

THE NEW PRIVITY IN PERSONAL JURISDICTION

Alexandra D. Labav

INTRODUCTION	540
I. THE EVOLUTION OF DUE PROCESS ANALYSIS	543
A. <i>The Presence Test</i>	544
B. <i>The Old Privity</i>	548
C. <i>Implied Consent</i>	549
D. <i>The International Shoe Balancing Test</i>	551
E. <i>The New Privity</i>	554
F. <i>The New Presence</i>	565
II. IMPLICATIONS	573
A. <i>The Jurisdictional Power Grab</i>	573
B. <i>Autonomy, Immunity, and Protection</i>	576
C. <i>Does Form Follow Function?</i>	579
CONCLUSION	581

THE NEW PRIVITY IN PERSONAL JURISDICTION

*Alexandra D. Labaw**

*Personal jurisdiction doctrine should be understood largely in relation to the substantive law. The doctrine makes sense when it is in harmony with state substantive law. It fails to cohere to the extent that it diverges from state substantive law. In the case of products liability law, which was at issue in the most recent personal jurisdiction case to come before the Court, personal jurisdiction doctrine attempts to balance the social obligation to produce safe products with immunity from suit. Until recently, the Roberts Court had failed to harmonize personal jurisdiction with substantive state law; indeed, it had usurped state law. The decision in *Ford Motor Co. v. Montana Eighth Judicial District Court* reverses this trend.*

INTRODUCTION

For over 100 years, a victim injured by a product was able to sue the manufacturer of that product where he was injured. For example, in 1912, Donald MacPherson, who had suffered an accident while driving a Buick Model 10 Runabout, sued Buick Motor Corporation in New York state court.¹ He bought the car from the Close Brothers dealership in Schenectady, New York.² At that time, Buick was headquartered and incorporated in Flint, Michigan.³ In a 1916 opinion that would become the staple of first-year torts classes, then-Judge Cardozo held that Buick could be answerable for a defect in the automobile even though MacPherson had not purchased the car from Buick directly but rather through the intermediary of the Close Brothers dealership.⁴ Privity would no longer be required under New York law.⁵ There is no mention in the decision, nor in any opinion below, of the power of the New York courts to adjudicate the tort in question; this power was taken for granted.⁶ Although

* Ellen Ash Peters Professor, University of Connecticut School of Law. Most sincere thanks to the University of Connecticut law library (especially Anne Rajotte and Maryanne Daly-Doran) and to Sarah Williams for excellent research assistance. This paper was improved greatly through conversations with Jill Anderson, Aditi Bagchi, Lynn Baker, Kiel Brennan-Marquez, Robert Bone, Kevin Clermont, Mike Dorf, Robin Effron, Howard Erichson, Michael Fischl, Amanda Frost, Maggie Gardner, Clare Huntington, Jeremy Paul, Joe Singer, Adam Steinman, Patrick Wooley, and Ben Zipursky, as well as participants in the Cornell and Fordham law faculty workshops. Finally, thanks to the Alabama Law Review editors for their work on the piece.

1. *MacPherson v. Buick Motor Co.*, 138 N.Y.S. 224, 224–25 (App. Div. 1912); Sally H. Clarke, *Unmanageable Risks: MacPherson v. Buick and the Emergence of a Mass Consumer Market*, 23 LAW & HIST. REV. 1, 2 (2005).

2. *MacPherson*, 138 N.Y.S. at 225.

3. See Morgan A. Robinson, *Thirst for the American Dream: The Lost City of Flint*, 32 MICH. SOCIO. REV. 170, 173 (2018).

4. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1055 (N.Y. 1916).

5. Privity was the requirement that the plaintiff have a contractual relationship with the manufacturer in order to sue for a product defect. *Privity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

6. Notably, in 1917 Cardozo ruled that the test for jurisdiction was presence, which is “whether its business is such that it *is* here.” *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917 (N.Y. 1917). The court in that case held that jurisdiction was proper based on the defendant’s course of business in New York. *Id.* at

Buick was probably not “present” in New York as required by the personal jurisdiction test of the times, there was no judicial discomfort in holding a manufacturer to account in the state where the end user was injured.

This rule changed in 2011. Robert Nicastro, who had suffered an accident while operating the McIntyre Model 640 Shear, a machine used to cut metal for recycling, sued the manufacturer of the shear in New Jersey state court.⁷ His employer had purchased the shear from an Ohio dealer, McIntyre Machinery America Ltd.⁸ The machine was manufactured by J. McIntyre Machinery, Ltd., headquartered and incorporated in Nottingham, England.⁹ In a set of opinions that are never going to be considered an example of great judicial craft, the Supreme Court held that Nicastro could not sue McIntyre in New Jersey.¹⁰ The plurality opinions mentioned the substantive law of products liability in passing¹¹ but did not discuss it. Thus, although the law of New Jersey offered Mr. Nicastro substantive relief, he could not obtain it there because there was no direct connection between the shear manufacturer and Mr. Nicastro.¹² The Court essentially imposed a new privity requirement through the Due Process Clause, reversing 100 years of settled law. The Court affirmed this requirement in *Bristol-Myers Squibb Co. v. Superior Court*, which held that a plaintiff’s cause of action must relate to the defendant’s conduct in that state.¹³ In that case, the Court ruled that an Ohio plaintiff could not sue a company in California for an injury that occurred in Ohio.¹⁴

In the 2020 October Term, the Supreme Court stepped back from this new privity requirement when it held that a plaintiff who was injured in Montana by a car purchased elsewhere could sue in Montana.¹⁵ In doing so, it rejected the argument that there must be a tight causal relationship between the plaintiff’s injury and the defendant’s conduct in the state. The majority also rejected a form of reasoning that had come to dominate its personal jurisdiction jurisprudence. Rather than announcing a conceptual categorical rule or engaging in line drawing, the Court articulated a loose standard: there must be a connection between the defendant’s conduct, the plaintiff, and the state.¹⁶ Of

918. It seems at least possible that Cardozo would have held that there was jurisdiction over Buick should that question have been raised.

7. Nicastro sued in 2003, but his case was not decided by the Supreme Court until 2011. *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 578 (N.J. 2010), *rev’d sub nom.* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

8. *Id.*

9. *Id.*

10. *J. McIntyre Mach., Ltd.*, 564 U.S. at 873.

11. *See id.* at 880.

12. *Id.* at 888 (Breyer, J., concurring) (stating that the company’s contacts with New Jersey were not sufficient to exercise jurisdiction).

13. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781–82 (2017).

14. *Id.* at 1782.

15. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021).

16. *Id.* at 1032.

course, the Court was able to fit previous cases—ones which created formal requirements and arbitrary conceptual categories in the unending, and ultimately fruitless, search for a rule-like personal jurisdiction doctrine.¹⁷ The Court's shift back to modes of argument that recall the mid-century comfort with balancing of interests is remarkable.

Personal jurisdiction doctrine has toggled between functional balancing and formal conceptualism. Until *Ford*, recent personal jurisdiction decisions used a method of reasoning that is sometimes described as the "Formal Style"¹⁸ or "classical orthodoxy."¹⁹ This style of legal reasoning is characterized by overuse of conceptual categories to do the work of genuine legal analysis and a reliance on rules that are falsely characterized as logically and inevitably following from general principles.²⁰ These methods, which remind one of nineteenth-century legal opinions, happened to yield a jurisprudence that also harkened back to the substantive requirements of nineteenth-century American law. There was a correlation between method and result: the preference for conceptual categories went along with a preference for immunity from suit. This correlation remains in *Ford*: the opinion returns to functionalist balancing and chooses regulation over immunity. There is no necessary relationship between methods of legal reasoning and regulation or immunity, however. In earlier times, proponents of regulation such as Justice Black preferred personal jurisdiction rules over standards.²¹

There is and ought to be, however, a necessary relationship between personal jurisdiction and the substantive law. This is the part of jurisdictional analysis that has largely been missed in the voluminous writings on the subject. Personal jurisdiction has a structure that makes sense when it is correctly applied: it is entirely responsive to the substantive law which is being litigated by the parties in the forum. This is the basis on which the validity of personal jurisdiction doctrine and its outcomes should be judged.

The Article will proceed in two Parts. The first Part will trace the changes in personal jurisdiction doctrine from the early twentieth century through today. It demonstrates how at the beginning of the twentieth century, judges deciding personal jurisdiction questions relied on abstract conceptual categories divorced from facts on the ground.²² Personal jurisdiction doctrine at that time was not

17. Notably, this nineteenth-century methodology crosses political lines. It characterizes the reasoning of all the Justices at one point or another, with the exception of Justice Sotomayor whose functional approach is consistent.

18. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 36–38 (1960) (contrasting the Formal Style with the Grand Style of legal analysis).

19. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 THEORETICAL INQUIRIES L. 541, 561 (2003).

20. See Grey, *supra* note 19, at 11.

21. See, e.g., *Int'l Shoe Co v. Washington*, 326 U.S. 310, 324 (Black, J., concurring); *infra* Part II.C.

22. This is the orthodox approach to legal reasoning that was critiqued by the legal realists for the same reasons I criticize it here. Grey, *supra* note 19, at 48–49.

only relatively restrictive; it was consistent with equally restrictive state tort law. Over time, the doctrine evolved into a standard that was relatively generous in terms of states' attempts to exercise jurisdiction, although it gave judges a fair bit of discretion to deny jurisdiction as well. This change was consistent with an expansion in state products liability law. More recently, the doctrine has developed a new restrictiveness and a new reliance on essential categories, divorced from reality and increasingly divergent from state law. This divergence, both new and most troubling, was halted in the *Ford* decision.

The second Part will explain the importance of the doctrinal evolution set forth in Part I. First, the adoption of rules moves decision-making to the highest authority, in this case, the Court, thereby taking decisions out of the power of state courts with respect to the operation of their own tort law. This is part of a larger trend of federal overreach, which can be seen in zealous removal and multidistrict litigation.²³ Second, the Court is exercising its power to make a decision with respect to the fundamental question of liberalism, privileging immunity over regulation despite state decisions to the contrary. Third, the shift from balancing to conceptualism in personal jurisdiction is intimately linked with the substantive law.

The Article concludes with a reminder that the Supreme Court's project of controlling state law through the Due Process Clauses ought to be consistent with our federalism.²⁴

I. THE EVOLUTION OF DUE PROCESS ANALYSIS

We begin with a historical review of the development of personal jurisdiction jurisprudence. Early on, personal jurisdiction doctrine was restrictive and relied on abstract categories to effectuate this restrictiveness. So too was state tort law. As states began to regulate business to a greater extent, especially in the area of tort liability for injurious products, personal jurisdiction doctrine evolved into a flexible standard that gave states leeway to effectuate their laws. More recently, the Court has pulled back, reverting to reliance on conceptual categories that fail to live up to critical scrutiny as it develops a more substantively restrictive jurisprudence. These conceptual categories are

23. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1413–14 (2006); Zachary D. Clopton & Alexandra D. Lahav, *Fraudulent Removal*, 135 HARV. L. REV. F. 87 (2021).

24. As defined by Justice Black, “Our Federalism” is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971). For a critical assessment of *Younger's* effect on modern civil rights struggles, see Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2322 (2018) (“If ‘Our Federalism’ is stopping us from fixing our Ferguson, it is time to revisit our federalism.”).

misleading because they give the appearance of a permissive doctrine when in fact the test is quite rule-like.

Most importantly, personal jurisdiction doctrine and state tort law have moved in tandem until recently. In both the nineteenth and twentieth centuries, substantive tort law and personal jurisdiction doctrine transitioned together from a set of rules favoring immunity from suit to a more flexible, standard-based regime favoring state regulation. In the twenty-first century, they parted ways, with serious implications for state tort law and our federal system. *Ford* brings a welcome correction to that trend.

A. *The Presence Test*

In the early twentieth century, personal jurisdiction over a defendant was determined by whether the person (or entity) was present in the state.²⁵ While it is easy to know where a natural person is present because we only have one body, a corporation is not corporeal, and so its location cannot be identified in the same way as that of a human being. Accordingly, with respect to a corporate entity, presence was a conceptual category that did not correspond to the real world. Asking whether a corporation is present in a state is like asking what kind of wings a cat has.

Because conceptual legal rules such as “presence” are divorced from the facts on the ground, they seem arbitrary.²⁶ This point was recognized by judges, particularly Judge Learned Hand, and made in a 1935 article by the legal realist Felix Cohen.²⁷ Cohen argued that the “vivid fictions and metaphors of traditional jurisprudence”—his opening example of these was the presence test for corporate jurisdiction—were actually “poetical or mnemonic devices for formulating decisions reached on other grounds.”²⁸ The use of these devices, he explained, can cause the reader of legal opinions to “forget the social forces which mold the law and the social ideals by which the law is to be judged.”²⁹ Cohen’s core argument was that, contrary to traditional jurisprudence, legal

25. *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917).

26. The rules remind one of the classification system Jorge Luis Borges described in a certain Chinese encyclopedia entitled *Celestial Empire of Benevolent Knowledge*.

On those remote pages it is written that animals are divided into (a) those that belong to the Emperor, (b) embalmed ones, (c) those that are trained, (d) suckling pigs, (e) mermaids, (f) fabulous ones, (g) stray dogs, (h) those that are included in this classification, (i) those that tremble as if they were mad, (j) innumerable ones, (k) those drawn with a very fine camel’s hair brush, (l) others, (m) those that have just broken a flower vase, (n) those that resemble flies from a distance.

JORGE LUIS BORGES, *OTHER INQUISITIONS: 1937-1952* at 103 (1964). Borges concludes: “[O]bviously there is no classification of the universe that is not arbitrary and conjectural.” *Id.* at 104.

27. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–12 (1935). The insight was first noted by Judge Hand in *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930).

28. Cohen, *supra* note 27, at 812.

29. *Id.*

rules ought to be criticized and accounted for by references to questions of “social fact and ethical value.”³⁰

A close reading of the cases Cohen and Hand criticized demonstrates that conceptual categories such as corporate presence did little analytical work. Instead, judges would determine presence by inquiring into the corporation’s agent’s contacts with a given state and the plaintiff. Justice Brandeis explained in 1917: “A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there.”³¹ Because a corporation is not a corporeal person, the legal fiction of presence could only be applied using an “inference” based on the extent of business the corporation was conducting in the state.³² Still, the test had teeth. The presence test lent itself to limiting state court jurisdiction at the Supreme Court level by permitting the imposition of formal requirements that were easy to avoid if the corporation wanted to escape suit. Doing business through an intermediary was one such tactic.

The extent to which the presence test immunized corporations from suit can be seen in the 1917 case *Philadelphia & Reading Railway Co. v. McKibbin*.³³ The railroad was sued in New York by a brakeman who was injured in a New Jersey freight yard.³⁴ The railroad ran lines in Pennsylvania and New Jersey.³⁵ It had no employees in New York or property in the state, but it did sell tickets there through a connecting carrier.³⁶ A customer would buy a ticket from the connecting carrier and that ticket would be good for travel also on the Philadelphia & Reading Railway Company.³⁷ This was not enough to constitute presence, the Court held, because the company was operating through an intermediary and therefore not “doing business” in New York.³⁸

Scratching beneath the thin veneer of the legal fiction of presence is a formal test: the company must do business in the jurisdiction through its own agents, not indirectly. Little scratching need be done to find the rationale. Justice Brandeis, writing for the Court, explained: “Obviously the sale by a local carrier of through tickets does not involve a doing of business within the state by each of the connecting carriers. If it did, nearly every railroad company in the country would be ‘doing business’ in every state.”³⁹ This slippery slope argument is

30. *Id.* at 814.

31. *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917).

32. It is evident from these early cases that the test in *International Shoe*, *infra* Part I.D, was not so revolutionary after all, but rather a restatement of the actual test being applied.

33. *McKibbin*, 243 U.S. at 265.

34. *Id.* at 266.

35. *Id.*

36. *Id.*

37. *Id.* at 267.

38. *Id.* at 268.

39. *Id.*

common in personal jurisdiction opinions that narrow the scope of state power.⁴⁰

Justice Brandeis gave no concrete explanation, and the Court never does, for the ills that would result from railroads being sued wherever they sell tickets. It is certainly possible to construct such arguments, but without support it is difficult to see anything more in the opinion than mere intuition.⁴¹ Even if one agrees with the Court that a company should not be sued *anywhere*, it remains unclear why a company that did significant business in Pennsylvania and New Jersey should not be held to account just over the border in New York, where it sold tickets and where its employee likely lived. The fact that reasonable people would agree that the brakeman should not be allowed to sue the company in, say, California or Alaska does not answer the policy question with respect to neighboring New York merely because the railroad laundered its business through an intermediary.⁴²

Consider another case decided the same month, this time in New York State's highest court, articulating the same test but reaching the opposite result. George Tauza brought an action against a Pennsylvania company that sold coal in New York, had offices there, and employed individuals there.⁴³ The test, Judge Cardozo stated, was “whether its business is such that it *is* here.”⁴⁴ How does one know where a corporation *is*? “[T]here is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here.”⁴⁵ The key difference between *Tauza* and *McKibbin* was the fact that the railroad insulated itself from liability by using an intermediary while the coal company acted through its own agents.⁴⁶ An intermediary immunity rule allows the company to structure its business to avoid suit. The contrary rule allows the state greater regulatory power. As we shall see, that a state court asked to enforce state law chose to enforce obligations, whereas a federal court chose immunity, is a longstanding pattern.

40. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980) (“Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.”).

41. For an example of such a policy analysis, see Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551 (2012) (conducting an economic analysis of personal jurisdiction with respect to products, concluding that the most efficient rule is one permitting consumers to sue where they purchased the product and arguing that manufacturers will vary prices to take increased legal risk into account).

42. Modern common carrier cases do allow third-party ticket sales, accompanied by some other relationship in the state, to give rise to jurisdiction—a situation that does not seem to be intolerable. See, e.g., *Selke v. Germanwings GMBH*, 261 F. Supp. 3d 645 (E.D. Va. 2017). It is tempting here to say that the answer is “federalism,” but of course the fact that there are state lines doesn’t by itself do any analytical work to explain *why*. That is, state lines can matter for some purposes and not others, and the trick is to distinguish those purposes in a reasonable manner.

43. *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 916 (N.Y. 1917).

44. *Id.* at 917 (emphasis added).

45. *Id.* at 918 (citations omitted).

46. *Phila. & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 266 (1917); *Tauza*, 115 N.E. at 917.

The implications of the underinclusive “doing business” rule can be seen in a 1923 case involving a bank that had engaged in significant business in New York through intermediaries.⁴⁷ The Supreme Court held that New York could not exercise personal jurisdiction over the bank.⁴⁸ Justice Brandeis wrote:

The jurisdiction taken of foreign corporations, in the absence of statutory requirement or express consent, does not rest upon a fiction of constructive presence, like ‘qui facit per alium facit per se.’ It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established.⁴⁹

All corporate acts are executed through agents. The Court’s factual predicate that the bank’s “large” business, which consisted of “varied, important and extensive” transactions, was done through intermediaries, did not in itself support the proposition that it should not be held to account in New York for the work of the intermediaries it directed.⁵⁰ It is almost unnecessary to state that “actual presence” of a corporation—which must perforce operate through agents—is as much a legal fiction as “constructive presence.”⁵¹ The difference is in the policy promoted by the two fictions. But the actual presence rule does a lot of work because it means that corporations can insulate themselves from liability by working through an intermediary. This, of course, is what the company International Shoe attempted to do many years later by structuring its sales business through salesmen working on commission.⁵²

Some say that legal fictions are transitional devices, although if so, transitions are long in common law development.⁵³ The objection to the use of a legal fiction “from the point of view of jurisprudence, is not so much that it is untrue—after all, it deceives nobody and has no dishonest purpose—but that it works off the record, without overt legal reasoning, and therefore suppresses principle.”⁵⁴ Realists like Cohen thought that a legal fiction ought not to be accepted as a legitimate justification in a system committed to public, reasoned

47. *Bank of Am. v. Whitney Cent. Nat’l Bank*, 261 U.S. 171, 172–73 (1923).

48. *Id.* at 173.

49. *Id.* The Latin means “he who acts through another does the act himself.”

50. *Id.* This line of reasoning very closely tracks the arguments in *Daimler A.G. v. Bauman*, in which the Supreme Court held that a car company that did billions of dollars of business in California could not be sued there for events occurring abroad. 571 U.S. 117, 139 (2014). The reason was that the company’s business elsewhere in the world was even greater than that in California, rather than, for example, that it was not fair to subject a company to United States jurisdiction over events that occurred in Argentina. *Id.*

51. This was evident at the time. See Calvert Magruder & Roger S. Foster, *Jurisdiction over Partnerships*, 37 HARV. L. REV. 793, 826 (1924).

52. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 313 (1945).

53. L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 368–80 (1930) (describing legal fictions as transitional devices); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 618–21 (2008) (describing procedural legal fictions in early American law).

54. J. H. BAKER, *THE LAW’S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY* 55 (2001).

decision-making.⁵⁵ As we shall see, such fictions resurged in recent cases, mostly to support outcomes limiting jurisdiction and, thereby, state regulation. The modern fictions obscure the true legal test being applied, which a close reading of the cases reveals.

When the Supreme Court rejected the presence test, Justice Stone, writing for the majority, specifically called out the legal fictions that stood in for an analysis of the relationship between the corporation and the forum state in which it was sued.⁵⁶ He explained: “True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents.”⁵⁷ But, the majority opinion went on, “more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.”⁵⁸

The move to permit the exercise of jurisdiction even where the defendant corporation has structured its business precisely to avoid a lawsuit was both a structural move—imposing a discretionary balancing test in place of the more rigid test that did not permit certain kinds of business dealings to be considered for personal jurisdiction purposes—and a substantive move in favor of state regulation.

B. *The Old Privity*

Personal jurisdiction doctrine is not the only doctrine employing this type of reasoning in the early part of the twentieth century. The iteration of the presence rule described in *Bank of America*, which allowed potential defendants to immunize themselves from suit by using intermediaries,⁵⁹ functioned much like privity in tort. Under the privity rule, a person injured by a product could only sue the entity with which they had a direct contractual relationship, which was usually the retailer.⁶⁰ The privity rule of the late eighteenth century privileged formalities, such as a direct contract between the parties, to determine exposure to liability. Both the presence and privity rules allowed businesses to structure their dealings to avoid lawsuits.

Just as the presence rule was rejected in favor of a rule focusing on the defendant’s contacts, the privity rule was rejected in favor of a rule that allowed end-user consumers to sue manufacturers directly for product defects. The

55. See Cohen, *supra* note 27, at 812.

56. *Int’l Shoe*, 326 U.S. at 318.

57. *Id.*

58. *Id.*

59. *Bank of Am. v. Whitney Cent. Nat’l Bank*, 261 U.S. 171, 173 (1923).

60. 63 AM. JUR. 2D *Products Liability* § 407 (2022). For a history of privity and its origins as a doctrine intended to prevent concurrent remedies for the same wrong, see Vernon Palmer, *Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright*, 27 AM. J. LEGAL HIST. 85 (1983).

purpose and effect of both of these changes were to allow the states to regulate conduct that injured people in the state. Legal structures that do not rely on formal requirements and allow the judge to determine the outcome of a dispute even in the absence of consent or clear communication of the parties' desired outcome facilitate regulation.⁶¹

The most famous rejection of the privity limitation is *MacPherson v. Buick Motor Co.*, discussed in the introduction, in which a car purchaser sued the car manufacturer for a defective wheel.⁶² Justifying the change in law, Judge Cardozo explained: "We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow."⁶³ There was no mention in the *MacPherson* opinion of personal jurisdiction over Buick, although the company was both incorporated and headquartered in Michigan.⁶⁴ Under the intermediary immunity rule of the presence test for personal jurisdiction, *MacPherson* should not have been permitted to sue Buick in New York. But he was because of the need for regulation of injurious products.

In the case of privity, the basis for rejecting the old rule was the social obligation to sell safe products rather than a deal struck between consumer and manufacturer.⁶⁵ As we shall see in the next Section, a parallel rationale came to prevail in personal jurisdiction doctrine: the benefit of doing business came with the burden of exposure to liability.

C. Implied Consent

The first cracks in the presence test appeared in interactions between individuals in tort, where the interest of the state in regulation is strongest. Consider the 1927 case of *Hess v. Pawloski*.⁶⁶ In that case, a Massachusetts resident was injured by a Pennsylvanian who was driving through the state.⁶⁷ Would she need to sue him in Pennsylvania in order to obtain a recovery? When *Hess* was decided, there were two bases on which a court could exercise

61. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1692 (1976).

62. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

63. *Id.* at 1053.

64. Robinson, *supra* note 3.

65. Cardozo explained:

[T]he presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

MacPherson, 111 N.E. at 1053. By which he meant the law of torts.

66. *Hess v. Pawloski*, 274 U.S. 352 (1927).

67. *Id.* at 353.

jurisdiction: either the defendant was present in the state, or the defendant had consented to jurisdiction.⁶⁸ The alleged tortfeasor did not fit either of these categories. He had only been in the state of Massachusetts temporarily, gotten into an accident, and was now home in Pennsylvania.⁶⁹ To avoid the perceived unfairness of requiring a victim to travel to the tortfeasor's home in order to sue, the Court created an exception to the presence requirement through the mechanism of "implied consent" to the appointment of the state as an agent for service of process when one travels through the state.⁷⁰

"The difference between the formal and implied appointment is not substantial,"⁷¹ the Court asserted, although there is in fact a significant difference between the two. Formal appointment is based on individual consent; implied appointment is a regulatory tool. The Court did not explain why express and implied consent are the same for purposes of the Due Process Clause, but it did explain why a state can make travel contingent on implied consent. The explanation was rooted in substantive tort law:

Motor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways.⁷²

State substantive law spurred the change in doctrine, as it continued to do throughout the twentieth century.

Every modern personal jurisdiction case decided by the Supreme Court, with perhaps one exception, involves a situation where there was no express consent to jurisdiction.⁷³ The reasoning of the *Hess* opinion demonstrates that what drove the creation of the legal fiction of implied consent was the danger posed by motor vehicles and the belief that states were right to regulate driving on their highways as part of the police power. The Court understood that to deny a state jurisdiction over a visiting motorist would have the effect of limiting that power.⁷⁴

Implied consent was a legal fiction that bridged the transition from the rigid presence test to the more direct regulatory "contacts" standard. It is an example of how the constraints imposed by certain forms of legal reasoning, particularly

68. *Pennoy v. Neff*, 95 U.S. 714, 733 (1877).

69. *Hess*, 274 U.S. at 353.

70. *Id.* at 356–57.

71. *Id.* at 357.

72. *Id.* at 356.

73. That exception is *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding a forum selection clause in contract of adhesion). Consent in that case was not very robust.

74. The reason that federalism as a concept is unhelpful in determining the scope of a state's regulatory power, the Court noted as early as *Pennoy*, is that when one state exercises jurisdiction over a resident of a neighboring state, it potentially infringes on the police power of its neighbor. *Pennoy v. Neff*, 95 U.S. 714, 722 (1877).

of abstract categories unmoored from facts in the world, retain a hold over judges. If a court is unwilling or simply not yet ready to be direct about a change in the law, it can utilize a legal fiction that resembles the previous test but in operation is quite different. Once a court is willing to imply consent and thereby loosen the test, it opens the door to state regulation.

D. *The International Shoe Balancing Test*

In the middle and later twentieth century, standards triumphed over rules, especially in personal jurisdiction. This was a period where balancing tests were the dominant form in federal constitutional law.⁷⁵ But, although modern personal jurisdiction doctrine began life as a balancing test, it has developed into a categorical test that imposes a threshold inquiry and then balances—to the extent it balances—only those cases that can pass the threshold.⁷⁶

The touchstone of modern personal jurisdiction doctrine is the familiar test articulated in *International Shoe v. Washington*⁷⁷ that “in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁷⁸

This general principle required courts to evaluate the relationship between the defendant’s contact with the forum state and the events that gave rise to the claim and, if this relationship was sufficiently strong, to then balance the interests of the state, the defendant, and the plaintiff in permitting the suit to go forward in that jurisdiction. Over time, the general standard was split into two logically separate inquiries: (1) an inquiry into the extent and nature of the defendant’s contacts with the forum state (“certain minimum contacts”) in relation to the claim and (2) an inquiry into whether maintenance of the suit is fair (“fair play and substantial justice”). The fairness inquiry developed to include analysis of five factors, ranging in concreteness,⁷⁹ although, tellingly, it

75. See, e.g., Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 (1992) (“Balancing tests have infiltrated modern constitutional law to the extent that categorical two-tier review is incompletely realized or breaks down.”); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–44 (1987) (stating that balancing “has become widespread, if not dominant, over the last four decades”); *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (requiring balancing of interest in due process determination).

76. Jamal Greene persuasively makes the case that this form, which he calls the “categorical approach,” is ubiquitous in constitutional law. Jamal Greene, *The Supreme Court 2017 Term—Foreword: Rights as Trumps?* 132 HARV. L. REV. 28, 38 (2018). He describes “the core features of the categorical approach: analysis is weighted toward threshold interpretive questions rather than the application of law to fact, and so balancing is notionally understood as exceptional rather than inherent.” *Id.* I think due process analysis is in the same family of approaches.

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

78. *Id.* at 316.

79. These factors are: (i) the burden on the defendant, (ii) the state’s “interest in adjudicating the dispute,” (iii) the “plaintiff’s interest in obtaining convenient and effective relief,” (iv) “the interstate judicial

has been dropped entirely from analysis in Supreme Court opinions over the last eight years.⁸⁰

The test is a standard; it is (relatively) discretionary, flexible, and its application is indeterminate and fact-specific. As a result, like all standards, the minimum contacts test devolves decision-making to the lowest court because the facts of each case are so crucial to the determination and the standard of review of factual findings is generally deferential.⁸¹ We shall see the importance of this observation later.

In his concurrence in *International Shoe*, Justice Black argued that the standard adopted by the Court would inevitably infringe on the states' power to regulate.⁸² "To read this into the due process clause would in fact result in depriving a State's citizens of due process," he explained, "by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation."⁸³ Although the state power was upheld in that case, he wrote, "the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice."⁸⁴ He claimed the problem was that the Court was taking to itself the power to draw the line between obligation and immunity, which he thought would tend "to curtail the exercise of State powers."⁸⁵ What he missed was that a flexible standard could also allow the Court to take into account the importance of state regulation in some cases, a possibility that is foreclosed in a restrictive rule regime.

Justice Black's concerns were realized, but for very different reasons than he predicted. For a long time, the courts continued to enforce the minimum contacts test as a standard that could be interpreted at the lower court level

system's interest in obtaining the most efficient resolution of controversies," and (v) the shared interest of the several States in furthering fundamental substantive social policies. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). The last two factors are the most abstract. Factor tests seem to have become popular in the 1970s. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (re-describing a previous balancing test for procedural due process as a factor test). They are not structurally different from balancing tests but create the appearance of greater constraint on judicial decision-making.

80. *See, e.g., Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781–82 (2017) (addressing only the threshold contacts question); *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014) (eliminating fairness considerations from general jurisdiction analysis); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 883, 886–87 (2011) (addressing only the threshold contacts question).

81. The choice between rules and standards is jurisdictional. Once a rule is determined by the legislature or high court, that decision is binding on all adjudicators. But this jurisdictional choice comes at a cost. The cost is that the rule may sometimes be applied in a way that those with jurisdiction to make the rules would think is a bad outcome. The proponents of the rule-based system are willing to trade off justice in the individual case for the orderly administration of laws, but that does not mean that this is not a trade-off. For further discussion, see Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 540–41 (1988).

82. "None of the cases purport to support or could support a holding that a State can tax and sue corporations only if its action comports with this Court's notions of 'natural justice.' I should have thought the Tenth Amendment settled that." *Int'l Shoe*, 326 U.S. at 324 (Black, J., concurring).

83. *Id.* at 323.

84. *Id.* at 326.

85. *Id.* at 323.

consistently in cases that repeat themselves but allowed flexibility in the individual case.

Signs of where the doctrine would go appeared early. Within ten years of deciding *International Shoe*, the Supreme Court started to move from a true balancing test to a factor test. Most of the cases decided during this period at the Supreme Court level were cases involving business dealings. The most important was *Hanson v. Denckla*.⁸⁶

Hanson involved a fight over how a Delaware trust would be disposed of under a will.⁸⁷ The important facts were that a settlor of the trust had moved from Delaware to Florida, where she died, and her will was adjudicated.⁸⁸ The question was whether a Delaware court would have to recognize the judgment of a Florida court with respect to the Delaware trust. The Supreme Court held that Florida had no jurisdiction over the trust because the settlor's activities in Florida had been "unilateral."⁸⁹ The court explained that while "application of [the minimum contacts] rule will vary with the quality and nature of the defendant's activity," nevertheless, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State."⁹⁰ *Hanson* was part of the shift in which the test moved from being a pure balance of values to a threshold test utilizing a series of factors, among them "purposeful availment." The reason for this, I suspect, is that already in the 1950s, the balancing test seemed too capacious and discretionary.

Almost immediately after it was decided, defendants argued in state and the lower federal courts that they should not be subject to jurisdiction for injuries caused by products travelling across state lines because they did not engage in the predicate "act" required under *Hanson*.⁹¹ At that time, these arguments were unsuccessful in the ordinary products liability case. As I will argue in a moment, this was because the products liability revolution was underway, and the courts wanted to enforce state products liability laws, which largely involved faraway manufacturers like Buick selling to local customers like MacPherson. Indeed, the explicit rationale of these cases was that the company, by benefitting from the market for the sale of goods in the state, had obligated itself to abide by the laws of the state.⁹²

86. *Hanson v. Denckla*, 357 U.S. 235 (1958).

87. *Id.* at 238.

88. *Id.* at 238–39.

89. *Id.* at 253.

90. *Id.*

91. *See, e.g.*, *Waco-Porter Corp. v. Superior Ct.*, 27 Cal. Rptr. 371, 374 (Dist. Ct. App. 1963).

92. *Id.* ("Waco-Porter did purposefully avail itself of the privilege of selling its products to a California distributor for resale to the citizens of the forum State. By doing so it invoked the benefits and protection of California laws and, consequently, it must accept the responsibilities, obligations and duties imposed by the law of the forum State. These include obligations to the purchasers of its products.")

Why the shift away from a looser balancing test to factors? Critics of balancing saw it as a problematic mode of reasoning because people cannot agree on methods of measurement.⁹³ A balancing test essentially restates the problem that it is meant to solve. Whether this is in fact a problem for the operation of courts, I address in Part II of this Article. I conclude that it is not because of the structure of common law reasoning. But first, we continue with our story of the development of the law to the present day. The Court has moved back to the more rigid, conceptual formulation doctrine that was the hallmark of the late eighteenth century and is similarly restrictive. The next two Subparts explain this shift.

E. *The New Privity*

This Subpart considers the shift to the more rule-like regime that focused increasingly on the direct relationship between the plaintiff and the defendant, which I call the new privity. The previous rule allowed a manufacturer to be sued almost everywhere its products injured people. That rule was consistent with substantive state products liability law of the twentieth century. The new privity diverged from substantive state law.

As noted earlier, it was once the case that in order to maintain an action against a manufacturer of a defective product as a matter of state tort law, the consumer had to have a direct relationship with that manufacturer.⁹⁴ Today, that rule has been rejected everywhere.⁹⁵ As a result of the state courts having jettisoned the privity rule that was once part of substantive tort law, one of the central problems for jurisdiction doctrine is that of defective products that were manufactured in one place and injured the victim in another. It is easy to imagine a situation in which the manufacturer has no relationship with the place in which the product was ultimately used and where it caused harm, yet the substantive law of the state creates a cause of action against the manufacturer.

In fact, many personal jurisdiction cases that have made it to the Supreme Court in the last forty years involve this scenario. In *Asahi v. Superior Court*, a part was manufactured in Taiwan, incorporated into a Japanese product, and caused injury in California.⁹⁶ In *Goodyear v. Brown*, the product was manufactured in Turkey, harmed the decedent in France, and suit was brought in North

93. Grey, *supra* note 19, at 50. Some critics also believed that balancing became rigid, formulaic, and unpersuasive. Aleinikoff, *supra* note 75, at 1005.

94. 63 AM. JUR. 2D *Products Liability* § 407 (2021). I note here in passing that there are contrary cases and indeed, the history of products liability law may be wrong in its emphasis on privity—the subject of a current project I am working on.

95. *Id.* But see 63 AM. JUR. 2D *Products Liability* § 410 (2022) for one potential exception. *Keck v. Dryvit Sys., Inc.*, 830 So. 2d 1, 10 (Ala. 2002).

96. *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 102 (1987). Notably, the issue in *Asahi* when it came to the Supreme Court was a contract dispute between *Asahi* and its counterparty, *Chen Shin*, not a tort case. *Id.* at 105–06.

Carolina.⁹⁷ In *McIntyre v. Nicastro*, the product was manufactured in the United Kingdom and injured the plaintiff in his home state of New Jersey.⁹⁸ In *Bristol-Myers Squibb Co. v. Superior Court*, in all likelihood the product was not manufactured either in Ohio, where the plaintiffs ingested it, or California, where they sued.⁹⁹ And in *Ford Motor Co. v. Montana Eighth Judicial District*, the vehicle was manufactured outside of Montana and imported into the state after a secondhand sale.¹⁰⁰

The doctrine that a manufacturer could be sued wherever its product ended up injuring somebody came to prominence in the state courts. The canonical articulation comes from Illinois, in the 1961 case of *Gray v. American Radiator & Standard Sanitary Corp.*¹⁰¹ *Gray* involved a component part manufactured in Ohio by the descriptively named Titan Valve Manufacturing Company.¹⁰² The valve was incorporated into a radiator in Pennsylvania and ultimately exploded in Illinois, injuring Phyllis Gray.¹⁰³ The Supreme Court of Illinois held that the state could exercise jurisdiction over the Ohio valve manufacturer.¹⁰⁴ The reasoning in the case tracks the flexible approach of *International Shoe* and draws on the fundamental principles of products liability law, at that time developing in various states.

The first question that the court had to address was whether the tort “occurred” in Ohio, when the valve was manufactured, or in Illinois, where it exploded. The court resolved this question by choosing both: “[T]he alleged negligence in manufacturing the valve cannot be separated from the resulting injury”¹⁰⁵ The Illinois court underscored the flexibility of the test articulated in *International Shoe* to promote regulation.¹⁰⁶ Notably, when it came to describing Titan’s actual connection with the state, inference won the day: “While the record does not disclose the volume of Titan’s business or the

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

98. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878 (2011).

99. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1777–78 (2017).

100. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1023 (2021).

101. *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 766 (Ill. 1961); *see also* *Shepard v. Rheem Mfg. Co.*, 106 S.E.2d 704, 705, 707 (N.C. 1959) (exercising jurisdiction over out-of-state manufacturer); *Nixon v. Cohn*, 385 P.2d 305, 306, 312 (Wash. 1963) (upholding jurisdiction over out-of-state manufacturer); *Andersen v. Nat’l Presto Indus., Inc.*, 135 N.W.2d 639, 640, 643 (Iowa 1965) (upholding jurisdiction over out-of-state manufacturer); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900, 910 (Okla. 1965) (upholding jurisdiction over out-of-state manufacturer); *Rosenblatt v. Am. Cyanamid Co.*, 86 S. Ct. 1, 3 (1965) (denying stay in case involving Maine corporation accused of stealing trade secrets held to account in New York and stating “jurisdiction on the basis of a single tort has been uniformly upheld”).

102. *Gray*, 176 N.E.2d at 762.

103. *Id.*

104. *Id.* at 767.

105. *Id.* at 762.

106. *Id.* at 766 (“[I]t is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.”). But the court did recognize that an isolated sale would not suffice. *Id.* at 765–66 (“[D]efendant does not claim that the present use of its product in Illinois is an isolated instance.”).

territory in which appliances incorporating its valves are marketed, it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State.”¹⁰⁷ In other words, in a national market, one can assume that there were significant sales.

The Illinois court’s analysis was grounded in products liability law: “[I]t is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.”¹⁰⁸ This argument rather nicely tracks the general thrust of products liability law as described by Justice Cardozo. It is premised on the idea that a manufacturer can be liable for injuries its defective product has caused a consumer. And it reflects both loss-spreading and accident-avoidance rationales in support of products liability law. Ultimately, that view was articulated in the *Restatement (Second) of Torts*, adopted in 1965: “[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained”¹⁰⁹

The rhetorical move of assuming a volume of business could be characterized as shifting the burden of proof to the defendant to show a lack of contact or as creating in effect a rule that any product injuring someone in the state can give rise to jurisdiction. The opinion takes pains to underscore the flexible, fact-specific structure of the doctrine it is applying. In its discussion of precedent, the court explains: “Little purpose can be served, however, by discussing such cases in detail, since the existence of sufficient ‘contact’ depends upon the particular facts in each case.”¹¹⁰ Still, although the rhetoric emphasized flexibility and attention to the individual case, the inference the court was willing to draw could be read as a rule that a company can be sued wherever its product injures someone. This demonstrates that rules do not always favor immunity.

What of the importance of federalism and state sovereignty? The *Gray* court explained: “Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines.”¹¹¹ These changes, in turn, require a change in personal jurisdiction doctrine drawing on the same “unchanging principles of justice” but altering the specific rules arising from them because “jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than

107. *Id.* at 766.

108. *Id.*

109. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (AM. L. INST. 1965); Gregory C. Keating, *Products Liability as Enterprise Liability*, 10 J. TORT L. 41, 46–47 (2017).

110. *Gray*, 176 N.E.2d at 767.

111. *Id.* at 766.

justice is promoted.”¹¹² This is classical common law reasoning, sometimes referred to as the Grand Style¹¹³: a general principle remains in place, but its application is altered to conform to social and economic reality. In this case, that reality is a perceived need for greater state regulation of products.

Given the nationalist description of the American economy that undergirds *Gray*, which is clearly correct, it is surprising that in the Supreme Court case affirming this broad theory of jurisdiction over manufacturers, the Court would underscore the continuing importance of state lines.¹¹⁴ In *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court cited *Gray* for the proposition that *manufacturers* could be held accountable wherever their product ended up injuring someone.¹¹⁵ But, the Court held an eastern *distributor* of a defective automobile could not be held to account in the southwestern state where the accident took place.¹¹⁶ Part of the rationale—although the analysis is somewhat obscure—was the need for limits imposed by state sovereignty. Rejecting fairness as the only criterion, the Court explained that regardless of convenience, ease of travel, and other practical or policy considerations, “the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”¹¹⁷

While seemingly contradictory, it is possible to reconcile a rule that allows jurisdiction over *manufacturers* participating in a national market to be held accountable in the state where their product ended up injuring someone with a rule limiting jurisdiction over more local *sellers* (such as regional distributors) to where the sale took place or in the confines of their market reach. What is the difference between manufacturers and distributors in the eyes of the law? The manufacturer is the entity most likely to know about the defect, most able to fix it, and therefore most likely to be responsive to the deterrent effect of tort law. While suing the distributor may achieve similar goals if the distributor is indemnified by the manufacturer or sues the manufacturer after being sued by

112. *Id.* The Court went on to say:

Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired.

Id.

113. Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255, 259 (1961) (discussing the term Grand Style as used in KARL N. LLEWELYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* (1960)).

114. Or maybe not, in the sense that the Court gave with one hand and took away with the other to create a kind of balance of responsibility.

115. “The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980).

116. *Id.* at 298–99.

117. *Id.* at 294.

the victim, this is a much more indirect route than permitting the victim to sue the manufacturer directly. This was the rationale for jettisoning the privity rule in the early twentieth century, and it makes sense in the personal jurisdiction context for the same substantive reason.¹¹⁸

Indeed, it could be argued that holding manufacturers accountable where their product ended up promotes a national market of safe goods by giving states power. In other words, it promotes nationalism through federalism.¹¹⁹ What are the possible results of such a regime? Holding a national manufacturer accountable wherever the product is distributed could result in the manufacturer adjusting its level of care to the highest applicable standard.¹²⁰ On the other hand, it might result in the manufacturer taking the same standard of care that it would have otherwise if most jurisdictions adopt similar standards for liability or if insurance allows the manufacturer to mitigate its risk from high-exposure jurisdictions. Or perhaps manufacturers would raise prices in jurisdictions with stricter liability regimes, passing on the costs of litigation risk to consumers.¹²¹ Whatever one's position on these questions, the important thing to understand is that jurisdiction and the substantive law are intertwined here—the level of regulation cannot be separated from the jurisdictional regime.

The Court explained that its Due Process Clause jurisprudence “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”¹²² Yet the Court's own standard of predictability was not met by the doctrine it chose to apply. A standard requiring some (unknown) quantum of marketing is not very predictable. By contrast, a rule that a distributor or manufacturer may be called to account wherever its products end up injuring someone, even nationwide, yields a consistent answer.

Indeed, as Justice Blackmun pointed out in his dissent in *World-Wide Volkswagen*, it would be relatively easy to produce a rule for cars and then

118. See *MacPherson v. Buick Motor Co.*, 138 N.Y.S. 224, 227–28 (App. Div. 1912); Keating, *supra* note 109, at 45 (stating that *MacPherson* articulates the still relevant “idea that the prospect of physical harm (harm to persons and their property) ousts contract and brings a non-disclaimable responsibility in tort into play”).

119. As Heather Gerken writes: “It is possible to imagine federalism integrating rather than dividing the national polity.” Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1892 (2014).

120. This is sometimes referred to as the “California effect.” See, e.g., DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 248 (1995); Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 67 (2012). If you favor regulation, this is a good result.

121. Klerman, *supra* note 41. Manufacturers might attempt to limit the sale of their product in some states to reduce the risk of exposure, but this is the least likely scenario. That is because under this rule, if a product arrived in a state even though the manufacturer did not engage a distributor to sell in that state, it would still likely face liability.

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

consider other instrumentalities as they arose.¹²³ Justice Blackmun predicted that under the majority's decision, courts would find themselves "parsing every variant in the myriad of motor vehicles fact situations that present themselves."¹²⁴ But he was wrong because the Court's decision in *World-Wide Volkswagen* became an immunity rule for all dealers sued out of state.¹²⁵

Ultimately a recurrent pattern in common law adjudication is that certain oft-repeated factual scenarios are determined by very fact-specific rules. The general standard purports to fill in the gaps, but in fact does not do so, leaving the law to develop an accretion of rules under the umbrella of a general standard. There are arguments that all this holds together on the basis of some formally realizable general principle,¹²⁶ but as the confusion of generations of law students and the continued writings of law professors attest, those arguments are weak.¹²⁷ For most factual scenarios that end up giving rise to a lawsuit, and car accidents are among the most common of all tort lawsuits, the answers to jurisdictional questions are obvious.¹²⁸

General common law standards cover specific and easily administrable rules like an umbrella. As students of the law, we study the liminal cases because these give us the most insight and are the most interesting, and so the doctrine may seem less administrable to us because of that focus. Yet, this does not mean that coherence is not important or that it is not present in most cases. One does not need to buy into the view that the law is a "seamless web" to seek coherence

123. "Cases concerning other instrumentalities will be dealt with as they arise and in their own contexts." *Id.* at 319 (Blackmun, J., dissenting).

124. *Id.*

125. For example, a search in the Westlaw database for district court cases involving car accidents, dealerships, and personal jurisdiction yielded only thirty-five results. A representative example is *Lightell v. Morris*, in which a Louisiana plaintiff sued a Texas mechanic arising out of a car accident she claimed was caused by the mechanic's negligence in repairing the tortfeasor's brakes. No. 93-1030, 1993 WL 475485, at *2 (E.D. La. Nov. 5, 1993). The court, without analysis, found no jurisdiction over the mechanic. *Id.* at *3. The other thirty-four cases involve jurisdiction over manufacturers, not dealers. Some states immunize dealerships when a manufacturer has been sued (with some nuances). *See, e.g.*, MINN. STAT. ANN. § 544.41 (West 2022).

126. Or at least, so the Supreme Court would have readers think when it asserts that "settled principles regarding specific jurisdiction control this case." *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781 (2017); *see also* *Walden v. Fiore*, 571 U.S. 277, 291 (2014) ("Well-established principles of personal jurisdiction are sufficient to decide this case."). Still, one might argue how it can be that so many cases have been taken up by the Supreme Court recently if the principles are settled and their application in the run of cases clear.

127. *See, e.g.*, Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 530 (1991); Jeremy Waldron, "Transcendental Nonsense" and *System in the Law*, 100 COLUM. L. REV. 16 (2000); Frederick Schauer, *Lawyers and Lawmaking*, 83 MICH. L. REV. 1141, 1141 (1985) (reviewing BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984)). For a sophisticated example of an attempt at field coherence with a functional approach, see Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001). For an attempt to make personal jurisdiction doctrine fit other aspects of constitutional law, see Robin J. Effron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. ONLINE 123 (2018). For further discussion, see *infra* Part II.A.

128. NAT'L CENTER FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2018 DATA, at 8 (2018), http://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf.

in a general rule with specific applications in a particular area of law.¹²⁹ In the difficult cases, the fundamental tensions that are present throughout American law between autonomy and regulation are revealed. The problem is not coherence, but conflicting values.

A jurisdictional rule allowing consumers to sue wherever they are injured is a rule that is easily administered and predictable, allowing manufacturers to make adjustments to their business practices, purchase insurance, and limit the costs of litigating over collateral issues such as where a suit should take place. It also devolves jurisdiction over the ultimate regulation of conduct to state tort law, rather than allowing parties to signal their preferred outcome to the court. One state may immunize manufacturers, for example, while another does not. This can make such a rule costly to manufacturers, which is why they resist it.

The manufacturer jurisdiction rule that was in place for many years, perhaps even since the early 1900s, is now in retreat. Recall that in *MacPherson v. Buick*, the car manufacturer contested the case on the substantive law, not jurisdiction.¹³⁰ But in the twenty-first century that rule was cabined in two key jurisdictional cases: *McIntyre v. Nicastro*¹³¹ and *Bristol-Myers Squibb Co. v. Superior Court*.¹³²

The Supreme Court split in *Nicastro* particularly well illustrates the tension between immunity and regulation and its relationship to the structure of personal jurisdiction doctrine. The plurality opinion in that case, authored by Justice Kennedy, adopted a consent-based rationale for jurisdiction.¹³³ Kennedy explained that jurisdiction is based on the defendant's submission to state authority: "[J]urisdiction is in the first instance a question of authority rather than fairness . . ."¹³⁴ Explicit consent or domicile are the only two clear ways to submit to this authority. Another "more limited form of submission to a State's authority" is when a dispute arises out of activities in the state.¹³⁵ "The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign."¹³⁶ In other words, the defendant must signal to the court that the state has power over the defendant's action in order for the court to be able to exercise jurisdiction.

129. See *infra* Part I.F. See generally Waldron, *supra* note 127.

130. *MacPherson v. Buick Motor Co.*, 138 N.Y.S. 224, 225 (App. Div. 1912). I recognize that it is possible to read too much into litigant strategy. A study of the treatment of personal jurisdiction prior to 1945 would be very valuable. It strikes me that because of various social factors, the fight over personal jurisdiction really began in earnest in the 1980s, along with the development of consumer protection laws and awareness of product liability issues. See Robert L. Rabin, *The Torts History Scholarship of Gary Schwartz: A Commentary*, 50 UCLA L. REV. 461, 476 (2002).

131. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011).

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

133. *Nicastro*, 564 U.S. at 880.

134. *Id.* at 883.

135. *Id.* at 881.

136. *Id.* at 882.

The Court presents authority as based on the defendant's expressed preferences or signaling, such as facts indicating a decision to "purposefully avail" itself of the forum state. At least at a rhetorical level, personal jurisdiction in this view is a search for *ex ante* indicia from the parties as to where they are willing to submit to be sued, rather than an evaluation of when it is desirable to permit the state to regulate conduct. The most direct way to achieve this policy goal is through a privity requirement, which makes contract a predicate to tort. This approach views all relationships, even those created without consent, from the perspective of a bilateral contract.

A second way to think about the consent approach, if it is to limit state power, is as a kind of social contract theory of the state.¹³⁷ Usually, social contract theory of state power imagines some kind of hypothetical agreement to submit to the power of the state, a putative contract that binds present-day members of society.¹³⁸ But in no respected version of this theory is there a mandate of contemporaneous consent by each member of the polity.¹³⁹ By contrast, under Justice Kennedy's theory, relying as it does on the conduct of the defendant, the agreement must be re-created contemporaneously with every transaction in the state and is only evident through the defendant's observable actions. Accordingly, it is hard to say that social contract theory provides a good basis for the notion of consent in *Nicastro*. The theory of state authority in that case is difficult to comprehend as political theory and better understood through some other frame.

A third model of consent in the personal jurisdiction context might be analogized to consent in intentional torts or criminal law.¹⁴⁰ As Kimberley Ferzan explains: "Consent waives a right one has against interference with one's person or property, rendering something that was previously impermissible, permissible."¹⁴¹ This lens for looking at the idea of consent in personal jurisdiction doctrine gives some insight into the proposed test. Instead of understanding personal jurisdiction as a relationship between the defendant and the state, jurisdiction is understood as enabling a relationship between the defendant and the plaintiff, in which the plaintiff is attempting to commit some injury to the defendant (a lawsuit), and the defendant cannot be required to

137. For a critique of this approach as it was used in the early 1900s, see *In re DES Cases*, 789 F. Supp. 552, 580 (E.D.N.Y. 1992) ("The usage of 'consent' in this context was disingenuous. The assertion of jurisdiction in these instances was clearly based on the power of the states to exact obedience to their jurisdictional laws because of their status as sovereign nations with the right to control their borders and activity within their borders.").

138. See Fred D'Agostino, Gerald Gaus, & John Thrasher, *Contemporary Approaches to the Social Contract*, STANFORD ENCYCLOPEDIA PHIL. (Sept. 27, 2021), <https://plato.stanford.edu/entries/contractarianism-contemporary/#Consent>.

139. See *id.* (noting that most modern models of social contract theory rely on hypothetical agreement).

140. Thanks to Aditi Bagchi for this insight.

141. Kimberley Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951, 954 (2018).

submit to that injury absent a waiver of its right to be free from suit.¹⁴² But a lawsuit is not an injury. It is a demand for justice.¹⁴³

Under this theory, state substantive law plays little role. Yet the plaintiff's ability to sue the defendant is based on a state substantive law that gives the plaintiff that right against the defendant. A lawsuit is conceived of as an injury if one takes the initial position that the suit is meritless. This is a problem because what ought to be at issue in a jurisdictional motion is not whether this plaintiff has a cause of action, but rather the power of the state's courts to adjudicate the matter of substantive obligation. In negligence and products liability cases, the foundation of the substantive doctrine is the absence of negotiation in advance.¹⁴⁴

The *Nicastro* plurality still permitted an *inference* of the defendant's consent from its conduct, rather than requiring express consent,¹⁴⁵ although express consent is presented as the paradigm in that case. Contrast this approach with earlier cases. The permissible inference in *Gray* supports regulation, whereas that in *Nicastro* favors autonomy. In *Nicastro*, the inference operates as a higher standard of proof, requiring significant evidence of contacts to allow the state to exercise jurisdiction.¹⁴⁶ By contrast, in *Gray*, the inference favors the state wishing to exercise jurisdiction because the underlying rationale bases jurisdiction on the structure of the economy rather than the defendant's particular choices or signals to the court.

Now consider the intermediary position, espoused by Justice Breyer's concurring opinion in *Nicastro*, which was joined by Justice Alito.¹⁴⁷ The concurrence rejects both the consent approach and the stream of commerce rule as too rigid, describing the consent rule as "seemingly [too] strict" and the

142. The idea of a lawsuit as an injury is a dominant trope, albeit wrongheaded in the cases under discussion. See generally Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000). In some contexts the litigation process may be humiliating, and this can be understood as a type of injury. See Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 533–34 (2020).

143. It should go without saying that to be hauled into court to answer for one's conduct ought not be understood as an injury but rather as part of the functioning of a healthy democracy in which individuals enforce their rights and resolve disputes peaceably. See ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (offering a democratic theory of the role of litigation in the United States).

144. An exception in some jurisdictions allows negligence to be waived by advance contracting. See, e.g., *Thompson v. Hi Tech Motor Sports, Inc.*, 945 A.2d 368, 377 (Vt. 2008) (enforcing waiver of negligence liability in context of motorcycle test ride).

145. The Court explained that from some conduct "it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011).

146. For example, the plurality says "there is no allegation that the distributor was under J. McIntyre's control," although they shared a name and "no more than four machines (the record suggests only one), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey." *Id.* at 878 (citation omitted). But the plurality does not mention the cost of the machine, which was very high, or the evidence that the company wanted to sell its product throughout the United States. *Id.* at 897–98 (Ginsburg, J., dissenting).

147. *Id.* at 887–93 (Breyer, J., concurring).

stream of commerce as “absolute.”¹⁴⁸ It recognizes that in application both of these rules suffer from the problem plaguing all rules: underinclusiveness and overinclusiveness. This commonality exists despite the fact that the two rules have very different approaches to the purpose of law. In place of both choices, these Justices offered a much narrower, fact-limited rule, which, given its scope, is likely to be under or overinclusive less of the time. That rule is that the single sale of a product is not enough to give rise to jurisdiction.¹⁴⁹ Although the concurrence pays lip service to the relational, fact-specific standard articulated in *International Shoe*,¹⁵⁰ it more closely adheres to the common law model of a narrow, fact-specific rule nested in the broad general standard.

This “nested” model also best describes another recent personal jurisdiction decision: *Bristol-Myers Squibb Co. v. Superior Court*.¹⁵¹ That case is a caution against relying too heavily on the fact-specific flexibility of the standard articulated in *International Shoe* to understand the structure of personal jurisdiction doctrine today.

Bristol-Myers Squibb was a products liability case involving plaintiffs who ingested the drug Plavix in various states, including Ohio and Texas, but wanted to sue in California for (apparently) strategic reasons.¹⁵² The pharmaceutical manufacturer had significant contacts with California, used a nationwide distribution scheme, and conceded that it was subject to suit by California residents who alleged that the drug injured them.¹⁵³ Under the old version of general jurisdiction, there would have been jurisdiction over the drug manufacturer for any claim. But instead, the Court imposed a new version of privity, requiring a relationship between the defendant and *this particular* plaintiff. The state could not exercise jurisdiction, the Court held, based on a version of the test for personal jurisdiction requiring an “affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.”¹⁵⁴ In other words, the Ohio and Texas plaintiffs needed to form a relationship with the manufacturer *in California*, such as having bought or taken the drug there.¹⁵⁵ The Court did not consider whether it was fair to exercise jurisdiction over the manufacturer in California with

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

149. *Id.* at 888 (Breyer, J., concurring) (“None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient.”).

150. *Id.* at 891 (describing the relationship test and the requirements of minimum contacts and purposeful availment).

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

152. *See id.* at 1775–76.

153. *Id.*

154. *Id.* at 1776.

155. *Id.* at 1782 (“The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State.”).

respect to out-of-state plaintiffs' claims. In previous decades, such concerns were of higher importance.¹⁵⁶

The Court insisted that its analysis was a “straightforward application” of “settled principles of personal jurisdiction.”¹⁵⁷ But that protestation expresses a key anxiety about uncertainty in legal analysis. It would not need to be said if the application were straightforward. This decision instead produces a new sub-rule: personal jurisdiction requires that the plaintiff purchase the product in the forum state. *Ford*, the latest contribution to this line of cases, holds that the plaintiff being injured in the forum state is sufficient.¹⁵⁸

That this sub-rule wasn't evident before, or at least that there was an alternative analysis available, is proven by the fact that the jurisdictional issue in *Bristol-Myers Squibb* was litigated all the way to the Supreme Court with competing views below. The Court maintains the appearance that a general standard is still applicable, but increasingly very specific sub-rules are articulated and the general standard provides less and less justification for the law as it is applied. Notably, with the exception of *Ford*, the new sub-rules all tilt in one direction—to block jurisdiction.

The foregoing is a familiar pattern. The sub-rule is consistent enough with products liability law as applied in the *Bristol-Myers Squibb* case because the Ohio plaintiff can still sue in Ohio, and products liability law permits the injured party to sue even if they lack a direct relationship with the manufacturer.¹⁵⁹ But it creates a disjuncture with products liability law in other cases that are likely to arise.¹⁶⁰ To arrive at this destination, the Court ignores significant aspects of the old standard, such as the role of fairness and state interests (both factors tending towards regulation), while it emphasizes factors that sound more in immunity, particularly the defendant's direct relationship with the plaintiff, without even

156. In earlier cases, the Supreme Court focused more on the state's interests in regulation. See *Lee-Hy Paving Corp. v. O'Connor*, 439 U.S. 1034, 1037 (1978) (Powell, J., dissenting) (asserting that personal injury cases should not be decided far from the place of injury because local jurors are better able to understand testimony about local landmarks and other factors “traditionally considered under the doctrine of *forum non conveniens*”); *Watson v. Empps. Liab. Assurance Corp.*, 348 U.S. 66, 72–73 (1954) (asserting importance of state interest in “safeguarding the rights of persons injured there” in case involving insurance contract made outside the state by entities outside the state).

157. *Bristol-Myers Squibb*, 137 S. Ct. at 1783; *id.* at 1781 (“Our settled principles regarding specific jurisdiction control this case.”).

158. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026–28 (2021).

159. *Bristol-Myers Squibb*, 137 S. Ct. at 1783. It would be interesting to see how this same set of arguments would play out if the allegations were that the company designed the injurious product in the state. Would the state's interest in regulating in that scenario be considered enough to overcome the absence of a direct relationship between the Ohio plaintiff and the drug manufacturer? An individualist approach to the rule would deny jurisdiction even in that case.

160. See *infra* Parts II.B and II.C; Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1417–33 (2018) (describing cases limiting access to justice through jurisdiction doctrine). For example, *Ford* argues that a plaintiff cannot sue it in the state of injury because the *Ford* vehicle that allegedly caused that injury was first sold elsewhere.

seriously taking into consideration the interests of the state. This is the new privity.

F. The New Presence

The new privity represents one mode of reasoning in which rules are nested in a broader principle such that over time reference to the broad principle recedes in favor of simply applying the rule. Now we turn to a different way in which rules are introduced into the system through the medium of conceptual categories that have little relationship to facts in the world. The new test for general jurisdiction is such a rule, harkening back to the much-maligned presence test of the early 1900s. This new rule gives life to Judge Cardozo's observation: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."¹⁶¹

If a litigant is subject to general or "all-purpose" jurisdiction in a forum, that person or entity can be sued for any claim, whether or not that claim bears a relationship to the forum.¹⁶² Human beings are subject to all-purpose jurisdiction in their domicile and wherever they were served with process.¹⁶³ Until recently, the rule for corporations was that they could be sued in places where they had "continuous and systematic" contacts that were "so substantial and of such a nature as to justify" subjecting the entity to suit.¹⁶⁴ The doctrine applied to human beings is a rule; the doctrine applied to juridical persons (corporations) was a standard.

In only one case has the Supreme Court upheld general jurisdiction over a corporation when it was contested.¹⁶⁵ This case was *Perkins v. Benguet Consolidated Mining Co.*, in which a company incorporated and with a principal place of business in the Philippines was sued in Ohio, by a nonresident of Ohio, on claims related to her ownership of stock in the company.¹⁶⁶ As it happened, the company's mining operations were halted because the Philippines was occupied by the Japanese.¹⁶⁷ The president of the company, who had originally been from Ohio, moved home during this period and conducted such corporate business

161. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

162. Steinman, *supra* note 160, at 1409.

163. *Id.* at 1426.

164. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317–18 (1945) ("[T]here 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."). In truth, as the careful reader of the parenthetical sentence will note, the opinion in *International Shoe* did not quite announce this as a rule but rather cited with approval instances where the rule had been applied and appeared in so doing to be claiming it has always been the rule.

165. But it is important to note that in many cases brought against out-of-state manufacturers, they have not contested jurisdiction. For example, in *Goodyear Dunlop Tires Operations, S.A. v. Bronn*, discussed later, Goodyear did not contest jurisdiction—only its Turkish subsidiary did. 564 U.S. 915, 921 (2011).

166. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438–39 (1952).

167. *Id.* at 447.

as there was (after all, the mines had closed due to the war and occupation) from Ohio.¹⁶⁸ This, the Supreme Court said, was sufficient for the company to be sued for any purpose in Ohio.¹⁶⁹

In many other cases, the Court has reminded the lower courts that intermittent or limited corporate contacts cannot give rise to general jurisdiction. For example, the fact that a Peruvian company entered into a contract in Texas to buy helicopters and some training services did not give rise to general jurisdiction over that Peruvian company in Texas.¹⁷⁰ Similarly, in an early case, a contract entered into in Indiana was held not to be the basis of a claim against an Indiana company in Pennsylvania, even if that company occasionally did other business in Pennsylvania.¹⁷¹

The inquiry into general jurisdiction was understood as a spectrum that included but was not limited to the facts of *Perkins*. When a corporate defendant contested general jurisdiction, it was the job of the courts to determine whether the corporation's relationship with the state was substantial, continuous, and systematic enough to subject it to all-purpose jurisdiction there.

Consider the Ninth Circuit's 2006 decision in *Tuazon v. R.J. Reynolds* as an example of this type of reasoning.¹⁷² In that case, Nilo D. Tuazon, who had spent most of his life in the Philippines, moved to Washington State and that same year sued R.J. Reynolds Tobacco Company on a product liability claim.¹⁷³ R.J. Reynolds was headquartered in North Carolina and incorporated in Delaware.¹⁷⁴ The court described the company's connection to Washington State as follows: between 1998 and 2006 the company maintained an office with forty employees in the state, it generated between \$145 and \$240 million in sales through distributors in Washington each year, and its market share in Washington was around 30%.¹⁷⁵ The company had engaged in advertising in Washington since 1949.¹⁷⁶ It had also funded research at a state public university and gotten involved in local politics, organizing "local opposition to city and state legislation that would have banned or limited smoking and cigarette advertising."¹⁷⁷ The Ninth Circuit held that "the confluence of Reynolds'

168. *Id.* at 447–48.

169. *Id.* at 448.

170. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 418 (1984).

171. *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 21 (1907). It is unclear from the opinion how much business the company did in Pennsylvania. In *International Shoe*, the activity is described alternatively as "activity of some sorts," "casual," and "isolated." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317–18 (1945).

172. *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1173 (9th Cir. 2006).

173. *Id.* at 1167.

174. The opinion states that the company was originally incorporated in New Jersey in 1899, but it appears that in 2006 it was incorporated in Delaware. *Id.* For this analysis, the only thing that matters is that it was *not* incorporated in Washington.

175. *Id.*

176. *Id.*

177. *Id.* at 1168.

physical, economic, and political presence and the company's myriad other activities in the state" justified jurisdiction over the company although the harm it had caused Tuazon occurred in the Philippines.¹⁷⁸

That opinion also included a discussion of how to apply personal jurisdiction doctrine. In laying out its approach, the court described a functional standard. Determining whether a corporate defendant's contacts in a particular case are substantial and continuous, the court wrote, turns on the "economic reality of the defendants' activities rather than a mechanical checklist."¹⁷⁹ It went on to say that "the lower courts have hewed to the principles set out as bookends by the Supreme Court and filled in the middle ground through a case-by-case review of individualized circumstances."¹⁸⁰ And in a recognition of the criticism of standards, it explained: "Although it may be frustrating to some commentators that no formula has emerged, the circumstances vary so widely that a mechanical application of factors and principles would be unprincipled."¹⁸¹ In this articulation we see the conjoining of the preference for standards with that for regulation through the explicit recognition that there is an unpredictable range of needs for interpersonal accountability.

Contrast this approach with the reasoning adopted by the Supreme Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.¹⁸² In that case, two boys from North Carolina were killed in a bus accident in France.¹⁸³ The boys' families sued in North Carolina, naming, among other entities, a Turkish subsidiary of Goodyear which allegedly manufactured the tire.¹⁸⁴ The question presented in the case was whether the Turkish subsidiary could be held to account in North Carolina for an accident that occurred in France. The bootstrapping argument for allowing the exercise of jurisdiction was that a few similar tires manufactured by the Turkish subsidiary were sold in North Carolina.¹⁸⁵ One rule that has emerged in personal jurisdiction is that if only a few (one to four) items of the manufacturer's defective product were sold in the forum, the courts lack the power to adjudicate.¹⁸⁶ As a result of that rule, it was clear from the start that this exercise of power by the North Carolina courts would be struck down by the Supreme Court. To obtain jurisdiction and work around the rule,

178. *Id.* at 1175.

179. *Id.* at 1173 (quoting *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1331 (9th Cir. 1984)).

180. *Id.* at 1173 n.3.

181. *Id.*

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

183. *Id.* at 918.

184. *Id.*

185. *Id.* at 920.

186. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878 (2011) (finding sale of one shear not sufficient to give rise to jurisdiction).

the North Carolina courts adopted a general jurisdiction theory.¹⁸⁷ This was the theory that the Supreme Court rejected.¹⁸⁸

What is important for the purpose of this analysis is the Court's articulation of a new rule based on essential concepts reminiscent of the presence test of 100 years ago. The Supreme Court explained that corporations can be sued for any claim where their "affiliations with the State are so 'continuous and systematic' as to render them *essentially at home in the forum State*."¹⁸⁹ A human being, the Court explained, is subject to general jurisdiction in their domicile.¹⁹⁰ The corporation is subject to suit in "an equivalent place, one in which the corporation is fairly regarded as at home."¹⁹¹

The Court did not explain why a corporation is like a human being such that its exposure to general jurisdiction should be treated in the same way. Nor did it explain the anomaly that a human being can be subject to general jurisdiction by service of process whereas a corporation cannot. There is, in fact, no discussion in the opinion that justifies the new rule; it is stated as though it has always been the rule and is somehow an integral part of the previous substantial, continuous, and systematic standard.

A citation to a law review article is the only support the Court provides for the proposition. The article, *A General Look at General Jurisdiction*, is very famous and very good, but it does not justify the rule that the Court articulated.¹⁹² To the extent the article advocates in favor of general jurisdiction being limited to very few places, it relies on two arguments. Both are worthy of consideration but ultimately not convincing. One argument is the tautological view that because the place of incorporation and principal place of business are "unique," this gives them a "special constitutional status" that courts have taken "more or less for granted."¹⁹³ A second is that as a matter of political theory, "a state's special relationship with those that have a right to influence state decision-making justifies the assertion of state power over those individuals or entities."¹⁹⁴ Since corporations cannot vote, it is unclear how this political theory would apply to them, and the article does not say. It is possible that

187. *Goodyear*, 564 U.S. at 919–920.

188. *Id.* at 920.

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

190. *Id.* at 924.

191. *Id.*

192. See Lea Brilmayer, Jennifer Haverkamp and Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988). A few things are important to note. First, Brilmayer et al. appear to be describing the law as courts apply it rather than defending the contours of the law normatively, although their normative position is implied by the lack of critique. Second, Brilmayer et al. do not explicitly support the idea that general jurisdiction must be very limited. Their discussion of substantial, continuous, and systematic contacts as a valid basis for general jurisdiction would probably permit jurisdiction in a case such as *Tuazon*. See *id.*

193. *Id.* at 735.

194. *Id.* at 726.

political activity or lobbying might count, as it did in *Tuazon*. In any event, none of these arguments are articulated by the Court.

The “essentially at home” language is remarkably similar in structure to the nineteenth-century presence test. A corporation is not corporeal; it cannot be present anywhere. Neither can it be “at home” somewhere. Home is a concept for living beings with feelings of attachment. Robert Frost writes that home is “[s]omething you somehow haven’t to deserve.”¹⁹⁵ In idiomatic English, we say “home is where the heart is,” and Dorothy reminds us that “[t]here’s no place like home.”¹⁹⁶ Home is real, but it is no more a concept applicable to corporations than “love.” And, strangest of all, “home” is not even a legal test for the category of beings to whom it is most relevant: humans.¹⁹⁷

The use of this concept, however absurd, does serve a structural purpose. Home is to places what “mom” or “dad” is to people, a narrow set defined by one’s relationship to it.¹⁹⁸ Indeed, the new test asking whether a corporation is essentially at home is narrower than the substantial, continuous, and systematic contacts test because of the analogy to human beings. It implies that there are only a few special forums, maybe only two, where general jurisdiction is proper.¹⁹⁹ This narrowing is precisely what happened in the next case when the new test was applied.

Goodyear was an easy case. It was evident that the happenstance of a couple of Turkish tires being found in North Carolina was not going to give rise to any kind of jurisdiction over a Turkish manufacturer in a lawsuit over an accident that occurred in France. Indeed, a significant portion of the decision in *Goodyear* is taken up by explaining why specific jurisdiction was improper. But in the next case, the real bite of the home test became clear. In *Daimler AG v. Bauman*,²⁰⁰ the Court applied the test that it had articulated in *Goodyear*, eliminating fairness considerations from the doctrine of general personal jurisdiction and holding that a company that did billions of dollars of business in California every year was not at home there.²⁰¹

The Court paid lip service to some limited flexibility in the doctrine, stating that “*Goodyear* did not hold that a corporation may be subject to general

195. Robert Frost, *The Death of the Hired Man*, POETRY FOUND., <https://www.poetryfoundation.org/poems/44261/the-death-of-the-hired-man> (last visited Feb. 22, 2022).

196. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

197. The test for human beings is domicile. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

198. Thanks to Jill Anderson for this analogy.

199. As Justice Ginsburg explained, place 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.” *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Law professors have argued that this new rule brings welcome certainty. *See, e.g.*, Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81, 86 (2013) (“Particularly in contrast to the *continuous and systematic* language that has befuddled courts for too long, the home-state test provides better grounding.”). It may do so, but at some cost as will be shown below.

200. *Daimler AG*, 571 U.S. 117.

201. *See id.* at 121–22.

jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”²⁰² It is hard to imagine what a third place would be, but this does leave the courts some wiggle room. A case like *Tuazon* could be distinguished from *Daimler*, for example, on the basis that it involved lobbying under the political theory of jurisdiction based on attempts to influence state decision-making.²⁰³ But the Court’s articulation of the test could just as easily support a regime where jurisdiction is found only in the paradigm forums as a practical matter because that is an easily administrable rule. It is more likely to be interpreted this way by courts favoring immunity from suit because it is a rule that lets the corporation decide, by its decision to incorporate or open headquarters, where it will consent to be sued.²⁰⁴

Indeed, other statements in the *Daimler* opinion support the narrowest view. The Court rejected the previous test that did not include the conceptual language at home as “unacceptably grasping.”²⁰⁵ It explained: “the inquiry under *Goodyear* is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.”²⁰⁶ The Court’s restatement of the rule with its new addendum means that the at-home test must add something more than the old test did. What do these new words add?

A corporation is not a corporeal person, so it cannot be served with process as a human being could. It only can work through its agents, who *are* human beings. Notably, the courts have consistently held that a corporation could not be subject to jurisdiction merely because its agents were served with process.²⁰⁷ Is a corporation its management, in which case it should be sued wherever the managers can be served, just as a person can be sued wherever she is served?²⁰⁸ Or is a corporation a nexus of contracts,²⁰⁹ and what would this mean for a theory of jurisdiction over corporations? Or perhaps a corporation is an entity separate from both of these, and if so, what should be the rules that apply to such entities?²¹⁰ These questions are worth thinking through in a systemic way.

202. *Id.* at 137.

203. *See* Brilmayer et al., *supra* note 192, at 726.

204. Changing the place of incorporation is difficult, but moving headquarters or lobbying the legislatures of one or two states is less onerous. *See id.* at 742.

205. *Daimler AG*, 571 U.S. at 137–38 (“Plaintiffs would have us . . . approve the exercise of general jurisdiction in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business.’ That formulation, we hold, is unacceptably grasping.”(citation omitted)).

206. *Id.* at 138–39.

207. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069.5 (4th ed. 2021).

208. *See* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1475 (1989) (discussing various theories).

209. *Id.* at 1478.

210. *Id.* at 1484–85, 1492.

Whatever one's views of the corporation, one thing is clear: little analytical work is done by stating that the corporation is either at home or present in a particular location.

Still, legal analysis is an exercise in creating and recreating categories to some extent, and of arguing over which category the object of litigation fits into. It is hard to imagine law without some categories, and even the most devoted functionalists would not say otherwise. Jeremy Waldron has argued, responding to Cohen, that technical terminology in law is not mere “word jugglery” and has a purpose: to reveal the systematicity in law.²¹¹ Understanding law as a system is important, and to some extent, technical legal language, including categorical labels, serves the function that Waldron suggests.²¹² But this does not mean that obscuring what the law is doing using legal fiction is justifiable when a direct statement of the legal category, one that corresponds to social facts, is available. Nor does it mean that using empty or arbitrary concepts in place of reasoning is beneficial for the development of the law.

Labeling is no substitute for reasoning. For example, a corporation subject to general jurisdiction where it is at home does little to advance systematicity because it does not help us understand either the reason for such a narrow jurisdiction rule for entities or the reason for other rules, such as why a person can be subject to jurisdiction by service anywhere, whereas a corporation cannot. A systematic approach to law would have a well-reasoned account for these rules.

By contrast, the alternative to essential abstract categories, functionalism, is also flawed because it does not provide an easily administered test.²¹³ A functional test such as the one articulated in *International Shoe* raises the familiar problems of appropriate line-drawing, administrability, and consistency.

Justice Scalia's plurality opinion in *Burnham v. Superior Court*²¹⁴ provides an excellent example of the argument against the flexible, standard-like approach that dominated personal jurisdiction doctrine in the twentieth century. He wrote that the “traditional territorial rules of jurisdiction”—in that case permitting tag service—“were designed precisely to avoid” the twin harms of “uncertainty and litigation over the preliminary issue of the forum's competence.”²¹⁵ He went on to explain: “It may be that those evils, necessarily accompanying a freestanding ‘reasonableness’ inquiry, must be accepted at the margins, when we evaluate *non*traditional forms of jurisdiction newly adopted

211. Waldron, *supra* note 127.

212. On the importance of understanding the procedural law as a system, see Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821 (2018). But it is important not to take systematicity too far and always keep in mind the values that are at stake.

213. This was the critique of functionalism that was prevalent among torts scholars starting around 1945. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 150–51 (1980).

214. *Burnham v. Superior Ct.*, 495 U.S. 604, 626 (1990).

215. *Id.*

by the States. But that is no reason for injecting them into the core of our American practice”²¹⁶

The key word in that passage is “freestanding,” which in this context can be read to mean without a basis in law, therefore dependent on the judge’s priors, which in turn can lead to bias in administration. A rule, once set, requires no justification in subsequent cases. According to Justice Scalia, when the state aims to regulate (“nontraditional forms of jurisdiction newly adopted by the States”),²¹⁷ the injection of judicial discretion is obvious and unavoidable, so it must be confronted directly and justified. Offering such an explanation opens the opinion up to more possible objections.²¹⁸ By contrast, a rule ordinarily need only be justified when it is adopted.²¹⁹

The difference between the forms discussed here is that although the concepts of corporate presence or home do little analytical work, both provide the appearance of a categorical test that can be applied universally. The at-home test supplies the *illusion* of a formally realizable general rule and could even become one if it reduces general jurisdiction to two places. But in that case the rule will not be the at-home test, but rather that there are two places where a corporation can be sued: its place of incorporation and headquarters. At home might serve as a kind of shorthand for this rule, but it is not clear why a shorthand is needed when the rule can be stated simply and directly.

In this case, the terminology, by its implied analogy to human beings, obscures the true legal test much as Cohen described. Instead of asking why a corporation should only be sued in two places, the implied analogy to human beings does the analytical work. But in truth there is no analytical work being done because the analogy fails.

It is still possible that the at-home test will not transform into a categorical rule that a corporation may only be sued in two places. Over time, the similarly conceptual presence rule transformed into a functional standard. Recall Justice Cardozo’s articulation of how one might answer the metaphysical question of where a corporation is: “[I]here is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here.”²²⁰

At the moment, however, the change in reasoning between *International Shoe* and more recent cases such as *Goodyear* and *Daimler AG* signals a substantial shift toward limiting the law’s reach. The at-home test has made something that

216. *Id.* (citation omitted).

217. *Id.*

218. Kennedy, *supra* note 61, at 1708 (“A standard is often a tactically inferior weapon in jurisdictional struggle, both because it seems less plausible that it is the only valid outcome of the reasoning process and because it is often clear that its application will require or permit resort to ‘political’ or at least non-neutral aspects of the situation.”).

219. This still means, however, that justification is required when the rule is promulgated. A significant problem with the at-home test, in addition to the categorical essentialism, is the absence of justification.

220. *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917).

used to be a standard (a sliding scale of contacts) into a narrower categorical rule (either the corporation is at home or it isn't), and over time it will likely be applied in a more and more rule-like manner until it does indeed become a rule that a corporation may only be sued under a general jurisdiction theory in two places: where it is incorporated and where it has its principal place of business. This creates certainty at the expense of the specific facts of the case, allows judges to avoid explaining the policy reasons for this choice, and promotes immunity by allowing the corporation to choose where, and sometimes whether, it can be sued.

II. IMPLICATIONS

This Part considers the implications of the changes in personal jurisdiction law for our understanding of how common law constitutionalism works. First, it points out that the shift from standards to rules has moved the jurisdictional decision to the highest authority, the Supreme Court. Second, it explains that what is at stake is the power to make a decision with respect to the fundamental question of liberalism: how best to balance freedom to act autonomously with freedom from harm. In taking control of this question, the Court's jurisprudence has carved out greater zones of immunity and restricted regulation. Finally, it describes the extent to which this development surfaces the substantive linkages between procedure and substance.

A. The Jurisdictional Power Grab

A core characteristic of rules is that they transfer the power to decide questions to a higher jurisdiction, in this case the Supreme Court.²²¹ This is because once a rule is determined, the job of the lower courts is to apply it as mechanically as possible. A standard, by contrast, allows the lower courts the flexibility to adjust the application of the law to the circumstances at hand and thereby devolves decision-making to lower levels in the jurisdictional hierarchy. This is even more true with standards that rely on fact-specific determinations to which the appellate courts are meant to defer.

A fundamental question raised by personal jurisdiction doctrine is at what jurisdictional level the line between obligation and immunity should be drawn. To put it another way, personal jurisdiction in tort cases can be understood as an expression of a societal struggle with the issue of local versus centralized

221. Schauer, *supra* note 81, at 543–544. Because formal rules move decision-making to the highest authority, in the federal system they also tend to centralize decision-making. See Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251 (2018) (demonstrating the horizontal aggregating effects of a recent Supreme Court decision). *But see* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1 (2018) (arguing that recent decisions limit aggregation by limiting specific jurisdiction).

power to determine the line between immunity and regulation or people's obligations to one another. This problem is familiar to political theorists and has a long history.²²²

This federalism issue is most directly evident when the Supreme Court evinces anxiety that if it does not draw the line at this place, a defendant can be sued *anywhere*. That argument demonstrates the Court's concern about too much pluralism linked to too much liability. As described in the previous Part, in many recent cases, the Court has decided that the states have unduly favored regulation and that the decentralization of state law allows these mistakes to continue.²²³ The Court creates more rigid opt-in rules for defendants and limits the forums available to tort plaintiffs because it cannot change tort law directly.

What is the lesson of the Supreme Court's turn towards rules in the due process context for our understanding of legal development? It presents us with two models of legal development. On the one hand, doctrinal development can be pluralistic and decentralized, as many theorists suggest.²²⁴ I will call this the pluralist model. On the other, doctrinal development may be understood as a process of legal concepts working themselves pure through a rise in the judicial hierarchy.²²⁵ Following Jacob Levy, I will call this the rationalist model.²²⁶

The pluralist model assumes that the process of finding a good rule is ever-evolving and ever-changing, adapting itself to the needs of the day. As Justice Lemuel Shaw put it in 1854:

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and

222. See generally JACOB T. LEVY, RATIONALISM, PLURALISM, AND FREEDOM (2015) (tracing the history of the treatment of the problem of local versus centralized control among political theorists).

223. See generally *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

224. This characterization was especially prevalent in the early law and economics literature, which characterized the evolution of efficient rules through the common law decentralized process as a kind of invisible hand. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 584–86 (5th ed. 1998). But it is also evident among other legal scholars. See, e.g., John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 *YALE L.J.* 1, 61 (2001) (describing decentralization as a feature of the English common law system in contrast to the civil law more-centralized control model); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 *DEPAUL L. REV.* 261, 272 (2007) (describing decentralized tort system and its relationship to administrative claims resolution); Jeffrey J. Rachlinski, *Bottom-up Versus Top-down Lawmaking*, 73 *U. CHI. L. REV.* 933, 954 (2006) (comparing top down, legislative decisions to pluralistic, common law, decentralized decision-making); Douglas A. Kysar, *The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism*, 9 *EUR. J. RISK REGUL.* 48, 54 (2018) (“[C]ommon law tort actions can offer a decentralized and citizen-empowering means of formulating and addressing regulatory goals.”).

225. The “law, that works itself pure” is a statement from Mansfield's opinion in *Omychund v. Barker* (1744) 26 Eng. Rep. 15, 23 (presenting argument of counsel). For a brief history, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 *U. CHI. L. REV.* 1819, 1824 n.11 (2016). For a general discussion of common law evolution and its relationship to rules, see Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. CHI. L. REV.* 883, 884–85 (2006) (arguing that deducing general principles from concrete cases is “more often distorting than illuminating”).

226. LEVY, *supra* note 222, at 11.

adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.²²⁷

As we saw earlier, general principles of the type described by Justice Shaw do not, in fact, decide concrete cases. Instead, there are gaps that allow for discretion in new cases with fresh facts, with the principles providing only general guidance. This is what Justice Scalia recognized when he wrote in *Burnham* that the “evils” of “uncertainty and litigation over the preliminary” issues may be necessary “when we evaluate *non*traditional forms of jurisdiction newly adopted by the States.”²²⁸

In application, the doctrine need not be uncertain with respect to the run of cases under the pluralist model because they present common fact patterns about which there is consensus. Many specific rules can be applied predictably and uniformly under the aegis of a general principle, such as the rule that an allegedly negligent driver may be sued in the state in which the accident occurred. What is distinctive about the pluralist model is that it assumes that there is not one right answer to legal questions, but rather that answers vary and can evolve over time.

By contrast, the rationalist model assumes that there is a right answer to legal questions.²²⁹ The rationalist model understands law as being comprehensive, in the sense that it provides answers to every question; complete, in the sense that these answers are the right answers; and conceptually ordered.²³⁰ Implicit in this idea is the assumption that ultimately the correct answer will be determined at the highest judicial level, rendering a decision that will be final as well as correct. Perhaps this is the type of legal order that personal jurisdiction scholars who accuse the doctrine of being too messy and incoherent strive for: one that dictates from above the correct resolution to cases in a conceptually ordered way.

The rationalist conception of legal order is being realized in the decisions of the Supreme Court, which, through personal jurisdiction, is attempting to limit pluralistic approaches to both jurisdictional and substantive law. It is a view of the law that is expressed in the increased use of essential conceptual categories, which are put forward as though they are both comprehensive and

227. *Nor. Plains Co. v. Bos. & Me. R.R. Co.*, 67 Mass. (1 Gray) 263, 267 (1854). Llewellyn referred to this as the Grand Style of legal reasoning. Grey, *supra* note 19, at n.27.

228. *Burnham v. Superior Ct.*, 495 U.S. 604, 626 (1990).

229. One of the characteristics of Langdell’s theory of the common law was that it was comprehensive, in other words, that the law provided a right answer for every question. Grey, *supra* note 19, at 8–11 (defining completeness and stating “the heart of classical theory was its aspiration that the legal system be made complete through universal formality[] and universally formal through conceptual order”).

230. These categories are discussed at greater length in Grey. *Id.* at 8–9.

complete, such as the test asking where companies are at home. It can be an attractive vision. Justice Holmes told a group of students:

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.²³¹

Holmes's speech presents an emotional appeal and a desire for certainty that is undeniably attractive, but it also embodies a political choice in favor of a central, homogenous order instead of a pluralistic, decentralized one. What is lost in centralization is the ability to respond to local social needs and the ability of states to exercise power over the development of local tort law, both of which are characteristics of our common law system.

B. *Autonomy, Immunity, and Protection*

At stake in personal jurisdiction doctrine is the scope of state power. Lawmakers in the liberal order argue over the scope of legal rights and duties, as well as when the state, in policing the zones of obligation and immunity, has overstepped its bounds.²³² With respect to accidents, this decision-making has been placed in the hands of state courts and legislatures articulating the scope of tort doctrine.

As an example of such arguments, consider the negligence principle. It draws a line between obligation and immunity in tort by requiring that a person who is found to be "at fault" is to pay for harming another.²³³ Judgments as to what a reasonable person would have done and what harm was foreseeable and to be avoided (that is, when a person is at fault) have always been socially contingent.²³⁴ What rights you have, in addition to when they have been violated, are determined by the legal system. They are the products of human decisions and are therefore contestable.²³⁵ Similarly, the choice to regulate the

231. *See id.* at 37 (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 202 (1920)).

232. Robert W. Gordon, Book Review, 94 HARV. L. REV. 903, 916 (1981) (reviewing G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980)).

233. Unlike previous rules based on status (such as different treatment for trespassers, licensees, and invitees), the negligence rule was understood to create a general, formally realizable rule that applied the same to everyone. *See id.* The negligence rule still constrains by dictating that the conduct need be objectively reasonable and by allowing judges to determine what is in fact reasonable conduct. *See id.* at 920.

234. *Id.* at 917.

235. Proponents of negligence naturalized the concept of fault, describing accidents that were not the product of fault as acts of God for which the proper solution was to let the harm lie where it fell. *See* Rabin, *supra* note 130, at 472–79. But, of course, many times these accidents were the product of human actions, just ones that the court found to be reasonable under the circumstances. Robert Gordon explains how this was done using Holmes as an example. In *The Common Law*, Holmes wrote: "Unless . . . a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than . . . to compel me to insure him against lightning." Gordon, *supra* note 232 (quoting

relationships between consumers and manufacturers is socially contingent; for this reason, it matters where a case proceeds.

Over the course of the twentieth century, it became increasingly clear to critics of the legal system that the category of right to be secure against harms caused by someone else's misconduct could be expanded to include a Buick with weak wooden tire spokes, a Coca-Cola bottle that cracked as a result of a manufacturing defect, and an Audi that exploded when hit at a particular angle.²³⁶ This resulted in a new line drawn between permitted and prohibited conduct and a new role for the state. Often that exercise in line drawing took the form of a cost-benefit analysis, still arguably under the general rubric of fault, but now translated into the Hand Rule for general negligence²³⁷ or the risk/utility test for design defects.²³⁸ Importantly, for purposes of thinking about the effect of personal jurisdiction doctrine, changes in tort law were largely the result of judicial decisions at the state level.²³⁹

Starting in the 1980s, an intellectual movement developed to limit products liability law. This movement was linked to a larger intellectual movement to curb litigation generally.²⁴⁰ Just as the recognition that the end-users of harmful products in a mass-production economy were not able to determine the safety of complex products drove the products liability revolution, the recognition that increased liability imposed increased costs, and that these costs would either be passed on to consumers or reduce profits for manufacturers, halted its development. It is easy to see how these developments are linked with personal jurisdiction doctrine.²⁴¹ Because most products are manufactured in one place and used in another, often involving parts manufactured in various places, an accident victim must sue an out-of-state defendant, giving the Supreme Court an opportunity to intervene.

The federal judiciary has little power over state tort law, but it does have the power to determine the meaning of the Due Process Clauses and to curb

OLIVER WENDELL HOLMES, *THE COMMON LAW* 96 (1881)). Gordon explains what is going on in Holmes' reasoning as "naturalizing" the idea of fault: "if your *right* . . . [has not been] violated, no human agency has done anything to you at all, and you are to see yourself as a victim of circumstances, 'industrial society,' life in a 'complex interdependent world,' a bolt of lightning." *Id.* at 916-917.

236. See *MacPherson v. Buick Motor Co.*, 138 N.Y.S. 224, 227-28 (App. Div. 1912) (involving wooden tire spokes); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 439-40 (Cal. 1944) (involving exploding bottle); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 299 (1980) (involving exploding Audi).

237. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

238. See *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 735 (N.Y. 1995) (describing risk/utility as a balancing test).

239. *The Restatement (Second) of the Law of Products Liability* was very influential, but in the end, the changes were made by judges in the state courts. See Rabin, *supra* note 130 (describing development of tort law during this period).

240. See generally SARAH STASZAK, *NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT* (2015).

241. Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 520 (1987) (discussing these rationales).

state law thereby.²⁴² The decision not to allow a lawsuit to proceed in the forum of the plaintiff's choosing does not dictate the choice of law because the state where the suit is ultimately brought, if a suit is brought, will determine what law applies to the suit.²⁴³ Accordingly, personal jurisdiction doctrine does not curb state law directly by altering or limiting the governing rules. Instead, it does so indirectly, curbing state law by limiting access to the states' courts. But the Court only does this when it disagrees with the line between obligation and immunity drawn by the state courts, sometimes described in the opinions as the specter of a defendant being sued *anywhere*, which is another way of saying that the liability exposure is too broad.

When striking its own balance of obligation and immunity through personal jurisdiction doctrine, the Supreme Court raises questions that are both policy-oriented and political. The policy-oriented questions are about whether the state substantive law promotes the best balance between obligation and immunity in a national market. Should some state be able to apply its idiosyncratic tort law to a manufacturer who sells goods on a national market? Does jurisdictional competition in personal injury cases favor plaintiffs too much?²⁴⁴ The political question is about who gets to decide these issues.

The resurgence of personal jurisdiction limitations can be read as an implicit recognition of the failure of the modern project to universalize state law through enterprises such as the American Law Institute *Restatements*, Uniform Codes, and the like, which were part of the larger enterprise of facilitating a national market. If all laws are more or less the same, why struggle so much over the question of whether a case should be heard in California or Maine? Yet it does matter to the Supreme Court, which continues to take these cases, and to the defendants who continue to appeal them. The revealed preferences of lawyers indicate that they perceive a difference between localities that affects outcomes.

Shifting to a more parsimonious personal jurisdiction doctrine reasserts national control over state tort law through the Due Process Clause. It limits local power to hear cases, even in some instances when the state's own citizens are injured locally, and raises the question of where these cases will go. The

242. Another way the Court has curbed state tort law is by imposing due process limitations on punitive damages. See generally Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of Philip Morris v. Williams*, 46 WILLAMETTE L. REV. 449, 457–63 (2010) (discussing state supreme court punitive damages doctrine and state resistance).

243. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that a federal court with diversity jurisdiction must apply conflict of law provisions of the state in which it sits); RESTATEMENT (SECOND) OF CONFLICT OF L. § 6 (AM. L. INST. 1971).

244. Jurisdictional competition may result in rules that favor plaintiffs so that one might support competition in the abstract but disfavor it because it tends to produce results that are at odds with one's policy preferences. For example, a study of the English common law system in the eighteenth century found that jurisdictional competition among courts favored plaintiffs, while the passage of an act to consolidate jurisdiction favored defendants. Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1183 (2007).

answer is most likely the place where the defendant agrees to be sued. As a result, the mechanism for nationalization is an embrace of immunity, designed to limit regulation through state tort law by removing control over state law from the state. The highest jurisdictional level, the Supreme Court, has taken over this decision-making and placed the decision in the hands of the individual or entity being sued.

C. Does Form Follow Function?

So far, this Article has demonstrated that the turn to presence and privity in personal jurisdiction doctrine both at the end of the nineteenth century and the beginning of the twenty-first was accompanied by substantive policy preference for greater immunity at the expense of obligation. And it has shown how the structure of the doctrine as rule-like puts decision-making power at the top of the federal hierarchy. Does this mean that forms of reasoning dictate function? Is a more formalist, rule-like approach to personal jurisdiction dictated by a political ideology?

American legal scholars still associate rules with conservative legal thought, and standards, especially balancing tests, are associated with left-leaning legal thought.²⁴⁵ For example, in the 1970s, Duncan Kennedy argued that form does follow function.²⁴⁶ Kennedy explained that rule formalism favors individualism and that standards or balancing tests favor altruism because of their structure.²⁴⁷ The model for the argument was contract doctrine. He argued, in sum and substance, that a doctrine that favors forms defers to the ex-ante preferences of the parties and, thereby, individualism.²⁴⁸ A doctrine that allows a judge to override the form for public policy reasons favors altruism because it displaces the individual's preferences with social regulation.²⁴⁹ As if to support Kennedy's thesis (albeit unintentionally), several years later Justice Scalia argued that "[t]he [r]ule of [l]aw [is] a [l]aw of [r]ules."²⁵⁰

The analysis here demonstrates that there is no necessary relationship between rules and immunity from liability or standards and obligation.²⁵¹ For example, one could have a rule that allows manufacturers to be sued wherever their product ends up harming someone in a national market. This would be

245. See Sullivan, *supra* note 75, at 96. ("In recent debates, rules have been associated with the right of the political spectrum and standards with the left.")

246. See generally Kennedy, *supra* note 61, at 1713–24 (arguing that rule formalism favors individualism and standards favor altruism).

247. *Id.*

248. *Id.*

249. *Id.*

250. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

251. Sullivan observed this in 1992. Sullivan, *supra* note 75, at 96–97 (showing that rules and standards do not map on to political categories but are historically contingent using examples from various constitutional debates).

rule-like but would increase exposure to liability and therefore favor obligation. Or one could have a standard that allows the court great discretion in determining whether a suit will lie in such a case, the result of which would be that the choice of obligation or immunity would depend on the judge's evaluation of the facts at hand. This latter result is what Justice Black feared when he criticized the balancing test in his concurrence in *International Shoe* because it could be used to ride roughshod over state power.²⁵² Black was a political liberal who favored rules.

Conceptual legal categories such as the essentially at home or presence test for personal jurisdiction similarly do not favor regulation or immunity inevitably. One could imagine an equally arbitrary but evocative label for a test that permitted state jurisdiction over corporations even when they are neither incorporated nor headquartered in a jurisdiction nor when they operate through a distributor, contra the Supreme Court's new presence test. For example, a test could be based solely on a minimalist view of consent so that a corporation has consented to jurisdiction when it files as a foreign corporation for purposes of service of process.²⁵³

Accordingly, although I have argued that there are substantive problems with the way the Supreme Court has adopted a new privity and new presence because they undermine state substantive law, those results are not dictated by the forms of reasoning that the Court is adopting.

The problem with the forms of reasoning that rely on conceptual categories divorced from reality is that they elide the truth of the matter. Rather than promoting systematicity in law and taking the opportunity to explain the reasons for the rule, the Court simply stated conceptual categories that stand in for reasoning. The result is that the Supreme Court's reasoning does seem to support the radical realist accusation that legal tests were "word-jugglery or the manipulation of symbols."²⁵⁴

252. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324 (1945) (Black, J., concurring); see also *supra* text accompanying note 171.

253. *Compare Segregated Acct. of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2017 WI 71, 83, 376 Wis. 3d 528, 555, 898 N.W.2d 70, 83 (2017) (finding a foreign corporation's compliance with statute requiring maintenance of a registered agent does not, on its own, confer general personal jurisdiction), with *Bors v. Johnson & Johnson*, 208 F. Supp. 3d 648, 655 (E.D. Pa. 2016) (finding registration to do business constitutes consent to jurisdiction). A lot depends on the language of the statute in question. See Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1831–32 (2018) (describing proposed legislation in New York).

254. Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 938 (1955); Cohen, *supra* note 27, at 821.

CONCLUSION

American courts working in the common law tradition, of which our due process jurisprudence is a part,²⁵⁵ must navigate an unresolved tension between immunity and obligation. As reflected in the doctrine, this tension looks messy, and thus scholars have often derided personal jurisdiction doctrine as incoherent.²⁵⁶ But digging a little deeper, we see that the messiness of personal jurisdiction doctrine merely reflects the political structure in which it is embedded, one where the question of where to draw the line between obligation and immunity is hotly contested.

There is, however, reason to worry that personal jurisdiction doctrine is usurping state tort law in ways that are inconsistent with our constitutional design and that the forms of reasoning chosen by the Court to achieve this goal were hiding rather than illuminating the policy results.

The *Ford* opinion is a welcome respite from this form of reasoning. It seriously considers the real issue at hand, which is whether a person who is injured by a vehicle produced by a national manufacturer should be able to sue in the state in which they live and were injured.²⁵⁷ Which state, in other words, most appropriately has the power to decide the question of obligation and immunity in such a case? It makes sense to have that state be the one of the person injured since that state is the one that has the responsibility for the common welfare of the citizens within it.

Until *Ford*, the Supreme Court's personal jurisdiction jurisprudence was on the brink of moving to where it was at the beginning of the mass market economy circa 1900. That approach does not have much to commend it, either as a matter of judicial craft or of state–federal relations. Indeed, until *Ford*, personal jurisdiction doctrine had become a tool for Supreme Court power grab as against state tort law and as against Congress, which has declined to preempt all state products liability law.²⁵⁸ At a minimum, before the Court takes for itself

255. For support that the Supreme Court's due process jurisprudence is a form of common law reasoning, see James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 255 (2004) (observing the common law approach to jurisdiction and criticizing due process jurisprudence). For broader analysis of the common law approach to constitutional doctrine, see Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10 (1975); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883–84 (1996); Greene, *supra* note 76, at 132. Notably, the early theorists whose work the Supreme Court's reasoning in the cases described below most resembles, Langdell and company, did not think that constitutional law was a proper subject for the scientific study of law because it was about incommensurable values. "Constitutional law was unscientific, because hopelessly vague, as typified by the police power doctrine; the question whether a statute was 'reasonably related to safety, health or morals' could not be treated formally." Grey, *supra* note 19, at 34.

256. See, e.g., A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 618 (2006) (describing "near-universal condemnation" of personal jurisdiction doctrine and proposing an alternative analysis).

257. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026–28 (2021).

258. Issacharoff & Sharkey, *supra* note 23, at 1353–54 ("[T]he U.S. Supreme Court has, in preemption and forum allocation cases, attempted to capture the considerable benefits that flow from national uniformity

the power to devise a new privity doctrine through the Due Process Clause and to ride roughshod over state tort law, it should develop more rigor in its reasoning.²⁵⁹ Better yet, if there is to be immunity from suit for manufacturers, it should come from state substantive law or explicit congressional preemption, not the Due Process Clause.

and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation.”).

259. “Just as ‘the slovenliness of our language makes it easier for us to have foolish thoughts,’ so too does slovenly judicial analysis facilitate misunderstandings about the mechanics and objects of judicial power.” Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1408 (1988) (footnote omitted) (quoting George Orwell, *Politics and the English Language*, in A COLLECTION OF ESSAYS 162 (Anchor Books ed. 1954)).