

FROM CONTACTS TO RELATEDNESS:
INVIGORATING THE PROMISE OF “FAIR PLAY
AND SUBSTANTIAL JUSTICE” IN PERSONAL
JURISDICTION DOCTRINE

Richard D. Freer

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INTRODUCTION

Personal jurisdiction is integral to access to justice. Without a convenient court, plaintiffs’ efforts to vindicate claims (and society’s interest in private enforcement of law) may be thwarted. After considerable engagement in between 1977 and 1990, the Supreme Court did not decide a personal jurisdiction case between 1990 and 2011. This Symposium addresses what the Court has done regarding personal jurisdiction in the “new era” that started in 2011. That year brought a specific jurisdiction decision,¹ *J. McIntyre Machinery, Ltd. v. Nicastro*,² and a general jurisdiction decision,³ *Goodyear Dunlop Tires Operations, S.A. v. Brown*.⁴ The former broke no significant new doctrinal ground,⁵ but the latter began a remarkable contraction of general jurisdiction. We did not know it at the time, but that contraction would have a profound impact on specific jurisdiction by forcing a change in focus: from whether the defendant had forged a purposeful contact with the forum to whether the plaintiff’s claim is sufficiently connected to the defendant’s purposeful contact.⁶

The Supreme Court is now caught up in this new focus: consider its 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court*⁷ and its 2021 effort in *Ford*

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1. Throughout this Article, we address only in personam jurisdiction. One of two species of in personam jurisdiction is “specific jurisdiction,” in which the plaintiff asserts a claim that has some relationship to the defendant’s contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). It is also known as “case-specific” jurisdiction.

2. 564 U.S. 873 (2011).

3. The second of two species of in personam jurisdiction, “general jurisdiction,” refers to cases in which the plaintiff’s claim has no relationship to the defendant’s contacts with the forum state. *Helicopteros*, 466 U.S. at 414 n.9. It is also known as “all purpose” jurisdiction.

4. 564 U.S. 915 (2011).

5. In fact, as discussed in Part II.A of this Article, *McIntyre* replicated the Court’s earlier failure, in *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102 (1987), to define what constitutes a relevant contact in stream-of-commerce cases.

6. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 227–28 (2014).

7. 137 S. Ct. 1773 (2017). See generally Matthew P. Demartini, Comment, *Stepping Back to Move Forward: Expanding Personal Jurisdiction by Reviving Old Practices*, 67 EMORY L.J. 809 (2018).

Motor Co. v. Montana Eighth Judicial District Court.⁸ In *Ford*, there are hopeful signs that the Court recognizes that its general jurisdiction decisions wrought more change than it appeared to recognize before. *Ford* is the first case in the Court's new era in which plaintiffs prevailed on the question of personal jurisdiction.

Far more significantly, it is the first case since 1957 in which the Court supported a finding of specific jurisdiction by appealing to considerations of the "fair play and substantial justice" prong of *International Shoe Co. v. Washington*.⁹ *Ford* leaves a great many questions unresolved. But it brings hope that the Court may be invigorating the role of fairness or reasonableness, which it had long subjugated to other considerations in the *International Shoe* canon. After six decades of indifference, *Ford* may signal that "fair play and substantial justice" may start to realize its potential to enhance court access.

I. WHERE WE WERE IN 1990

When the Court stepped away from personal jurisdiction in 1990, the scope of general jurisdiction, under which a defendant may be sued in the forum for a claim that arose anywhere, was relatively clear. The clarity had little to do with any effort by the Court. First, the Court had not explained (and still has not explained) why we have general jurisdiction.¹⁰ Second, the Court had done little beyond suggesting that contacts-based general jurisdiction over a corporation¹¹ was proper when the defendant had "continuous and systematic" or "substantial" ties with the forum.¹² The relative doctrinal clarity came from the state and lower federal courts, which had reached a rough understanding of how much activity was enough to justify general jurisdiction. To be sure, there

8. 141 S. Ct. 1017 (2021).

9. 326 U.S. 310 (1945). The 1957 case was *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957), in which the Court used a mélange approach of factors relating to contact and factors relating to "fair play and substantial justice" to uphold jurisdiction. See *infra* notes 23–26 and accompanying text.

10. See Stanley E. Cox, *The Missing "Why" of General Jurisdiction*, 76 U. PITT. L. REV. 153, 158–73 (2014) (discussing the Court's failure to explain general jurisdiction).

11. By "contacts-based general jurisdiction," I mean general jurisdiction based upon a company's business activities in the forum, not based upon its incorporation or maintaining its principal place of business there.

12. See, e.g., *International Shoe*, 326 U.S. at 317. In fact, the phrase "continuous and systematic" in *International Shoe* referred to an instance of specific jurisdiction. Later in the opinion, however, the Court spoke of defendants with "continuous corporate operations . . . [that are] so substantial" as to justify general jurisdiction. *Id.* at 318. For some reason, courts came to use the "continuous and systematic" rubric in referring to general jurisdiction. For example, in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448 (1952), the Court upheld general jurisdiction by referring to the defendant's "continuous and systematic" business in Ohio. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984), the Court, in dictum, stated that general jurisdiction can be based upon "continuous and systematic general business contacts" with a forum. Justice Sotomayor traced this evolution in her concurring opinion in *Daimler AG v. Bauman*, 571 U.S. 117, 149 n.6 (2014) (Sotomayor, J., concurring) ("It is unclear why our precedents departed from *International Shoe's* 'continuous and substantial' formulation in favor of the 'continuous and systematic' formulation, but the majority does not contend—nor do I perceive—that there is a material difference between the two.").

were difficult cases at the margin, and courts reached results that could not be reconciled.¹³ But lawyers and judges developed an ability perhaps not to define “continuous and systematic” or “substantial” activity, but to recognize it when they saw it.¹⁴

Between 1945, when the Court decided *International Shoe*, and 1990, the Court focused almost all its personal jurisdiction attention on specific jurisdiction, under which a defendant may be sued only for a claim that is appropriately connected to the defendant’s activities in the forum. *International Shoe* was revolutionary. It permitted jurisdiction beyond the “traditional bases” enshrined in *Pennoyer v. Neff*.¹⁵ Those bases—the defendant’s presence in the forum when served with process, domicile in the forum, and consent¹⁶—strained under the increased mobility and trade of the twentieth century. The strain required the Court to invent fictive notions of implied presence and implied consent¹⁷ to fit modern conditions to the hidebound traditional bases.

In contrast, in *International Shoe*, the Court instructed courts to assess whether the defendant had such “minimum contacts with [the forum] that the maintenance of the suit d[id] not offend traditional notions of fair play and substantial justice.”¹⁸ This iconic phrase clearly consists of two parts: (1) contact between the defendant and the forum and (2) the fairness (or reasonableness) of exercising jurisdiction on the facts of a given case. We will refer to these as the contact prong and the fairness prong of *International Shoe*.

The express recognition of “fair play and substantial justice” was novel. In *Pennoyer*, the Court addressed the forum’s power over the defendant or the defendant’s property without regard to whether an assertion of jurisdiction would be fair.¹⁹ This fact explains why courts operating under the *Pennoyer* regime felt the need to recognize a “force or fraud exception” to personal jurisdiction when a defendant was tricked or dragged into the forum and then

13. Compare *Bryant v. Finnish Nat’l Airline*, 208 N.E.2d 439, 441–42 (N.Y. 1965) (upholding general jurisdiction over an airline based upon its maintaining a one-and-a-half-room suite of offices in the forum and employment of people at that office), with *Follette v. Clairol, Inc.*, 829 F. Supp. 840, 845–47 (W.D. La. 1993) (rejecting general jurisdiction over national store chain that operated 264 retail stores in forum), *aff’d mem.*, 998 F.2d 1014 (5th Cir. 1993).

14. For example, in *Goodyear* the Court held that North Carolina did not have general jurisdiction over European subsidiaries of Goodyear USA. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 (2011) (“North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction.”). In that case, no one questioned that North Carolina would have general jurisdiction over Goodyear USA, however, based upon its maintaining of three manufacturing plants and employing hundreds of workers in that state. *See id.* at 918. The notion was so well understood that Goodyear USA did not contest general jurisdiction over it. Ironically, as a result of the holding in *Goodyear*, North Carolina would no longer have general jurisdiction over Goodyear USA, because it is not incorporated there and does not have its principal place of business there. *See id.* at 924.

15. 95 U.S. 714 (1877).

16. *Id.* at 719.

17. *See, e.g., Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (inferring consent to in personam jurisdiction when the defendant operated motor vehicle in forum).

18. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation omitted).

19. *See Pennoyer*, 95 U.S. at 719.

served with process.²⁰ Under *International Shoe*, though, an assessment of reasonableness was an express part of the due process analysis.²¹

But it was not the entirety of the new standard: there must also be “minimum contacts” between the defendant and the forum. Indeed, the Court made clear in *International Shoe* that there can be no jurisdiction if the defendant has “no contacts, ties, or relations” with the forum state.²² In its earliest applications of *International Shoe*, the Court gave an equal position to contact and fairness. In *McGee v. International Life Insurance Co.*,²³ the Court set out a mélange of factors relating to “minimum contacts” alongside those relating to “fair play and substantial justice” to uphold jurisdiction in California over a Texas company that had sold only one policy of insurance in the forum.²⁴

McGee employed a broad understanding of the contact requirement. The Court did not focus tightly on the affiliation between the defendant and the forum. Rather, it considered the relevant contact to be the *contract* between the parties.²⁵ It focused on the *relationship* between the defendant, the plaintiff, and the forum, California. In this way, the assessment of contact implicated the interests of the plaintiff and of the forum state, in addition to the affiliative actions by the defendant. Front and center, in the same paragraph as its contact assessment, the Court explained that California had an interest in protecting its residents, that the plaintiff had an interest in suing at home, that there was a relevant interest in having the litigation proceed where the witnesses and evidence would be found, and that the relative hardships facing the parties were to be considered and balanced.²⁶

This flexible mélange approach lasted less than a year. In its next Term, the Court changed direction in *Hanson v. Denckla*.²⁷ There the Court narrowed the notion of contact by requiring that the tie between the defendant and the forum result from the defendant’s “purposeful availment” of the forum.²⁸ The defendant itself must reach out to the forum; the unilateral act of a third party²⁹ cannot suffice. *Hanson*’s lens was entirely set upon the defendant. Interests of

20. See, e.g., *Wyman v. Newhouse*, 93 F.2d 313, 314–15 (2d Cir. 1937) (holding a judgment void because the defendant’s presence in state was procured by fraud); *Wanzer v. Bright*, 52 Ill. 35, 40 (1869) (procuring presence of the defendant “was a fraud on appellee and upon the process of the court that we presume never has or can be sanctioned by courts of justice”).

21. 326 U.S. at 320.

22. *Id.* at 319.

23. 355 U.S. 220 (1957). The Court had adopted the mélange approach in *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 648–49 (1950), which was the first case in which it applied *International Shoe*.

24. 355 U.S. at 222–23.

25. See *id.* at 223 (“It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the forum] State.”).

26. *Id.* at 223–24.

27. 357 U.S. 235 (1958). For an insightful discussion of the abrupt change in approach adopted by *Hanson*, see MICHAEL VITIELLO, ANIMATING CIVIL PROCEDURE 26–32 (2017).

28. *Hanson*, 357 U.S. at 253.

29. See *id.*

the plaintiff, of the forum state, in litigation efficiency, and in relative hardship—pivotal in *McGee*—now were ignored.³⁰ On the facts, the majority held, Florida lacked jurisdiction over a Delaware trustee despite years of transactions between the trustee and the settlor in Florida.³¹ Why? Because the trustee’s contact with Florida was the result of the settlor’s moving to Florida—that is, the unilateral act of a third party; the trustee itself had done nothing to avail itself of Florida.³²

Twenty-two years later, in *World-Wide Volkswagen v. Woodson*,³³ the Court made the disengagement of contact and fairness express. It did so in two ways. First, it adopted a lock-step approach that gave primacy to contact over fairness: until a purposeful contact is found, a court simply cannot consider factors of fair play and substantial justice.³⁴ Indeed, all the fairness and convenience in the world will not overcome the defendant’s lack of purposeful affiliation with the forum.³⁵ Second, the Court catalogued five factors (the “fairness factors”) relevant to the assessment of whether jurisdiction will be fair on the facts of a given case.³⁶ The list included staples from the *McGee* analysis, such as the interest of the forum, the interest of the plaintiff, considerations of efficient litigation, and the relative burden on the parties.³⁷ Again, though, these considerations were relegated to secondary importance, locked behind the wall of contact through purposeful availment.³⁸

In *Burger King Corp. v. Rudzewicz*,³⁹ the Court reemphasized the primacy of contact over fairness. It imposed a daunting burden on any defendant who

30. See *id.* at 254 (reasoning that a state “does not acquire . . . jurisdiction by being the ‘center of gravity’ of the controversy, or the most convenient location for litigation”).

31. *Id.*

32. *Id.* at 239.

33. 444 U.S. 286 (1980).

34. *Id.* at 297 (focusing on the “defendant’s conduct and connection with the forum State”).

35. *Id.* at 294 (“Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, 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.”).

36. *Id.* at 292.

37. *Id.* (listing the factors as: (1) burden on the defendant, (2) interest of the forum state, (3) plaintiff’s interest, (4) litigation efficiency, and (5) the states’ interests in shared substantive policies).

38. See Richard D. Freer, *Personal Jurisdiction: The Walls Blocking an Appeal to Rationality*, 72 VAND. L. REV. EN BANC 99, 105-10 (2019) (describing the Court’s “contact wall” as thwarting arguments that “fair play and substantial justice” would support jurisdiction). That article was a response to Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401 (2018). In *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 96-97 (1978), the Court concluded that jurisdiction would be “unreasonable” in light of the forum’s lack of interest and other factors. But the Court had already concluded that the defendant had no relevant contact with the forum. *Id.* at 93-96. *Kulko* was decided two years before *World-Wide Volkswagen* imposed the rigid two-step approach that compels dismissal upon a finding of lack of contact without assessing the fairness factors. After *World-Wide Volkswagen*, a court addressing facts such as those in *Kulko* likely would not have addressed the fairness factors at all; the lack of contact was determinative.

39. 471 U.S. 462 (1985). The Court listed the same five fairness factors in *Burger King* as it had in *World-Wide Volkswagen*. *Id.* at 477. But the holding in *Burger King* did much to subjugate them to the primary

sought to defeat jurisdiction by appealing to the fairness factors. Once the plaintiff shows purposeful contact between the defendant and the forum, the burden shifts to the defendant to “present a compelling case”⁴⁰ that litigating in the forum is so “gravely . . . inconvenient” as to put it at a “severe disadvantage” in the litigation.⁴¹ Moreover, a disparity in resources between the plaintiff and the defendant is not determinative.⁴² In sum, due process does not guarantee the most convenient forum for the defendant. It only guarantees one that is not so grossly unfair as to deprive the defendant of a fair chance to defend itself.⁴³ Accordingly, on the facts of the case, the Court concluded that it was not unconstitutionally unfair for a multinational corporation to sue two individual Michigan franchisees in the (for them, distant) corporation’s hometown.⁴⁴

World-Wide Volkswagen and *Burger King* diminish the importance of the fairness prong of *International Shoe* in two ways. First, the reasonableness of jurisdiction cannot be used to support the finding of a contact between the defendant and the forum. In other words, the fairness factors cannot be used to *support* jurisdiction, only to defeat it. Second, even when the fairness factors are addressed, they will rarely defeat jurisdiction because of the considerable burden imposed on the defendant. Because it was so difficult to defeat jurisdiction by appealing to the fairness factors, defendants repeatedly put all their eggs in the contact basket, arguing that they have no relevant contact with the forum. By 1990, when the Court left the personal jurisdiction stage, the fresh aspect of *International Shoe*—its appeal to fair play and substantial justice—seemed rather an afterthought.

consideration of contact. See Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: Justice Brennan’s Ironic Legacy*, 63 S.C. L. REV. 551, 569-74 (2012) (arguing that the *Burger King* methodology relegates fairness assessment to defeating, and not supporting, the exercise of jurisdiction).

40. *Id.*

41. *Id.* at 478 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

42. *Id.* at 483 n.25 (finding that a defendant “may not defeat jurisdiction . . . simply because of his adversary’s greater net wealth”).

43. See, e.g., Elliott E. Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 25 (1971) (“To say that a law does not violate the due process clause, is to say the least possible good about it.”).

44. *Burger King*, 471 U.S. at 487. In *Asahi*, after failing to muster a majority opinion on what constituted a relevant contact, the majority held that the exercise of jurisdiction in California was defeated by the fairness or “reasonableness” factors. *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-16 (1987). It is the only case in which the Court has rejected jurisdiction based upon the fairness analysis. But the case was very easy on that point; after dismissal of the plaintiff’s claim, the dispute involved an indemnity claim between two Asian companies concerning a contractual relationship they formed in Asia. California had little interest in providing a forum for the dispute. *Id.* at 114. As Dean Hay notes, *Asahi* could have been dismissed under *forum non conveniens*. Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 19 (1988).

II. THE NEW ERA: 2011 TO PRESENT

A. *Specific Jurisdiction and the Continued Focus on Contact: McIntyre and Walden*

In 2011, the Court returned to personal jurisdiction. Since then, it has decided seven personal jurisdiction cases: three addressing general jurisdiction⁴⁵ and four addressing specific jurisdiction.⁴⁶ The first two specific jurisdiction decisions—*McIntyre* in 2011 and *Walden v. Fiore* in 2014—involved the application of *International Shoe* in two interesting contexts: the stream of commerce and “effects” jurisdiction. In each, however, the Court picked up exactly where it left off in the twentieth century: rejecting jurisdiction because the defendant lacked purposeful contact with the forum. Because there was no contact, there was no call to consider whether jurisdiction would be fair or reasonable. Lack of contact was determinative, as it had been in *Hanson* and *World-Wide Volkswagen*.

McIntyre even replicated the twentieth-century failure to generate a majority opinion on the contact prong of the analysis in the stream of commerce context. In 1987, in *Asahi Metal Industry Co. v. Superior Court*,⁴⁷ the Court infamously split four-to-four-to-one on whether placing a component into the stream of commerce constitutes a purposeful contact when the finished product is marketed by a third party in another state.⁴⁸ The case generated two approaches, each garnering the support of four Justices, and thus failed to establish a precedent.⁴⁹ In *McIntyre*, a case involving a finished product in the stream of commerce, rather than a component,⁵⁰ the passage of twenty-four years and turnover of eight Justices brought no clarity. The Court again failed to generate a majority approach, this time splitting four-to-two-to-three.⁵¹ Because six Justices concluded that there was no purposeful contact, however, considerations of fairness or reasonableness were irrelevant.⁵²

45. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

46. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021); *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

47. 480 U.S. 102.

48. *Id.* at 112–13 (plurality opinion); *id.* at 117–18 (Brennan, J., concurring).

49. *See id.* at 112 (plurality opinion) (purposeful availment); *id.* at 117 (Brennan, J., concurring) (stream of commerce).

50. *McIntyre*, 564 U.S. at 877. Justice Ginsburg noted this factual distinction between *McIntyre* and *Asahi* and argued that the manufacturer of a finished product has greater control over where its product will be marketed than the manufacturer of a component. *Id.* at 908 (Ginsburg, J., dissenting).

51. Justice Kennedy wrote the plurality opinion, joined by three others. *Id.* at 876 (plurality opinion). Justice Breyer, joined by Justice Alito, concurred in the judgment. *Id.* at 887 (Breyer, J., concurring). Justice Ginsburg dissented, joined by two others. *Id.* at 893 (Ginsburg, J., dissenting).

52. Justice Kennedy and Justice Breyer, representing a total of six Justices, rejected the argument that the English company had forged a purposeful contact with New Jersey. *See id.* at 885 (plurality opinion).

The emphasis on contact *über alles* could not be starker. Indeed, the result in *McIntyre* can be justified only by *ignoring* the most basic principles of “fair play and substantial justice.” In that case, a New Jersey plaintiff, injured on the job in New Jersey by a machine purchased by his employer, was prohibited from pursuing suit in New Jersey against the manufacturer of the machine, notwithstanding that the manufacturer had marketed the product to all states and (presumably) made money from the sale into New Jersey.⁵³

In *Walden*, the Court focused on the contact analysis in the context of “effects” jurisdiction.⁵⁴ In that case, a police officer working at the Atlanta International Airport seized cash belonging to the plaintiffs while they were making a flight connection from Puerto Rico to their home in Nevada.⁵⁵ The officer claimed that the cash was related to illegal drug activity. He allegedly swore out a false affidavit about drug activity, which led the United States Attorney in Atlanta to seize the money.⁵⁶ Ultimately, the cash, which was related to legal gambling activity, was returned to the plaintiffs, and they were not charged with a crime.⁵⁷ The plaintiffs sued the police officer in Nevada, arguing that although everything the officer did was done in Georgia, his acts had caused an effect in Nevada and thus constituted a contact.⁵⁸

The Court held that the officer could not be sued in Nevada because he did not forge a relevant purposeful contact with that state.⁵⁹ The plaintiffs complained about being deprived of the use of the money and noted that the deprivation was suffered in Nevada.⁶⁰ The Court seemed willing to agree with this point—yes, the plaintiffs suffered harm in Nevada. But that harm was felt in Nevada only because the *plaintiffs* happened to live there, not because the officer aimed his conduct toward Nevada.⁶¹ The case was another lineal descendent of *Hanson* and *World-Wide Volkswagen*.

53. See *id.* at 897 (quoting an email from the defendant corporation’s president: “All we wish to do is sell our products in the [United] States—and get paid!”) (Ginsburg, J., dissenting).

54. *Walden v. Fiore*, 571 U.S. 277, 290 (2014). The doctrine is generally associated with *Calder v. Jones*, 465 U.S. 783 (1984). In that case, a reporter and an editor, acting in Florida, produced a newspaper article that defamed a California movie actress. *Id.* at 784–85. The analysis of contact depended upon the nature of the claim. The “brunt” of defamation is suffered where a falsehood is published. See *id.* at 788–89. Indeed, one element of the tort of defamation is publication, and the article was published in California. *Id.* at 784–85; see also *id.* at 785 n.2. Moreover, in *Calder*, the story concerned the activities of the plaintiff in California, alleging that she was not performing well because of an alcohol problem. *Id.* at 784–786; Joint Appendix at *8–9, *Calder v. Jones*, 571 U.S. 783 (1984) (No. 82-1401) 1983 U.S. S. Ct. Briefs LEXIS 214. The defendants forged purposeful contact by causing an effect in California. *Calder*, 465 U.S. at 789.

55. *Walden*, 571 U.S. at 280.

56. *Id.* at 280–81.

57. *Id.* at 281.

58. See *id.*

59. *Id.* at 290 (“[T]he effects of petitioner’s conduct on respondents are not connected to the forum State in a way that makes those effects a proper basis for jurisdiction.”).

60. *Id.* at 289.

61. *Id.* (“[M]ere injury to a forum resident is not a sufficient connection to the forum.”).

McIntyre and *Walden* broke no new methodological ground. The rigid two-step approach from the twentieth century remained intact. The finding of no relevant contact left considerations of fair play and substantial justice on the sidelines.

B. Further Subjugation of the Fairness Factors

The Court's new-era decisions on general jurisdiction are most noteworthy for their restriction of the doctrine and impact on specific jurisdiction analysis. Before addressing those points, note two collateral consequences of one of those cases, *Daimler AG v. Bauman*.⁶² In a remarkable footnote in her majority opinion, Justice Ginsburg, speaking for eight Justices, did two noteworthy things. First, she embraced the *World-Wide Volkswagen* lockstep, two-pronged analysis for specific jurisdiction.⁶³ This was surprising because her dissent in *McIntyre* had appeared to embrace something akin to the Court's *mélange* approach from *McGee*.⁶⁴ Thus, even Justice Ginsburg now relegated the fairness factors to a subsidiary position, irrelevant in the absence of purposeful contact.

Second, she concluded that the fairness factors are irrelevant in cases of general jurisdiction.⁶⁵ If the facts of a case satisfy the new test for general jurisdiction (the "at home" test, addressed momentarily), jurisdiction is automatic, without considerations of fairness. After *Daimler*, then, "fair play and substantial justice" was arguably more peripheral than it had been in 1990: the *mélange* approach now appeared to have no adherent on the Court, and the fairness assessment was irrelevant in general jurisdiction cases.

C. The Restriction of General Jurisdiction and the Specific Jurisdictional Gap

Justice Ginsburg wrote the majority opinions in the three new-era general jurisdiction cases: *Goodyear*, *Daimler*, and *BNSF Railway Co. v. Tyrrell*.⁶⁶ In these cases, the Court significantly restricted general jurisdiction. That restriction need be recounted only briefly here.⁶⁷ Our focus is not on the new doctrine of

62. 571 U.S. 117 (2014).

63. *Id.* at 139 n.20 ("First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case.").

64. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 899–901 (2011) (Ginsburg, J., dissenting).

65. *Daimler*, 571 U.S. at 139 n.20 ("When a corporation is genuinely at home in the forum State, . . . any second-step inquiry would be superfluous."). Justice Sotomayor noted that the Court's holding on this issue was "a ground neither argued nor decided below." *Id.* at 146 (Sotomayor, J., concurring).

66. 137 S. Ct. 1549 (2017).

67. The new-era restrictions on general jurisdiction have generated considerable commentary. *See, e.g.*, Patrick J. Borchers, *The Muddy-Booted, Disingenuous Revolution in Personal Jurisdiction*, 70 FLA. L. REV. FORUM 21, 27 n.62 (2018); Robin J. Efron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 100 (2018); Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 14 NEV. L.J. 1161, 1165–

general jurisdiction per se, but what it means for the new era of specific jurisdiction cases.

Goodyear, in 2011, seemed to suggest that “continuous and systematic” ties between the defendant and the forum were no longer sufficient to invoke all-purpose jurisdiction. Instead, general jurisdiction requires that the defendant be “at home” (or “essentially at home”)⁶⁸ in the forum.⁶⁹ The Court refused to define “at home” but provided “paradigms” that appeared to be quite narrow. For a corporation, the state of incorporation and the state in which the company established its principal place of business (apparently meaning its nerve center)⁷⁰ would have general jurisdiction.⁷¹ The Court hinted that general jurisdiction might be proper in another state, based upon the level of business activity.⁷² In other words (mine, not the Court’s), the opinion may have left open the possibility that a defendant could be “figuratively” at home, as opposed to “literally” at home, based upon its level of activity. Moreover, the Court made clear that general jurisdiction cannot be based upon the defendant’s buying products from or selling products into the forum.⁷³

In 2014, in *Daimler*, Justice Ginsburg made clear that the Court meant what it said in *Goodyear*: the test for general jurisdiction is not whether the defendant has “continuous and systematic” or “substantial” ties with a state, but whether the defendant is “at home” there.⁷⁴ Contacts-based general jurisdiction over a corporation might be possible if the case resembled *Perkins v. Benguet Mining Co.*, which, as the Court explained it, conducted all of its business in a single state.⁷⁵ Finally, in *BNSF*, decided in 2017, Justice Ginsburg led the Court in effectively

74 (2015); Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2002 (2014).

68. Initially, in *Goodyear*, the Court used the phrase “essentially at home.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Later, however, the Court dropped “essentially” and referred twice to “at home.” *Id.* at 924, 929. Later, in *Daimler*, the Court’s discussion is about where a corporation is “at home.” 571 U.S. at 122. Except in quotations from *Goodyear*, the modifier “essentially” does not appear. *Id.* at 122, 127, 133 n.11, 139. More recently, in *BNSF*, the Court used the phrase “at home” seven times but “essentially at home” once in a quotation from *Goodyear*. *See, e.g.*, 137 S. Ct. at 1555 (“[E]xercise of personal jurisdiction [was] impermissible because BNSF is not ‘at home’ in Montana.”).

69. *Goodyear*, 564 U.S. at 919.

70. This conclusion follows the Court’s citation to *Hertz Corp. v. Friend*, 559 U.S. 77, 92 (2010), which adopted this “nerve center” definition of “principal place of business” for purposes of federal subject-matter jurisdiction. The Court failed to explain why this definition—as opposed to one that focused on a corporation’s activities in the work world—should apply. Moreover, the Court has never explained where unincorporated businesses such as partnerships and limited liability companies are “at home.” In practice, many unincorporated associations feature diffused decision-making, which might take place at multiple places. *See Susan Gilles & Angela Upchurch, Finding a “Home” for Unincorporated Entities Post-Daimler AG v. Bauman*, 20 NEV. L.J. 693, 721 (2020). In addition, partnerships are formed by conduct and do not require anything analogous to the process of incorporation. *See id.*

71. *Goodyear*, 564 U.S. at 924.

72. *Id.* at 928.

73. *Id.* at 929.

74. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014).

75. *Id.* at 129–30.

ending the possibility of contacts-based general jurisdiction.⁷⁶ It appears, when the dust settles, that general jurisdiction is now available over a corporation on the same bases as were available before *International Shoe*: where it is incorporated and where it maintains its principal place of business.

By limiting general jurisdiction, these decisions created a gap. General jurisdiction no longer applies to defendants who have “continuous and systematic” or “substantial” ties with the forum but who are not “at home” there. The results, increasingly, are cases in which the defendant has a great deal of contact with the forum (perhaps enough to have invoked general jurisdiction before the new era) but in which general jurisdiction now is no longer available. Such cases must now be handled, if at all, by specific jurisdiction. And specific jurisdiction can apply only if the plaintiff’s *claim* is sufficiently connected to the defendant’s contact with the forum—an assessment we will call “relatedness.”

The relatively easy invocation of general jurisdiction before the new era often liberated courts from the task of assessing relatedness. After all, if the defendant had continuous and systematic or substantial ties with the forum, it could be sued there for any claim, so there was no concern with whether the claim had sufficient relatedness with the forum. With general jurisdiction doing less lifting, courts can no longer simply elude the relatedness question.

The two most recent specific jurisdiction cases—*Bristol-Myers* and *Ford*—fall into this gap. Again, they are a different breed from *Hanson*, *World-Wide Volkswagen*, *McIntyre*, and *Walden*. Here, there is no question of purposeful contact between the defendant and the forum. The question is the relatedness of a claim to that contact. This emerging focus on relatedness invokes a shift from a two-step to a three-step methodology. *World-Wide Volkswagen* established the two-step inquiry of purposeful contact followed by an assessment of fairness. Now, the analysis likely should go from (1) purposeful contact to (2) relatedness and, if relatedness is satisfied, to (3) the assessment of the fairness factors. We turn now to what the Court has done in its two relatedness cases.

III. FILLING THE GAP

A. *The Specific Jurisdiction Mantra and Bristol-Myers*

Just as we have long had a mantra for general jurisdiction—it was “continuous and systematic” or “substantial” and is now “at home”—so we have a mantra for relatedness: whether the plaintiff’s claim “arises out of or

76. In her separate opinion, Justice Sotomayor reached this conclusion about the Court’s reasoning in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549, 1561 (2017) (Sotomayor, J., concurring in part and dissenting in part). For discussion of the tortured history of personal jurisdiction over corporations, see Patrick J Borchers, *Ford Motor Co. v. Montana Eighth Judicial District Court and “Corporate Tag Jurisdiction” in the Pennoyer Era*, 72 CASE W. RESV. L. REV. 45 (2021).

relates to” the defendant’s contact with the forum.⁷⁷ In his dissent in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁷⁸ Justice Brennan argued that “arises out of” and “relates to” mean different things and that the latter phrase is broader than the former. Thus, he argued for specific jurisdiction in *Helicopteros*, in which the plaintiffs’ claims did not arise directly from the defendant’s activity in Texas but could be said to be “related to” it.⁷⁹ The majority in *Helicopteros* avoided the issue.⁸⁰ Not until 2017, in *Bristol-Myers*, did the Court wrestle with “arises out of or relates to.”

In *Bristol-Myers*, 678 plaintiffs sued a pharmaceutical manufacturer in California.⁸¹ They sought damages for personal injuries allegedly caused by the defendant’s blood-thinning drug Plavix.⁸² The defendant had enormous, continuous contacts with California, including more than 400 employees, 5 research and development centers, a lobbying office, and having sold \$900,000,000 worth of Plavix over the relevant time.⁸³ Despite these contacts, in the new era the defendant was not subject to general jurisdiction in California; it was not incorporated there and did not maintain its principal place of business there.⁸⁴

The jurisdictional difficulty was that 592 of the plaintiffs were not residents of California.⁸⁵ The Plavix they ingested was not manufactured, packaged, labeled, or sold in California.⁸⁶ Nonetheless, the California Supreme Court upheld specific jurisdiction over the claims of all plaintiffs (including the 592 non-Californians) by invoking a “sliding scale” that adopted some aspects of the Brennan approach from *Helicopteros*.⁸⁷ Because the defendant had such overwhelming ties with California, the California court concluded, the claims of the nonresidents needed only “relate to” those contacts and not to “arise out

77. The phrase was first used in *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting) (emphasis added).

78. *Id.* at 425.

79. *Id.* at 426–27. Justice Brennan made this argument in asserting that Texas had specific jurisdiction in *Helicopteros*. *Id.* at 424. The majority in that case did not address the issue, however, because it interpreted the plaintiffs’ brief to concede that there was no specific jurisdiction. *Id.* at 415 (majority opinion).

80. The litigants in that case stipulated that the defendant was not subject to specific jurisdiction, meaning that the Court was not required to assess whether the claims were sufficiently connected to the forum to satisfy specific jurisdiction. *Id.* at 415 n.10 (“[T]he parties have not argued any relationship between the cause of action and Helicol’s contacts with the State of Texas . . .”).

81. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1778 (2017).

82. *Id.*

83. *Id.*

84. Originally, the California trial court exercised general jurisdiction based upon the defendant’s continuous and systematic ties with the forum. *Id.* After the Supreme Court decided *Daimler*, however, the Court determined that general jurisdiction was not available. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1781.

of” them.⁸⁸ The state court found sufficient connection from the facts that the defendant engaged in a nationwide advertising campaign (all the plaintiffs saw the same advertisements) and that the Plavix ingested by the non-Californians was identical to that taken by the Californians.⁸⁹

The Court, in an eight-to-one decision authored by Justice Alito, reversed and held that the 592 non-California plaintiffs failed to connect their *claims* sufficiently to the defendant’s California *contacts*.⁹⁰ Those non-Californians did not get Plavix through California doctors, did not ingest Plavix in California, and were not injured or treated in California.⁹¹ On the other hand, the California court did have specific jurisdiction over the defendant for the claims of the eighty-six California plaintiffs.⁹² The lack of “relatedness” thus was a difficulty only for the non-California plaintiffs.

The majority opinion refused to follow Justice Brennan’s suggestion in *Helicopteros*. The phrase “arises out of or relates to,” said the Court, does not contain two parts, but espouses a unitary standard.⁹³ And that standard was not satisfied for the claims by the non-Californians. True, the Plavix ingested by the California plaintiffs was identical to that ingested by the non-California plaintiffs. True, the plaintiffs were subjected to the same advertising and marketing scheme in every state. But these facts did not satisfy the requirement that the claims “arise out of or relate to” the defendant’s contacts with the forum.⁹⁴ Nothing the defendant did in California had any connection with the purchase or ingestion of Plavix, say, in Ohio. Not only that, the majority concluded, but there is no “sliding scale” by which the level of the defendant’s activity in the forum affects the degree of relatedness required.⁹⁵

The move from contact to relatedness entails a profound shift in focus: from whether the *defendant* affiliated itself with the forum (through purposeful availment) to whether the *plaintiff’s claim* is sufficiently connected to the defendant’s forum activities. We Civil Procedure teachers tell our students that personal jurisdiction is exercised over litigants while subject-matter jurisdiction is exercised over cases and claims. But here, we see some morphing: even though we are assessing personal jurisdiction, we are looking at the details of the *claims* being asserted, which, in turn, requires consideration of the *plaintiff’s* connection with the forum. In *Bristol-Myers*, it was the non-California *plaintiffs* (not the defendant) who had no contact with California.

88. The state court concluded that the claims of the non-California plaintiffs related to the California contacts because all plaintiffs were subjected to consistent nationwide advertising and marketing and the Plavix pills ingested in California were identical to those ingested in other states. *Id.* at 1778–79.

89. *Id.* at 1781; *id.* at 1784 (Sotomayor, J., dissenting).

90. *Id.* at 1781 (majority opinion).

91. *Id.* at 1778.

92. *Id.* at 1779.

93. *Id.* at 1780–81.

94. *Id.* at 1782.

95. *Id.* at 1781.

The relatedness analysis reflects a profound truth: with specific jurisdiction, the forum does not exercise regulatory power over the defendant *per se*, but over some aspect of the defendant's conduct or activity—conduct or activity that takes place in or causes an effect in the forum. Again, in *Bristol-Myers*, California did not lack personal jurisdiction over the pharmaceutical company. It lacked jurisdiction over the *claims* asserted by non-California plaintiffs against that defendant. Why? Because though the defendant's contacts with California were extensive, they did not justify California's regulating its non-California behavior. In the new era, only the defendant corporation's state of incorporation and state in which it maintains its principal place of business have authority to regulate its out-of-state conduct.

The majority in *Bristol-Myers* grounded its holding in the concept of interstate federalism. California's exercise of jurisdiction over the claims by non-Californians invaded the province of those states in which the defendant was "at home."⁹⁶ Surprisingly, Justices Ginsburg, Breyer, and Kagan joined the majority opinion despite having expressed doubts (in other cases) about the role of interstate federalism in personal jurisdiction analysis.⁹⁷ In dissent, Justice Sotomayor attacked the notion that California's exercise of general jurisdiction would have encroached on the sovereignty of states in which the defendant was "at home."⁹⁸

Regardless of what one thinks of the holding in *Bristol-Myers*, there is at least a legitimate argument that California taxpayers should not be required to fund a court system to adjudicate claims of Ohio plaintiffs for injuries sustained in Ohio and which likely will be governed by Ohio tort law. Even so, *Bristol-Myers* raised a disturbing possibility: that the defendant's contact with the forum must include *the very product* (such as the very pill) that harmed the plaintiff. Such a holding would allow manufacturers selling a defective product into State A, which is subsequently sold privately to an owner in State B, to escape jurisdiction in the latter state.⁹⁹ And, as Justice Sotomayor noted in her dissent, such a tight definition of relatedness might unduly hamper aggregate litigation concerning a defective product in a single state with which a defendant has significant contacts but is not "at home."¹⁰⁰

The ultimate reach of *Bristol-Myers* is not clear because the Court left several key questions unaddressed—questions that state and lower federal courts had

96. *Id.* at 1780 (finding that limitations on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States").

97. It is also surprising that the same three Justices agreed with Justice Alito's discussion of purposeful availment as requiring that the defendant "submit" to the authority of the forum. *Id.* at 1780.

98. *Id.* at 1788 (Sotomayor, J., dissenting) ("What interest could any single State have in adjudicating respondents' claims that the other States do not share?").

99. *See* Freer, *supra* note 38, at 113 ("This view of relatedness will make it more difficult to aggregate the claims of plaintiffs who are injured in different states by different (though identical) products.").

100. *Bristol-Myers*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) (making the argument and noting that such a limitation would be especially problematic in aggregate cases asserting negative-value claims).

engaged long before *Bristol-Myers*.¹⁰¹ It was clear from the case law that one potentially difficult issue concerning relatedness is whether the defendant's contact with the forum must have *caused* the harm suffered by the plaintiff. *Bristol-Myers* does not engage the question and does not address what sort of causation, if any, would be required.

For instance, suppose a Hawaii hotel advertises in Massachusetts. *P*, a citizen of Massachusetts, in response to these ads, goes to the hotel, where she suffers injury in a slip and fall. Assuming the advertising constituted a contact between the hotel and Massachusetts, does the claim "arise from or relate to" that contact? Under a "but for" causation theory, arguably yes: but for the ads, *P* would not have gone to the hotel and thus would not have been injured there. Or, instead, must there be "proximate causation"? If so, perhaps Massachusetts would lack personal jurisdiction over the Hawaii hotelier because its ads in Massachusetts were not the immediate cause of the plaintiff's slip and fall in Hawaii. Or, instead, is there some other variant of causation? Or, again, is causation required at all in the relatedness analysis? *Bristol-Myers* left such questions unaddressed. Less than four years later, the Court returned to the topic.

B. Ford and the Possible Invigoration of the Fairness Analysis

In March 2021, the Court decided *Ford*, which involved two companion cases, one from Montana and one from Minnesota.¹⁰² For simplicity, we will address the facts of the Montana case. There, Ford manufactured a 1996 Explorer in Kentucky and sold it to a dealer in Washington.¹⁰³ Through a series of independent transactions, with which Ford had no connection, the vehicle ended up in Montana, owned by the decedent, who was a resident of Montana.¹⁰⁴ She was killed in a wreck in Montana, and her representatives sued Ford in that state, asserting various product liability claims.¹⁰⁵ The state courts in Montana upheld specific jurisdiction over Ford.¹⁰⁶

Could the plaintiff argue that the presence of the vehicle in the forum constituted purposeful availment between Ford and Montana for purposes of

101. See, e.g., *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 572 (Tex. 2007) (discussing various approaches to causation in the context of specific jurisdiction).

102. 141 S. Ct. at 1022–24.

103. *Id.* at 1023.

104. *Id.*

105. *Id.*

106. *Id.* In the other case, Ford manufactured a vehicle (a 1994 Crown Victoria) in Canada and sold it to a dealer in North Dakota. *Id.* Through a series of independent transactions, with which Ford had no connection, the vehicle ended up in Minnesota, owned by a resident of Minnesota, who was a friend of the injured. *Id.* The injured was a passenger in the vehicle and suffered significant personal harm in a wreck in Minnesota. *Id.* He sued Ford in that state. *Id.* The state courts in Minnesota upheld specific jurisdiction over Ford. *Id.*

the contact requirement of *International Shoe*? Under *World-Wide Volkswagen*, the answer must be no: the vehicle got into Montana through the unilateral acts of third parties, not through anything Ford did.¹⁰⁷ Could the plaintiff argue that the presence of the vehicle in Montana was a contact under the stream of commerce theory? This seems unlikely: the Explorer was not swept into Montana by anything Ford put into motion; Ford directed the sale of the vehicle into Washington. In addition, under *Walden*, it may be difficult to conclude that the happenstance of where the plaintiff chose to own and drive (or to be a passenger in) a Ford vehicle should constitute a contact between Ford and the forum.

Fortunately, in *Ford*, the plaintiff was not required to rely on a contact created by the specific Explorer involved in the wreck. Ford had what we can easily call continuous and substantial contacts with Montana: it maintains scores of dealers there, sells and ships thousands of vehicles directly to those dealers, advertises, and provides parts and service in Montana. Before the new era, Ford likely would have conceded that it was subject to general jurisdiction in that state because of those ties. Add to that the fact that the wreck occurred in the forum and resulted in the death of a forum resident (which may support an argument that we are talking about specific (and not general) jurisdiction) and any pre-2011 jurisdictional challenge would have been doomed. Indeed, as Professor Rhodes recently demonstrated, between 1945 and the present case, Ford did not challenge personal jurisdiction in even a single case involving similar facts.¹⁰⁸

In the new era, though, a jurisdictional challenge was likely. Despite the defendant's substantial ties with Montana, there was no general jurisdiction because Ford was not incorporated there and did not maintain its principal place of business there. Accordingly, specific jurisdiction was the only option. In *Ford*, the defendant did not argue (and, indeed, could not have argued) that it lacked purposeful contact with the forum states. Neither did it argue that the exercise of jurisdiction would have violated the fairness factors (again, how could it?). Its entire argument was that the plaintiff's claim did not "arise out of or relate to" Ford's contacts with the forum. According to Ford, relatedness could only be satisfied by a very strict causal relationship—that the *very car* in which the plaintiff was killed was either (1) designed or (2) manufactured or (3) sold directly by Ford into the forum.¹⁰⁹

107. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

108. Charles W. "Rocky" Rhodes, *The Roberts Court's Jurisdictional Revolution within Ford's Frame*, 51 *STETSON L. REV.* 157, 159 (2022) (noting that a Westlaw search showed that Ford made no such challenge in any domestic case during those years).

109. *Ford*, 141 S. Ct. at 1023.

The Court unanimously rejected this argument and upheld specific jurisdiction.¹¹⁰ Rather curiously, the majority opinion by Justice Kagan¹¹¹ did two things that the majority in *Bristol-Myers* had declined to do. First, it separated the phrase “arises out of” from the phrase “relates to.” The former, it concluded, requires causation: that the defendant’s contact with the forum *caused* the harm suffered by the plaintiff.¹¹² Importantly, however, a causal relationship is not required in all cases. Sometimes, all that is required is that the defendant’s contact with the forum “relates to” the plaintiff’s claim.¹¹³ In other words, Justice Brennan was right: “relates to” is broader than “arises out of.”

Second, the Court appears to recognize a sliding scale (though it will never call it that, given the rejection of the term in *Bristol-Myers*). Justice Kagan explained that if the defendant has a great deal of contact with the forum (such as Ford’s contacts with Montana), the plaintiff need only satisfy the “relates to” test to support specific jurisdiction.¹¹⁴ On the other hand, if the defendant has relatively less contact with the forum, the plaintiff must show that the claim “arises out of” that contact, which, as noted, requires a causal relationship between the defendant’s contact and the plaintiff’s claim.¹¹⁵

Perhaps more interesting, however, is how the Court appears to draw the line between whether to apply “arises out of” or “relates to” in a given case. Arguably, the Court is resurrecting (albeit for a limited purpose) the old “continuous and systematic” or “substantial” test that was employed for general jurisdiction before the new era. Justice Kagan’s opinion reads like a general jurisdiction case from back in the day: Ford had “substantial business in the State,”¹¹⁶ Ford “systematically served” the state market,¹¹⁷ Ford “regularly

110. Though the decision was unanimous, there were three opinions: Justice Kagan for the majority of five, Justice Alito in concurrence, and Justice Gorsuch concurring in the judgment, in which Justice Thomas joined. *Id.* at 1022. Justice Barrett did not participate in the case. *Id.* Thus, only eight Justices participated in the case. *Id.*

111. Justice Alito concurred in *Ford* and decried the parsing of “arise out of or relate to” into two parts. (Perhaps he was defending turf since his opinion in *Bristol-Myers Squibb* refused to make such a distinction.) To him, a causal connection is always required but was easily satisfied on the facts of the case. *Id.* at 1033 (Alito, J., concurring) (“[H]ere, there is a sufficient link [for causation].”). Justice Gorsuch, joined by Justice Thomas, concurred in the judgment in an opinion that will command a good bit of attention. He discussed traditional approaches to personal jurisdiction and expressly discussed *Pennoyer*. *Id.* at 1034–36 (Gorsuch, J., concurring in the judgment). Though some will see this as an appeal to restrictive jurisdictional doctrine, the opposite appears to be the case. Justice Gorsuch was particularly concerned that though individuals can be subject to “tag” jurisdiction, corporate defendants have not been, so a return to *Pennoyer* (under which all jurisdiction was general jurisdiction) may signal a desire to expand jurisdiction over businesses. *Id.* at 1036.

112. *Id.* at 1026–27 (majority opinion).

113. *Id.*

114. *Id.*

115. *See id.*

116. *Id.* at 1022.

117. *Id.* at 1028.

conduct[ed]” business in the state,¹¹⁸ and Ford had “systematic contacts” with the forum.¹¹⁹ Justice Alito’s concurring opinion chimed in, referring to Ford’s “heavy presence” in Montana.¹²⁰ Such forum activity is contrasted, in the majority opinion, with “isolated or sporadic” conduct.¹²¹

Of course, in this context, extensive ties with the forum do not support *general* jurisdiction. But they do permit *specific* jurisdiction on a lesser showing of relatedness. In these cases, the plaintiff’s claim must merely “relate to” the defendant’s substantial and continuous ties with the forum. Stated another way, if the defendant has the kind of contacts that supported general jurisdiction before 2011, it is easier to show relatedness than if the defendant has merely isolated or sporadic ties to the forum.

Without doubt, *Ford* leaves a good many unanswered questions.¹²² For example, at what point does the defendant’s contact become so extensive as to justify the application of the “relates to” standard? In applying “arises out of,” what sort of causal relationship is required? Moreover, how far does “relates to” reach? The Court cautions that “relates to” does not mean “anything goes” but, instead, imposes “real limits” to protect the defendant from litigation in an inappropriate place.¹²³

The only guidance we have on the latter point comes from the facts of *Ford* itself, in which the Court held the “relates to” standard was satisfied. Ford’s extensive activities in Montana were aimed at creating a market for Ford vehicles there: by advertising and maintaining dealerships that not only sell new vehicles but provide service and Ford parts for used vehicles, the company encouraged Montanans to become Ford owners, even if they bought their cars out-of-state in second-hand transactions.¹²⁴ Ford cultivated ongoing relationships with Montana residents. The Court was willing to assume that the decedent “might never have bought” the used Ford vehicle “except for Ford’s contacts with [her] home State[.]”¹²⁵ The claim, while not *caused* by Ford’s actions in the forum (because those actions did not include the specific vehicle

118. *Id.* at 1029.

119. *Id.* at 1022, 1028–29.

120. *Id.* at 1032 (Alito, J., concurring).

121. *Id.* at 1028 n.4 (majority opinion).

122. See, e.g., Patrick J. Borchers, Richard D. Freer & Thomas C. Arthur, Ford Motor Co. v. Montana Eighth Judicial District: *Lots of Questions, Some Answers*, 71 EMORY L.J. ONLINE 1, 19–26 (2021) (discussing various questions left open by *Ford*).

123. *Ford*, 141 S. Ct. at 1026.

124. *Id.* at 1029 (“[Ford’s] contacts might turn any resident of Montana or Minnesota into a Ford owner—even when he buys his car from out of state.”).

125. *Id.* The Court’s willingness to make this presumption avoids requiring the plaintiff in each case to show that she bought her used Ford from someone out-of-state because Ford advertising in the forum led her to do so or because she knew that Ford dealers in her state were available to provide service. Because litigating such issues case by case would not serve the interest of predictability, the Court wisely concluded that the record supported the inference that the plaintiffs bought Fords because of the company’s actions in the forum.

in which the plaintiffs were injured), “relate[d] to” Ford’s continuous and systematic creation and maintenance of a market for its vehicles.

The *Ford* Court emphasized that its holding was presaged by its discussion, in dictum, of jurisdiction over the manufacturer of the car involved in *World-Wide Volkswagen*.¹²⁶ There, while rejecting jurisdiction over the New York distributor and retailer for lack of contact with Oklahoma, the Court assumed that the forum had personal jurisdiction over the German manufacturer.¹²⁷ In making the point, the Court failed to note one distinction between the cases: in *World-Wide Volkswagen*, the plaintiff was not a resident of the forum. If anything, the fact that the plaintiffs in *Ford* were residents of the forum states makes jurisdiction in that case stronger than *World-Wide Volkswagen*—at least if one is willing to consider fairness factors such as the plaintiff’s interest in litigating at home.

One can argue that the majority opinion in *Ford* reflects regret about how far the Court has gone in limiting general jurisdiction. The new-era test for general jurisdiction takes no account of the level of the defendant’s activity in the forum. Justice Kagan’s bifurcation of “arises out of” from “relates to”—based upon the level of defendant contact—may work to narrow the gap created by the “at home” test.

We suggested at the end of the preceding section that the analysis of specific jurisdiction in cases such as *Bristol-Myers* and *Ford* consists of three steps: (1) purposeful contact followed by (2) relatedness followed (if relatedness is satisfied) by (3) an assessment of the fairness factors.¹²⁸ It is clear from *Ford* that the starting point is indeed contact, which was obviously satisfied in the case. The majority opinion defines contact in terms of “purposeful availment”¹²⁹ but does not specifically mention “foreseeability” as a contact factor. *World-Wide Volkswagen* held that foreseeability that the defendant could be sued in the forum was “critical” to the contacts assessment.¹³⁰ Though Justice Kagan did not mention foreseeability as such, the concept is implicit in the Court’s

126. *Id.* at 1027–28.

127. *Id.* (“In *Daimler*, we used the Audi/Volkswagen scenario as a paradigm case of specific jurisdiction.”).

128. In her dissent in *Bristol-Myers*, Justice Sotomayor expressly adopted this three-part analytical framework. *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1785–87 (2017) (Sotomayor, J., dissenting). One interesting question is which party has the burden of proof regarding relatedness. It has been clear since *World-Wide Volkswagen* that the plaintiff must make the initial showing of contact between the defendant and the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *Burger King* made equally clear that the defendant has the burden of demonstrating that the exercise of jurisdiction would be unfair under the circumstances. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985). But what about relatedness? Now that the first inquiry regarding relatedness appears to be the level of contact between the defendant and the forum, it seems likely that the burden on that issue will be on the plaintiff. Beyond that, must the plaintiff demonstrate that the claim “arises out of” or “relates to” that contact?

129. *Ford*, 141 S. Ct. at 1024–25.

130. In *World-Wide Volkswagen*, the Court held that the foreseeability that the defendant can reasonably anticipate being sued in the forum “is critical to due process analysis.” 444 U.S. at 297.

conclusion that Ford's level of contact in the forum gave it "fair warning" that it might be subjected to jurisdiction there.¹³¹

The bigger methodological question is how the Court assesses the fairness factors. We know that they apply only in specific jurisdiction cases, so they become relevant only if the relatedness requirement is satisfied. And we know that relatedness was satisfied in *Ford*. Thus, it is curious that the majority did not address the reasonableness of jurisdiction in a third express analytical step.¹³²

Methodology aside, the important point in *Ford* is that the fairness factors were on the table—not to defeat specific jurisdiction but as arguing in favor of its exercise. Remarkable to say, *Ford* is the first decision since *McGee*—sixty-three years earlier—in which the Court relied upon fairness factors to *support* jurisdiction. And the classic list of fairness factors was on display.

First, the Court addressed the burden on the defendant by concluding that there is nothing unfair in making Ford defend in a state in which it carries on substantial business activities (and reaps financial rewards).¹³³ Second, Montana, as the forum, has an interest in enforcing its motor vehicle safety laws.¹³⁴ Montana also has an interest that other states do not intrude on its ability to provide a remedy for its residents.¹³⁵ Third, the plaintiff's interest in suing at home was facilitated by upholding jurisdiction in Montana.¹³⁶ Finally, though unstated, it is clear that the interest in efficient litigation is fostered by suit in Montana because the witnesses and relevant evidence will be found there.

On this latter point, the Court in *Ford* did not mention the choice of law inquiry, which would seem to be an obvious consideration. After all, the fact that a dispute will be governed by the substantive law of the forum state channels the case to the court best able to interpret and apply that law. Consider the issue in the four new-era specific jurisdiction cases. In *Walden*, denying jurisdiction in Nevada required Nevada plaintiffs (if they chose to proceed) to sue the police officer in Georgia in a case likely governed by Georgia law. Similarly, denying jurisdiction in California in *Bristol-Myers* over claims by Ohio residents required Ohio plaintiffs to sue in Ohio in a case likely governed by Ohio law. These results seem right. In each case, the litigation is funneled to a state in which the plaintiff is a resident, in which the forum has an interest in

131. *Ford*, 141 S. Ct. at 1025. This conclusion is consistent with the *World-Wide Volkswagen* requirement of foreseeability that the defendant might be sued in the particular forum.

132. Instead, the Court appears to have folded considerations of fairness into its relatedness inquiry. Possibly, then, in cases such as *Ford*, the fairness factors are not to be shunted away to tertiary status behind contact and relatedness—but are part of the relatedness assessment.

133. *Id.* at 1029–30.

134. *Id.* at 1030.

135. *Id.* (noting state interest in providing residents with a convenient forum for redressing injuries inflicted by out-of-state actors).

136. *Id.* (overlapping with state's interest in providing a convenient forum for resident plaintiffs).

protecting its residents, in which the harm was suffered, and the law of which will govern the dispute.

What about *Ford*? Denying jurisdiction in *Ford* would have required a Montana plaintiff to sue Ford in Michigan (where Ford is subject to general jurisdiction) in a case likely governed by Montana law. Stated another way, denying jurisdiction in *Ford* would have imposed considerable dislocation. Michigan certainly has broad regulatory power over Ford and an interest in the adjudication of claims involving one of its leading corporate citizens. But it surely has a lesser interest in adjudicating claims asserted by a Montana resident concerning injuries sustained in Montana.

This analysis demonstrates that the result in *McIntyre* was problematic. By refusing jurisdiction in New Jersey, the Court forced the plaintiff, a New Jersey resident, to sue in Ohio¹³⁷ in a case likely governed by New Jersey law. Permitting him to sue in New Jersey would have avoided that dislocation.

We can chart these variables:

Case	<i>Walden</i>	<i>Bristol-Myers</i>	<i>Ford</i>	<i>McIntyre</i>
Forum	Nevada	California	Montana	New Jersey
Plaintiff	In-state	Out-of-state	In-state	In-state
Law Applied	Out-of-state	Out-of-state	Forum law	Forum law

Based on these factors, *Ford* and *McIntyre* ought to have come out the same way. And other factors support jurisdiction in both cases. In *Ford*, litigating in Michigan would not be convenient for the Montana plaintiff. The witnesses to the wreck, the medical evidence, the wrecked vehicle, and evidence of maintenance of the vehicle are in Montana. So too in *McIntyre*: litigating in Ohio would not have been convenient for the New Jersey plaintiff; the witnesses to the accident, the medical evidence, the machine, and evidence of its maintenance are in New Jersey, not Ohio.

But remember: the factors we are discussing here as supporting jurisdiction in New Jersey in *McIntyre* are fairness factors. They cannot be assessed until the court determines that there is a relevant contact between the defendant and the forum. In *McIntyre*, six Justices concluded that there was no such contact, so the assessment of fairness was impossible. Nothing in *Ford* directly undermines the result in *McIntyre*; after all, even *International Shoe* made clear that there can be no jurisdiction without a relevant contact between the defendant and the forum.¹³⁸

137. The English manufacturer sold its machines to a distributor in Ohio, which then marketed the machines throughout the United States. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 896 (2011) (Ginsburg, J., dissenting). Clearly, then, the manufacturer had direct purposeful ties with Ohio. The question becomes whether the plaintiff's claim—regarding injuries suffered in New Jersey—would satisfy the “arises out of or relates to” requirement.

138. See *supra* note 22 and accompanying text.

But the tenor of *Ford* might indicate a receptiveness even to relaxing the sclerotic view of contact the Court embraced in cases such as *McIntyre*. As discussed above, *Ford* adopted Justice Brennan's view that "relates to" is broader than "arises out of" and that it should be employed when the defendant has considerable ties with the forum. Perhaps the Court will be receptive to another Brennan innovation: tying the assessment of contact to the assessment of fairness in cases in which contact is minimal. In *Burger King*, Brennan, writing for the Court, opined that a strong showing that jurisdiction would be reasonable will support jurisdiction based upon a lesser showing of contact.¹³⁹ The Court has not referred to the notion since *Burger King*. Just as *Ford* resurrected the notion that "relates to" is broader than "arises out of," perhaps the Court will see wisdom in further expanding the sway of "fair play and substantial justice."

Even without that innovation, there are signs in *Ford* of a desire to regain balance in personal jurisdiction doctrine. There is great common sense to the notion that the level of the defendant's activity in the forum should affect the degree of relatedness required for specific jurisdiction. And the fact that the forum state's interest, plaintiff's interest, and litigation efficiency (augmented as suggested by the addition of choice of law) are front and center in cases of clear contact is cause for hope.

CONCLUSION

The promise of *International Shoe* always was its express incorporation of "fair play and substantial justice" into the personal jurisdiction canon. But the promise was largely unrealized. For over six decades, the Court subjugated the fairness assessment in cases of specific jurisdiction by focusing tightly on the defendant's "purposeful availment" of the forum. In the new era, it continued on that path with painfully narrow interpretations of when a defendant can be said to have forged a purposeful contact with the forum. At the same time, inexplicably, it set out to restrict general jurisdiction. Doing so created a gap: cases in which the defendant had considerable ties with the forum but in which there is no longer general jurisdiction. The Court now must address that gap and, with it, the concept of relatedness for specific jurisdiction. Hopefully, *Ford* signals that the Court recognizes the lack of wisdom of it restricting general jurisdiction in an era of parsimonious specific jurisdiction. Hopefully, *Ford* reinvigorates personal jurisdiction doctrine by rekindling assessments of a defendant's level of contact with the forum and, more profoundly, for letting the fairness factors support specific jurisdiction.

139. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) ("These [fairness] considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.").

In short, hopefully the Court will let “fair play and substantial justice” fulfill its promise.