreme Court's approach.⁸ This article presents a real-world

1. 564 U.S. 915 (2011).

2. 571 U.S. 117 (2014).

3. 137 S. Ct. 1549 (2017).

4. 137 S. Ct. 1773 (2017).

5. 326 U.S. 310, 316–18 (1945).

6. 564 U.S. 873 (2011).

7. See generally Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413 (2017) [hereinafter Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2)*]; Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245 (2011) [hereinafter Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*]; Meir Feder, *Goodyear, "Home" and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671 (2012); Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107 (2015); Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101 (2015); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207 (2014); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014); Craig Sanders, Note, *Of Carrots and Sticks: General Jurisdiction and Genuine Consent*, 111 NW. U. L. REV. 1323 (2017).

8. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2)*, *supra* note 7, at 417 (proposing Rule amendment to allow nationwide diversity and alienage jurisdiction); Sachs, *supra* note 7, at 1303–04 (proposing new statute providing nationwide federal personal

examination of the decision quartet’s potential impact on the landscape of class actions, mass actions and other corporate litigation against the backdrop of how courts were previously addressing corporate personal jurisdiction, offering a mostly positive prognosis for the quartet’s impact, and providing specific recommendations for how courts should address future application of the decision quartet so as not to deprive deserving plaintiffs of a reasonable forum.

As just about every lawyer still alive today learned at the outset of first-year Civil Procedure class, *International Shoe* introduced the minimum contacts-based, “fair play and substantial justice” analysis for personal jurisdiction.⁹ Basing its analysis on the quality and quantity of corporate contacts with a state, the *International Shoe* opinion proffered, in substance, a *continuum*. At one end were contacts with a state clearly evincing the proper assertion of jurisdiction such as the company’s “home,” “principal place of business” or where it has “continuous corporate operations . . . so substantial and of such a nature” as to allow jurisdiction over *any* lawsuit against it there¹⁰—what later came to be labeled as “general,” all-purpose jurisdiction. Further along the continuum were lesser contacts such as “when the activities of the corporation . . . have not only been continuous and systematic, but also give rise to the liabilities sued on”¹¹ and even some “single or occasional acts” in the state that “because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit”¹²—which later came to be labeled as “specific,” claim-connected jurisdiction. Ultimately, at the very other end of the continuum were contacts with the state that were too fleeting and unrelated to the lawsuit to justify jurisdiction.¹³ *International Shoe* was followed by the enactment of long-arm jurisdiction statutes in all states,

jurisdiction); see also A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, U.C.L.A. L. Rev. (forthcoming 2019) (manuscript at 1, 57–60 and n.30). Otherwise, “[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction.” *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (“service of process is effective over a defendant ‘who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.’” (quoting FED. R. CIV. P. 4(k)(1)(A))). The federal Advisory Committee on Civil Rules of Procedure, at its April 10, 2018 meeting, discussed the issue but opted to defer active work on such changes relating to personal jurisdiction for future consideration. ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, MINUTES 32 (April 10, 2018), https://www.uscourts.gov/sites/default/files/2018-04-10-cv_minutes_final_0.pdf.

9. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923–24 (2011).

10. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317–18 (1945).

11. *Id.* at 317.

12. *Id.* at 318.

13. *Id.* at 317–18.

and led to decades of litigation and commentary over how much “doing business” in a state should be required for the exercise of general, all-purpose jurisdiction and how much connection a state must have to the plaintiffs’ claims in a lawsuit for the exercise of specific, claim-related jurisdiction.¹⁴ In particular, the post-*International Shoe* courts commonly allowed general jurisdiction over corporations based upon the company doing “continuous and substantial business” in the state.¹⁵

The Court’s recent decision quartet substantially recasts the *International Shoe* corporate jurisdictional continuum into a more bright-line, simple dichotomy that is both reflective of the post-*International Shoe* concepts of general versus specific jurisdiction as well as more protective against forum shopping, which was a key backdrop to each of the quartet cases.¹⁶ Under this new dichotomy, for a company to be subject to general jurisdiction, the firm must be essentially “at home” in the state such as being incorporated or having its principal place of business there.¹⁷ Otherwise, the only constitutionally permissible exercise of jurisdiction over a non-consenting corporation, even one doing substantial continuous business in the state, will need to be specific jurisdiction for which each plaintiff’s claims must “aris[e] out of or relat[e] to” the company’s contacts with the state.¹⁸ Under the

14. See generally Lea Brilmayer, Jennifer Haverkamp, Buck Logan, Loretta Lynch, Steve Neuwirth & Jim O’Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988); Walter W. Heiser, *A Minimum Interest Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915 (2000); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (2001); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) [hereinafter Twitchell, *The Myth of General Jurisdiction*]; Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1125, 1141–44 (1966).

15. See, e.g., *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629, 632–33 (N.C. 1977) (upholding general jurisdiction over a New York based coin dealer for a breach of employment claim brought by a North Carolina resident based on unrelated sales of rare coins to at least twenty-seven North Carolina residents); *Frummer v. Hilton Hotels Int’l*, 227 N.E.2d 851, 854 (N.Y. 1967) (upholding general jurisdiction over English subsidiary of Hilton for New York resident injured in England due to “doing business” in the state through advertising and marketing in New York by parent company through other Hilton affiliates); Cornett & Hoffheimer, *supra* note 7, at 104–05 (the law was so well settled that companies doing large volumes of continuous business in a state did not contest general jurisdiction, with MBUSA in the *Daimler* case being a prime example).

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

17. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

18. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). Professor Twitchell used the term “dichotomy” to describe the general-specific categorization. Twitchell, *The Myth of General Jurisdiction*, *supra* note 14, at 611. She argued that “[u]sed correctly, the general/specific dichotomy has helped courts focus on their reasons for exercising jurisdiction in particular cases.” *Id.* However, she lamented that courts had confused and jumbled the two categories. *Id.* She ultimately proposed a much broader, more flexible and

decision quartet's new dichotomy, moreover, the Court made clear that general jurisdiction should be the exception to the rule, meaning that ordinarily jurisdiction should be specific jurisdiction that ties the suit itself to the defendant company's contacts with the forum state.¹⁹

The fact that the Court's quartet of decisions are either unanimous (*Goodyear*, *Daimler*) or nearly unanimous (8-1 in *BNSF* and *Bristol-Myers*) demonstrates a very strong level of agreement on the new brighter-line approach that cuts across the Court's other notable cleavages.²⁰ Nevertheless, Justice Sotomayor, in strongly worded dissents in *Bristol-Myers* and *BNSF* and in her concurring opinion in *Daimler*, argued that the Court's new, "restrictive" approach will make it "difficult," and in some instances "impossible," for plaintiffs to bring nationwide mass actions addressing nationwide corporate conduct, particularly if the cases involve either foreign country corporations or two or more defendants that are "at home" in different states.²¹ Therefore, Justice Sotomayor argued, the Court's new approach will make it more difficult to "aggregate the claims of plaintiffs across the country whose claims may be worth little alone."²²

Justice Sotomayor's concerns certainly merit pause for reflection because no person should be left without meaningful access to an appropriate court to redress injury. However, this article will seek to demonstrate that for most cases, the Court's decision quartet, if properly applied, should not threaten access by plaintiffs to the courts. For most cases, there will still be appropriate state and federal courts in which nationwide and multiple-state actions can be brought against corporate defendants, on either a class action or mass action basis, including a defendant's "at home" state, and the states where the allegedly harmful product or communication was designed, manufactured, managed, or tested or from which the product or communication was distributed or where the defendant's national marketing campaign was developed. For multiple defendants sued together, an action could also be brought in the

"fairness"-centered analysis for specific jurisdiction in place of courts blurring the waters between general and specific jurisdiction. *Id.* at 662–65, 680.

19. *Bristol-Myers*, 137 S. Ct. at 1780; Twitchell, *The Myth of General Jurisdiction*, *supra* note 14, at 628.

20. See *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549, 1554 (2017); *Bristol-Myers*, 137 S. Ct. at 1778; Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2)*, *supra* note 7, at 421.

21. *BNSF*, 137 S. Ct. at 1560–61 (Sotomayor, J., concurring and dissenting); *Bristol-Myers*, 137 S. Ct. at 1784–85 (Sotomayor, J., dissenting); *Daimler*, 571 U.S. at 143 (Sotomayor, J., concurring).

22. *Bristol-Myers*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).

states in which the defendants engaged together in the subject conduct at issue, in addition to the other states that overlap.

Moreover, this article will make the important point that a nationwide class action or mass action will not necessarily be the most just, speedy, efficient, and cost-effective format for the resolution of every case concerning even nationwide-impacting corporate conduct, as there are important values and choice-of-law benefits in local resolution of local citizens' claims (and local defenses related to such claims).²³ Sometimes the better choice in aggregate litigation may consist of state-wide-only actions brought only on behalf of state residents, utilizing a number of effective and flexible tools available for litigants to achieve nationwide or multi-state coordination of such actions through effective use of Federal Multidistrict Litigation ("MDL") centralization, as well as time-tested approaches for federal-state court coordination of similar cases that can allow parties to benefit from both nationwide pre-trial coordination and localized trials.

Nevertheless, there is a compelling need for courts in applying the new brighter-line tests adopted in the decision quartet to be careful not to allow the four decisions, which all dealt with instances of clear forum shopping, to deprive deserving plaintiffs of an appropriate forum for litigation against a company with sufficient purposeful contact(s) with the forum.²⁴ As Professor Richman warned decades before the decision quartet, limiting allowable personal jurisdiction to just the two paradigms of general and specific jurisdiction has the danger of leaving cases in between the two that fail to meet either paradigm despite the fact that they offer compelling contacts that come up just short in each.²⁵ There is a danger that states that had previously narrowly applied the availability of specific jurisdiction, while broadly applying a "substantial-and-continuous-doing-business" test for general jurisdiction, will now

23. See generally *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 818–23 (1985) (choice of law is a due process consideration in class actions); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741–43 (5th Cir. 1996) (choice of law is an important consideration in the predominance inquiry in Rule 23(b)(3) multistate class actions); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018–19 (7th Cir. 2002) (same).

24. See generally Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, *supra* note 7, at 1246.

25. See William M. Richman, *Review Essay: Part I—Casad's Jurisdiction in Civil Actions, Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1340–46 (1984) (suggesting that a continuum or sliding scale approach to personal jurisdiction would help fill the gaps between the two paradigms of general and specific jurisdiction). *But see* Christian E. Mammen, Note, *Here Today, Gone Tomorrow: The Timing of Contacts for Jurisdiction and Venue under 28 U.S.C. § 1391*, 78 CORNELL L. REV. 707, 717–20 (1993) (arguing for separate treatment of general and specific jurisdiction rather than a continuum).

continue their narrow specific jurisdiction approach even as the Supreme Court's decision quartet has removed "substantial-and-continuous-doing-business" as grounds for general jurisdiction.²⁶ And, finally, there is the danger that the courts will over-read the limits on general jurisdiction imposed by the decision quartet's "at home" test to preclude jurisdiction over foreign country corporations.

For these reasons, this article proposes a number of approaches to prevent unwarranted deprivation of a reasonable forum for deserving plaintiffs. For example, *Bristol-Myers* requires that *all* joined plaintiffs in a specific jurisdiction case against a company have a claim that "aris[es] out of or relate[s] to" the defendant [company's] contacts with the state in which suit is brought,²⁷ but it does not prevent courts from applying a more flexible claim connection test when warranted by the given case, such as only requiring a "but for" connection rather than "proximate cause," or other more restrictive claim connection standard.²⁸ Similarly, if necessary to allow access to a reasonable forum for injuries sustained in this country, general "at home" jurisdiction could be permitted over a foreign multinational company with a substantial United States "quasi-home base" state such as the state of its principal United States subsidiary or division.²⁹ This proposed flexibility will still protect against forum shopping by requiring that *all* plaintiffs must have the appropriate claim-connection to the forum or for the corporation to be essentially at home. This will also protect plaintiffs from a scenario in which they could "slip between" the decision quartet's bright-line general versus specific dichotomy and thus be deprived of access to a United States forum.

26. See generally Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 129–32 (2001) [hereinafter Borchers, *The Problem with General Jurisdiction*] (suggesting that general jurisdiction has been expanded by the courts because of irrational narrowness specific jurisdiction decisions); Twitchell, *The Myth of General Jurisdiction*, *supra* note 14, at 637–39 (same).

27. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014)).

28. See *infra* Parts III.A., III.E.

29. See *infra* Parts III.A., III.E. von Mehren and Trautman defined "home base" as the place of incorporation, the principal place of business or corporate headquarters. von Mehren & Trautman, *supra* note 14, at 1179; see also Twitchell, *The Myth of General Jurisdiction*, *supra* note 14, at 618–20. It is proposed that a "quasi-home base" could, in the appropriate case involving harm caused to United States residents, be the United States headquarters of a foreign country multi-national corporation or a United States corporate division headquarters for the product, service or communication involved in the case. See *infra* Part III.E; see, e.g., Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 137 (advocating allowing general jurisdiction for a company "branch" in appropriate cases).

In addition, this article will discuss, and propose a solution to, the fifty-state sales targeting dilemma presented in *J. McIntyre Machinery, Ltd. v. Nicaastro*,³⁰ in which a foreign corporation targets its sales and marketing to all fifty states but does not otherwise have contacts with the state where its product was purchased and caused injury.³¹ In a nutshell, it is proposed that a company that affirmatively targets its sales to all fifty states should be deemed to have purposeful specific jurisdiction contacts with any state in which injury is caused for purposes of suit on that injury.³²

Organizationally, this article begins, in Part I, with a discussion of *International Shoe*, and modern, minimum contacts-based corporate jurisdictional analysis by the Supreme Court and lower courts before the decision quartet, including how the Supreme Court struggled in *J. McIntyre* with the fifty-state targeting dilemma. Next, Part II presents the quartet decisions in *Goodyear*, *Daimler*, *BNSF*, and *Bristol-Myers*, and how they transformed the continuum drawn in *International Shoe* into a much brighter-line dichotomy between *general* and *specific* jurisdiction, with stricter tests for each. Finally, Part III presents various important questions, as well as posited answers, concerning the application of these decisions in today's complex corporate litigation, such as (a) how much flexibility is afforded by the new brighter-line tests of whether a company is essentially "at home" for general jurisdiction and whether a plaintiff's claim "arises out of or relates to" the company's contacts with the state for specific jurisdiction; (b) how will the decision quartet's dichotomy impact class actions; (c) how will the four decisions impact mass tort actions and other similar aggregate litigation; (d) what role can Federal MDL centralization and other existing procedural devices play in ensuring fair and efficient resolution of corporate conduct with national or multi-state impact; (e) how to address Justice Sotomayor's concerns about the decision quartet restricting aggregate litigation against corporations; (f) how to address the *J. McIntyre* fifty-state sales targeting dilemma; and (g) whether the decision quartet will lead to more intense jurisdictional discovery, and how opposing counsel can (and should) attempt to work together to resolve corporate jurisdictional issues. While the article concludes that the overall impact of the decision quartet should be largely positive, recommendations are offered for necessary flexibility in applying these decisions to protect access at the courthouse door.

30. 564 U.S. 873 (2011).

31. *See id.* at 882–83.

32. *See infra* Part III.E.

I. *INTERNATIONAL SHOE* AND MODERN PERSONAL JURISDICTION ANALYSISA. The “Canonical” *International Shoe* Decision

The Supreme Court’s groundbreaking decision in *International Shoe* changed the reigning *in personam* jurisdiction analysis from the question of whether the State has physical power over a defendant by virtue of physical presence and service of process (or consent), as articulated in the Court’s decision in *Pennoyer v. Neff*,³³ to the question of whether the person’s contacts with the state are of such a quality and quantity that it would be fundamentally fair and reasonable that the person be subjected to jurisdiction, either for a particular claim (what today is known as specific jurisdiction) or for all claims (what today is known as general jurisdiction).³⁴ Justice Ginsburg in *Goodyear* described *International Shoe* as “the canonical opinion in this area.”³⁵

In *International Shoe*, the Supreme Court held that the State of Washington could, consistent with due process, exercise personal jurisdiction over the defendant, International Shoe Company, a Missouri-headquartered Delaware corporation, for claims seeking payments for Washington’s unemployment fund based on the earnings of the company’s Washington-based sales agents.³⁶ Although the company maintained no manufacturing or offices in the state, and accepted and shipped all orders from St. Louis, the company employed between eleven and thirteen salespersons who resided in, promoted, and took orders for shoes in Washington, albeit all under the supervision of St. Louis sales managers and without any authority to enter into contracts or make collections.³⁷ All orders were accepted or rejected, and if accepted, were filled, in St. Louis.³⁸

In an opinion by Chief Justice Harlan Fiske Stone, the Court held that due process permits a state to exercise personal jurisdiction over an

33. 95 U.S. 714 (1877).

34. Law students often begin their study of personal jurisdiction with *Pennoyer v. Neff*, 95 U.S. 714 (1877). There, the Court held that an Oregon court’s *in personam* judgment on an Oregon lawyer’s contract claim against a non-resident client (Neff) was entered without due process, and was therefore an invalid basis for a later execution on the client’s in-state property, because the client was not personally served with process in the state and did not voluntarily consent to jurisdiction there. *Id.* *Pennoyer* has never been overruled, and in effect, survives as the basis for jurisdiction by virtue of physical presence. Indeed, in *Daimler*, Justice Ginsburg makes clear that the roots of “at home” general jurisdiction over corporations remain in *Pennoyer*. *Daimler AG v. Bauman*, 571 U.S. 117, 131-33 (2014).

35. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

36. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945).

37. *Id.* at 313-14.

38. *Id.*

out of state defendant corporation if it has “sufficient contacts” with the state “to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations” sued upon.³⁹ In this respect, the Court went on, the question to be answered is whether the “nature and level of contacts” with the state “make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there,” adding that “[a]n ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.”⁴⁰ The Court also noted that a corporation’s contacts that give rise to benefits from the state should also subject the company to the obligation to respond to suits arising out of such contacts.⁴¹

The Court thus portrayed a continuum of potential contacts that a company might have with a state and with the particular suit at issue.⁴² Throughout the opinion, the Court assumed that a corporation can always be sued in its “home” state, or its “principal place of business” irrespective of whether the suit at issue arose out of contacts with the state.⁴³ The Court also pointed out that “there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”⁴⁴ These contacts foreshadowed what later came to be termed *general* jurisdiction. The Court correspondingly held that corporate jurisdictional “‘presence’ . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on.”⁴⁵ Further, the Court held that even some “single or occasional acts” in the state, “because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit”⁴⁶—foreshadowing what today is called *specific* jurisdiction. Finally, the Court noted, “it has been generally recognized that the [mere] casual presence of [a] corporate agent or even his conduct of single or isolated . . . activities in

39. *Id.* at 320.

40. *Id.* at 317 (citing *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)).

41. *Id.* at 319–20.

42. *See id.* at 316–17.

43. *Id.* at 317 (“An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.” (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)).

44. *Id.* at 318.

45. *Id.* at 317.

46. *Id.* at 318.

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a state . . . are not enough to subject it to suit on causes of action unconnected with the activities there.”⁴⁷

It is clear from the language of the decision that *International Shoe* posited that corporate jurisdictional contacts with the state and claims at issue exist in a continuum:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit and those which do not cannot be simply mechanical or quantitative Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.⁴⁸

Based on this analysis, the Court concluded that International Shoe’s continuous and systematic contacts with the state of Washington through its sales agents employed there were the very basis for Washington State’s unemployment tax enforcement claims against the company and that, therefore, the State’s exercise of jurisdiction satisfied due process.⁴⁹ Thus, the actual holding in *International Shoe* was on the claim-connected end of its posited contacts-based jurisdictional continuum. However, the clear message of *International Shoe*, taught to several generations of lawyers, was that the new world of minimum-contacts-based jurisdictional analysis was based on a flexible and substantive analysis of degrees of corporate contacts with the state and the claims at issue in which “the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.”⁵⁰

B. The World of Modern Corporate Personal Jurisdiction Before the Decision Quartet

In the years following *International Shoe*, states enacted long arm statutes extending personal jurisdiction over foreign corporations “doing business” in the state, either to the maximum extent allowed by due

47. *Id.* at 317.

48. *Id.* at 319. Professors Rhodes and Robertson similarly point out that International Shoe identified three points a scale at which jurisdiction could properly be found, not just two. See Rhodes & Robertson, *supra* note 7, at 235.

49. *Int’l Shoe Co.*, 326 U.S. at 320.

50. *Id.* at 319.

process, or over various broad categories of contacts with the state.⁵¹ The lack of a bright-line test in *International Shoe* as to what contacts constituted “continuous corporate operations within a state . . . so substantial and of such a nature as to justify suit against it on causes of action . . . entirely distinct from those activities”⁵² led to decades of litigation and debate over how continuous or substantial a corporation’s “doing business” within a state other than its state of incorporation or principal place of business would allow for that state’s exercise of general, all-purpose jurisdiction over it.⁵³ In addition, a number of states enacted “doing business” registration statutes that required companies’ consent to the appointment of an agent for service of process and to general jurisdiction in the courts of the state as a condition of registration.⁵⁴ At the other end of the *International Shoe* continuum, a great deal of litigation and academic debate also focused on what quality of claim connection would be required for the exercise of claim-specific jurisdiction.⁵⁵

Professors von Mehren and Trautman, in 1966, first coined the terms “general” and “specific” for the two key categories of jurisdiction

51. Richard A. Barsotti, *Personal Jurisdiction over Non-Resident Individuals: A Long-Arm Statute Proposed for California*, 9 SANTA CLARA LAW. 313, 317–19 (1969) (crediting New York and Illinois for having developed different prototype long-arm statutes in 1956 and 1957, the Illinois statute providing for jurisdiction to limits of due process and New York’s specifying categories of transacting business in New York that will give rise to jurisdiction); see also Robert D. Nussbaum, *The Shortcomings of New York’s Long-Arm Statute: Defamation in the Age of Technology*, 88 ST. JOHN’S L. REV. 175, 176 (2014).

52. *Int’l Shoe Co.*, 326 U.S. at 318.

53. Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 122, 127–28 (The New York “doing business” statute is “notoriously indeterminate and seems to exist without regard for supposed due process limits” and noting other examples of inconsistency in application of “doing business” general jurisdiction). See generally Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, *supra* note 14; Twitchell, *The Myth of General Jurisdiction*, *supra* note 14; Brilmayer et al., *supra* note 14.

54. See, e.g., *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) (holding that Pennsylvania statute provides notice that “registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts”); *Merriman v. Crompton Corp.*, 146 P.3d 162, 177 (Kan. 2006) (finding application of Kansas registration statute to require consent to jurisdiction).

55. See generally Mark M. Maloney, *Specific Personal Jurisdiction and the “Arise from or Relate to” Requirement . . . What Does it Mean?*, 50 WASH. & LEE L. REV. 1265 (1993) (reviewing different approaches to defining which claims “arise from or [are] related to” the forum state); Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583 (2001) (reviewing relevant case law and scholarly input regarding sufficient claims for specific jurisdiction); Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343 (2005) (comparing various tests for sufficient connection to the forum state); Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619 (2001) (reviewing pendent personal jurisdiction issues in federal court).

highlighted in the *International Shoe* continuum: general jurisdiction, in which a defendant's ties to the state are so close that the defendant should be subject to personal jurisdiction for any and all claims, and specific jurisdiction, based on the claims against the defendant having a "reasonable and substantial connection to the forum."⁵⁶ They and a number of others in the academy advocated for more than half a century that general jurisdiction, because of its all-purpose breadth, should be restricted to states in which the corporation is at home.⁵⁷ Correspondingly, they suggested that it would be better to encourage specific jurisdiction, with its protective requirement that the suit be connected to the defendant's contacts with the state.⁵⁸ Yet, in actual practice, the states (and federal district courts within them) often applied *International Shoe* as a continuum on which a corporation's substantial and continuous "doing business" in a state would also be considered sufficient for general jurisdiction.⁵⁹

1. General Jurisdiction Before the Decision Quartet

As Justice Ginsberg recognized in *Goodyear* and *Daimler*, the Supreme Court issued only two post-*International Shoe* decisions on general jurisdiction before the decision quartet.⁶⁰ First was *Perkins v. Benguet Consolidated Mining Co.*,⁶¹ decided seven years after *International Shoe*. There, the Court applied "the realistic reasoning [of] *International Shoe*," to hold that the Ohio courts could properly exercise jurisdiction over a shareholder's suit claiming entitlement to dividends and stock against a Philippines incorporated and headquartered mining company, even though the "cause of action [did] not aris[e] out of the corporation's activities in the state of the forum."⁶² The Court based its decision on the grounds that during World War II, when the company's

56. Genetin, *supra* note 7, at 113–15; von Mehren & Trautman, *supra* note 14, at 1125, 1141–44, 1147.

57. von Mehren & Trautman, *supra* note 14, at 1164–66; Twitchell, *The Myth of General Jurisdiction*, *supra* note 14, at 667–69, 680.

58. Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 123–24; Genetin, *supra* note 7, at 114; Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 274–75, 281–88 (1965); von Mehren & Trautman, *supra* note 14, at 1164–67; Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, *supra* note 14, at 203–14.

59. See *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629, 632–33 (N.C. 1977); *Frummer v. Hilton Hotels Int'l*, 227 N.E.2d 851, 854 (N.Y. 1967); Cornett & Hoffheimer, *supra* note 7, at 104–05.

60. *Daimler AG v. Bauman*, 571 U.S. 117, 129–31 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 925 (2011).

61. 342 U.S. 437 (1952).

62. *Id.* at 446.

mining operations were taken over by the Japanese, “many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that state at the time he was served with summons [in the suit],”⁶³ including “directors’ meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.”⁶⁴ The Court concluded that the company had engaged in Ohio in “a continuous and systematic, but limited, part of its general business” during the war that was substantial enough to justify all-purpose jurisdiction.⁶⁵ The Court thus allowed what was later to be called general jurisdiction in a state that was neither the company’s state of incorporation nor principal place of business.

The second general jurisdiction case, decided literally thirty-nine years later, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁶⁶ was the first Supreme Court case to apply the terms “general” and “specific” jurisdiction. In *Helicopteros*, the Court held that due process precluded the assertion of “general” jurisdiction by the state of Texas over the defendant Colombian helicopter transport company arising out of a fatal helicopter accident in Peru in which four non-Texas resident plaintiff-decedents were killed while working in Peru for a Texas consortium that had contracted for the defendant’s helicopter service.⁶⁷ Although the defendant company was not licensed to do business in and did not have any offices, real property, or employees in Texas, jurisdiction over the Colombian corporation had been upheld by the Texas Supreme Court based on the corporation’s contacts with Texas.⁶⁸ Those contacts consisted of its chief executive officer having gone to Texas to negotiate the helicopter transport contract at issue (although the ultimate contract was formalized in Peru and provided for Peruvian jurisdiction for disputes related to the contract); the company having purchased a significant percentage of its helicopters and parts, as well as the training services for its pilots, from Bell Helicopter in Texas (the accident at issue occurred in Peru, on one such Bell Helicopter); and the company having accepted checks drawn on Texas bank accounts.⁶⁹ The Supreme Court held that the combination of these contacts did not rise to the level of

63. *Id.* at 448.

64. *Id.* at 445.

65. *Id.* at 438, 446. Dean Borchers has argued that specific jurisdiction would have been warranted in the case because the shareholder claims in the case involved corporate inaction during the period that its President was carrying on corporate activity in Ohio. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2)*, *supra* note 7, at 1251.

66. 466 U.S. 408 (1984).

67. *Id.* at 409–10, 416.

68. *Id.* at 417.

69. *Id.* at 410–11.

“continuous and systematic general business contacts” necessary for the assertion of “general” jurisdiction.⁷⁰

What is most troubling about the *Helicopteros* case, however, is that the Court declined to consider specific jurisdiction.⁷¹ As Justice Brennan pointed out in his dissent, the very contract for the helicopter service at issue was negotiated at least in part in Texas, the pilot whose alleged negligence purportedly caused the accident was trained in Texas, and the helicopter itself was purchased by the defendant in Texas.⁷² According to Justice Blackmun’s majority opinion, the parties had conceded that the claims did not “arise out of” or “relate[]to” Texas, and the Court therefore declined to entertain whether there was specific jurisdiction.⁷³

Thus, before the decision quartet, the clear focus of the Supreme Court for general jurisdiction was whether there were “continuous and systematic general business contacts,”⁷⁴ not whether the company defendant was “at home” in the state by virtue of either incorporation or principal place of business there.⁷⁵ Not surprisingly, many courts continued to follow that same, more flexible “continuous and systematic general business contacts” standard for general jurisdiction leading up to the decision quartet,⁷⁶ despite arguments by many in the academy advocating for cabining general jurisdiction in favor of specific jurisdiction.⁷⁷ In fact, as some in the academy observed, the courts were using general jurisdiction as an “imperfect safety valve” to allow for jurisdiction in deserving cases where a rigid application of specific jurisdiction would have denied access to the court.⁷⁸

70. *Id.* at 416–17.

71. *Id.* at 423–24 (Brennan, J., dissenting).

72. *Id.*

73. *Id.* at 415 (majority opinion). As we shall discuss in Part III.E., aviation accidents involving foreign country corporations present an example of personal jurisdiction quandaries that still exist today after the decision quartet.

74. *Id.* at 416.

75. *See id.* at 414–18 (describing the minimum contacts standard endorsed by the court and applying this standard to the facts of the case).

76. *See id.* at 416; *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629, 632–33 (N.C. 1977); *Frummer v. Hilton Hotels Int’l*, 227 N.E.2d 851, 853–54 (N.Y. 1967).

77. *See* Borchers, J. McIntyre Machinery, Goodyear, and the *Incoherence of the Minimum Contacts Test*, *supra* note 7, at 1245–47; Hazard, *supra* note 58, at 274–75, 281–88; Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, *supra* note 14, at 203–14; Twitchell, *The Myth of General Jurisdiction*, *supra* note 14; von Mehren & Trautman, *supra* note 14, at 1164–67.

78. *Daimler AG v. Bauman*, 571 U.S. 117, 152 n.9 (2014) (“[G]eneral jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.” (citing Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 139 (2001))). Dean Borchers argued that until courts moved to a more permissive approach for specific jurisdiction, it was important to keep general jurisdiction in place to assure that there will always be a place

2. Specific Jurisdiction Before the Decision Quartet

The Supreme Court's post-*International Shoe* jurisdiction decisions applied three principal due process requirements for corporate personal jurisdiction at the specific jurisdiction end of the *International Shoe* spectrum: (1) purposeful minimum contacts, (2) that the contacts "arise out of or relate to" the subject suit, and (3) reasonableness of the exercise of jurisdiction.⁷⁹

a. Purposeful Minimum Contacts

It became quickly settled following *International Shoe* that the inquiry on the level of claim-related contacts necessary for personal jurisdiction would be qualitative, not quantitative.⁸⁰ In *McGee v. Int'l Life Ins. Co.*,⁸¹ the Supreme Court in 1957 held that an Arizona insurance company's single purposeful contact with California, consisting of issuing an insurance policy mailed to the California-resident policyholder there, along with the insurer's continued receipt of premiums mailed from there, was sufficient for California's exercise of jurisdiction over the policyholder's suit to enforce the policy.⁸²

Most of the Supreme Court's specific jurisdiction cases have centered on the requirement that the defendant's contacts be "purposeful," in order to exercise jurisdiction. The Court in *Hanson v. Denckla*,⁸³ held that due process would not permit the Florida courts to exercise specific jurisdiction over two Delaware trust companies in a suit brought by legatees of a Florida decedent's will challenging the passing of monies under a trust that the decedent established in Delaware years before moving to Florida.⁸⁴ Although the decedent had, after moving to Florida, taken the challenged actions related to the trust, the Court found that neither of the two defendant Delaware trust companies holding the trust assets had engaged in any *purposeful* contacts with Florida connected

to sue. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2)*, *supra* note 7, at 425. In Dean Borchers's view, the problem is "at least partly about [courts too narrowly defining] specific jurisdiction." See Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 119. Professor Twitchell made essentially the same point. Twitchell, *The Myth of General Jurisdiction*, *supra* note 14, at 666.

79. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–79 (1985) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

80. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

81. *Id.*

82. *Id.*

83. 357 U.S. 235 (1958).

84. *Id.* at 248–51.

with the dispute so as to make a Florida court's jurisdiction over them fair or reasonable.⁸⁵

Two decades later, in *World-Wide Volkswagen Corp. v. Woodson*,⁸⁶ the Court held that an Oklahoma court could not exercise personal jurisdiction over a New York car dealer and New York-based Volkswagen distribution affiliate involved in the sale of an allegedly defective Audi car in New York that the New York-resident plaintiff-purchasers were driving in Oklahoma at the time of the accident at issue.⁸⁷ The Supreme Court held that the theory that it was "foreseeable" when the car was sold by these New York companies that the car would be driven in Oklahoma was insufficient for Oklahoma's exercise of jurisdiction over these companies that had no purposeful contact with Oklahoma.⁸⁸ The Court stressed that the due process personal jurisdiction analysis is guided by both the protection of a defendant's liberty interest in not being subjected to distant or inconvenient litigation that is unconnected to the defendant's activity in the forum state as well as the inherent boundaries of each state's sovereign interests within our system of federalism.⁸⁹ The Court found that the two New York companies, which sold no vehicles for the Oklahoma market and engaged in no business there, could not "reasonably anticipate being haled into court" in Oklahoma.⁹⁰ By contrast, the Court pointed out that there was no dispute that the Volkswagen company responsible for producing the vehicle, Audi NSU Auto Union AG, and the United States importer, Volkswagen of America, Inc., would be subject to jurisdiction due to their purposeful systematic efforts to serve the national market for Audi cars.⁹¹

Then, in *Asahi Metal Industry Co. v. Superior Court of California*,⁹² a more divided Court, in a 1987 plurality opinion by Justice O'Connor, held that a Taiwanese tire tube manufacturer sued in a California product liability personal injury action could not, consistent with due process, implead its Japanese tire valve supplier, Asahi, into the action because Asahi did not have sufficient purposeful contacts with California related to the plaintiff's lawsuit.⁹³ The sole issue to be decided in the case involved whether one foreign manufacturer can indemnify another based on a contract entered into regarding the shipment of valves from Japan

85. *Id.* at 251–53.

86. 444 U.S. 286 (1980).

87. *Id.* at 299.

88. *Id.* at 295–97.

89. *Id.* at 292.

90. *Id.* at 297.

91. *See id.* at 288 n.3, 297.

92. 480 U.S. 102 (1987).

93. *Id.* at 116.

to Taiwan.⁹⁴ Justice O'Connor wrote that it was not sufficient that Asahi sold its products into the "stream of commerce" with knowledge that they could end up in California because it had no agents, employees, advertising or solicitation for these products in California, nor did it direct the products to be sold there, so as to constitute a purposeful availment of the California forum.⁹⁵ The plurality also factored into its "reasonableness" analysis that California should not have a strong sovereignty interest in such an indemnity dispute between two foreign manufacturers since the manufacturer of the tire tube was subject to California jurisdiction for the underlying personal injury action.⁹⁶

The Supreme Court had perhaps the most difficult time in *J. McIntyre Machinery Ltd. v. Nicastro*, a 2011 case that presented the significant issue of how to address jurisdiction over a corporation that targets all fifty states with sales of a product that causes injury in a state in which the company otherwise has no contacts.⁹⁷ The case divided the Court 4-2-3 in the same Term that the Court unanimously decided *Goodyear*, the first of the decision quartet cases. The case involved a New Jersey plaintiff who seriously injured his hand at work while using a metal shearing machine produced by defendant J. McIntyre, an English company that sold its machines for resale throughout the United States to an independent Ohio distribution company, which while not controlled by J. McIntyre, nevertheless structured its advertising and sales efforts whenever possible with J. McIntyre's guidance.⁹⁸ The J. McIntyre company also attended annual scrap recycling industry conventions in various states (but never New Jersey) to promote its machines alongside its United States distributor and had obtained United States patents for its machines.⁹⁹ Yet only between one and four machines, including the one that caused the plaintiff's injury, ended up in New Jersey.¹⁰⁰ The New Jersey Supreme Court found personal jurisdiction over J. McIntyre on the ground that the company placed its products into the "stream-of-commerce" and "kn[ew] or reasonably should [have known] 'that its products are distributed through a nationwide distribution

94. *See id.* at 105–06.

95. *Id.* at 112–13.

96. *See id.* at 114–16. A concurring opinion by Justice Brennan proffered a test in which the exercise of jurisdiction over a product producer in a product liability suit will satisfy due process so long as the producer "is aware" when it "place[s] goods in the stream of commerce" that the final product will be "marketed in the forum State." *Id.* at 117 (Brennan, J., concurring).

97. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011).

98. *Id.* at 878–79.

99. *Id.* at 878.

100. *Id.*

system that might lead to those products being sold in any of the fifty states.”¹⁰¹ The United States Supreme Court reversed, with a plurality opinion authored by Justice Kennedy and joined in by Chief Justice Roberts and Justices Scalia and Thomas, holding that for a state to exercise specific jurisdiction, a company must “purposefully avai[] itself” of the “benefits and protections” of the state by “target[ing]” its sales to the forum state in some manner, and that, consistent with Justice O’Connor’s plurality opinion in *Asahi*, mere “foreseeability” that the company’s products will be sold in the state is not alone sufficient.¹⁰²

In a concurring opinion by Justice Breyer, joined in by Justice Alito, the two Justices concurred in the judgment because the company’s contacts with New Jersey were too isolated, but noted that the continuing advancement of the global digital market may soon call upon the Court to recognize that former notions of requiring “target[ing]” of a forum state will need to carry new meaning in an age when foreign producers can easily sell goods nationally and internationally through an intermediary such as Amazon.com.¹⁰³ Justice Ginsburg dissented in an opinion joined in by Justices Kagan and Sotomayor, in which she argued that J. McIntyre’s targeting of all fifty states through its distribution system was in essence targeting New Jersey and that its conduct was the direct cause of injury in New Jersey.¹⁰⁴

The decision is a difficult pill to swallow. As the five concurring and dissenting Justices noted, the “purposeful” contact requirement is beginning to take on new importance as commerce moves into a global digital age in which companies may not intend for their products to reach any one specific state, but plainly do intend to reach *all* states, whether through an intermediary distributor or the internet. Perhaps the *J. McIntyre* decision can best be explained by the tiny number of the company’s products that reached New Jersey and the company’s complete lack of other contacts with the state. Surely, the result would have been different if hundreds or thousands of the products reached New Jersey? There are also suggestions in the plurality and concurring opinions that the plaintiffs in the case did not create an adequate record.¹⁰⁵ The *J. McIntyre* decision was a precipitating cause for Professor Sachs’s article proposing that Congress enact a statute to provide for fifty-state personal jurisdiction for federal district court actions to avoid

101. *Id.* at 877 (quoting *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575, 591–92 (N.J. 2010)).

102. *Id.* at 882–86 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

103. *Id.* at 890 (Breyer, J., concurring).

104. *Id.* at 893–910 (Ginsburg, J., dissenting).

105. *See id.* at 886 (plurality opinion); *id.* at 889 (Breyer, J., concurring).

the seemingly unfair result that a foreign company targeting all fifty states with its product could escape jurisdiction in the state in which the plaintiff was injured.¹⁰⁶ Yet Justice Breyer's concurring opinion points out that a blanket rule providing jurisdiction over any company targeting all fifty states through a distributor would result in a small business in Appalachia being subject to jurisdiction in Hawaii, preferring instead an approach that requires that the forum be "fair" in light of the defendant's contacts with that forum.¹⁰⁷

Presumably, Mr. Nicastro could have sued J. McIntyre in Ohio, the distributor's principal place of business, where it is assumed that J. McIntyre had affirmative contacts concerning United States distribution,¹⁰⁸ or in Nevada, where the machine was promoted to plaintiff's employer by J. McIntyre and its distributor.¹⁰⁹ However, these alternatives appear less appealing when it is considered that the defendant company affirmatively targeted sales to the entire country and the plaintiff was injured in New Jersey.¹¹⁰ For that reason, this article, in Part III.E., proposes the solution that those companies that regularly and systematically target sales and marketing to all fifty states should, at least in cases of bodily injury, be considered to have purposefully targeted each state in which their product has caused the injury, subject to a reasonableness analysis as to fairness of exercising jurisdiction in the particular case.¹¹¹

b. "Arising out of or Relating to"

The Supreme Court has never provided a definition of the claim-connection requirement, derived from *International Shoe*, that a

106. Sachs, *supra* note 7, at 1302–03.

107. *J. McIntyre*, 564 U.S. at 891–92 (Breyer, J., concurring).

108. *See id.* at 896 (Ginsburg, J., dissenting).

109. *See id.*

110. *Id.* at 897.

111. The Supreme Court rendered another (this time non-corporate) specific jurisdiction decision in 2014, *Walden v. Fiore*, 571 U.S. 277, 288–89 (2014), which also reprised the "purposeful availment" requirement, but this time in a much easier, unanimous decision. A Nevada couple brought suit in the federal district court in Nevada against a Georgia deputized Federal Drug Enforcement Administration agent at the Atlanta Hartsfield airport for alleged wrongful search and seizing of their assets on a trip through the Atlanta airport on their way back from Puerto Rico. The Court held that due process would not permit the Nevada district court to exercise specific personal jurisdiction over the defendant officer because the officer had no purposeful contacts with Nevada related to the claims at issue. *Id.* at 288–89. The Court rejected the argument that the officer's simply knowing that the plaintiffs resided in Nevada and that his actions would delay the return of the seized funds to them in Nevada constituted purposeful claim-related contacts with that state. *Id.* at 289.

case “arise out of or relate to” the defendant’s contacts with the subject state. The Supreme Court declined two specific opportunities to define the phrase, first in *Helicopteros*,¹¹² discussed above, and then again in *Carnival Cruise Lines v. Shute*.¹¹³ As discussed in Part III.A., the phrase appears to allow a choice of two alternative concepts, “arise out of” and “relate to,” the first of which is causal and the other denoting simply a logical connection.¹¹⁴ Functionally, we know from the Court’s decisions that the phrase has been held to encompass a state where, for example, the company’s employees solicited sales leading to suit,¹¹⁵ where the contract sued upon was entered into or performed,¹¹⁶ or where a company has intentionally breached its discovery obligations in contesting jurisdiction.¹¹⁷

c. *Reasonableness*

Also taken from *International Shoe*, the final touchstone in the specific jurisdiction inquiry is the requirement that the exercise of jurisdiction be “reasonable and just according to our traditional conception of fair play and substantial justice.”¹¹⁸ Reasonableness, in words or substance, was part of the analysis in all of the *McGee*, *Hanson*, *World-Wide Volkswagen*, *Asahi*, and *J. McIntyre* cases discussed above.¹¹⁹ Justice White described the reasonableness requirement in *World-Wide Volkswagen* as primarily focused on protecting defendants from the burden of an inappropriate forum, but also on the interests of the plaintiff, the state, and our federal system:

The relationship between the defendant and the forum must be such that it is “reasonable . . . to require the corporation to defend the particular suit which is brought there.” Implicit in this emphasis on reasonableness is the understanding that the

112. *Helicopteros Nacionales de Colombia SA v. Hall*, 466 U.S. 408, 415 (1984) (noting that both parties conceded lack of specific jurisdiction).

113. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) (declining to reach); *Helicopteros*, 466 U.S. at 415 (declining to reach).

114. Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 126–27.

115. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

116. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482–87 (1985); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957).

117. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707–09 (1982).

118. *Int’l Shoe Co.*, 326 U.S. at 320.

119. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 903–06 (2011); *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 114–16 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Hanson v. Denckla*, 357 U.S. 235, 251–53 (1958); *McGee*, 355 U.S. at 222–23.

burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.¹²⁰

The reasonableness requirement thus acts as a fundamental fairness check on the exercise of personal jurisdiction.¹²¹ Some of the proposals later made in this Article regarding jurisdiction over nationwide class actions, and addressing the *J. McIntyre* fifty-state targeting dilemma, specifically incorporate the reasonableness requirement as a final test to assure that the assertion of jurisdiction is fair and warranted under all the circumstances.¹²²

II. THE *GOODYEAR*, *DAIMLER*, *BNSF*, AND *BRISTOL-MYERS* QUARTET ESTABLISH BRIGHTER LINE TESTS FOR GENERAL AND SPECIFIC JURISDICTION

The Court's recent decision quartet transformed the *International Shoe* corporate jurisdictional *continuum* into a strict *dichotomy*, which is reflective of the post-*International Shoe* concepts of general and specific jurisdiction, but which also introduced brighter-line and more restrictive tests for personal jurisdiction over a corporation. As shown above, although the Supreme Court and lower courts had gradually adopted the labels of general and specific jurisdiction beginning with the 1982 *Helicopteros* case,¹²³ the courts were otherwise continuing to apply jurisdictional analysis along the more flexible continuum articulated in *International Shoe*. Most importantly, before the decision quartet, there was little question among practicing lawyers or academia that national and multi-national companies could potentially be subject to personal

120. *World-Wide Volkswagen*, 444 U.S. at 292 (citations omitted).

121. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 592–94 (1991) (employing reasonableness analysis in enforcing personal jurisdiction clause in the parties' contract); *Burger King*, 471 U.S. at 482–87 (same).

122. *See infra* Parts III.B and III.E.

123. *Helicopteros Nacionales de Colombia SA v. Hall*, 466 U.S. 408, 415–16 (1984).

jurisdiction (whether described as general or specific) in all states in which they engaged in continuous and substantial business.¹²⁴

A. *Goodyear, Daimler, and BNSF Require that a Corporation be Essentially “At Home” for the State to Exercise General Jurisdiction*

In 2011, Justice Ginsburg authored the first of the quartet decisions in the Court’s unanimous decision in *Goodyear*.¹²⁵ The Court held that due process would not permit North Carolina courts to subject three foreign-country subsidiaries of the Goodyear Tire and Rubber Company to “general” personal jurisdiction in a product liability case concerning an accident in France involving a car with Goodyear brand tires manufactured and distributed by the Goodyear European subsidiaries.¹²⁶ The North Carolina courts had justified the exercise of jurisdiction based on the companies having placed the tires in the “stream of commerce” that would necessarily include North Carolina, even though only a tiny percentage of tires manufactured by these subsidiaries came to be sold in North Carolina.¹²⁷ The particular tires at issue were not sold into North Carolina, nor did the accident occur there.¹²⁸ *Goodyear* thus appeared an easy case on the facts to overturn North Carolina’s assertion of general jurisdiction over the foreign Goodyear subsidiaries, given the complete dearth of any contacts of the subsidiaries with North Carolina.

Yet in holding that North Carolina’s exercise of jurisdiction violated due process, Justice Ginsburg’s opinion for the unanimous Court took the opportunity to recast what she termed the “canonical” decision in *International Shoe*.¹²⁹ Observing that jurisdictional jurisprudence beginning with *International Shoe* has drawn a distinction between corporation contacts with a state sufficient for general, all-purpose jurisdiction, versus specific, claim-connected jurisdiction,¹³⁰ Justice Ginsburg continued that, under this dichotomy, due process demands that general jurisdiction be exercised only in “instances in which” a company’s “continuous corporate operations within a state [are] 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.”¹³¹

124. See *supra* note 15 and accompanying text. Indeed, the *Helicopteros* decision used the broad language of “continuous and systematic general business contacts” in describing the requirements for general jurisdiction. *Helicopteros*, 466 U.S. at 416–17.

125. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 917 (2011).

126. *Id.* at 919–20.

127. *Id.* at 920.

128. *Id.* at 919.

129. *Id.* at 923.

130. *Id.* at 919, 923–24 (citing von Mehren & Trautman, *supra* note 14, at 1144–63).

131. *Id.* at 924 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)).

She then quoted Professor Brilmayer in identifying the “paradigm forum” for general jurisdiction over a corporation “[a]s . . . one in which the corporation is fairly regarded as at home,” meaning its “place of incorporation and principal place of business.”¹³² Under this analysis, the three overseas Goodyear subsidiaries were plainly not “at home” in North Carolina so as to allow for general jurisdiction, and they had no North Carolina contacts connected to the subject accident to allow for specific jurisdiction.¹³³ Thus, despite *Goodyear* being such an easy case for rejecting general jurisdiction given the foreign subsidiaries’ almost complete lack of business contacts with North Carolina, Justice Ginsburg’s opinion used the occasion to introduce the concept that the paradigm forum for general jurisdiction over a corporation will be the state where the company is “at home” based on its being incorporated or operating its principal place of business there.¹³⁴ This was a groundbreaking announcement since many state and lower federal courts throughout the United States had been finding general corporate personal jurisdiction based on a company’s continuous and substantial “doing business” in states that were not the corporation’s so-defined “home.”¹³⁵

Then, three years later in *Daimler AG v. Bauman*,¹³⁶ in another opinion by Justice Ginsburg, the Court unanimously reversed a Ninth Circuit decision holding that a California federal district court could properly exercise general personal jurisdiction over the German company Daimler AG in a suit asserting federal Alien Tort Statute and state law claims on behalf of twenty-two Argentine residents alleging the complicity of Daimler’s Argentine subsidiary with human rights violations by the former Argentine government.¹³⁷ The Ninth Circuit had based its holding on the alleged substantial, continuous, and systematic contacts with California of Daimler itself and its principal United States subsidiary, Mercedes Benz USA, LLC (“MBUSA”), a Delaware corporation with its principal place of business in New Jersey, that owned and operated numerous California facilities and engaged in sales in California representing more than ten percent of all Daimler’s new car sales in the United States.¹³⁸

132. *Id.* (quoting Brilmayer et al., *supra* note 14, at 728).

133. The United States headquartered parent company, Goodyear USA, did not contest personal jurisdiction. *Id.* at 918.

134. *Id.* at 924.

135. *See supra* note 15 and accompanying text.

136. 571 U.S. 117 (2014).

137. *Id.* at 120–24, 136–42.

138. *Id.* at 120–22, 133–35.

The Court's opinion in *Daimler*, joined in by all justices except Justice Sotomayor (who separately concurred in the judgment), began by stating that the Court's decision was "[i]nstructed by *Goodyear*,"¹³⁹ which it called a "pathmarking opinion."¹⁴⁰ It adopted and further elaborated *Goodyear*'s bright-lined due process dichotomy between general and specific jurisdiction, holding that general jurisdiction can be exercised only when a corporation's contacts with the state "are so constant and pervasive as to render [it] essentially at home in the forum state,"¹⁴¹ again presenting a company's state of incorporation and principal place of business as the "paradigm" examples.¹⁴² Although acknowledging that there could be other corporate affiliations with a state that could subject a company to general jurisdiction, the *Daimler* Court specifically rejected the contention that engaging in a "substantial, continuous, and systematic course of business" in a state alone is sufficient for general, all-purpose jurisdiction.¹⁴³ The Court accordingly concluded that Daimler's contacts with California, even when viewed as including its subsidiary MBUSA's very extensive California operations, were not sufficient to make Daimler "at home" so as to subject it to general jurisdiction.¹⁴⁴

In both *Goodyear* and *Daimler*, Justice Ginsburg cited the Court's *Perkins v. Benguet Consol. Mining Co.* decision,¹⁴⁵ discussed above, as the type of a case that would allow a finding that a corporation is at home in a state (Ohio in *Perkins*) for general jurisdiction even if it is not incorporated or does not have its principal place of business there.¹⁴⁶ As Justice Ginsburg construed *Perkins*, Ohio became "a surrogate" for the

139. *Id.* at 122.

140. *Id.* at 136 n.16.

141. *Id.* at 122 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

142. *Id.* at 137 (citing Brilmayer et al., *supra* note 14, at 728).

143. *Id.* at 126 n.4, 138 n.19 (distinguishing the "continuous and systematic" contacts held sufficient for jurisdiction in *International Shoe* as contacts sufficient for "specific" (not "general") jurisdiction, noting that *International Shoe* arose out of the State of Washington's claims for unemployment fund payments tied to the company's agents employed in the state).

144. *Id.* at 136–39. The Court assumed for purposes of its decision that MBUSA's contacts could be imputed to Daimler, but also specifically rejected the "agency" tests utilized by Ninth Circuit. *Id.* The Court held that these tests, of whether the subsidiary is performing in the state services that the parent company would otherwise have to perform itself, and whether the parent company "controls" the subsidiary, could not provide a fair basis for finding general jurisdiction because they would almost always yield affirmative "pro jurisdiction" answers and therefore subject foreign parent corporations to general jurisdiction whenever they have in-state subsidiaries. *Id.*

145. 342 U.S. 437 (1952).

146. *Daimler*, 571 U.S. at 128–31.

company's Philippines principal place of business because World War II forced the company President to set up temporary shop there.¹⁴⁷ At bottom, the *Daimler* Court cemented into place the new “essentially at home” requirement for general jurisdiction first introduced in *Goodyear*:

As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations “so ‘continuous and systematic’ as to render [the foreign corporation] essentially at home in the forum State” . . . i.e., comparable to a domestic enterprise in that state.¹⁴⁸

Daimler thus made clear that the Court was moving to a new, simpler dichotomy in which the concept of “doing business” in a state, even a multi-billion-dollar “substantial, continuous and systematic course of business” in a state,¹⁴⁹ would no longer be part of the analysis for general jurisdiction, applying instead the bright line, “essentially at home” requirement. Justice Ginsburg emphasized that a company cannot fairly be treated as “at home” in every jurisdiction in which it operates on a substantial level, pointing out that otherwise it would make *Daimler* (and thus every large multi-national corporation) subject to general, all-purpose jurisdiction in every state.¹⁵⁰ She also noted the virtue of simplicity and predictability of the new approach in which the paradigm affiliations of incorporation and principal place of business “have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable.”¹⁵¹

Adopting suggestions made for decades by Professors Brilmayer, Twitchell, and others, the *Daimler* opinion portrays general jurisdiction as essentially an exception to the general rule that contacts-based assertions of long arm jurisdiction should ordinarily be confined to situations in which *specific* jurisdiction can be exercised based on a forum state connection to the claims at issue:

[G]eneral and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond limits

147. *Id.* at 128–31, 130 n.8 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 925 (2011); von Mehren & Trautman, *supra* note 14, at 1164).

148. *Id.* at 133 n.11 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

149. *Id.* at 136–38, 138 n.18.

150. *Id.* at 138–39.

151. *Id.* at 136–37.

traditionally recognized. As this Court has increasingly trained on the “relationship among the defendant, the forum, and the litigation,” i.e., specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.¹⁵²

In other words, rather than forming a part of the *International Shoe* minimum-contacts continuum, general jurisdiction should henceforth be viewed as centered on *Pennoyer*-vintage concepts of power over a corporate defendant based on its presence and implied consent in incorporating or operating its principal place of business in the state. While supported by many in the academy, this was of course a large leap from the manner in which the courts across the country had been actually applying general jurisdiction based on a corporation’s simply “doing business” in the state on a continuous and substantial basis.¹⁵³

Three years after *Daimler*, the Supreme Court in *BNSF Railway Co. v. Tyrrell*¹⁵⁴ again applied the new bright-line dichotomy to reject the assertion of Montana general jurisdiction over Federal Employers’ Liability Act (“FELA”) claims brought in Montana state court against the defendant railroad company for injuries sustained outside Montana by two non-resident employee plaintiffs.¹⁵⁵ In another opinion by Justice Ginsburg, the Court held that the company’s contacts with the state consisting of two thousand miles of track and over two thousand employees were insufficient to satisfy due process because neither of the non-resident plaintiffs’ claims arose from the company’s activities in Montana so as to allow for specific, claim-related jurisdiction, and the defendant company was neither incorporated nor had its principal place of business in the state so as to render the company “at home” for general jurisdiction.¹⁵⁶ While again noting that there may be exceptions to the general jurisdiction paradigm of incorporation or principal place of

152. *Id.* at 131–33, 132 n.9 (citation omitted) (“[G]eneral jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum when specific jurisdiction would deny it.” (citing Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 139)). Dean Borchers, for his part, argued that until courts moved to a more permissive approach with specific jurisdiction, it was important to keep general jurisdiction in place to assure that there will always be a place to sue; in his view, the “problems are at least partly about [courts too narrowly defining] specific jurisdiction. . . . [and] finding a rational jurisdictional scheme that encompasses both general and specific jurisdiction.” Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 119, 135. Professor Twitchell made essentially the same point. See Twitchell, *The Myth of General Jurisdiction*, *supra* note 14, at 666.

153. See *supra* note 14 and accompanying text.

154. 137 S. Ct. 1549 (2017).

155. *Id.* at 1553.

156. *Id.* at 1554, 1559.

business in the state (again citing *Perkins* as an example), the Court held that the defendant railroad company's contacts with Montana were not nearly sufficient to render it "essentially at home" as required under the new dichotomy.¹⁵⁷

B. Bristol-Myers Requires that for Specific Jurisdiction, Each Plaintiff's Claim Must Be Connected to the Corporate Defendant's Contacts with the State

In *Bristol-Myers Squibb Co. v. Superior Court of California*,¹⁵⁸ the Supreme Court held, 8-1, in an opinion by Justice Alito, that the California Superior Court lacked personal jurisdiction over 592 non-resident plaintiffs in a group of eight coordinated personal injury "mass actions" filed on behalf of 678 plaintiffs against Bristol-Myers for injuries allegedly caused by the company's blood thinner drug Plavix.¹⁵⁹

Justice Alito's opinion followed the same general and specific jurisdiction dichotomy and analysis set out in Justice Ginsburg's opinions in *Goodyear*, *Daimler*, and *BNSF*. Although it was undisputed that Bristol-Myers maintained extensive and continuous multi-billion-dollar operations in California, including five research laboratory facilities employing approximately 160 employees, 250 sales representatives, and a Sacramento advocacy office, engaged in substantial advertising in California and booked hundreds of millions of dollars in annual sales of Plavix in the state, and presumably billions of dollars of other drug sales, the Court held that the only two states where general jurisdiction could

157. *Id.* at 1558–59. The *BNSF* Court declined to address the plaintiffs' argument that BNSF had consented to jurisdiction in Montana, holding that the issue had not been addressed by the court below. *Id.* at 1559. There is serious question as to whether statutorily required "doing business" registrations that had previously been interpreted to include mandatory consent to *general* jurisdiction can survive the bright-line "at home" requirement for general jurisdiction after *Goodyear*, *Daimler*, and *BNSF*. Post-*Daimler* courts have generally held that such statutes cannot be interpreted to grant general jurisdiction. *See, e.g.*, Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 898 N.W.2d 70, 77–79 (Wis. 2017) (following *Daimler*, the Wisconsin Supreme Court held that state's "doing business" registration and consent to service of process statute will not confer general jurisdiction when corporation defendant is not "at home" in the state); Genuine Parts Co. v. Cepec, 137 A.3d 123, 126 (Del. 2016) (following *Daimler*, the Delaware Supreme Court held that Delaware registration and consent statute will not confer general jurisdiction); *see also* Brown v. Lockheed Martin Corp., 814 F.3d 619, 626–27 (2d Cir. 2013) (similar interpretation of Connecticut registration statute before *Daimler*).

158. 137 S. Ct. 1773 (2017).

159. *Id.* at 1777–79, 1783.

be obtained over the company would be its states of incorporation (Delaware) and headquarters (New York).¹⁶⁰

More fundamentally, the Court held that the California courts lacked specific jurisdiction over the 592 non-residents' claims because none of their claims bore any connection to any Bristol-Myers contacts or activities in California.¹⁶¹ The Court reasoned that under *International Shoe*, specific jurisdiction requires that the plaintiff's suit must actually "aris[e] out of or relat[e] to the defendant's contacts with the forum" such that there is "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."¹⁶² It was undisputed that the company did not manufacture, label, package, or manage the marketing or obtaining of regulatory approval for Plavix in California. Moreover, the *non-residents* did not allege that they were injured in California or that they purchased or were prescribed their Plavix from any California source.¹⁶³

The Court rejected the "sliding scale" test for specific jurisdiction applied by the California Supreme Court, which had provided a more relaxed requirement of state connection to the claims at issue the greater the defendant company's contacts with the state.¹⁶⁴ Under this "sliding scale," the California Supreme Court had found the indirect connection of the 86 California resident plaintiffs and other California residents who were or could be injured by Plavix as sufficient for specific jurisdiction over all the 678 plaintiffs in the "mass actions," given the very substantial Bristol-Myers contacts with the state.¹⁶⁵ Justice Alito's opinion described the "sliding scale" test as "resemble[ing] a loose and spurious form of *general* jurisdiction," holding that for *specific* jurisdiction, an actual connection between the claims and the forum must be shown for each plaintiff, which was missing from the 592 non-residents' claims.¹⁶⁶

160. *Id.* at 1777–78, 1783.

161. *Id.* at 1781.

162. *Id.* at 1780 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

163. *Id.* at 1781–82.

164. *Id.* at 1781.

165. *Id.*

166. *Id.* at 1781. The Court also rejected the proposition that the wholesale distribution of Plavix by McKesson, a California headquartered company, could establish a claim connection for the non-residents because there was no showing that McKesson acted with Bristol-Myers in California in a way that resulted in injury to the non-residents. *Id.* at 1783. As will be discussed in Part III.F., in future cases, there will be greater incentive in discovery to locate such claim-connections. *See, e.g.,* *Slemp v. Johnson & Johnson*, No. 1422-CC09326-02, 2017 WL 9732409 (Mo. Cir. Ct. Nov. 29, 2017) (denying Johnson & Johnson's

Justice Sotomayor dissented, urging that under *International Shoe*, the due process test for specific jurisdiction should be based solely on the three-part test of (1) whether the company, by its contacts or conduct, purposefully availed itself of the privileges or benefits of the forum, (2) whether the claims asserted “arise out of or relate to” the company’s forum conduct and (3) whether the exercise of jurisdiction is “reasonable.”¹⁶⁷ In Justice Sotomayor’s view, Bristol-Myers “d[id] not dispute that it has purposefully availed itself of California’s markets” in a major way for sales of Plavix and many other drugs¹⁶⁸ and the undisputedly substantial contacts between Bristol-Myers and California and its significant marketing of Plavix to California residents meant that the state’s exercise of jurisdiction over Bristol-Myers was certainly not “unreasonable” under *International Shoe*.¹⁶⁹

On a more fundamental level, Justice Sotomayor’s strongly worded dissent warned that the decision could make it more difficult to aggregate claims of plaintiffs across the country whose claims may be worth little alone, making it impossible to bring “nationwide mass actions” against multiple defendants who are “at home” in different states, or against foreign country defendants not headquartered or incorporated in the United States, and thus lead to piecemeal litigation and the bifurcation of claims.¹⁷⁰

III. HOW WILL THE *GOODYEAR*, *DAIMLER*, *BNSF*, AND *BRISTOL-MYERS* QUARTET IMPACT COMPLEX LITIGATION AGAINST CORPORATIONS?

A. *The Decision Quartet Establishes a Dichotomy with Brighter Line Tests for General and Specific Jurisdiction*

The Supreme Court’s decision quartet has created, with strong majorities, a dichotomy between general and specific jurisdiction, with stricter, brighter-line tests for whether a state’s exercise of each will comply with due process. For the assertion of *general* jurisdiction, no longer will merely engaging in continuous and very substantial business

post-verdict motion to dismiss non-Missouri plaintiffs’ product liability claims seeking recovery for ovarian cancer allegedly caused by Johnson & Johnson talcum powder, based on *Bristol-Meyers*, on the ground that the plaintiffs identified in post-trial discovery that Johnson & Johnson had purportedly sourced its talcum powder from a supplier in Missouri).

167. *Bristol-Myers*, 137 S. Ct. at 1785–86 (Sotomayor, J., dissenting).

168. *Id.* at 1787.

169. *Id.* at 1786–87.

170. *Id.* at 1788–89. See *infra* Part III.C. (discussing Justice Sotomayor’s warnings in further detail).

within a state allow for the exercise of general jurisdiction, which now requires that the corporate defendant be essentially “at home.”¹⁷¹ For *specific* jurisdiction, the corporation must have had purposeful contacts with the state that are sufficiently connected to the plaintiff’s claims such that it would be fair and reasonable for the defendant to be required to answer those claims in a court in that state.¹⁷² Moreover, under *Bristol-Myers*, in multiple plaintiff suits, the claims of *each* plaintiff must satisfy this claim-connection requirement.¹⁷³

The dichotomy approach between general and specific jurisdiction should not in and of itself be inherently problematic. The danger is that the move to this new bright-line dichotomy will cause courts to abandon the more flexible continuum approach that *International Shoe* had introduced with its admonition that “the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.”¹⁷⁴

For this reason, when it comes to complex litigation, there should be flexibility in and around the boundaries of the new Supreme Court-defined bright lines. In the case of the general jurisdiction “at home” requirement, for example, the Supreme Court has made clear that there may be situations that will allow for general jurisdiction beyond the paradigm scenarios.¹⁷⁵ To begin with, the Court has already found in *Perkins*, as specifically approved in *Daimler*,¹⁷⁶ that a state into which a corporation temporarily moved the management of its business can satisfy due process for general jurisdiction.¹⁷⁷ One can also imagine other scenarios that litigants may still strongly argue satisfy general jurisdiction: (1) when a corporation announces that it will have two headquarters or principal locations,¹⁷⁸ (2) when a corporation’s executive headquarters is in a different state than its principal operations

171. See *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549, 1558–59 (2017).

172. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

173. *Bristol-Myers*, 137 S. Ct. at 1781.

174. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

175. See *Daimler AG v. Bauman*, 571 U.S. 117, 137–38 (2014).

176. See, e.g., *id.* at 128–29.

177. *Id.* at 128–30; see, e.g., *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448–49 (1952).

178. Amazon has recently made an announcement of such an intention. Nick Wingfield & Patricia Cohen, *Amazon Plans Second Headquarters, Opening a Bidding War Among Cities*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/technology/amazon-headquarters-north-america.html>.

center,¹⁷⁹ or (3) when a conglomerate corporation has large, separately managed business “groups” or “divisions,” each with principal places of business in different locations, and the lawsuit involves one such “group” or “division” that is headquartered in the forum State.¹⁸⁰ Similarly, for large multi-national corporations incorporated and headquartered in other countries, it is proposed that “quasi-at home” general jurisdiction should be found in the state of their United States headquarters (this may be the state of incorporation of the company’s principal United States subsidiary) for injuries caused in the United States to residents here, if necessary, to permit a reasonable forum for such claims.¹⁸¹

Correspondingly, for specific jurisdiction, the requirement that the claim “aris[e] out of or relat[e] to”¹⁸² a corporation’s contacts with the state also presents the potential for flexibility in approach. The Supreme Court has not yet defined the phrase,¹⁸³ which originated in *International Shoe*.¹⁸⁴ As a matter of linguistic construction, it would appear that the phrase allows a choice of two alternative concepts: “arising out of,” which is causal in nature, or “relating to,” which simply denotes a logical connection.¹⁸⁵ We know functionally from *International Shoe* and the Supreme Court’s post-*International Shoe* decisions discussed above that the term requires some purposeful conduct bringing about or connected to the claim at issue such that a defendant would have an appreciation that its purposeful conduct could subject it to jurisdiction in the forum

179. See, e.g., *Wisconsin Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) (finding that Wisconsin Knife Works had its principal place of business in Wisconsin, but its corporate headquarters in Maryland).

180. See Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 137–38 (arguing that general jurisdiction should be applied to appropriate corporate “branches,” but not “twigs”).

181. *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014). Of course, in the last two posited categories, it is possible that plaintiffs may be able to obtain *specific* jurisdiction in the state if it can be shown that the group headquarters or United States headquarters at issue was responsible for managing the development, design, manufacture, marketing, testing or distribution of the complained of product, service or communication. In such a case, “quasi-at-home” general jurisdiction would not be necessary.

182. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017) (quoting *Daimler AG*, 571 U.S. AT 127).

183. The *Bristol-Myers* Court did not define the term “arising out of or related to,” although Justice Alito’s opinion also used synonyms such as “an affiliation” or “connection” with the claim at suit. *Id.* at 1781; see *Daimler*, 571 U.S. at 755. The Court has yet to define the term, and specifically declined to reach the issue in both *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) (deciding the case on a forum selection clause, declining to reach issue of definition of term); and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984) (declining to define the term); Maloney, *supra* note 55, at 1266.

184. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (“[S]o far as those obligations arise out of or are connected with the activities within the state.”).

185. Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 126–29.

for the claim in question.¹⁸⁶ Yet, as discussed more fully below, commentators have differed over how narrowly or broadly they would define the claim-connectedness requirement. Professor Brilmayer would define the claim-contacts sufficient for specific jurisdiction narrowly to avoid forum shopping, requiring that for corporate claim contacts pled in a complaint to “count” toward establishing specific jurisdiction, they must be of such a nature that they would be a substantively relevant part of a claim even if the claim were being pled in a local suit in the company’s home jurisdiction.¹⁸⁷ Other commentators would apply broader tests to avoid depriving plaintiffs of a forum that is fair and reasonable to the defendant.¹⁸⁸

The Ninth Circuit and other courts in some cases have applied an easier-to-satisfy “but for” claim connection requirement that encompasses a broader range of corporate contacts with a state. This “but for” test would permit a finding that the case “arises out of or relates to” a plaintiff’s claims in a state in which some corporate contact(s) occurred “but for” which the plaintiff’s alleged injury sued upon would not have occurred.¹⁸⁹ For example, if a product liability complaint alleging that a

186. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 882–84 (2011); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

187. Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82–84 (1980). Professor Brilmayer argued for a narrow test for specific jurisdiction claim-connection that would protect against allegations of claim-connection simply made as a “hook” for personal jurisdiction in the forum but which were not substantively connected to claim at issue. *Id.* at 82.

188. See, e.g., Twitchell, *The Myth of General Jurisdiction*, *supra* note 14, at 637–39, 662, 680 (suggesting two part test for specific jurisdiction where (1) claim must relate in some way to a defendant’s forum activities and (2) the defendant’s contacts should be the result of seeking economic benefit in the forum such that it would be reasonable for it to anticipate suit relating to the activities); Maloney, *supra* note 55, at 1282, 1294–95 (arguing for a “but for” test on the ground that the Brilmayer “substantive connection” approach is not justified textually and will leave reasonably deserving cases without jurisdiction); Richman, *supra* note 25, at 1345–46. More recent scholarship, after some of the decision quartet cases were decided, also suggests further flexibility in analyzing specific jurisdiction. Genetin, *supra* note 7, at 109–15, 162–67 (suggesting an “interest” analysis continuum for specific jurisdiction that weighs the connections of the case, the corporate defendant and the plaintiffs to the state as well as the state’s interest in providing a forum for the action); Rhodes & Robertson, *supra* note 7, at 207–08, 232–35, 247, 269 (suggesting sliding scale approach to specific jurisdiction, with the claim connection requirement relaxed for corporations that would meet the pre-*Daimler* “doing business” business standards for general jurisdiction).

189. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385–86 (9th Cir. 1990), *rev’d on other grounds*, 499 U.S. 585 (1991) (applying “but for” test to uphold Washington federal court’s jurisdiction over a Washington resident’s suit against an out-of-state cruise line for personal injury in California waters due to the cruise line’s advertising in the state of Washington that attracted the plaintiff and the plaintiff’s purchase of tickets through a Washington travel agent). The Supreme Court reversed *Carnival Cruise Lines* on the

pharmaceutical drug was defective identified that significant and case-relevant clinical trial testing used to obtain regulatory approval for the drug occurred in a state, personal jurisdiction in the state could arguably be based on the “but for” claim connection that the drug would not have been sold “but for” such testing.¹⁹⁰ Alternatively, if tour company tickets for a trip outside the state were advertised and sold in a state, a resident who purchased the tickets in the state could sue the tour company there for injuries that occurred elsewhere.¹⁹¹

Some have criticized the “but for” test as being too broad since it could arguably encompass every contact identified along an incident’s causative chain regardless of how substantially related to the injury.¹⁹² More courts (at least before the decision quartet) have applied either a “proximate cause” or “substantial relation” test, both of which require a more rigorous claim-connection with the forum.¹⁹³ Yet many of the same courts that applied these much stricter rules for *specific* jurisdiction were utilizing the very broad “doing business” tests for *general*

ground that the parties contractually agreed to jurisdiction in the state of Florida, declining to reach the Ninth Circuit’s “but for” analysis. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Courts in the Ninth Circuit have applied the “but for” test as part of a three-part analysis with “purposeful” contact and overall “reasonableness” components as well. *Nakaki v. Caesar’s Entm’t. Operating Co.*, No. LACV12-03942 JAK (AGRx), 2012 WL 12893849, at *3–6 (C.D. Cal. Aug. 24, 2012) (upholding jurisdiction in California federal district over defendant, Nevada hotel company, for California resident’s injury at the Nevada hotel where plaintiff alleged that she was induced to come to the hotel by the hotel’s advertising in California).

190. See, e.g., *Cortina v Bristol-Myers Squibb Co.*, No. 17-CV-00247-JST, 2017 WL 2793808, at *3–4 (N.D. Cal. June 27, 2017) (in mass action concerning alleged injuries from the drug Saxagliptin against defendants Bristol-Myers and AstraZeneca, the court declined to dismiss the claims of the non-California residents under *Bristol-Myers* because, unlike the case of the drug Plavix in the Supreme Court’s *Bristol-Myers* decision, California had a claim-connection with all the out-of-state plaintiffs based on California having been one of the significant sites for allegedly deficient clinical trial reporting for the drug leading to FDA approval).

191. See *Carnival Cruise Lines*, 897 F.2d 377 at 387; *Nakaki*, 2012 WL 12893849, at *3–6; Maloney, *supra* note 55, at 1265, 1276, 1299 (arguing in favor of the “but for” interpretation of “arising out of or relating to”).

192. See Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1462 (1988); Flavio Rose, *Related Contacts and Personal Jurisdiction: The “But For” Test*, 82 CAL. L. REV. 1545 (1994).

193. In *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 580–85 (Tex. 2007), the Texas Supreme Court rejected the “but for” test as too unrestricted. It instead applied a “substantial connection” test to reject specific jurisdiction over a resident’s personal injury suit against a Utah expedition company, despite the defendant company’s extensive in-state advertng having attracted the plaintiff, because the defendant’s alleged negligent conduct causing the injury occurred out of state. *Id.* In the decision, the Texas Supreme Court catalogued the various different tests for the claim-connection requirement adopted by many of the courts across the country. *Id.*

jurisdiction—allowing for a corrective “safety valve” outlet to address poor outcomes associated with a stingy application of specific jurisdiction tests.¹⁹⁴

Now that the Supreme Court has substantially limited when general jurisdiction can be exercised, and thus removed a large portion of this “safety valve,” it is especially important that courts be vigilant in not blindly applying overly restrictive tests for specific jurisdiction that would deprive plaintiffs of access to a reasonable forum.¹⁹⁵ In Part III.E, *infra*, this Article proposes that courts be prepared to apply the somewhat more flexible “quasi-at home” general jurisdiction and “but for” specific jurisdiction approaches, as necessary, to address cases in which deserving plaintiffs would otherwise face deprivation of a reasonable forum.

B. The Decision Quartet Should Not Adversely Impact Personal Jurisdiction for Class Actions

Justice Sotomayor in her *Bristol-Myers* dissent asked the important question of whether nationwide *class actions* may be at risk as a result of the decision quartet,¹⁹⁶ on the ground that corporate defendants will now argue that specific jurisdiction in class actions will require a purposeful connection between a defendant corporation’s contacts with the state and the injuries to *each* of the *absent* putative class members.¹⁹⁷ After all, the Court in *Bristol-Myers* dismissed the cases of *all* of the 592 non-California resident plaintiffs in consolidated mass tort actions on the ground that none of these non-residents’ claims had any connection with the forum state of California, despite there being 86 California-resident plaintiffs in the case whose claims did arise out of their drug purchase and injury in the state.¹⁹⁸ As Justice Sotomayor noted, the issue is an important one, particularly for small value class claims over nationwide misconduct.¹⁹⁹

For the reasons that follow, it is posited that while there may be short term disruption in current nationwide and multi-state class actions

194. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2)*, *supra* note 7, at 131; Rhodes & Robertson, *supra* note 7, at 232–34; Daimler AG v. Bauman, 571 U.S. 117, 132 n.9 (2014) (general jurisdiction is “an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.” (quoting Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2)*, *supra* note 7, at 139)).

195. *See infra* Part III.E.

196. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1789 n.4 (2017).

197. *Id.* at 1789.

198. *Id.* at 1781.

199. *Id.* at 1784, 1789 n.4.

arising from the litigation over the application of *Bristol-Myers* to class actions, there should be little reason for significant concern over the survival of class actions addressing alleged nationwide corporate misconduct, no matter how the decision quartet is construed in application to class actions. Nevertheless, it is important to review the options for class actions because there is no doubt that personal jurisdiction defenses will be, and are being, increasingly asserted in class actions following *Bristol-Myers* and the other quartet decisions.²⁰⁰

To begin with, there are at least three options over the long term that will support personal jurisdiction over a nationwide or multi-state plaintiff class action against one or more defendants even under the strictest reading of the decision quartet:

1) The easiest option, and the one encouraged by the decision quartet, will be to obtain *specific* jurisdiction for the entire multi-state or nationwide class in a state in which the defendant company has designed, produced, tested, or from which it has shipped, the product or packaging, or the state from which the defendant planned, authored, or disseminated the communication that is the subject of the class claims.²⁰¹ For a consumer contract case, it could be the corporation's place of contracting.²⁰²

2) Another option for personal jurisdiction consists of suits in either the "at home" state of incorporation or the principal place of business of the corporate defendant.²⁰³ This approach could add additional states to the specific jurisdiction states as options. Of course, as noted by Justice Sotomayor in her *Bristol-Myers* dissent, if there is more than one defendant with different states of incorporation or principal places of business, the issue can

200. See, e.g., cases collected *infra* notes 216–17; see also Michael Leffel & Aaron Wegryzn, *Jurisdiction Issues Dog Multistate Class Actions*, LAW360 (March 2, 2018, 12:09 PM), <https://www.law360.com/articles/1017610/jurisdiction-issues-dog-multistate-class-actions>; Adam Pollet, Amber Unwala & Jessica Rodgers, *Bristol-Myers Squibb: 1 Year Later*, LAW360 (June 18, 2018, 3:14 PM), <https://www.law360.com/articles/1054768/bristol-myers-squibb-1-year-later>; Neil Tyler & Claudia Vetesi, *Bristol-Myers Squibb: A Dangerous Sword*, LAW360 (April 25, 2018, 2:11 PM), <https://www.law360.com/articles/1037204/bristol-myers-squibb-a-dangerous-sword>.

201. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 921, 923 (2011).

202. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 480 (1985) (company headquarters); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (policyholder's state).

203. See *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549, 1552–53 (2017); *Bristol-Myers*, 137 S. Ct. at 1780; *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014); *Goodyear*, 564 U.S. at 924.

become more complicated, but there should often be overlap in at least one state among the potential specific jurisdiction and general jurisdiction states.²⁰⁴ For multiple corporate defendants who have allegedly conspired or engaged in alleged wrongdoing together, there are also the states where it can be shown that they engaged together in alleged actions upon which the claims are based.

3) For federal securities,²⁰⁵ antitrust,²⁰⁶ ERISA,²⁰⁷ and certain other important federal claims,²⁰⁸ there is nationwide personal jurisdiction available in the federal district courts via nationwide service of process statutes and, therefore, nationwide class actions are potentially available for these significant claim areas.²⁰⁹ The federal district court will also have supplemental subject matter jurisdiction over state law claims joined in such an action.²¹⁰ Indeed, one unintended result of the decision quartet may be to encourage plaintiffs' counsel to search for such federal claims that provide nationwide jurisdiction alongside state law claims.

Aside from these options, there is also the more fundamental option for plaintiffs' class counsel to argue that in a nationwide or multi-state class action context, only the named plaintiffs, not the absent class members, should be considered as plaintiff-parties for purposes of determining the court's jurisdiction over defendants in a class action. Under this approach, the absent class members would not be considered

204. *Bristol-Myers*, 137 S. Ct. at 1784–89 (Sotomayor, J., dissenting). In addition, as noted above, there will be cases to be made for reasoned incremental expansion of the “at home” definition to address, for example, companies with two or more principal places of business or a foreign company with a single, large United States headquarters and principal base of operations that it could be argued should be treated as its “at home” jurisdiction for suits in the United States relating to United States claims.

205. See 15 U.S.C. § 77v(a) (2012); 15 U.S.C. § 78aa (2012).

206. 15 U.S.C. § 22 (2012).

207. Employee Retirement Income Security Act, 29 U.S.C. § 1132(e)(2) (2012).

208. See Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1965 (2012); Comprehensive Environmental Response Compensation & Liability Act, 42 U.S.C. § 9613(e) (2012); FED. R. BANKR. P. 7004(d); Federal Interpleader Act, 28 U.S.C. § 2361 (2012); FED. R. CIV. P. 4(k)(1)(C) (allowing for service in accordance with federal statutes under which cases are brought).

209. See generally *Bristol-Myers*, 137 S. Ct. at 1783 (leaving open the question of whether the Fifth Amendment due process limitations on federal jurisdiction are different than the Fourteenth Amendment limitations for states); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 62–85 (1984).

210. 28 U.S.C. § 1367 (2012).

plaintiffs for the *Bristol-Myers* claim-connection analysis.²¹¹ The Supreme Court has previously held that absent class members may be deemed parties only for some purposes, and not for others.²¹² For example, on the question of determining traditional diversity subject matter jurisdiction in a class action under 28 USC § 1332(a), the Court will only look to the citizenship of the *named* plaintiffs, not to the absent class members.²¹³ There is logic as well to the distinction between: (a) the hundreds of non-resident plaintiffs joined in a single mass tort personal injury action in a *Bristol-Myers*-type case, in which the defendant must investigate, discover, and litigate each joined plaintiff's claim on issues like causation, individual physician's advice, potential misuse, and damages; and (b) a certified class action in which predominant common legal and factual issues are, by definition, mostly focused on the defendant and are presented by the named representative plaintiffs with virtually no participation by, or discovery needed from, out-of-state absent class members. In the *Bristol-Myers*-type "mass action," there is a much greater litigation burden on a defendant haled into a jurisdiction to face hundreds of full-fledged individual claims that do not bear any contacts with that jurisdiction.²¹⁴ In the class action, by contrast, the class should not even be certified unless the issues are found to be so common that they can be effectively and fairly litigated solely by the class representative plaintiffs, which provides another protection to defendants in such cases.²¹⁵

Several post-*Bristol-Myers* federal district court decisions have confined the specific jurisdiction analysis in class actions to the named plaintiffs on essentially these grounds,²¹⁶ while others have applied

211. See *infra* note 217.

212. See *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting); *Devlin v. Scardelletti*, 536 U.S. 1, 7–11 (2002) (finding that absent class members who object to a settlement have standing to appeal without formal intervention as party).

213. See *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 365–67 (1921). This case discusses how only named plaintiffs must meet the traditional complete diversity requirement, not absent plaintiff class members. *Id.*

214. *Bristol-Myers*, 137 S. Ct. at 1776.

215. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 807–10 (1985).

216. See *Molock v. Whole Foods Market, Inc.*, 297 F. Supp. 3d 114, 126–27 (D.D.C. 2018) (allowing jurisdiction over class claims asserted on behalf of non-resident absent class members based on the claims of the named plaintiffs having arisen in the District of Columbia forum State, noting the protections to the defendant accorded by the class certification requirements); *Braver v. Northstar Alarm Services, LLC*, No. 17-0383, 2018 WL 6929590, at *4 (W.D. Okla. Oct. 15, 2018) ("This court joins the majority of other courts in holding that *Bristol-Myers* does not apply to class actions in federal court"); *In re Morning Song Bird Food Litig.*, No. 12CV01592 JAH-AGS, 2018 WL 1382746, at *5 (S.D. Cal. March 19, 2018) (finding *Bristol-Myers* is not applicable to claims of unnamed class members in a class action); *Greene v. Mizuho Bank, Ltd.*, 289 F. Supp. 3d 870, 877 (N.D. Ill. 2017)

Bristol-Myers to dismiss class action claims on behalf of out-of-state residents, principally on the grounds that the Rules Enabling Act, 28 U.S.C. § 2072(b), prohibits Federal Rule 23 from being applied to abridge substantive rights such as a defendant's due process right not to be subject to jurisdiction in a state for any non-resident claims (whether as a party or absent class member) that do not satisfy the tests of either general or specific jurisdiction in the state.²¹⁷

(dismissing claims of non-resident named plaintiff but declining to dismiss Illinois-resident named plaintiffs asserting nationwide class claims in a putative class action); *In re Chinese-Manufactured DryWall Prods. Liab. Litig.*, No. 09-2047, 2017 WL 5971622, at *14 (E.D. La. Nov. 30, 2017) (upholding jurisdiction over Chinese manufacturers and distributors for four nationwide class actions centralized in an MDL proceeding from their original federal transferor districts in Louisiana, Florida, and Virginia, distinguishing *Bristol-Myers* as a “mass tort action[]” of joined individual claims that mostly had no contact with California in contrast to the *Chinese DryWall* defendants’ claim-contacts with each state and emphasizing that the resident named plaintiffs’ claims in the *Chinese DryWall* case had been certified as cohesive under the Rule 23 tests of commonality, typicality, adequacy of representation, predominance, and superiority); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp.*, No. 17-cv-00564 NC, 2017 WL 4224723, at *5–6 (N.D. Cal. Sept. 22, 2017) (denying motion to dismiss for lack of jurisdiction over out-of-state class members in a nationwide class action because only the *named plaintiffs’* claims should be considered for personal jurisdiction). Still other courts have deferred the decision on the personal jurisdiction defense until the time of deciding class certification, an approach that would allow the Court to confirm the truly common and cohesive nature of the proposed named plaintiffs’ representative action. *See, e.g.*, *Broomfield v. Craft Brew All., Inc.*, No. 17-cv-01027-BLF, 2017 WL 3838453, at *15 (N.D. Cal. Sept. 1, 2017) (deferring jurisdictional motion to dismiss nationwide class based on *Bristol-Myers* until the class certification motions are presented, noting that nationwide class may not be able to be certified without class representatives from each state in a putative class action for alleged misleading labeling of beer).

217. *See* *Leppert v. Champion Petfoods USA, Inc.*, No. 18 C 4347, 2019 WL 216616, at *4 (N.D. Ill. Jan. 16, 2019) (the *Bristol-Myers* requirement that each plaintiff must have a claim-connection with the state applies to class actions because “a defendant’s due process rights should remain constant regardless of the suit against him, be it an individual, mass, or class action.”); *Practice Mgmt. Support Servs. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 860–62 (N.D. Ill. 2018) (certifying statewide-only class, applying *Bristol-Myers* to limit the class to in-state residents of Illinois on the grounds that Federal Rules Enabling Act, 28 U.S.C. § 2072(b) (2012), prohibits Rule 23 from abridging a defendant’s substantive rights, including the right not to be subject to claims of non-residents over which the court has no specific jurisdiction); *Mizuho Bank, Ltd.*, 289 F. Supp. 3d at 874 (“Nothing in *Bristol-Myers* suggests that it does not apply to named plaintiffs in a putative class action; rather, the Court announced a general principle—that due process requires a ‘connection between the forum and the specific claims at issue.’” (quoting *Bristol-Myers*, 137 S. Ct. at 1781)); *McDonnell v. Nature’s Way Prods. LLC*, No. 16 C 5011, 2017 WL 4864910, at *4 (N.D. Ill. Oct. 26, 2017); *Wenokur v. AXA Equitable Life Ins.*, No. CV-17-00165-PHX-DLR, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017) (“The Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.”); *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (dismissing out-of-state portions of proposed classes, expressing the court’s belief “that it is more likely than

The Supreme Court's groundbreaking 1985 class action decision in *Phillips Petroleum Co. v. Shutts*,²¹⁸ in which the Court first upheld the very concept of a *state* court adjudicating a *nationwide* class action, also provides some support for analyzing jurisdiction in class actions by reference to the named plaintiffs rather than absent class members, even though the Supreme Court's *Bristol-Myers* decision declined to find the case persuasive with respect to the non-class mass tort plaintiffs at issue in that case.²¹⁹ In *Shutts*, Phillips Petroleum, a Delaware corporation headquartered in Oklahoma, was sued in a Kansas state court class action seeking recovery of unpaid interest on certain delayed gas lease royalty payments.²²⁰ The class action was brought on behalf of a class of lease investors in all fifty states and some foreign countries by three named plaintiffs: Irl Shutts, a Kansas resident, and Robert and Betty Anderson, residents of Oklahoma.²²¹ Although Kansas had only limited contacts with the dispute (99% of the leases and 97% of the investor class members were out-of-state), Phillips did not even contest personal jurisdiction.²²² Rather, Phillips raised Constitutional due process objections to the Kansas court's (1) assertion of nationwide jurisdiction over the absent nationwide (and foreign country) plaintiff class members with which it did not have minimum contacts or consent and (2) determination to apply Kansas substantive law to all claims.²²³

The Supreme Court's two holdings went on to influence how class actions, particularly state court class actions, were to be litigated to this day. On the subject of whether the Kansas *state court* could adjudicate a nationwide class action without first obtaining jurisdiction over absent

not . . . that the courts will apply *Bristol-Myers Squibb* to outlaw nationwide class actions in a form [sic], such as in this case, where there is no general jurisdiction over the Defendants").

218. 472 U.S. 797 (1985). The case was argued by two prominent Supreme Court litigators, Arthur R. Miller and Joel I. Klein. *Id.* at 798. For two prominent early reviews of this groundbreaking case, see John E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein: Phillips Petroleum Co. v. Shutts and the State Multistate Class Action*, 34 U. KAN. L. REV. 255 (1985); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986).

219. *Bristol-Myers*, 137 S. Ct. at 1781–82.

220. *Shutts*, 472 U.S. at 799.

221. *Id.* at 799–801.

222. *Id.* at 804–05, 815; see Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 616 (1987). One might ask why Phillips did not contest jurisdiction in the case, but the reason was most probably because lawyers at the time commonly believed that general jurisdiction arose from a company's continuous and extensive "doing business" in a state, which Phillips no doubt did in Kansas, and the fact that Kansas, like most states, had a foreign "doing business" registration and consent to service of process statute that was assumed to confer jurisdiction on companies registered to do business there.

223. *Shutts*, 472 U.S. at 806, 815–16.

out-of-state class members, the Court, in a 7-1 opinion authored by Justice Rehnquist, held that due process did not require the same type of “minimum contacts” protections with respect to the absent plaintiff class members as with respect to a named defendant.²²⁴ The Court reasoned that the absent plaintiff class members are not burdened in the litigation in the same way as a defendant: they are not haled into court, do not need to fear damages or other penalty, and, most significantly, they are, at least in a money damages action, given actual notice and the right to opt out of the class, and they have the benefit of court approval with an opportunity to be heard for any proposed settlement.²²⁵ Moreover, the Court noted, absent class members are protected by the representative nature of the class action in which the class certification process insures that the named plaintiffs’ claims are common with those of absent class members and that the named plaintiffs will adequately represent them.²²⁶

On the subject of whether a Kansas state court could apply Kansas’s own substantive law to all claims, the Supreme Court agreed with Phillips that due process and the Full Faith and Credit Clause of the Constitution would not allow the application of a forum state’s substantive law to out-of-state lease investors’ claims if the state did not “have a significant contact or significant aggregation of contacts” applicable to each class member for which the law would be applied or, at a minimum, a lack of conflict with the laws of out-of-state class members’ states.²²⁷ The Court remanded the case to the Supreme Court of Kansas to address this choice of law issue.²²⁸ This holding in *Shutts* has led to some well-known decisions in the federal circuit courts reversing class certifications in nationwide class actions when, in addition to other problems, numerous conflicts among potentially applicable state laws were held to preclude a finding of predominance of common issues under Federal Rule 23(b)(3).²²⁹ Thus, wholly aside from *Shutts*’s application to the class action personal jurisdiction question, the choice of law prong of the *Shutts* decision acts as a constraint on

224. *Id.* at 811–12.

225. *Id.* at 809–10.

226. *Id.* at 808–14.

227. *Id.* at 816–18 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

228. *Id.* at 816, 823.

229. *See, e.g., id.* at 818–23 (1985); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741–43 (5th Cir. 1996); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018–19 (7th Cir. 2002). Some courts have upheld multi-state class certifications when different state laws were applied via different plaintiff sub-classes within a single class action. *See, e.g., Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010).

nationwide class actions that could involve multiple different state laws.²³⁰

Although Justice Alito's opinion for the Court in *Bristol-Myers* rejected the plaintiffs' citation of *Shutts* as a basis for allowing California jurisdiction with respect to the 592 individual non-resident plaintiffs' claims in the mass tort action presented in *Bristol-Myers*, on the principal ground that personal jurisdiction over the defendant was never considered by the Court in *Shutts*,²³¹ there is a strong argument for the applicability of the *Shutts* reasoning to absent class members in the context of a multi-state *class action* against a defendant. *Shutts* can be read to support the proposition that, generally, only the *named* plaintiffs claims should be considered in the jurisdictional analysis because the absent class members are not parties to the same degree and are being represented by the named plaintiffs through a rigorous class certification procedure²³² intended to ensure commonality of claims, adequacy and typicality of representation of the class members, and in the case of Rule 23(b)(3) class actions, preponderance of common issues and superiority of the class action to adjudicate the issues presented.²³³ Moreover, as discussed above, absent class members do not present a defendant with the same litigation burdens as individual plaintiffs in terms of discovery or case participation; rather, their claims are represented by the named plaintiffs.

Shortly after *Shutts* was decided three decades ago, one prominent commentator (then Professor, now Seventh Circuit Chief Judge Diane P. Wood) suggested a similar construct for analysis of class action personal jurisdiction over a corporate defendant.²³⁴ To begin with, she suggested, like others in the academy, that "general jurisdiction" should be limited to the one or two states that would be considered the company's "home" to protect against "forum shopping."²³⁵ She also noted that for many class actions, the most logical states for specific jurisdiction would often be, by definition, states where all class members had a claim connection.²³⁶ She then proposed that for what she termed "purely representational" Rule

230. See *Shutts*, 472 U.S. at 821–23.

231. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1782–83 (2017).

232. See *Shutts*, 472 U.S. at 808–09.

233. FED. R. CIV. P. 23(a), (b)(1), (b)(2) & (b)(3); see, e.g., *Sanchez v. Launch Tech. Workforce Solutions LLC*, 297 F. Supp.3d 1360, 1365–66 (N.D. Ga. 2018) (holding that only the named class plaintiffs, not absent class members, should be considered for the court's specific personal jurisdiction analysis (citing *Shutts*, 472 U.S. at 811)).

234. See generally Wood, *supra* note 222, at 597.

235. *Id.* at 614–15.

236. *Id.* at 617.

23(b)(1) and (b)(2) class actions and “small-stakes” Rule 23(b)(3) class actions, a court’s analysis of personal jurisdiction over the defendant should generally focus only on the representative named plaintiffs’ claims, not on the absent class members.²³⁷ By contrast, she proposed that for what she termed “joinder” class actions, where there are larger individual monetary claims and less clear cohesion, the jurisdictional analysis could need to focus on each plaintiff class member.²³⁸

This Article proposes a presumption, not a hard and fast rule, in favor of class action specific jurisdiction being based on solely the named plaintiffs’ claim-connections to the forum state. If there are cases in which a defendant can demonstrate that the forum state has insufficient claim-connection with absent class members, then there could be a due process “reasonableness” defense asserted that could be tested by the actual facts of the case. After all, plaintiff class counsel should not, as a matter of “fair play and substantial justice,” be able to choose a state with which the defendant has had only the most minimal contacts to file a nationwide class action based on only a few in-state named plaintiffs and little else to tie the defendant to the state. Of course, for a nationwide class action, any one state generally will not have a huge percentage of class members versus the entire remainder of the country, but what could be shown to be unreasonable is for the forum state to have an insignificant number of absent class members. Due process requires that the defendant’s contacts must reasonably support the exercise of jurisdiction, taking into account the burdens on the defendant.²³⁹

Most importantly, looking forward, if plaintiffs class counsel are mindful in their forum selection process, the issue of non-resident absent class members should not present significant jurisdictional issues. The issue will not arise at all in cases that are brought in states where there is *general* jurisdiction over the defendant(s) because, by definition, the defendant corporation will be subject to jurisdiction for all purposes in a state in which it is subject to general jurisdiction.²⁴⁰ Moreover, if plaintiffs’ counsel selects a strong specific jurisdiction state for filing the class action—such as where the subject product or communication was designed, produced, or from which it was purposely distributed, for example—the forum selection will necessarily ensure that the defendant’s contacts with the state will be connected to the claims of

237. *Id.* at 615–18.

238. *Id.*

239. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017) (“[T]he ‘primary concern’ is ‘the burden on the defendant.’” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980))).

240. 28 U.S.C. § 1332(c)(1) (2012).

every injured absent class member nationally, also solving any potential *Bristol-Myers* issue completely.²⁴¹ For these reasons, the issue of non-resident absent class members should more often come up in the transitional period, just after *Bristol-Myers* and the other quartet decisions, when there are still already pending class actions that were brought before *Bristol-Myers* and the other decision quartet cases established the new dichotomy approach to personal jurisdiction.

Indeed, there are other protections to prevent plaintiff class counsel from pursuing nationwide or multistate class actions in which absent class members' claims bear no real connection to the forum state. First, *Shutts* makes clear, as later reinforced by subsequent circuit decisions, that due process will prevent application of the forum state's law to a multi-state class action if the class members do not have appropriate connections to the state and there are meaningful differences in the potentially applicable other states' laws.²⁴² Plaintiffs' counsel who attempt to squeeze too many different state laws into one class action risk losing the all-important class certification motion on the ground of lack of predominance of common issues.²⁴³ Bringing a nationwide or multistate class action with different state law subclasses might be one option to attempt to address this issue.²⁴⁴ However, there is also the simple option of class counsel bringing state-wide-only class actions with only state resident plaintiffs. Any such actions could, in most cases, be filed or removed with *minimal diversity* in the appropriate federal district court under the Class Action Fairness Act, 28 U.S.C. § 1332(d) and 28 U.S.C. § 1353.²⁴⁵ Most importantly, if there are multiple such state-wide class actions filed or removed to the federal district courts in different states, as will often be the case if plaintiffs' counsel wishes to cover the entire country or there are competing cases filed in or removed

241. See *Bristol-Meyers Squibb Co.*, 137 U.S. at 1773.

242. See *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 818–23 (1985); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018–19 (7th Cir. 2002); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741–43 (5th Cir. 1996).

243. See *Shutts*, 472 U.S. at 818–23; *In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1018–19 (class certification denied because of, *inter alia*, choice of law differences among nationwide class members); *Castano*, 84 F.3d at 741–43 (same).

244. *Pella Corp. v. Saltzman*, 606 F.3d 391, 392–93 (7th Cir. 2010).

245. See 28 U.S.C. § 1332(d) (2015); 28 U.S.C. § 1353 (2012); Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005). The proposed class will need to satisfy the overall \$5 million amount in controversy requirement and not be subject to the local action exceptions. 28 U.S.C. § 1332(d)(2)–(d)(4) (2015). Traditional diversity jurisdiction is also available under 28 U.S.C. § 1332(a) if there is complete diversity of citizenship of all defendants from the *named* class plaintiffs and the \$75,000 amount in controversy can be met by the named plaintiffs. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 579 (2005); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 366 (1921).

to federal district courts in different states by different counsel, then MDL centralization of the cases for pre-trial purposes under 28 U.S.C. § 1407 can be sought from the Judicial Panel on Multidistrict Litigation (“JPMDL”). As discussed further in Part III.D. *infra*, once centralized by the JPMDL, these cases can be coordinated together for class certification, summary judgment motions and all other motion practice short of trial, and can also be settled on a class basis in, and with the assistance of, the MDL transferee court.²⁴⁶

When the Class Action Fairness Act was passed in 2005, Professor Carol Andrews asked why this federal class action reform effort did not specifically address the personal jurisdiction problems in nationwide class actions, and proposed that a federal statute or the Federal Rules of Civil Procedure provide for nationwide personal jurisdiction for certain defined categories class actions as one solution.²⁴⁷ *Bristol-Myers* explicitly left open the issue of whether Fifth Amendment jurisdictional due process analysis would be different for a federal court than Fourteenth Amendment jurisdictional due process analysis,²⁴⁸ but there would seem to be little doubt that as a matter of pure constitutional law, Congress could enact a statute or approve a new federal rule that would allow a federal court to exercise nationwide jurisdiction for multi-state Class Action Fairness Act cases consistent with the country’s sovereignty.²⁴⁹

The decision quartet is bringing about heightened examination by defendants of class actions to ensure that the defendant(s) have been sued either “at home” or that there is a specific jurisdiction connection between the defendant’s conduct and the forum state with respect to every plaintiff’s claims.²⁵⁰ If the courts and the Supreme Court do adopt a personal jurisdiction analysis in class actions that *presumptively* looks only to the plaintiff class representatives for specific jurisdiction analysis, as proposed in this Article, this should further underscore the important gate keeping function of the class certification motion to

246. See generally John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008).

247. Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 SMU L. REV. 1313, 1383 (2005).

248. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1783–84 (2017).

249. See generally Andrews, *supra* note 247; Sachs, *supra* note 7, at 1346–50. There are federal nationwide jurisdiction statutes for certain very important and often asserted claims such as those under the securities laws, antitrust laws, bankruptcy laws, Employee Retirement Income Security Act, Comprehensive Environmental Response, Compensation, and Liability Act, Racketeer Influenced and Corrupt Organizations Act, and the Federal Interpleader Act. See *supra* notes 205–08 and accompanying text.

250. See *supra* note 200 and accompanying text.

ensure that any proposed class is cohesive enough in terms of commonality, adequacy of representation, typicality of claims, and predominance of common issues to warrant class certification. If the courts go in the other direction, and instead require that each and every absent class member's claim "arise out of or relate to" the defendant's contacts with the state to support specific jurisdiction, then, as discussed above, plaintiffs will nevertheless still be able to support jurisdiction over a corporate defendant for a nationwide or multi-state class action in any "at home" state or strong specific jurisdiction state where the defendant's conduct giving rise to the action occurred.

C. *Jurisdiction for "Mass Actions" Will Now Require that the Corporate Defendant is Either Essentially "At Home" or that its Contacts with the State Are Connected to Each Plaintiff's Claim*

Mass torts often lead to large, complex cases in which numerous plaintiffs are joined, under traditional joinder rules, in what are often termed "mass actions." In these cases, the predominance of individual issues and the large stakes of the joined individuals' claims renders the class action device unavailable. This is the purest form of "joinder" action posited by Chief Judge Wood in her 1987 article, in which she contended that personal jurisdiction should be separately analyzed for each plaintiff.²⁵¹ Mass action complaints will often follow publicity about an alleged injury-causing product defect, mass accident, or other similar scenario in which a large number of injuries have occurred.²⁵²

Prior to *Bristol-Myers*, it was common in product liability or other mass injury scenarios for experienced plaintiff counsel to attract plaintiffs on a multi-state or nationwide basis and then bring suit with all such plaintiffs in a state or federal court in a chosen state. Some would attribute this activity to plaintiffs' counsel "forum shopping" for a favorable "magnet" jurisdiction where it is hoped to obtain more favorable results.²⁵³ Others would attribute the phenomenon simply to cases being referred by counsel across the country to particularly experienced lawyers in given states.²⁵⁴ Whatever the motivation, as

251. Wood, *supra* note 222, at 601–05.

252. Heyburn, *supra* note 246, at 2229–30; see *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 900 (E.D. La. 2012); *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices & Prods. Liab. Litig.*, 704 F. Supp. 2d 1379, 1381 (J.P.M.L. 2010); *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005).

253. See, e.g., Wood, *supra* note 222, at 612, 612 n.39, 614–16.

254. Interestingly, while the *Bristol-Meyers* mass actions were pending in California, many other Plavix product liability cases were contemporaneously filed in or removed to federal courts across the country and centralized as an MDL proceeding in the District of

a result of the decision quartet, plaintiffs' counsel seeking to bring a multi-state or nationwide mass tort lawsuit on behalf of *both* residents and non-residents of the forum state will now need to bring the case in either an "at home" jurisdiction of the defendant(s) under *Goodyear*, *Daimler*, and *BNSF*, or in a state in which the specific contacts of the defendant are connected to the claims of each of the plaintiffs as required in *Bristol-Myers*. While that might sound daunting, and will likely cause some dislocation in already pending pre-*Bristol-Myers* mass actions, the truth is that it should not be a difficult task in most future cases to locate such a state. In addition to the defendants' "at home" states, there are the "strong" specific jurisdiction states, such as where the mass accident occurred, or where the allegedly defective product or misleading statement was designed, produced, tested, or from which it was distributed or disseminated.

But what should no longer occur is the filing of non-residents' claims in a state in which their claims have no meaningful relation. In fact, shortly following the *Bristol-Myers* decision, a number of trial courts granted dismissals of product liability mass tort cases brought on behalf of non-residents.²⁵⁵

Moreover, plaintiffs will often have the option of filing "mass actions" of one hundred or more plaintiffs against a minimally diverse defendant or defendants in the federal district court under the Class Action Fairness Act,²⁵⁶ or filing actions with fewer plaintiffs under traditional diversity jurisdiction.²⁵⁷ If there are any federal claims, an action can also

New Jersey by the JPMDL. *In re Plavix Mktg., Sales Practices and Prods. Liab. Litig.* (No. II), 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013). The non-residents plaintiffs could simply have brought suit in their home states or in any of the various other states with specific or general jurisdiction and joined the MDL proceeding. They probably still can if they bring suit in a state with a savings statute to toll the statute of limitations for their claims. *See, e.g.*, VA. CODE ANN. § 8-34 (1957); 735 ILL. COMP. STAT. 5/13-217 (2018); IOWA CODE § 614.10 (2009). These statutes, with some differences between them from state-to-state, toll the statute of limitations when a claim is filed within the statute of limitations period and there is a pre-merits dismissal of the case after the statute of limitations would otherwise have run.

255. *See, e.g.*, *Siegfried v. Boehringer Ingelheim Pharm., Inc.*, No. 4:16 CV 1942 CDP, 2017 WL 2778107, at *6 (E.D. Mo. June 27, 2017) (dismissing claims of eighty-six non-resident plaintiffs, leaving only a handful of Missouri-resident plaintiffs); *Jordan v. Bayer Corp.*, 4:17-CV-865 (CEJ), 2017 WL 3006993, at *4 (E.D. Mo. July 14, 2017) (dismissing all but seven Missouri plaintiffs and one an Illinois plaintiff, in a case with ninety-four total plaintiffs under *Bristol-Myers*). *But see* *Slemp v. Johnson & Johnson*, No. 1422-CC09326-02, 2017 WL 9732409 (Mo. Cir. Ct. Nov. 29, 2017) (in which the plaintiffs, after *Bristol-Myers* was decided, developed discovery to tie the subject talcum powder to the state of Missouri, thus saving the out-of-state plaintiffs' claims).

256. 28 U.S.C. § 1332(d)(11)(B)(i) (2012).

257. *Id.* § 1332(a)(3).

be filed in the federal district court under federal question jurisdiction.²⁵⁸ All such similar federally filed or removed cases brought in different states can be centralized in a single MDL proceeding pursuant to 28 U.S.C. § 1407. Moreover, there is a growing history of, and precedent for, coordination of virtually all significant pre-trial practice between federal MDL courts and state courts with similar cases.²⁵⁹

The key point is that for most cases, there is little reason to believe that there are not plenty of options open for the filing and economically efficient prosecution of mass tort claims following the decision quartet.

D. MDLs and Federal-State Judicial Cooperation Will Continue to Provide an Avenue for Nationwide Coordination

As noted above, the MDL process will continue to provide an important vehicle for the nationwide centralization of similar class actions, mass actions, and other litigation brought in or removed to the federal district courts located in different states arising out of common alleged wrongful corporate conduct or a common accident or disaster. MDL centralization has been utilized for mass tort,²⁶⁰ business fraud,²⁶¹ consumer fraud,²⁶² environmental,²⁶³ securities,²⁶⁴ antitrust,²⁶⁵ and many other claims involving similar actions pending in different districts.²⁶⁶

258. *Id.* § 1331.

259. *See In re Vioxx Prod. Liab. Litig.*, 360 F. Supp. 2d 1352, 1353–54 (J.P.M.L. 2005); *In re New York Renu with Moistureloc Prod. Liab. Litig.*, No. MDL 1785, CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *2 (D.S.C. May 8, 2008) (memorandum opinion and order regarding documents asserted to be protected by attorney-client privilege or as work product).

260. *See, e.g., In re Vioxx*, 360 F. Supp. 2d at 1354.

261. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 85–86 (D. Mass. 2008) (regarding claims of grossly inflated prices of drugs in industry publications); *In re Humana Inc. Managed Care Litig.*, Nos. MDL-1334, MDL-1364, MDL-1367, MDL-1366, 2000 WL 1925080 (J.P.M.L. Oct. 23, 2000) (seeking centralization of all claims against managed care companies); *In re Humana, Inc. Managed Care Litig.*, No. 1334, 2000 U.S. Dist. LEXIS 5099, at *2 (J.P.M.L. Apr. 13, 2000) (regarding claim that physician financial incentives violate several federal statutes).

262. *See In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367 (N.D. Cal. 2015) (regarding sales of vehicles with engines that emitted nitrous oxide in excess of legal limits despite official testing).

263. *See, e.g., In re Deepwater Horizon*, 739 F.3d 790, 795–96 (5th Cir. 2014) (regarding the 2010 Gulf of Mexico oil spill).

264. *See, e.g., In re Initial Public Offering (IPO) Sec. Litig.*, 277 F. Supp. 2d 1375, 1377 (S.D.N.Y. 2003) (regarding claim of misrepresentations to manipulate the price of issuers’ securities).

265. *See, e.g., In re Vitamin C Antitrust Litig.*, 416 F. Supp. 2d 1352, 1353 (J.P.M.L. 2006) (regarding claims of conspiracy to eliminate competition and price-fixing).

266. Heyburn, *supra* note 246, at 2229–30.

Once an MDL proceeding has been established by the Judicial Panel on Multi-District Litigation, there will typically be later-filed “tag-along” cases that are either transferred to the district court presiding over the MDL proceeding as additional MDL cases or directly filed in the MDL district court.²⁶⁷ Often the MDL judge will ask that the parties consent to the direct filing of such additional tag-along actions directly in the MDL district or at least to accept service of process for such cases.²⁶⁸ However, if the case is not a federal statutory case with nationwide personal jurisdiction, there must be grounds for personal jurisdiction over the defendant(s) in the MDL district in order for the MDL transferee court to adjudicate the case other than for pre-trial purposes unless the defendant(s) consent to jurisdiction.²⁶⁹ Defendants will likely be more vigilant following the decision quartet not to waive any personal jurisdiction defense in consenting to MDL “direct filings” of tag-along cases in an MDL proceeding.²⁷⁰ Nevertheless, the value of the MDL in helping to resolve all *pre-trial* matters and often bringing about full settlement cannot be overstated.²⁷¹

As also noted above, when similar such cases remain in both state and federal courts, there has also now been at least two decades of experience with ad hoc coordination of such cases, with the state and federal judges agreeing to coordinate discovery and motion schedules, hear nearly identical motions in each other’s courtrooms together and work together to organize bellwether trials and other efforts toward a settlement of all or as many of the cases as possible.²⁷² In fact, the JPMDL website has a link dedicated to “Federal and State Coordination,” which is described on the website as “[a] joint project by the National Center for

267. JPML Rule 7.2 (a), titled “Potential Tag-alongs in Transferee Court”, provides that “[p]otential tag-along actions filed in the transferee district do not require Panel action. A party should request assignment of such actions to the Section 1407 transferee judge in accordance with applicable local rules.” J.P.M.L.R. 7.2 (a).

268. See James Beck, *No Basis for Personal Jurisdiction in MDL Direct Filing*, LAW360 (Oct. 31, 2017, 12:48 PM), <https://www.law360.com/articles/979311/no-basis-for-personal-jurisdiction-in-mdl-direct-filing>.

269. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37–40 (1998).

270. Beck, *supra* note 268.

271. See generally UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, CALENDAR YEAR STATISTICS (2016), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2016.pdf (calendar year statistics January through December 2016); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014) (discussing the fee structure for compensating lead attorneys in an effort to not discourage settlement).

272. See generally *In re New York Renu with Moistureloc Prod. Liab. Litig.*, No. MDL 1785, 2008 WL 2338552 (D.S.C. May 8, 2008); *In re Vioxx Prod. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

State Courts . . . and the Federal Judicial Center.”²⁷³ One very prominent example consisted of the federal and state coordination efforts and settlement in the *Vioxx* pharmaceutical cases that were pending in both a federal MDL proceeding in the Eastern District of Louisiana and in a number of state courts, principally in New Jersey and California.²⁷⁴ But there are numerous other examples as well.²⁷⁵

E. Concerns Over Whether There Will Be Instances Where No State Can Offer Jurisdiction for a Nationwide Mass Action after the Decision Quartet

Justice Sotomayor’s dissent in *Bristol-Myers* raises a number of concerns about the ability to bring nationwide mass action cases in a single state:

After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are “at home,” and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? . . . Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, the effect of today’s opinion will be to curtail—and in some cases eliminate—plaintiffs’ ability to hold corporations fully accountable for their nationwide conduct.²⁷⁶

These concerns should certainly be heeded as judges move forward in applying the decision quartet in future cases, and certainly will raise significant issues if the concerns bear out in the crucible of actual litigation experience. However, it is submitted that with respect to most

273. Alan Rothman, *And Now a Word from The Panel: 5 MDL Lessons*, LAW360 (Nov. 28, 2017, 11:17 AM), <https://www.law360.com/articles/988626/print?section=classaction> (citing <https://multijurisdictionlitigation.wordpress.com>).

274. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 608–10 (E.D. La. 2008); *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d at 1353.

275. See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, 704 F. Supp. 2d 1379 (J.P.M.L. 2010); *In re Vioxx Prod. Liab. Litig.*, 650 F. Supp. 2d 549, 551–52 (E.D. La. 2009); Beck, *supra* note 268.

276. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J. dissenting) (citations omitted).

multiple-defendant mass tort suits, there should be (as a due process matter) one or more states other than the defendants' home states in which a nationwide mass action could be brought in the event that the home states themselves do not overlap. As already noted, such states could potentially include, among other places, the state where the subject mass accident occurred, the state where the allegedly harmful product was designed, produced, tested or shipped, or in which the marketing plan was managed or from which other significant case-significant communications emanated, or where the defendants allegedly conspired. In all likelihood, these jurisdictions, together with the defendants' "at home" states, should bring about an appropriate state or states in which to bring suit.

Moreover, in reading Justice Sotomayor's concerns about nationwide actions, we should again ask the very legitimate question of whether indeed a nationwide mass or class action is necessarily best from the standpoint of the parties or the judicial system. In many cases, justice may best be served by locally filed actions in given states that will be tried, if the case does not settle, before a jury of peers in the same state.²⁷⁷ Filing of such localized actions in federal court, whether as a "mass action" under the Class Action Fairness Act, traditional diversity or federal question jurisdiction, will allow for nationwide MDL centralization of similar cases pending nationally in one proceeding for all pre-trial purposes as well as coordination with similar coordinated state cases.²⁷⁸

As for Justice Sotomayor's posited problem of foreign country defendants not incorporated or headquartered in the United States, a serious issue following *Daimler*, a variety of options should be open for suits against such a defendant that has caused harm here. Plainly, the foreign company should be subject to specific jurisdiction in a state in which it has purposefully arranged to distribute its purportedly harmful product or communication, at least for residents of that state. Such a company may also potentially be subject to specific jurisdiction for nationwide claims in any state in which the company's allegedly injurious products or communications were designed, manufactured, tested or distributed from, where the United States advertising or marketing was designed, or in the state of a mass accident for which the

277. In certain prescription drug litigation, for example, where the thought processes of the plaintiff's prescribing doctor and defenses based on the plaintiff's misuse or other pre-existing conditions present important factual issues, localized trials may present the fairest and most effective option for both sides, but numerous plaintiffs with similar suits nationwide would benefit from MDL centralization and state-federal court pre-trial coordination. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

278. See Beck, *supra* note 268.

foreign company is claimed to be responsible.²⁷⁹ Even where separate actions are brought only on behalf of residents injured in the state, federal MDL centralization can be sought for all such suits filed in or removed to the federal district courts, and federal-state coordination can also be achieved when there are also similar state court actions that have not been removed to federal court.²⁸⁰

There is also room allowed by the decision quartet (and good reason) for the courts to more flexibly define the “arising out of or related to” requirement for specific jurisdiction when necessary to prevent unjust loss of access to our courts for claims against foreign country companies for injury occurring here or in other similar circumstances where sensible access to our courts is threatened. As Dean Borchers observed, the courts before the decision quartet were applying simple “doing business” general jurisdiction as a sort of “poorly functioning safety valve” from otherwise unjust outcomes that would otherwise result from using rigid definitions of claim-connection for specific jurisdiction.²⁸¹ Now, with the decision quartet substantially cabining the requirements for general jurisdiction, and instructing that general jurisdiction should be the exception rather than the rule, the courts on a going-forward basis should be vigilant in appropriate cases to allow more flexible application of the specific jurisdiction “arising out of or related to” requirement to ensure access to an appropriate court for suit against corporations while also protecting against forum shopping as occurred in *Bristol-Myers* and other decision quartet cases.

The sole jurisdictional due process defect overturned in *Bristol-Myers* was the inclusion in that case of plaintiffs without any claim connection to the state.²⁸² But this should still allow for a range of approaches to specific jurisdiction so long as the claims of *all* plaintiffs in the case *are* connected to the defendant company’s purposeful contacts with the state. For example, where appropriate to ensure access, courts could apply the broader “but for” claim-connection test that would permit jurisdiction in a state in which one or more corporate contacts occurred “but for” which *all* the plaintiffs alleged injuries would not have

279. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 n.3, 289, 297 (1980) (acknowledging grounds for jurisdiction over auto manufacturer and U.S. importer).

280. 28 U.S.C. § 1407 (2012).

281. Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 131, 139; *see also* *Daimler AG v. Bauman*, 571 U.S. 117, 132 n.9 (2014) (“[A]n imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.” (citing and quoting Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 139)).

282. *See Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1781–82 (2017).

occurred.²⁸³ Particularly if there is no other more reasonable available forum, and if the company has a regular business presence in the state, the “but for” claim-connection test should certainly be fair, reasonable and in conformity with *Bristol-Myers* and prior specific jurisdiction cases.²⁸⁴ The defendant company’s “liberty interest” in being required to respond to claims only in fora in which it could reasonably expect to be sued would be satisfied because every plaintiff’s claim would be “but for” connected to the company’s contacts with the forum state.²⁸⁵ The state would also have an adequate “sovereign” interest in regulating a company with such contacts.²⁸⁶ And, there would be no *Bristol-Myers* forum shopping problem because *all* plaintiffs would be linked by the “but for” claim connection to the forum. State courts may choose to apply a more rigorous claim-connection test as a matter of state law, whether it be a “proximate cause” or “substantial relation” claim-connection test,²⁸⁷ but a court’s decision to use the less rigorous “but for” test in appropriate cases to protect access to its courts for deserving plaintiffs should not present due process issues so long as there is a valid claim affiliation with the state for all plaintiffs’ claims.

Moreover, if the defendant company also does substantial business in the state, it is submitted that such substantial non-claim connections should be permitted to add additional support for the “reasonableness” of the exercise of personal jurisdiction over the company so long as at least a “but for” claim-connection is presented for each individual plaintiff.²⁸⁸

283. See, e.g., *Cortina v Bristol-Meyers Squibb Co.*, No. 17-CV-00247-JST, 2017 WL 2793808, at *4 (N.D. Cal. June 27, 2017) (finding California claim-connection with out-of-state plaintiffs in pharmaceutical product liability case based on California having been one of the significant sites for allegedly deficient clinical trial reporting for the drug leading to FDA approval); *Nakaki v. Caesar’s Entm’t Operating Co.*, 2012 WL 12893849 at *3–6 (C.D. Cal. Aug. 24, 2012) (upholding jurisdiction in California federal district over defendant Nevada hotel company for California resident’s injury at a Nevada hotel where plaintiff alleged that she was induced to come to the hotel by the hotel’s advertising in California).

284. *Rhodes & Robertson*, *supra* note 7, at 208, 247, 269 (suggesting that for corporations with substantial business contacts with the state that the dispute connection requirement be more relaxed than for corporations with single or occasional contacts).

285. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980); *Genetin*, *supra* note 7, at 130–31.

286. *World-Wide Volkswagen*, 444 U.S. at 293.

287. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569 (Tex. 2007) (rejecting the “but for” test as too unlimited and instead requiring a “substantial connection” and cataloguing how different courts across the country have adopted “but for,” “proximate cause,” “sliding scale,” or “substantial connection” tests).

288. Since *Int’l Shoe Co.*, reasonableness has long been an underlying part of due process jurisdictional analysis, stated or unstated. See *supra* Part I.B.3; *World-Wide Volkswagen*, 444 U.S. at 292; *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945); *Genetin*, *supra* note 7, at 121–35.

This approach is different from the “sliding scale” approach utilized by the California Supreme Court and rejected in *Bristol-Myers* because, under this approach, all plaintiffs must have, at a minimum, a “but for” claim connection to the forum state for jurisdiction.

Also, for claims against large foreign-country-headquartered “multinational” corporations for harm caused in the United States, it is proposed that a court could, consistent with due process as articulated in the decision quartet, find that such a foreign company defendant is quasi-at home for general jurisdiction (1) in the state of its United States headquarters, or (2) the state of incorporation or principal place of business of its main United States subsidiary or of its United States subsidiary, division, or group whose product or communication is specifically involved in the alleged harm at issue if specific jurisdiction is somehow not otherwise available.²⁸⁹ In this respect, it should be noted that in *Daimler*, California was *neither* the state of incorporation nor the principal place of business of MBUSA, Daimler’s principal United States subsidiary, and the claims asserted in that case did *not* involve injury in the United States or to United States residents.²⁹⁰

Finally, in today’s era of internet and other similar mass marketing, the *J. McIntyre* fifty-state targeting dilemma should be solved by treating any company’s regular and systematic targeting of product sales and marketing to all fifty states as “purposeful” targeting in any state in which injury to the plaintiff occurs, subject to a “reasonableness” analysis as to the fairness to the defendant of exercising jurisdiction in the particular case.²⁹¹ This solution would ensure that an injured plaintiff has access to an appropriate court to sue for injury caused by a product purposefully marketed to and purchased in the plaintiff’s state, yet afford a reasonableness test before the imposition of jurisdiction in an inconvenient forum.²⁹²

Stated another way, courts should be vigilant to protect against a scenario in which limiting personal jurisdiction to only the “general” or “specific” paradigms has the danger of precluding necessary and appropriate personal jurisdiction when the case comes up just short of the most rigid tests of either paradigm but nevertheless offers fair and reasonable corporate contacts upon which to base the exercise of personal jurisdiction, and presents no problematic forum shopping.²⁹³ One

289. *Daimler AG v. Bauman*, 571 U.S. 117, 120–21, 138–40, 143–44, 146–47 (2014).

290. *Id.* at 120–21.

291. *See supra* Part I.B.2.a.

292. *See Richman, supra* note 25, at 1339–40.

293. *See id.* at 1340–46 (suggesting that a continuum or sliding scale approach to personal jurisdiction would help fill the gaps between the two paradigms of general and specific jurisdiction). For examples of other recently proposed flexible approaches, see

hypothetical example of such a scenario might be the crash over the high seas of an airplane manufactured in France by a company incorporated and with a principal place of business there, operated by a U.S. airline incorporated in Delaware with a principal place of business in the state of Georgia, with both French and New Jersey resident pilots carrying 200+ United States passengers from many different states who took off from a New York airport to Paris before crashing in the Atlantic Ocean. Can one personal injury suit be brought on behalf of all the 200+ United States passengers against the French manufacturer and the Delaware/Georgia airline, along with the United States subsidiaries of those companies, in New York under the decision quartet if the claims are for an alleged defect in the airplane and for alleged negligence of the pilots and maintenance crew? The foreign airplane manufacturer and airline are not both “at home” in any single state under the paradigm definitions. Did each of the companies’ contacts with New York have a sufficient specific jurisdictional claim-connection for all the United States citizens’ claims based on the fact that the passengers all booked this flight to take off from New York, the manufacturer had sold and marketed billions of dollars in planes to U.S. carriers that were often used in New York, the airline created much of its United States advertising in New York and displayed much of it in broadcast media that originated in New York, and, in addition, sells tens of millions of dollars in tickets each year in New York? A prior decision of New York’s highest court permitted such a suit on the old, pre-*Daimler* “doing business” general jurisdiction grounds,²⁹⁴ yet the suit would not pass general jurisdiction muster today under *Daimler* and would probably require a “but for” connection test for specific jurisdiction.²⁹⁵ It would seem appropriate for the Supreme Court to address close cases like these by allowing for a “but for” claim connection test and allowing state and federal courts leeway in exploring the outer limits of the lines drawn in the decision quartet to ensure that access to our courts is not unreasonably or unjustly denied.²⁹⁶

Rhodes & Robertson, *supra* note 7, at 207–08, 247, 269 (proposing that the specific jurisdiction claim-connection requirement be relaxed for a corporation which does substantial business in a state and be more rigorous for a corporation with only a single or occasional contacts); Genetin, *supra* note 7, at 162 (proposing an “interest analysis” approach to specific jurisdiction that would allow greater flexibility).

294. *Bryant v. Finnish Nat’l Airline*, 208 N.E.2d 439, 441 (N.Y. 1965).

295. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

296. Borchers, *The Problem with General Jurisdiction*, *supra* note 26, at 138 (suggesting that there is a “need to build a bridge between general and specific jurisdiction[.]” and that a form of supplemental jurisdiction be allowed with a goal to have a single forum “resolve conclusively all of the parties’ related claims arising out of a common transaction or occurrence.”).

Further undergirding the grounds for this Article's proposed flexibility in application of the decision quartet's new brighter line boundaries is the fact that each of the quartet cases addressed problematic forum shopping in which the plaintiffs had no compelling basis to bring the dismissed claims in the forum state. In *Goodyear*, the forum shopping consisted of the plaintiffs bringing suit in North Carolina against foreign companies whose tire products at issue were not sold in the United States for an accident that occurred in a foreign country.²⁹⁷ In *Daimler*, it was Argentine plaintiffs suing a foreign parent company in California for conduct that occurred in Argentina, when even the company's also-sued principal United States subsidiary was not incorporated, headquartered, or managed in California.²⁹⁸ In *BNSF*, it was two non-resident plaintiffs bringing employment related claims in Montana that did not in any way arise there and in which BNSF was not at home or even "quasi-at home."²⁹⁹ And, in *Bristol-Myers*, it was suits brought in California against Bristol-Myers on behalf of hundreds of non-resident plaintiffs whose claims were totally unconnected with the state even though the company was not at home or quasi-at home

It should be noted that another potential option would be separate suits in federal courts in different states that are centralized into a single MDL proceeding. Federal subject matter jurisdiction could be based on diversity under 28 U.S.C. § 1332(a) or the Multi-Party Multi-Forum Jurisdiction Act, 28 U.S.C. § 1369 (2012), which grants federal *subject matter* jurisdiction and MDL assignment of civil actions involving disasters in which at least seventy-five citizens of multiple states are killed in a single disaster in any state or "other location." § 1369(a)(1).

Yet another potential answer would be Congressional legislation to address overseas aircraft disasters (and perhaps other disasters) involving large numbers of United States citizens and a strong connection to the United States. It could be accomplished by amendment to the Multi-Party Multi-Forum Jurisdiction Act to provide federal nationwide personal jurisdiction as well as subject matter jurisdiction.

Congress can also address potential shortfalls that may occur with respect to foreign company defendants with legislation providing for federal nationwide jurisdiction for foreign companies in the state of the company's United States principal place of business or the state of incorporation or principal place of business of its principal United States subsidiary. See Sachs, *supra* note 7, at 1303. The Court in *Bristol-Myers* explicitly left open the question of whether the Fifth Amendment's due process constraints on federal court personal jurisdiction may allow for broader jurisdictional powers than those allowed for the states. *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1784 (2017) (citing *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102, n.5 (1987)). However, it would seem beyond peradventure that Congress can provide for nationwide personal jurisdiction for a category of cases affecting interstate or foreign commerce. Andrews, *supra* note 247, at 1383–84; Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2)*, *supra* note 7, at 446–48; Sachs, *supra* note 7, at 1303.

297. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918–19 (2011).

298. *Daimler AG v. Bauman*, 571 U.S. 117, 120–21 (2014).

299. *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549, 1553–54 (2017).

there.³⁰⁰ Read in this light, the decision quartet provides greater simplicity and clarity of construct for due process jurisdictional analysis, along with a strong message against forum shopping abuse, and the necessary flexibility to allow personal jurisdiction in a manner that protects access to our courts in accordance with our “traditional conception of fair play and substantial justice.”³⁰¹

F. The Decision Quartet Should Lead to More Intense Early Efforts by Counsel in Complex Cases to Pursue Jurisdictional Discovery and to Reach Early Agreements to Resolve Unnecessary Jurisdictional Disputes

The stricter and brighter line rules of the *Goodyear*, *Daimler*, *BNSF*, and *Bristol-Myers* decisions, as well as the disheartening result in the *J. McIntyre* decision addressing what appears to have been “fifty-state targeting,” should lead to more intense early focus by plaintiffs on personal jurisdictional investigation and discovery if there is going to be any dispute about personal jurisdiction. Often, plaintiffs’ counsel will sue a parent company and as many subsidiaries as counsel believes may have responsibility, be subject to personal jurisdiction and have the necessary financial ability to pay a judgment. The decision quartet places a premium on plaintiffs’ counsel getting this right at the outset, and hence will likely impel efforts at early investigation and discovery of contacts with the forum as well as on whether there are any piercing the corporate veil issues such as alter ego, disregard of corporate formalities, fraud and the like, with respect to corporate subsidiaries. Most importantly, this investigation and discovery should focus on locating a state with strong specific jurisdiction connections such as being the place of creation, design, production, development, distribution, approvals, marketing, advertising, and testing of the alleged injurious product or communication, in addition to the “at home” states of the potential defendant company(ies). After all, *Bristol-Myers* could seemingly have been decided differently if plaintiffs’ counsel would have discovered that Plavix had been invented, developed or manufactured in, or shipped to all states from, California, or if discovery would have shown that the national marketing or advertising plan for the drug had been developed there.³⁰² Similarly, both the plurality and concurring opinions in the

300. *Bristol-Myers*, 137 S. Ct. at 1777–78.

301. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

302. *Bristol-Myers*, 137 S. Ct. at 1779. Trial Order at *1, *Slemp v. Johnson & Johnson*, No. 1422-CC09326-02, 2017 WL 9732409, at *1 (Mo. Cir. Ct. Nov. 29, 2017) is a recent decision in one of multiple product liability cases brought on behalf of non-residents in Missouri alleging that Johnson & Johnson’s talcum powder caused the plaintiff’s ovarian

difficult 4-2-3 decision in *J. McIntyre* indicated that a different result may have been obtained had a better record been presented of the manufacturer's purposeful fifty-state sales efforts.³⁰³

The brighter-line tests provided by the decision quartet should also propel thoughtful counsel on both sides to try to reach agreements that avoid unnecessary jurisdictional disputes. For example, I teach my Complex Civil Litigation students, based on my prior experiences as a long-time large case litigator, that it is often in the defendants' as well as plaintiffs' interest from a cost-effectiveness standpoint to try to reach early agreement on personal jurisdiction issues, where feasible, such as agreeing on just one corporate defendant in a corporate family that is clearly subject to jurisdiction, and dismissing unnecessary affiliates or parent companies, perhaps with the agreement that the dismissed affiliated companies will submit to certain discovery and/or a tolling agreement as part of the dismissal. Counsel for both sides should also discuss potential agreements for plaintiffs to refile in a more appropriate jurisdiction, agreements for 28 U.S.C. §§ 1404(a) or 1406(a) transfers or 1407 centralization in federal cases to an appropriate district or, in the appropriate cases, simply agree on one appropriate federal or state jurisdiction for all plaintiffs.³⁰⁴ It may not be possible to reach agreement in every case, but it will certainly be worth the effort for both sides and the courts.

CONCLUSION

The importance and impact of the decision quartet for complex civil litigation lies in the enunciation of simpler, brighter-line and stricter due process tests for general and specific jurisdiction, and a clear dichotomy between general and specific jurisdiction due process analysis. The decisions should act to protect corporate defendants from certain types of forum shopping that previously stretched jurisdictional limits. For most cases, the decision quartet should not result in the denial of access for

cancer. After *Bristol-Myers* was decided, and defendants moved after a verdict had been rendered in favor of the plaintiff to dismiss the action on the grounds that the out-of-state plaintiff had no claim-connection to Missouri. Plaintiff's counsel developed discovery to tie the subject talcum powder to the state of Missouri, resulting in the trial court denying the motion to dismiss the out-of-state plaintiff's claims.

303. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886 (2011); *id.* at 887, 889 (Breyer, J., concurring).

304. 28 U.S.C. § 1404 (a) (2012) (permitting the transfer of venue to another district in which the case might have been brought "[f]or the convenience of parties and witnesses, [and] in the interest of justice."); 28 U.S.C. § 1406 (a) (2012) (allowing such a transfer to correct a venue defect); 28 U.S.C. § 1407 (2012) (allowing for the transfer of a civil action that involves common questions of fact).

class actions or mass actions. There will often be multiple general jurisdiction and specific jurisdiction options for the filing of nationwide or multi-state class actions and mass actions addressing nationwide misconduct, when warranted, recognizing that state-wide actions may often be better suited given choice-of-law or other local individual problems with a multi-state or nationwide putative class or group of joined plaintiffs. In addition, the procedural devices available to litigants for filing in federal court under the Class Action Fairness Act, traditional diversity and federal question jurisdiction, together with MDL centralization, as well as the growing tradition of federal court-state court cooperation, can be used to provide for efficient centralized resolution of most instances of multiple separate state-resident-only class actions, mass actions, or individual lawsuits arising out of nationwide or multi-state corporate conduct.

Nevertheless, there is the threat of the general-specific jurisdiction dichotomy being applied in an overly narrow way to deny access to our courts in cases that pose no forum shopping abuse and that should, as a matter of fairness and substantial justice, warrant personal jurisdiction. It is these cases that the suggestions offered here are designed to assist.