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## Note

### ***BRISTOL-MYERS SQUIBB CO. v. SUPERIOR COURT:* REPROACHING THE SLIDING SCALE APPROACH FOR THE FIXABLE FAULT OF SLIDING TOO FAR**

JOHN V. FELICCIA\*

In *Bristol-Myers Squibb Co. v. Superior Court*,<sup>1</sup> the Supreme Court of the United States considered whether California courts appropriately exercised personal jurisdiction<sup>2</sup> over a nonresident defendant.<sup>3</sup> The minimum contacts doctrine<sup>4</sup> permits a court to assert personal jurisdiction over nonresident defendants with respect to claims “aris[ing] out of” or “related to” the defendant’s activities in the forum state.<sup>5</sup> When a court exercises personal jurisdiction so grounded, it is said to be exercising “specific jurisdiction.”<sup>6</sup> The California courts asserted specific jurisdiction over claims brought by nonresident plaintiffs for out-of-state injuries arising out of the defendant’s conduct that occurred entirely outside California.<sup>7</sup> The nonresidents’ claims were allegedly connected with California because the defendant engaged in a nationwide course of similar conduct, giving rise to claims brought by California residents that were materially identical to the claims brought by the nonresidents.<sup>8</sup> The Supreme Court held that Califor-

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1. 137 S. Ct. 1773 (2017).

2. A court without personal jurisdiction over a defendant cannot render a binding judgment against them. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

3. *Bristol-Myers Squibb*, 137 S. Ct. at 1779.

4. Under the minimum contacts doctrine, a court may assert personal jurisdiction over a defendant that makes minimum contacts with the forum state such that maintenance of the suit in the forum is not unreasonable. *Int’l Shoe*, 326 U.S. at 316.

5. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (“When a controversy is related to or ‘arises out of’ a defendant’s contacts with the forum . . . a ‘relationship among the defendant, the forum, and the litigation’ is the essential foundation of *in personam* jurisdiction.” (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977))). This Note will refer to the “arise out of or relate to” requirement and the “relatedness” requirement interchangeably.

6. *Id.* at 414 n.8.

7. *Bristol-Myers Squibb*, 137 S. Ct. at 1782 (“The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition . . . all the conduct giving rise to the nonresidents’ claims occurred elsewhere.”).

8. *See id.* at 1786 (Sotomayor, J., dissenting) (“[The nonresident plaintiffs’ claims] concern conduct materially identical to the acts the company took in California . . . which it undertook on a

nia's exercise of specific jurisdiction over the nonresidents' claims violated the Due Process Clause of the Fourteenth Amendment<sup>9</sup> because a relationship between the defendant and a third party is not enough to connect the nonresidents' claims with the forum.<sup>10</sup> A nonresident's claim remains unconnected with a forum despite the fact that forum residents bring identical claims arising out of the defendant's substantially similar conduct.<sup>11</sup> Even when a defendant's highly coordinated and uniform course of conduct generates both forum contacts with third parties and the out-of-state conduct that gives rise to the nonresident plaintiff's claim, a connection between the claim and the forum is wanting.<sup>12</sup>

The Court reached the correct conclusion because the objectives of due process are undermined when a court asserts specific jurisdiction over claims so tenuously connected with the forum.<sup>13</sup> Allowing the relatedness requirement to be satisfied by a similarity relationship exploits an expansive, untenable understanding of "relate to" that would upset the "orderly administration of the laws."<sup>14</sup> Such an interpretation would grant states the authority to adjudicate claims that fail to implicate their sovereign interest.<sup>15</sup> A defendant's course of conduct that generates separate acts likewise fails to implicate a sovereign interest over the whole when only some of those acts occur within the forum state's borders.<sup>16</sup> If these kinds of relationships were allowed to satisfy the "arise out of or relate to" requirement, the minimum contacts doctrine would bring about wildly unpredictable litigation for defendants operating on a national scale.<sup>17</sup>

Although reaching the correct conclusion, the Court failed to provide much guidance as to the "arise out of or relate to" requirement beyond its determination that a relationship between the defendant and a third party is not enough to connect a claim with a forum.<sup>18</sup> After a cursory evaluation,

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nationwide basis in all 50 States. . . . All the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts.”).

9. U.S. CONST. amend. XIV, § 1.

10. *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (majority opinion) (“[A] defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.” (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014))).

11. *See id.* (“The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims.”).

12. *See id.* (“What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”).

13. *See infra* Section IV.A.

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

15. *See infra* Section IV.A.

16. *See infra* Section IV.A.

17. *See infra* Section IV.A.

18. *See infra* Section IV.B.

the majority admonished the lower courts for adhering to the “sliding scale approach,”<sup>19</sup> an increasingly popular method for assessing the requisite relationship between a plaintiff’s claim and the forum.<sup>20</sup> Cautioning against the use of a sliding scale, the Court observed that the courts below “found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims.”<sup>21</sup> This lack of a connection, however, was a failing of the lower courts’ expansive reading of “relate to,” not the sliding scale approach.<sup>22</sup> Without substituting an approach of its own, the Court left lower courts rudderless in navigating the expanse of what constitutes an “adequate link” for the purposes of specific jurisdiction.<sup>23</sup> This Note argues that not only does sliding scale remain viable but, as a flexible standard, it also best comports with the minimum contacts doctrine’s fundamental inquiry—fairness.<sup>24</sup>

### I. THE CASE

On March 12, 2012, plaintiffs from thirty-four different states filed eight separate complaints with identical causes of action against Bristol-Myers Squibb Company (“BMS”) and McKesson Corporation (“McKesson”) in the San Francisco Superior Court.<sup>25</sup> The complainants sought to hold the defendants liable for the harmful side effects of taking Plavix,<sup>26</sup> a blood clotting inhibitor, which BMS manufactured and McKesson distributed.<sup>27</sup> The presiding judge of the superior court coordinated the complaints and jointly assigned them to a coordination trial judge.<sup>28</sup>

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19. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (“Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction.”).

20. *See infra* Section IV.B. Under the “sliding scale approach,” a weaker connection between a defendant’s forum contacts and the plaintiff’s claim is permissible if the defendant has extensive forum contacts that are unrelated to the claim. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

21. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

22. *See infra* Section IV.B.

23. *See Bristol-Myers Squibb*, 137 S. Ct. at 1781–82.

24. *See infra* Section IV.B.

25. *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412, 415–16 (Ct. App. 2014), *aff’d*, 377 P.3d 874 (Cal. 2016), *rev’d and remanded*, 137 S. Ct. 1773 (2017).

26. The complaints asserted the same twelve causes of action: strict products liability based on design, strict products liability based on manufacturing defect, negligence, breach of implied warranty, breach of express warranty, deceit by concealment, negligent misrepresentation, fraud by concealment, unfair competition, false or misleading advertising, injunctive relief for false or misleading advertising, and loss of consortium. *Id.* at 416 n.1. The complaints were later amended to include a cause of action for wrongful death. *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 878 (Cal. 2016), *rev’d and remanded*, 137 S. Ct. 1773 (2017).

27. *Bristol-Myers Squibb*, 175 Cal. Rptr. 3d at 415–16.

28. *Id.* at 416.

The consolidated cases consisted of 659 individual plaintiffs, 84 of whom were California residents.<sup>29</sup> BMS filed a consolidated motion to quash service to the 575 nonresident plaintiffs, arguing that the exercise of general jurisdiction over it by California courts would be improper under *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>30</sup> since BMS was not “at home” in California.<sup>31</sup> BMS also asserted that the nonresident plaintiffs, none of whom were prescribed or allegedly injured by Plavix in California,<sup>32</sup> could not invoke the specific jurisdiction of California courts because their cases did not arise out of or relate to BMS’s contacts with the forum.<sup>33</sup>

Although BMS was incorporated under Delaware law and headquartered in New York,<sup>34</sup> it drew a sizable amount of revenue from California,<sup>35</sup> was registered with the California Secretary of State,<sup>36</sup> operated out of ten locations in the state,<sup>37</sup> and employed over 500 in-state residents.<sup>38</sup> The trial court determined that such extensive in-state activity amounted to “wide-ranging, systematic, and continuous contacts” with California, warranting the exercise of general jurisdiction over BMS.<sup>39</sup> The trial court accordingly denied BMS’s motion to quash service on the nonresident plaintiffs.<sup>40</sup>

BMS appealed the trial court’s decision to the California Court of Appeals, which summarily denied the petition for review on January 14, 2014.<sup>41</sup> That same day, however, the Supreme Court of the United States rendered its decision in *Daimler AG v. Bauman*,<sup>42</sup> which clarified *Goodyear*’s “at home” limitation on the exercise of general jurisdiction.<sup>43</sup> The

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29. *Id.* at 415.

30. 564 U.S. 915 (2011).

31. *Bristol-Myers Squibb*, 175 Cal. Rptr. 3d at 416–17 (quoting *Goodyear*, 564 U.S. at 919).

32. *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 879 (Cal. 2016), *rev’d and remanded*, 137 S. Ct. 1773 (2017).

33. *Bristol-Myers Squibb*, 175 Cal. Rptr. 3d at 416.

34. *Id.*

35. Between 2006 and 2012, BMS sold nearly \$1 billion worth of Plavix in California. *Id.* at 417.

36. Since 1936, BMS has maintained its registration to do business in California, which requires the appointment of an in-state agent for service of process. *Id.*

37. Five of the locations were offices, four were facilities used primarily for research and laboratory activities not involving Plavix, and the final location was used by BMS’s government affairs group. *Id.*

38. In-state personnel consisted of sales representatives, office employees, and research staff. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 418.

42. 134 S. Ct. 746 (2014).

43. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (“A court may assert general jurisdiction over foreign . . . corporations . . . when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945))). While *Goodyear*’s “at home”

*Daimler* Court held that “only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.”<sup>44</sup> The Court doubled down on *Goodyear*’s determination that the “paradigm” bases for general jurisdiction over a corporation are the place of incorporation and the principal place of business.<sup>45</sup> *Daimler* reframed the general jurisdiction inquiry as “not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’” but, rather, “whether that corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum state.”<sup>46</sup> The *Daimler* Court reasoned that only in truly exceptional cases will a substantial, continuous, and systematic course of business, by itself, subject a corporation to the general jurisdiction of a court in a state where it neither incorporated nor maintains its principal place of business.<sup>47</sup>

BMS, relying heavily on *Daimler*, petitioned the Supreme Court of California for further review of the trial court’s order denying their motion to quash service.<sup>48</sup> The Supreme Court of California granted the petition and remanded the case back to the California appellate court for further review in light of *Daimler*.<sup>49</sup> Under the new guidance of *Daimler*, the court of appeals held that the nonresident plaintiffs did not present evidence sufficient to establish that BMS was “at home” in California and overturned the trial court’s exercise of general jurisdiction.<sup>50</sup> The court failed to discern any differences between BMS’s activities in California and those of the defendant in *Daimler*, which the United States Supreme Court had held insufficient for the exercise of general jurisdiction.<sup>51</sup>

The court then turned to the principles of specific jurisdiction to find a basis for California courts to hear the nonresident plaintiffs’ claims.<sup>52</sup> To exercise specific jurisdiction over a nonresident defendant, the court needed to find (1) that the defendant “purposefully directed” its activities at the forum state, (2) that the plaintiffs’ claims arose out of or related to those forum-directed activities, and (3) that the exercise of jurisdiction is reasona-

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limitation seems straightforward, the opinion did not definitively state that the traditional “continuous and systematic” basis no longer sufficed. *See id.*

44. *Daimler*, 134 S. Ct. at 760.

45. *Id.*

46. *Id.* at 761 (alteration in original) (quoting *Goodyear*, 564 U.S. at 919).

47. *Id.* at 761 n.19. In those circumstances, general jurisdiction “calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide.” *Id.* at 762 n.20.

48. *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412, 418 (Ct. App. 2014), *aff’d*, 377 P.3d 874 (Cal. 2016), *rev’d and remanded*, 137 S. Ct. 1773 (2017).

49. *Id.*

50. *Id.* at 424.

51. *Id.*

52. *Id.* at 425.

ble.<sup>53</sup> After observing that the United States Supreme Court had not yet defined what it means to “arise out of” or “relate to” a defendant’s contacts with a state,<sup>54</sup> the court turned to decisions of the Supreme Court of California for guidance.<sup>55</sup>

In *Vons Companies, Inc. v. Seabest Foods, Inc.*,<sup>56</sup> the Supreme Court of California adopted a “substantial connection” test, under which the relatedness requirement is satisfied if “there is a substantial nexus or connection between the defendant’s forum activities and the plaintiff’s claim.”<sup>57</sup> Drawing on language in *International Shoe Co. v. Washington*,<sup>58</sup> which contrasted the sufficiency of corporate “presence” incident to a suit arising out of continuous and systematic activities with the insufficiency of corporate presence incident to a suit unconnected with casual contacts, *Vons* further reasoned that “the intensity of forum contacts and the connection of the claim to those contacts are inversely related.”<sup>59</sup> Under this “sliding scale approach,” a connection between a defendant’s forum contacts and a claim is more readily shown as the defendant engages in more wide-ranging contacts with a forum.<sup>60</sup>

On this basis, the court of appeals held that BMS’s deliberate exploitation of the California Plavix market and “common effort” marketing Plavix to both residents and nonresidents alike created a substantial connection between BMS’s forum contacts and the nonresidents’ claims.<sup>61</sup> The court observed that the sufficiency of that connection was ensured by BMS’s substantial and continual contacts with California, the presence of dozens of resident plaintiffs alleging precisely the same wrongdoing as the nonresident plaintiffs, the interstate nature of BMS’s business, and BMS’s nationwide sales of Plavix.<sup>62</sup> Under the sliding scale approach articulated by *Vons*, these considerations in the aggregate made California’s assertion of

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53. *Id.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

54. *Id.* at 429 (“[T]he Supreme Court has not yet further defined the second step of specific jurisdiction analysis, that being what it means for a suit to ‘arise out of’ or ‘relate’ to a defendant’s contacts with the State.” (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 n.10 (1984))).

55. *Id.*

56. 926 P.2d 1085 (Cal. 1996).

57. *Id.* at 1099–100.

58. 326 U.S. 310 (1945).

59. *Vons*, 926 P.2d at 1096–97.

60. *Id.* at 1098–99.

61. *Bristol-Myers Squibb Co. v. Superior Court*, 175 Cal. Rptr. 3d 412, 433–34, 439 (Ct. App. 2014), *aff’d*, 377 P.3d 874 (Cal. 2016), *rev’d and remanded*, 137 S. Ct. 1773 (2017).

62. *Id.* at 435. In considering the interstate and nationwide nature of BMS’s business, the appellate court reasoned that a “necessary incident” to operations of such a character is “the foreseeable circumstance of causing injury to persons in distant forums.” *Id.* at 434 (quoting *Cornelson v. Chaney*, 545 P.2d 264, 269 (Cal. 1976) (en banc)).

specific jurisdiction over BMS with respect to the nonresidents' claims comport with the "traditional conception of fair play and substantial justice."<sup>63</sup> After finding that BMS had not met its burden to show the unreasonableness of jurisdiction, the court of appeals denied BMS's petition for review.<sup>64</sup>

On further appeal, the Supreme Court of California affirmed the appellate court's ruling.<sup>65</sup> Honing in on the strength of the connection between BMS's forum contacts and the nonresidents' claims by reason of BMS's nationwide marketing of Plavix, the court did away with appellant arguments that the relatedness test failed due to the nonresidents' claims being "parallel" and failing to "intersect" with the residents' claims.<sup>66</sup> The court reasoned that this was not a case of mere "parallel" claims because the claims brought by the resident and nonresident plaintiffs arose out of "a single, coordinated, nationwide course of conduct."<sup>67</sup> The court also restated the sliding scale approach to specific jurisdiction established by *Vons* and observed that BMS's extensive activity in California allowed for the relatedness requirement to be met with a less direct connection than might otherwise be required in the absence of such activity.<sup>68</sup> Granted this low threshold for relatedness, the court found that "BMS's nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the company's contacts in California concerning Plavix."<sup>69</sup>

Justice Werdegar dissented, accusing the majority of "reducing relatedness to mere similarity and joinder."<sup>70</sup> Although BMS's similar conduct gave rise to similar claims brought by forum residents, Justice Werdegar could discern no further relationship between the nonresidents' claims and BMS's California contacts.<sup>71</sup> Justice Werdegar reasoned that California's legitimate interest in regulating conduct within its borders had not been implicated because BMS's California contacts failed to "intersect" with the nonresidents' claims.<sup>72</sup> In Justice Werdegar's view, the nonresident plain-

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63. *Id.* at 435–36.

64. *Id.* at 436–40.

65. *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 878 (Cal. 2016), *rev'd and remanded*, 137 S. Ct. 1773 (2017).

66. *Id.* at 888.

67. *Id.*

68. *Id.* at 889.

69. *Id.* at 888.

70. *Id.* at 896 (Werdegar, J., dissenting).

71. *Id.* at 898 ("In each state, the company's activities are connected to claims by those who obtained Plavix or were injured in that state, but no relationship other than similarity runs between the claims made in different states.").

72. *Id.* at 898–900.



tiffs' claims arose solely out of BMS's conduct in other states and did not implicate California's sovereign interest by virtue of a mere resemblance to claims brought by residents.<sup>73</sup> Unable to identify a substantial nexus connecting BMS's California contacts with the nonresidents' claims, Justice Werdegar warned that the majority's decision "impairs important functions of reciprocity, predictability, and limited state sovereignty served by the relatedness requirement."<sup>74</sup>

BMS filed a petition for a writ of certiorari with the Supreme Court of the United States. The Supreme Court granted certiorari to decide whether the California courts' exercise of jurisdiction violated the Due Process Clause of the Fourteenth Amendment.<sup>75</sup>

## II. LEGAL BACKGROUND

When a court seeks to assert personal jurisdiction over a nonresident defendant, the power to do so is constrained by the Due Process Clause of the Fourteenth Amendment.<sup>76</sup> To satisfy due process, a nonresident defendant must have "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>77</sup> Unless a defendant corporation is amenable to general jurisdiction in the forum state, the minimum contacts doctrine additionally requires that the claim "arise out of or relate to" the corporation's forum contacts.<sup>78</sup> While the Court has refined the minimum contacts doctrine significantly over the years, it has provided shockingly little guidance with respect to the "arise out of or relate to" requirement,<sup>79</sup> leaving lower courts to craft their own definitions. Section II.A traces the evolution of the Supreme Court's minimum contacts doctrine from its origin in *International Shoe Co. v. Washington*. Section II.B focuses on the Supreme Court's sparse developments with regard to the "arise out of or relate to" requirement. Finally, Section II.C surveys the state of the law regarding "arise out of or relate to" in the federal circuits.

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73. *Id.* at 899–900.

74. *Id.* at 896.

75. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779 (2017).

76. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

77. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

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

79. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 415 n.10 (1984) (posing several questions regarding the "arise out of or relate to" requirement, but declining to answer them).

A. *The Origin of the Minimum Contacts Doctrine and Later Refinements*

In *International Shoe*, the Supreme Court established the minimum contacts doctrine under which courts may secure personal jurisdiction over nonresident defendants.<sup>80</sup> *International Shoe Company*, a corporation based in Missouri and incorporated in Delaware, was sued by the State of Washington to compel payment of unemployment tax assessments which had accrued due to its employment of salesmen in the state.<sup>81</sup> *International Shoe* contested Washington's assertion of jurisdiction over it on the grounds that it had no offices in the state, it did not make any contracts in the state,<sup>82</sup> and that it was, therefore, not "present" in the state for the purposes of personal jurisdiction.<sup>83</sup>

In order for a forum to assert personal jurisdiction over a nonresident defendant, the Court required "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>84</sup> The Court drew a distinction between the minimum contacts required to entertain jurisdiction over liabilities arising out of or related to those contacts and contacts "so substantial and of such a nature as to justify suit against [a defendant] on causes of action arising from dealings entirely distinct from those activities."<sup>85</sup> The latter type of jurisdiction concerning claims not necessarily arising out of forum contacts became known as "general jurisdiction"<sup>86</sup> while the former type of jurisdiction concerning claims arising out of contacts with a forum became known as "specific jurisdiction."<sup>87</sup>

In order for a court to exercise specific jurisdiction over a foreign corporation, the Court required that: (1) the foreign corporation "exercise[] the privilege of conducting activities within a state,"<sup>88</sup> (2) the litigation "arise out of or [be] connected with" those activities,<sup>89</sup> and (3) the state's adjudica-

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80. *Int'l Shoe*, 326 U.S. at 316.

81. *Id.* at 311-12.

82. *Id.* at 313-14. The contracts for purchase of *International Shoe's* merchandise were formed in Missouri following receipt of customers' orders that their salesmen solicited in the state. *Id.*

83. *Id.* at 315-16. Historically, a defendant's presence within the territorial jurisdiction of a court was a prerequisite to the court's rendition of a binding judgment on the defendant. *Id.* at 316.

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

85. *Id.* at 318.

86. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-44 (1966)).

87. *Id.* at 414 n.8 (citing von Mehren & Trautman, *supra* note 86, at 1144-64).

88. *Int'l Shoe*, 326 U.S. at 319.

89. *Id.*

tion of the suit be reasonable under the circumstances.<sup>90</sup> The Court reasoned, “to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state.”<sup>91</sup> Granted those benefits, a reciprocal requirement for the corporation to defend against suits enforcing “obligations [that] arise out of or are connected with the activities within the state . . . can, in most instances, hardly be said to be undue.”<sup>92</sup> In view of the fact that International Shoe had engaged in activities in Washington throughout the years and the obligation sued upon “arose out of those very activities,” the Court held that it was “reasonable and just” to allow Washington to enforce that obligation in its own courts.<sup>93</sup>

### 1. Purposeful Availment

*International Shoe*’s requirement that a foreign corporation “exercise[] the privilege of conducting activities within a state” operates to ensure that there is a fair reciprocity between a forum’s enforcement of an obligation and the defendant’s activities.<sup>94</sup> It was unclear, however, what precise actions would constitute the exercise of a privilege in a state. It was not until *Hanson v. Denckla*<sup>95</sup> that the Court first articulated the “purposeful availment” requirement.<sup>96</sup> In *Hanson*, a Florida court sought to assert jurisdiction in probate proceedings over a Delaware corporation that served as the decedent’s trustee.<sup>97</sup> The decedent had created the trust while living in Pennsylvania but had subsequently moved to Florida, where she carried on a number of transactions with the corporation concerning the trust.<sup>98</sup> The Court decided that the unilateral activity of the decedent moving to Florida and continuing to do business with the corporation did not constitute an exercise of a privilege in Florida by the corporation since the corporation did not purposefully avail itself of a privilege in the forum.<sup>99</sup> The lack of pur-

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90. *Id.* at 317.

91. *Id.* at 319.

92. *Id.*

93. *Id.* at 320.

94. *See id.* at 319 (“[The Due Process Clause] does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.”).

95. 357 U.S. 235 (1958).

96. *Id.* at 253 (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”).

97. *Id.* at 241–42.

98. *Id.* at 238–40.

99. *Id.* at 253.

poseful Florida contacts by the trustee made the exercise of personal jurisdiction by Florida courts improper.<sup>100</sup>

In *World-Wide Volkswagen Corp. v. Woodson*,<sup>101</sup> the Court circumscribed the scope of the requirement that a foreign corporation “exercise[] the privilege of conducting activities within a state” even further. In that case, an automobile retailer sold a car in New York which was involved in an accident in Oklahoma.<sup>102</sup> While the retailer did not conduct any business whatsoever in Oklahoma,<sup>103</sup> the plaintiffs asserted that the foreseeability of a buyer driving a car into other states warranted a finding that the retailer had exercised a privilege in those states that the car traveled through.<sup>104</sup> The Court reasoned that the foreseeability that is relevant to due process analysis is that which emanates from the defendant’s purposeful “conduct and connection” with the forum state.<sup>105</sup> Foreseeability that a defendant’s product will wind up in the foreign state is not, by itself, a sufficient basis for a forum to exercise personal jurisdiction over a nonresident defendant.<sup>106</sup>

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100. *Id.*

101. 444 U.S. 286 (1980).

102. *Id.* at 288–89.

103. *Id.* at 289. The Court noted that the retailer did not ship or sell any of its products to Oklahoma, had no agent to receive process in Oklahoma, and did not purchase any advertisements in any media calculated to reach Oklahoma. *Id.*

104. *Id.* at 295. The Oklahoma Supreme Court agreed, finding it “reasonable to infer, given the retail value of the automobile, that the [retailer] derive[s] substantial income from automobiles which from time to time are used in the State of Oklahoma.” *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351, 354 (Okla. 1978), *rev’d*, 444 U.S. 286 (1980).

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

106. *Id.* at 295–97. On this basis, the Court reasoned that a defendant’s delivery of its products “into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State” is sufficient to establish purposeful contacts. *Id.* at 298 (emphasis added). This reasoning led to the stream of commerce debate in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), which involved the question of whether a defendant establishes purposeful contacts with a forum state by placing a product in the stream of commerce that eventually reaches the forum state. *Compare Asahi*, 480 U.S. at 112 (plurality opinion) (“The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”), *with id.* at 117 (Brennan, J., concurring) (“The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale.”), *id.* (“As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”), *and id.* (“[B]enefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.”). The plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), disavowed Justice Brennan’s approach but ultimately lacked the majority support necessary to settle the debate. *See McIntyre*, 564 U.S. at 882 (plurality opinion) (“The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”).

Instead, the *World-Wide Volkswagen* Court required purposeful conduct on the part of a nonresident defendant giving it “clear notice that it is subject to suit” in the forum state.<sup>107</sup> The Court concluded that such a requirement allows defendants to “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>108</sup> Since the foreseeability of the car being taken to Oklahoma could not be attributed to the retailer’s purposeful “conduct and connection” with the forum state, the Court found no purposeful “contacts, ties, or relations” between the retailer and Oklahoma.<sup>109</sup> The Court held that the exercise of jurisdiction over the retailer by Oklahoma courts was improper.<sup>110</sup>

## 2. Reasonable Under the Circumstances

*International Shoe* also indicated that when a defendant makes purposeful contacts with the forum state, a court must find that “maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” before the court can make a finding of minimum contacts and properly exercise jurisdiction.<sup>111</sup> The Court noted that the demands of due process are met when a corporation’s contacts make it reasonable “in the context of our federal system of government,” to require the corporation to defend a suit in a foreign jurisdiction.<sup>112</sup> The Court further noted that an “estimate of the inconveniences” borne by the nonresident defendant in defending suit away from home is relevant in this connection.<sup>113</sup>

While the ultimate determination of fairness in *International Shoe* was assessed in a straightforward appraisal of the defendant’s systematic and continuous activities in the state which resulted in a large volume of interstate business,<sup>114</sup> the Court’s later decision in *McGee v. International Life Insurance Co.*<sup>115</sup> concerned a single forum contact by the defendant, warranting a closer look at the reasonableness of asserting jurisdiction.<sup>116</sup> The *McGee* Court recognized a state’s interest in providing effective means of redress to its residents when a Texas insurer denied payment for a covered loss to a California insured.<sup>117</sup> The Court described the “severe disad-

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107. *World-Wide Volkswagen*, 444 U.S. at 295–97.

108. *Id.* at 297.

109. *Id.* at 298–99 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

110. *Id.* at 299.

111. 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

112. *Id.* at 317.

113. *Id.* (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930)).

114. *Id.* at 320.

115. 355 U.S. 220 (1957).

116. *Id.* at 222.

117. *Id.* at 223.

vantage” posed to out-of-state plaintiffs that would be forced to litigate in Texas and the resultant potential that the Texas insurer may become judgment proof as to those plaintiffs.<sup>118</sup> The Court observed, “[w]hen claims were small or moderate[,] individual claimants frequently could not afford the cost of bringing an action in a foreign forum” and ultimately found the exercise of jurisdiction by California courts to be in accord with due process.<sup>119</sup>

In *World-Wide Volkswagen*, the Court noted that, while the burden on the defendant is “always a primary concern,” reasonableness of jurisdiction is to be considered “in light of other relevant factors.”<sup>120</sup> The Court summarized the case law implicating the reasonableness of jurisdiction and specifically recognized a state’s interest in adjudicating a dispute,<sup>121</sup> the plaintiff’s interest in obtaining convenient and effective relief,<sup>122</sup> the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,<sup>123</sup> and the shared interest of the states in furthering fundamental substantive social policies.<sup>124</sup> In *Burger King Corp. v. Rudzewicz*,<sup>125</sup> the Court observed, “[t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”<sup>126</sup> The *Burger King* Court made several recommendations for overcoming the unreasonableness that inheres in these considerations<sup>127</sup> and noted that the defendant must present a “compelling case” to defeat jurisdiction based on a sufficient finding of purposeful contacts.<sup>128</sup>

In *Asahi Metal Industry Co. v. Superior Court*,<sup>129</sup> Justice Brennan framed his opinion concurring in the judgment with the plurality as the

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118. *Id.*

119. *Id.* at 223–24.

120. 444 U.S. 286, 292 (1980).

121. *Id.* (citing *McGee*, 355 U.S. at 223).

122. *Id.* (citing *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978)).

123. *Id.* (citing *Kulko*, 436 U.S. at 93).

124. *Id.* (citing *Kulko*, 436 U.S. at 98). In *Kulko*, for example, the Court considered California’s “substantial interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised.” 436 U.S. at 98.

125. 471 U.S. 462 (1985).

126. *Id.* at 477.

127. *Id.* For example, the Court contended that “the potential clash of the forum’s law with the ‘fundamental substantive social policies’ of another State may be accommodated through application of the forum’s choice-of-law rules” and that “a defendant claiming substantial inconvenience may seek a change of venue.” *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

128. *Id.*

129. 480 U.S. 102 (1987).

“compelling case” *Burger King* contemplated.<sup>130</sup> Although Justice O’Connor’s plurality opinion catalogued the unreasonableness of jurisdiction gratuitously after finding that Asahi had made no purposeful contacts with the forum state,<sup>131</sup> in Justice Brennan’s view, reasonableness considerations decisively upended jurisdiction based on purposeful contacts.<sup>132</sup> In *Asahi*, California’s exercise of jurisdiction over a Japanese defendant corporation with respect to a products liability claim would have required the defendant to traverse the Pacific Ocean to defend suit in a legal system very different from its own.<sup>133</sup> The Court also observed that California’s interest in adjudicating the dispute was minimal since the plaintiff was not a California resident.<sup>134</sup> The international context of the case further compounded the unreasonableness of jurisdiction by calling into question whether California’s adjudication of the dispute would be an efficient resolution that advanced substantive policies.<sup>135</sup> The weighty procedural and substantive interests of other nations, along with the foreign relations policies which became implicated, ultimately steered the Court’s determination towards a finding of unreasonableness.<sup>136</sup> The Court held that the California courts’ assertion of jurisdiction offended due process.<sup>137</sup>

#### B. The “Arise out of or Relate to” Requirement

*International Shoe* first formulated the “arise out of or relate to” prong of the minimum contacts test in slightly different language than that which appeared in subsequent Supreme Court decisions. The *International Shoe* Court explained that, so long as a foreign corporation’s obligations “arise out of or are *connected with* the[ir] activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”<sup>138</sup> Other parts of the opinion discussing the nexus between forum-state activities and the plaintiff’s claim use the words “unrelated to,”<sup>139</sup> but it was not until *Helicopteros*

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130. *Id.* at 116 (Brennan, J., concurring) (“This is one of those rare cases in which ‘minimum requirements inherent in the concept of “fair play and substantial justice” . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.” (alteration in original) (quoting *Burger King*, 471 U.S. at 477–78)).

131. *Id.* at 113–14 (plurality opinion) (observing that, even apart from the plurality’s judgment that Asahi made no purposeful contacts with the forum, “[a] consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi”).

132. *See supra* note 130 and accompanying text.

133. *Asahi*, 480 U.S. at 113–14.

134. *Id.*

135. *Id.* at 115.

136. *Id.* at 115–16.

137. *Id.* at 116.

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

139. *Id.* at 318, 320.

*Nacionales de Colombia, S.A. v. Hall*,<sup>140</sup> that the Court phrased the prong as requiring suits to “aris[e] out of or relate[] to” the defendant’s forum activities.<sup>141</sup> Whatever the wording, a connection between the defendant’s contacts with the forum and the plaintiff’s claim is required for a court to assert specific jurisdiction.<sup>142</sup>

The Supreme Court has rarely discussed the “arise out of or relate to” requirement. In *Helicopteros*, the relatedness requirement was ripe for discussion, yet the parties failed to argue and brief it.<sup>143</sup> In that case, *Helicopteros Nacionales de Colombia, S. A.* (“Helicol”), a helicopter transport company based in Colombia, had numerous business contacts with the State of Texas.<sup>144</sup> Helicol purchased most of its helicopters and accessories from a Texas company, sent its pilots to Texas for training, and negotiated a contract in Texas by which it would render transportation services in Peru.<sup>145</sup> While performing under that contract, one of Helicol’s helicopters crashed, killing four United States citizens.<sup>146</sup> The survivors and representatives of the decedents filed wrongful death claims against Helicol in Texas.<sup>147</sup>

The claimants conceded that the wrongful death claims did not arise out of or relate to Helicol’s Texas contacts and, instead, relying on *Perkins v. Benguet Consolidated Mining Co.*,<sup>148</sup> argued that Helicol was amenable to general jurisdiction in Texas.<sup>149</sup> *Perkins* involved a Philippine mining company whose president conducted the entirety of its limited wartime activities in Ohio after being forced to abandon the company’s principal place of business near the Pacific theater of World War II.<sup>150</sup> In that case, the Court relied on the mining company’s “sufficiently substantial” forum contacts to permit Ohio courts to exercise jurisdiction over the company with respect to a cause of action entirely distinct from the limited wartime activities it conducted within the State.<sup>151</sup> The *Helicopteros* Court found that Helicol’s contacts with Texas did not “constitute the kind of continuous and

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140. 466 U.S. 408 (1984).

141. *Id.* at 414 n.8. In *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the Court also employed “relate to” language, though not specifically in the context of the minimum contacts doctrine’s relatedness requirement. *See id.* at 438.

142. *See infra* Section II.C.

143. *Helicopteros*, 466 U.S. at 415 n.10.

144. *Id.* at 410–11.

145. *Id.*

146. *Id.* at 409–10.

147. *Id.* at 412.

148. 342 U.S. 437 (1952).

149. *Helicopteros*, 466 U.S. at 415.

150. *Perkins*, 342 U.S. at 447–48.

151. *Id.*



systematic general business contacts” found in *Perkins* and held that Helicol was not amenable to the general jurisdiction of Texas courts.<sup>152</sup>

The Court’s majority opinion expressed “no ‘view’” with respect to the relationship between the plaintiffs’ wrongful death causes of action and Helicol’s contacts with Texas because the issue of specific jurisdiction was not argued.<sup>153</sup> The majority therefore did not confront the potential difference between “arise out of” and “relate to” and declined to “address the validity or consequences of such a distinction.”<sup>154</sup> In a lone dissent, Justice Brennan found the defendant’s Texas contacts to be both sufficiently substantial, warranting the exercise of general jurisdiction over Helicol,<sup>155</sup> and sufficiently related to the underlying cause of action, warranting the exercise of specific jurisdiction over the plaintiffs’ claims.<sup>156</sup> Justice Brennan warned that one possible reading of the Court’s opinion seemed to imply that Texas courts could not exercise specific jurisdiction over the plaintiffs’ claims because the cause of action did not formally arise out of Helicol’s Texas contacts.<sup>157</sup>

While Justice Brennan conceded that the cause of action did not “arise out of” Helicol’s specific activities in Texas, he asserted that the cause of action *did* “relate[] to” the defendant’s Texas contacts since the helicopter that crashed was performing under a contract negotiated in Texas, the pilot flying the helicopter was trained in Texas, and the helicopters themselves were purchased in Texas.<sup>158</sup> Justice Brennan asserted that these contacts were “directly related” to the alleged negligence in the plaintiffs’ wrongful death claims.<sup>159</sup> Justice Brennan reasoned that limiting specific jurisdiction to suits that arise out of a nonresident defendant’s forum contacts would “subject constitutional standards . . . to the vagaries of the substantive law or pleading requirements of each State.”<sup>160</sup> The Due Process Clause, Justice Brennan explained, “has never been so dependent upon the applicable substantive law or the State’s formal pleading requirements.”<sup>161</sup> Justice Brennan asserted that the narrow understanding of relatedness implied by the

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152. *Helicopteros*, 466 U.S. at 415–16.

153. *Id.* at 415 n.10 (quoting *id.* at 419–20 (Brennan, J., dissenting)).

154. *Id.* at 415 n.10 (majority opinion).

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

156. *Id.* at 424.

157. *Id.* at 426–27.

158. *Id.* at 425–26.

159. *Id.*

160. *Id.* at 427. For example, Justice Brennan pointed out that the wrongful death claims brought by the plaintiffs alleged negligence based on pilot error. *Id.* If the substantive state law required proof of negligent training as an element of that claim, the plaintiffs’ cause of action would arise out of Helicol’s Texas contacts. *Id.*

161. *Id.*

majority overlooked the expansion of personal jurisdiction under *International Shoe* and its progeny.<sup>162</sup>

*Helicopteros* was not the last time the Court shied away from interpreting the “arise out of or relate to” requirement. In *Carnival Cruise Lines, Inc. v. Shute*,<sup>163</sup> a plaintiff’s slip-and-fall on a Carnival cruise was litigated in the state where Carnival had solicited the ill-fated vacationer.<sup>164</sup> In that case, the Court set aside the question of whether the slip-and-fall negligence cause of action arose out of or related to Carnival’s solicitation contacts in the state and, instead, rejected the forum’s adjudication of the dispute on the basis of a forum-selection clause printed on the plaintiff’s ticket.<sup>165</sup> The Court stated, “Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner’s constitutional argument as to personal jurisdiction.”<sup>166</sup> Notwithstanding the “arise out of or relate to” requirement’s crucial function distinguishing specific jurisdiction from general jurisdiction, the Supreme Court has seemingly gone out of its way to say very little of it, making it the least developed aspect of the minimum contacts doctrine.

### C. Survey of “Arise out of or Relate to” Approaches in the Federal Circuits

In the absence of guidance by the Supreme Court, with the exception of Justice Brennan’s dissent in *Helicopteros*,<sup>167</sup> lower courts have taken it upon themselves to fashion the rules necessary to determine relatedness in the cases before them.<sup>168</sup> Most circuits apply a tort-like, causation-focused

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162. *Id.* at 422 (“The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State’s jurisdiction under the Due Process Clause.”); *id.* at 423 (“As active participants in interstate and foreign commerce take advantage of the economic benefits and opportunities offered by the various States, it is only fair and reasonable to subject them to the obligations that may be imposed by those jurisdictions.”); *id.* (“[C]hief among the obligations that a nonresident corporation should expect to fulfill is amenability to suit in any forum that is significantly affected by the corporation’s commercial activities.”).

163. 499 U.S. 585 (1991).

164. *Id.* at 588.

165. *Id.* at 589.

166. *Id.*

167. *See supra* notes 158–162 and accompanying text.

168. The Fourth, Seventh, Eighth, and Tenth Circuits, however, have not adopted any approach in particular for assessing relatedness. *See Myers v. Casino Queen, Inc.*, 689 F.3d 904, 912–13 (8th Cir. 2012) (observing that the Eighth Circuit has not adopted an approach, but, rather, considers “the totality of the circumstances” in determining whether “the litigation ‘result[s] from injuries . . . relating to [the defendant’s] activities [in the forum state.]’” (first quoting *K-V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588, 592–93 (8th Cir. 2011); and then quoting *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008)); *Tamburo v. Dworkin*, 601 F.3d 693, 709 (7th Cir. 2010) (cataloging the circuit split on the relatedness issue and stating “[w]e have not weighed in

approach, requiring that a defendant's forum contacts be a but-for cause of the plaintiff's claim.<sup>169</sup> Some of these circuits, while still requiring but-for causation, refuse to find relatedness if the but-for cause is too attenuated.<sup>170</sup> One circuit applies a "substantial connection" approach, requiring a defendant's contact with the forum to be substantially connected with the plaintiff's claim.<sup>171</sup> Finally, a few circuits have sometimes applied a "sliding scale approach" to adjust the measure of relatedness in appropriate circumstances where a court deems it fair in view of a defendant's cumulative contacts with the forum.<sup>172</sup>

### 1. *The But-For Approach*

In *Shute v. Carnival Cruise Lines*,<sup>173</sup> prior to the Supreme Court declining to address the relatedness question, the United States Court of Appeals for the Ninth Circuit employed a but-for test to determine whether Shute's cause of action arose out of Carnival's forum contacts.<sup>174</sup> Similar to the law of torts, this test merely requires that but for a defendant's forum contacts, the plaintiff's injury would not have occurred.<sup>175</sup> In *Shute*, the Ninth Circuit reasoned that this relationship manifested because but for Carnival's forum contact, selling the cruise ticket, Shute's subsequent injury in a foreign jurisdiction while redeeming that ticket would not have occurred.<sup>176</sup> The *Shute* court explained that this approach "preserves the essential distinction between general and specific jurisdiction" by preventing defendants from being "haled into court for activities unrelated to the cause of action" and by requiring "some nexus between the cause of action and the defendant's activities in the forum."<sup>177</sup> The Ninth Circuit acknowledged that courts following the but-for approach could plausibly decide causes of action largely attenuated from a defendant's forum contacts.<sup>178</sup> In such instances, the court proposed that the reasonableness prong of the jurisdic-

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on this conflict and need not do so here"); *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 295 (4th Cir. 2009) (observing that the relatedness requirement was met using a vague "genesis" standard); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (detailing the circuit split but ultimately stating "we have no need to pick sides today").

169. *See infra* Section II.C.1.

170. *See infra* Section II.C.2.

171. *See infra* Section II.C.3.

172. *See infra* Section II.C.4.

173. 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991).

174. *Id.* at 385.

175. *Id.* at 384 (summarizing the test as requiring that "[b]ut for [the defendant's] contacts, the cause of action would never have come about").

176. *Id.* at 386.

177. *Id.* at 385.

178. *Id.*

tional inquiry would trigger a due process violation and divest the court of jurisdiction.<sup>179</sup>

The United States Court of Appeals for the Fifth Circuit has indicated preference for the but-for test without adopting it outright. In *Prejean v. Sonatrach, Inc.*,<sup>180</sup> the Fifth Circuit ordered further discovery as to the formation of an employment contract in the forum so it could determine whether personal jurisdiction was properly exercised over a defendant with respect to wrongful death suits.<sup>181</sup> The widowed plaintiffs alleged that their husbands' employer had entered into a contract with the defendant corporation in the forum state.<sup>182</sup> While performing under the alleged contract abroad, a plane carrying the plaintiffs' husbands crashed.<sup>183</sup> The *Prejean* court reasoned that if the employment contract existed, it was a but-for cause of the tort by virtue of it bringing the parties within "tortious 'striking distance.'"<sup>184</sup> This reasoning, however, is "arguably dicta,"<sup>185</sup> and a more recent Fifth Circuit opinion has indicated preference for the but-for-plus approach without making an explicit adoption.<sup>186</sup>

## 2. *The Substantive-Proximate Cause and But-For-Plus Approaches*

The United States Court of Appeals for the First Circuit has resolved the problem of contacts being attenuated from the ultimate cause of action by following an approach that requires a more rigorous "proximate cause" tort analogy.<sup>187</sup> This approach requires that the plaintiff's claim be a directly foreseeable result of the defendant's contact with the forum, making the defendant's forum contact a substantive aspect of the plaintiff's claim.<sup>188</sup> In *Marino v. Hyatt Corp.*,<sup>189</sup> for example, the plaintiff booked out-of-state ho-

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179. *Id.* ("If the connection between the defendant's forum related activities is 'too attenuated,' the exercise of jurisdiction would be unreasonable, and therefore in violation of due process." (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980))).

180. 652 F.2d 1260 (5th Cir. Unit A Aug. 1981).

181. *Id.* at 1270-71.

182. *Id.* at 1264.

183. *Id.*

184. *Id.* at 1270 n.21.

185. *Breathwit Marine Contractors, Ltd. v. Deloach Marine Servs., LLC*, 944 F. Supp. 2d 845, 851-52 (S.D. Tex. 2014).

186. *See In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 543-44 (5th Cir. 2014) (citing the Eleventh Circuit's adherence to the but-for-plus approach approvingly and acknowledging that "this test is also satisfied").

187. *See, e.g., Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1260 (1st Cir. 1990) (holding that injuries sustained at an out-of-state hotel did not arise from forum contacts comprised of newspaper advertisements).

188. *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992).

189. 793 F.2d 427 (1st Cir. 1986).

tel accommodations while in the forum and subsequently suffered injuries due to the proprietor's negligence while at the hotel.<sup>190</sup> The First Circuit held that although the plaintiff formed the contract in the forum, the negligence which resulted in the plaintiff's injuries while enjoying the accommodations was too far removed from the defendant's forum contacts arranging the reservation.<sup>191</sup> The court observed that the defendant's forum contacts would "hardly be an important, or perhaps even a material, element of proof" in the plaintiff's negligence cause of action.<sup>192</sup>

The First Circuit developed the proximate cause test further in *United Electrical, Radio & Machine Workers of America v. 163 Pleasant Street Corp.*,<sup>193</sup> stating that personal jurisdiction is rejected when the connection between the cause of action and the forum contact is attenuated and indirect.<sup>194</sup> Analogizing the concept of causation in tort law, the court required both cause in fact, that the plaintiff's injury would not have occurred but for the defendant's forum activity, and legal causation, that the defendant's forum activity "gave birth to the cause of action."<sup>195</sup> In the inquiry of legal causation, "foreseeability is critical."<sup>196</sup> The First Circuit has opined that since foreseeability is critical in evaluating the purposeful availment prong of the minimum contacts inquiry, it should also inform the relatedness prong, thus giving the defendant fair warning of their susceptibility to suit in a foreign jurisdiction.<sup>197</sup>

In *O'Connor v. Sandy Lane Hotel Co.*,<sup>198</sup> the United States Court of Appeals for the Third Circuit found both the but-for and proximate cause approaches unappealing, instead opting for a middle ground looser than proximate causation but still closely tailored to the reciprocity principle conceived by *International Shoe*.<sup>199</sup> The court acknowledged that the plaintiff, O'Connor, established but-for causation since he would not have been injured by Sandy Lane's negligence in the course of spa treatments had Sandy Lane not made forum contacts soliciting him to make a reservation.<sup>200</sup> In the Third Circuit's view, however, a simple but-for standard was

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190. *Id.* at 427.

191. *Id.* at 430.

192. *Id.*

193. 960 F.2d 1080 (1st Cir. 1992).

194. *Id.* at 1089.

195. *Id.*

196. *Id.*

197. *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996).

198. 496 F.3d 312 (3d Cir. 2007).

199. *Id.* at 323 ("The causal connection can be somewhat looser than the tort concept of proximate causation, but it must nonetheless be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable." (citation omitted)).

200. *Id.*

too overinclusive to be the law of the circuit.<sup>201</sup> The Third Circuit reasoned that “specific jurisdiction requires a closer and more direct causal connection.”<sup>202</sup> Turning to the more restrictive test of the First Circuit, the court stressed that “relatedness analysis . . . requires neither proximate causation nor substantive relevance.”<sup>203</sup> Later described as the “but-for-plus” approach,<sup>204</sup> the court found sufficient relatedness between O’Connor’s claim and Sandy Lane’s forum contacts by recognizing the “meaningful link exist[ing] between [the] legal obligation that arose in the forum and the substance of the plaintiffs’ claims.”<sup>205</sup> The United States Court of Appeals for the Eleventh Circuit has also relied on an approach similar to the Third Circuit’s but-for-plus test, stating that “[n]ecessarily, the contact must be a ‘but-for’ cause of the tort, yet the causal nexus between the tortious conduct and the purposeful contact must be such that the out-of-state resident will have ‘fair warning that a particular activity will subject [it] to the jurisdiction of a foreign sovereign.’”<sup>206</sup>

### 3. *The Substantial Connection Approach*

The United States Court of Appeals for the Sixth Circuit has adopted an approach that requires the cause of action to bear a substantial connection with the defendant’s forum contacts.<sup>207</sup> In *Third National Bank v. WEDGE Group Inc.*,<sup>208</sup> the Sixth Circuit applied a broad interpretation of its “substantial connection” requirement.<sup>209</sup> In that case, Third National Bank in Nashville (“Third National”) sought to hold WEDGE Group, a nonresident defendant, liable for debts incurred by its subsidiary that operated out of the forum.<sup>210</sup> The subsidiary’s debts arose from its default on a loan

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201. *Id.* at 322–23.

202. *Id.*

203. *Id.* at 324.

204. *See* *Breathwit Marine Contractors, Ltd. v. Deloach Marine Servs., LLC*, 994 F. Supp. 2d 845, 852 (S.D. Tex. 2014) (citing *O’Connor*, 496 F.3d at 322–23).

205. *O’Connor*, 496 F.3d at 324.

206. *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1222–23 (11th Cir. 2009) (alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

207. *See, e.g., S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 384 n.27 (6th Cir. 1968) (“The only requirement is that the cause of action, of whatever type, have a substantial connection with the defendant’s in-state activities.”). *But see* *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1988) (finding that a cause of action arose out of a defendant’s forum contacts because the claim was “made possible” by those contacts (quoting *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 231 (6th Cir. 1972))).

208. 882 F.2d 1087 (6th Cir. 1989).

209. *Id.* at 1091 (“Only when the operative facts of the controversy are not related to the defendant’s contact with the state can it be said that the cause of action does not arise from that [contact].” (alteration in original) (quoting *S. Mach.*, 401 F.2d at 384 n.29)).

210. *Id.* at 1088.

agreement with Third National.<sup>211</sup> WEDGE Group's liability stemmed from a tax-sharing agreement it entered into with its subsidiary that was executed outside the forum state.<sup>212</sup> Under the tax-sharing agreement, WEDGE Group was obligated to pay its subsidiary in the event of net operating losses.<sup>213</sup> The Sixth Circuit noted that WEDGE Group entered into the tax-sharing agreement with an entity based in the forum and involved itself in negotiations to amend the loan agreement between its subsidiary and Third National.<sup>214</sup> The Sixth Circuit reasoned that it was beside the point that the cause of action arguably arose out of the subsidiary's default under its loan agreement with Third National because, even so, WEDGE Group's forum contacts were substantially connected with the litigation, rendering WEDGE Group subject to personal jurisdiction in the forum.<sup>215</sup>

The Sixth Circuit's more recent decisions, however, have reframed its "substantial connection" approach, a test the Sixth Circuit has described as "lenient" in the past,<sup>216</sup> as requiring proximate causation. In *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*,<sup>217</sup> a Michigan resident, Nasser Beydoun, was approached by a Qatari corporation about taking on a position as the corporation's CEO.<sup>218</sup> A representative of the corporation met with Beydoun in Michigan to discuss the terms and conditions of his employment.<sup>219</sup> Beydoun ultimately accepted the position and moved to Qatar.<sup>220</sup> Beydoun lost a substantial amount of the corporation's money during his tenure and was left stranded in Qatar when the corporation had his exit visa revoked pending litigation.<sup>221</sup> Once the litigation was resolved in his favor, Beydoun was finally able to return to Michigan.<sup>222</sup>

Beydoun filed a complaint against the corporation in Michigan alleging, among other things, false imprisonment, abuse of process, and malicious prosecution.<sup>223</sup> The Sixth Circuit rejected Beydoun's assertion that the corporation's Michigan contacts recruiting him and his numerous business trips returning to Michigan on the corporation's behalf had a substan-

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211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1091–92.

216. *See Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002) (describing the Sixth Circuit's standard when evaluating the "arising from" criterion as "lenient").

217. 768 F.3d 499 (6th Cir. 2014).

218. *Id.* at 503.

219. *Id.*

220. *Id.*

221. *Id.* at 503–04.

222. *Id.*

223. *Id.*

tial connection with the causes of action.<sup>224</sup> The Sixth Circuit reasoned that “the plaintiff’s cause of action must be proximately caused by the defendant’s contacts with the forum state” to satisfy the relatedness requirement.<sup>225</sup> Since Beydoun’s causes of action all arose in Qatar long after the corporation had recruited him and his subsequent business trips to Michigan were unrelated to the operative facts of the controversy, the Sixth Circuit held that Beydoun failed to establish that his causes of action were substantially connected with the corporation’s forum contacts.<sup>226</sup>

#### 4. *The Sliding Scale Approach*

The “sliding scale approach,” yet to gain much of a following outside of the Ninth and Second Circuits, is not a distinct approach in and of itself, but, rather, consists of one of the other approaches supplemented by a guiding principle.<sup>227</sup> The guiding principle allows a forum to exercise personal jurisdiction over defendants with respect to claims that are increasingly attenuated from the defendant’s contacts as the defendant’s contacts with the forum become more and more significant.<sup>228</sup> The Supreme Court of California applied the sliding scale approach in *Bristol-Myers Squibb* to establish a low threshold for relatedness under the substantial connection approach.<sup>229</sup> Federal courts, however, have applied the sliding scale approach to determine the allowable level of attenuation that is appropriate for a given defendant under the but-for approach.<sup>230</sup>

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224. *Id.* at 507–08.

225. *Id.*

226. *Id.* at 508.

227. *See Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (observing that the “sliding scale approach” allows “the strength of the requisite connection between the forum and the specific claims at issue [to be] relaxed if the defendant has extensive forum contacts that are unrelated to those claims”); *see, e.g., Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 n.7 (9th Cir. 1990) (adopting the but-for approach, but noting that “where a defendant has only one contact with the forum state, a close nexus between its forum-related activities and the cause of the plaintiff’s harm may be required” (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987))), *rev’d on other grounds*, 499 U.S. 585 (1991).

228. *See, e.g., Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1210 (9th Cir. 2006) (“In a specific jurisdiction inquiry, we consider the extent of the defendant’s contacts with the forum and the degree to which the plaintiff’s suit is related to those contacts. A strong showing on one axis will permit a lesser showing on the other.”); *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (observing that “the relatedness test is but a part of a general inquiry which is designed to determine whether the exercise of personal jurisdiction in a particular case does or does not offend ‘traditional notions of fair play and substantial justice’” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

229. *See supra* notes 56–63 and accompanying text.

230. *See, e.g., Chew*, 143 F.3d at 29 (suggesting the proximate cause approach for defendants that have had only limited contacts with the forum state and suggesting that a defendant with more substantial state contacts which relate to the cause of action may be subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff’s injury); *Lake*,



In *Nowak v. Tak How Investments, Ltd.*,<sup>231</sup> the First Circuit briefly broke away from its precedent following the proximate cause approach and acknowledged that circumstances sometimes dictate loosening the rigid restrictiveness that approach entails.<sup>232</sup> Citing the nonresident defendant's successful, "ongoing effort to further a business relationship" in the forum, the court reasoned that the nexus between the defendant's forum contacts soliciting guests for its hotel and the negligence cause of action regarding the death of one of those guests was "sufficiently strong to survive the due process inquiry at least at the relatedness stage."<sup>233</sup> The First Circuit deduced that such a departure was warranted by the jurisdictional inquiry's need for flexibility, noting that "relatedness cannot merely be reduced to one tort concept for all circumstances."<sup>234</sup> While *Nowak* signaled that the First Circuit views claim relatedness broadly with respect to particular defendants that have made significant forum contacts, the sliding scale approach simply operates with that broad understanding as a premise. Courts adhering to the sliding scale approach assess the entirety of a defendant's contacts with the forum state to derive a threshold of relatedness that is fair with respect to that particular defendant.<sup>235</sup>

### III. THE COURT'S REASONING

In *Bristol-Myers Squibb*, the Supreme Court of the United States held that a defendant's relationship with a third party is not enough to connect a claim with a forum.<sup>236</sup> The Court reversed the judgment of the Supreme Court of California which reasoned that California had specific jurisdiction over the nonresidents' claims by virtue of the fact that BMS's nationwide sales of Plavix also gave rise to claims brought by California residents.<sup>237</sup> The Court held that California's exercise of jurisdiction violated the Due Process Clause of the Fourteenth Amendment because there was no "adequate link" connecting the nonresidents' claims with the forum.<sup>238</sup> Since the plaintiffs at issue were not California residents, did not suffer harm in California, and the conduct giving rise to the claims happened elsewhere,

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817 F.2d at 1421 ("[A] high degree of relationship is needed where there is only one contact with the forum state. In order to support jurisdiction with only one forum state contact, the cause of action must arise out of that particular purposeful contact of the defendant with the forum state.").

231. 94 F.3d 708 (1st Cir. 1996).

232. *Id.* at 716.

233. *Id.* at 715–16.

234. *Id.* at 716.

235. *See supra* notes 228–230 and accompanying text.

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

237. *Id.* at 1777.

238. *Id.* at 1781.

such a connection was severely lacking.<sup>239</sup> The Court reasoned that BMS's activities in California and the resident plaintiffs' claims that arose out of those activities provided no basis for asserting specific jurisdiction over the nonresidents' claims because "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction."<sup>240</sup>

Given that "restrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation'" but are also "a consequence of territorial limitations on the power of the respective States," the fact that BMS would have to defend the suit against the resident plaintiffs was not conducive to the forum's exercise of personal jurisdiction over BMS with respect to the claims brought by nonresidents.<sup>241</sup> The Court concluded that BMS's amenability to the resident plaintiffs' identical suits failed to satisfy specific jurisdiction's requirement that the nonresidents' suits bear some connection with the forum.<sup>242</sup>

Finding the California Supreme Court's sliding scale approach "difficult to square" with Supreme Court precedent, Justice Alito remarked that the approach resembles "a loose and spurious form of general jurisdiction."<sup>243</sup> The danger of sliding scale, the Court explained, was illustrated by California's exercise of specific jurisdiction on the faulty basis of a defendant's extensive forum contacts with third parties while overlooking the glaring inadequacy of the connection between the nonresidents' claims and the forum.<sup>244</sup> When there is no connection between a claim and the forum, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."<sup>245</sup>

The Court held that the plaintiffs had misinterpreted two cases relied on in support of California's exercise of specific jurisdiction.<sup>246</sup> First, in *Keeton v. Hustler Magazine, Inc.*,<sup>247</sup> the Court held that a plaintiff could recover damages for libel printed in a magazine that was distributed across the country.<sup>248</sup> The Court distinguished *Keeton* since its holding concerned the "scope of a claim involving in-state injury and injury to residents of the State" while the case at hand concerned entirely distinct claims "involving no in-state injury and no injury to residents of the forum State."<sup>249</sup> Second,

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239. *Id.* at 1781–82.

240. *Id.* (omission in original) (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

241. *Id.* at 1780 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

242. *Id.* at 1781.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 1782.

247. 465 U.S. 770 (1984).

248. *Bristol-Myers Squibb*, 137 S. Ct. at 1782.

249. *Id.*

in *Phillips Petroleum Co. v. Shutts*,<sup>250</sup> the Court held that the exercise of personal jurisdiction over nonresident members of a class action did not violate due process.<sup>251</sup> In that case, however, the defendant had argued that the exercise of jurisdiction violated the due process rights of the *plaintiffs*.<sup>252</sup> The Court reasoned that since the case at hand concerned the due process rights of the *defendant*, an issue that was not argued in *Shutts*, the Court's reasoning in *Shutts* was minimally relevant to the issues presented by BMS.<sup>253</sup>

Justice Sotomayor dissented, finding that the California courts appropriately exercised specific jurisdiction over the nonresident plaintiffs' claims.<sup>254</sup> Describing the core concern of personal jurisdiction as fairness, Justice Sotomayor reasoned that "there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike."<sup>255</sup> Subscribing to a more expansive understanding of "relate to," Justice Sotomayor found that since the claims were materially identical and arose out of the defendant's nationwide course of conduct, the requirements of specific jurisdiction had been met.<sup>256</sup> Justice Sotomayor accused the majority of taking the reasoning of *Walden v. Fiore* out of context and inappropriately applying it to the "arise out of or relate to" requirement when it solely concerned purposeful availment.<sup>257</sup> Fearing a chilling effect on the ability to bring mass tort actions—specifically ones involving more than one defendant, as was the case here—Justice Sotomayor characterized the majority opinion as curtailing the ability to hold corporations accountable for their nationwide conduct.<sup>258</sup>

#### IV. ANALYSIS

In *Bristol-Myers Squibb*, the Supreme Court of the United States reversed California's exercise of specific jurisdiction over claims brought by nonresident plaintiffs for out-of-state injuries arising out of conduct that occurred entirely outside California.<sup>259</sup> The Court held that California lacked specific jurisdiction over the nonresidents' claims notwithstanding the fact

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250. 472 U.S. 797 (1985).

251. *Bristol-Myers Squibb*, 137 S. Ct. at 1782–83.

252. *Id.* at 1783.

253. *Id.*

254. *Id.* at 1786 (Sotomayor, J., dissenting).

255. *Id.* at 1784.

256. *Id.* at 1786.

257. *Id.* at 1787.

258. *Id.* at 1789.

259. *Id.* at 1781–82 (majority opinion).

that the claims arose out of a nationwide course of conduct that also gave rise to claims brought by California residents. The Court reasoned that California's exercise of specific jurisdiction violated the Due Process Clause because the defendant's relationship with a third party is not enough to connect the nonresidents' claims with the forum.<sup>260</sup> The Court reached the correct result because asserting specific jurisdiction over claims so tenuously connected with the forum exploits an expansive understanding of "relate to" that is incompatible with the objectives of due process and long-standing Supreme Court precedent.<sup>261</sup> Although reaching the correct conclusion, the Court made a cursory evaluation of sliding scale relatedness, an approach employed by a number of lower courts for compelling reasons, and may have passed over the method of assessing relatedness that best comports with the minimum contacts doctrine's fundamental purpose—fairness.<sup>262</sup>

A. *Asserting Specific Jurisdiction over a Claim on the Sole Basis of the Defendant's Relationship with a Third Party Undermines the Objectives of Due Process and Conflicts with Precedent*

In *Bristol-Myers Squibb*, the Supreme Court foreclosed an expansion of the minimum contacts doctrine's "arise out of or relate to" requirement which reasoned that a defendant's relationship with a third party, by itself, is enough to connect a claim with a forum.<sup>263</sup> While BMS's nationwide course of similar conduct in the marketing of Plavix provided sufficient relatedness between the nonresidents' claims and BMS's forum contacts in the view of both the California Supreme Court<sup>264</sup> and Justice Sotomayor,<sup>265</sup> the majority opinion honed in on the relationship between the nonresidents' claims and the forum to the exclusion of BMS's relationships with third parties.<sup>266</sup> Setting those third-party relationships aside, the Court resolved that a connection between the nonresidents' claims and the forum was

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260. *Id.*

261. *See infra* Section IV.A.

262. *See infra* Section IV.B.

263. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

264. *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 888 (Cal. 2016) ("Both the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state. Thus, the nonresident plaintiffs' claims bear a substantial connection to BMS's contacts in California."), *rev'd*, 137 S. Ct. 1773 (2017).

265. *See Bristol-Myers Squibb*, 137 S. Ct. at 1786 (Sotomayor, J., dissenting) ("All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.")

266. *Id.* at 1781 (majority opinion) ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." (omission in original) (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014))).

clearly lacking.<sup>267</sup> In so holding, it follows that the minimum contacts doctrine's relatedness inquiry cannot rely on a similarity relationship<sup>268</sup> or the defendant's course of conduct with respect to third parties in establishing a nexus between the forum and the litigation. The Court aptly voided these interpretations since such an expansive reading of the words "relate to" would only serve as an obstacle to the Due Process Clause's most fundamental functions while furnishing superficial compatibility with the minimum contacts doctrine's necessarily indeterminate wording.<sup>269</sup>

Construing forum contacts as "related to" conduct that gives rise to a suit on the basis of a similarity relationship has long been met with skepticism due to its expansiveness.<sup>270</sup> Despite the lack of courts which have relied on similarity relationships,<sup>271</sup> *Bristol-Myers Squibb* presented a compelling basis for a narrow adoption. Under California's "sliding scale approach," requisite relatedness was at its nadir due to BMS's extensive activities in the forum.<sup>272</sup> Additionally, BMS's "single, coordinated, nation-

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267. *Id.*

268. An understanding of relatedness that encompasses similarity relationships would view forum activity as related to activity giving rise to a claim if both activities are similar. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 83–84 (1980) (describing a similarity relationship as "the similarity test"). A similarity relationship is distinct from "a test of historical connection," which views forum activity as related to activity giving rise to a claim under the substantial connection approach. See *id.*; see, e.g., *Cornelison v. Chaney*, 545 P.2d 264, 267–68 (Cal. 1976) (en banc) (holding that an out-of-state truck accident was substantially connected with the defendant's forum contacts because the defendant made regular trucking trips to the forum and the accident occurred during one of them).

269. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985) ("We . . . reject any talismanic jurisdictional formulas . . ."); *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) ("[T]he facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present." (quoting *Hanson v. Denckla*, 357 U.S. 235, 246 (1958))); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("[T]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.").

270. See Brilmayer, *supra* note 268, at 84 (describing similar acts relatedness as leading to "dubious results"); Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise from or Relate to" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1281 (1993) (describing a similarity relationship as "the most expansive possible interpretation" of "related to" and questioning whether Justice Brennan could have intended such an interpretation). But see Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 367–71 (2005) (arguing that while similar acts relatedness is "[p]ossibly the most lenient standard," it is suitable for "stream of commerce cases where fungible products are distributed widely" since the defendant's "jurisdictional expectation" is the same in all forums).

271. See Flavio Rose, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1583 (1994) (noting that a number of cases have employed reasoning that resembles a similar acts understanding of relatedness, but ultimately concluding that courts have not adopted it); see also *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 903 (Cal. 2016) (Werdegar, J., dissenting) (noting that California's precedential cases do not "support specific jurisdiction on the tenuous basis of a *resemblance* to other claims by other plaintiffs"), *rev'd*, 137 S. Ct. 1773 (2017).

272. *Bristol-Myers Squibb*, 377 P.3d at 889 (majority opinion).

wide course of conduct,” which was comprehensively “implemented by distributors and salespersons across the country,” seemed to provide a stronger basis for connecting the nonresidents’ claims with BMS’s forum contacts.<sup>273</sup>

The Court, however, rendered this line of reasoning invalid by noting that “a defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.”<sup>274</sup> By curbing BMS’s forum contacts with third parties, the Court indicated that neither similarity nor an extensively coordinated general strategy is material to a relatedness inquiry between separate acts occurring within and without the forum state.<sup>275</sup> A court cannot exercise specific jurisdiction over claims brought by nonresidents simply because resident plaintiffs were similarly harmed by the defendant’s similar conduct.<sup>276</sup> As to BMS’s course of conduct, the majority opinion’s analysis does not even mention it.<sup>277</sup> While BMS’s course of conduct may seem to connect its California contacts with the nonresidents’ claims, from start to finish, BMS’s activities in California solely involve a relationship between BMS and third parties.<sup>278</sup> Were it not for that relationship, the nonresidents’ claims would have nothing to do with the forum state.<sup>279</sup> Thus, when a relatedness inquiry relies on a similarity relationship or the defendant’s course of conduct, BMS’s relationship with a third party “stand[s] alone” as the basis for jurisdiction.<sup>280</sup>

Although Justice Sotomayor attacked the majority for drawing reasoning which concerned purposeful availment from *Walden v. Fiore*,<sup>281</sup> there

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273. See *id.* at 888 (asserting that it is inaccurate to characterize the claims as “parallel” and that the relatedness of the nonresidents’ claims is not based not on mere similar conduct (quoting *id.* at 899 (Werdegar, J., dissenting) (quoting Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 687 (2015))).

274. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (omission in original) (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

275. See *id.*

276. *Id.* (“The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims.”).

277. See *id.* at 1781–83.

278. See *Bristol-Myers Squibb*, 377 P.3d at 906 (Werdegar, J., dissenting) (“This is not a case . . . of a single act injuring plaintiffs in multiple states in one blow, where the argument for common jurisdiction might be stronger.”); *id.* at 906–07 (“All that appears is that Plavix was marketed nationwide and that BMS may have used many of the same materials—none of them generated in California—in various states.”).

279. See *id.* at 898 (“In each state, the company’s activities are connected to claims by those who obtained Plavix or were injured in that state, but no relationship other than similarity runs between the claims made in different states.”).

280. See *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (“What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”).

281. *Id.* at 1787 (Sotomayor, J., dissenting).

are few reasons not to look to *Walden* for guidance since its reasoning draws on the core principle that specific jurisdiction is centrally concerned with “the relationship among the defendant, the forum, and the litigation.”<sup>282</sup> Pertinently, this relationship does not include third parties. As *Walden* explained, “[d]ue process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant.”<sup>283</sup> That liberty interest is undermined when a defendant’s relationship with a third party is allowed to satisfy the relatedness requirement with respect to claims bearing no further connection with the forum state because the forum lacks a sovereign interest in regulating that conduct.<sup>284</sup> Without a sovereign interest, courts asserting jurisdiction under the expansive understanding of relatedness advanced by California would address wrongs that they have no interest to right and thereby impinge on the liberty interests of nonresident defendants.<sup>285</sup>

Allowing a defendant’s relationship with a third party, by itself, to serve as the connection between a claim and a forum would undermine other fundamental tenets of due process as well. Endorsing such an interpretation would contravene *World-Wide Volkswagen* by infusing the Due Process Clause with a great degree of unpredictability.<sup>286</sup> If the courts of each state where BMS sold Plavix interpreted “relate to” as expansively as California, plaintiffs would have the choice of any state they like for proceeding against BMS.<sup>287</sup> Plaintiffs exercising such wide-ranging freedom of choice in selecting a forum would thus upset the “orderly administration of the laws,” one of the central purposes of the Due Process Clause identified in

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282. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

283. 134 S. Ct. 1115, 1122 (2014).

284. See *Bristol-Myers Squibb*, 377 P.3d at 910 (noting that “[w]here the conduct sued upon did not occur in California, was not directed at individuals or entities in California, and caused no injuries in California or to California residents,” neither California’s “interest in regulating conduct within its borders nor its interest in providing a forum for its residents to seek redress for their injuries is implicated.” (citations omitted)).

285. See Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness”*, 58 S.M.U. L. REV. 1313, 1347 (2005) (“The defendant has a due process right to have states act only within the limits of their sovereignty.”); Brilmayer, *supra* note 268, at 85 (“[T]he sovereignty concept inherent in the Due Process Clause is not the reasonableness of the burden but the reasonableness of the particular State’s imposing it.”).

286. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“The Due Process Clause, by ensuring the ‘orderly administration of the laws,’ 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.” (citation omitted) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945))).

287. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 242 (2014) (observing that allowing a similarity relationship to satisfy the relatedness requirement “would give the plaintiff the choice of essentially every state for proceeding against a national corporation”).

*International Shoe*.<sup>288</sup> This unpredictability is compounded by the potential for plaintiffs' judgments to vary drastically in amount depending on which state they choose.<sup>289</sup> Basing jurisdiction solely on a relationship between the defendant and a third party would also cause friction with *International Shoe*'s principle of reciprocity.<sup>290</sup> Even if BMS sold a minimal amount of Plavix in the forum state, plaintiffs across the country could cluster their claims there by virtue of BMS's relationship with third parties.<sup>291</sup> What little privilege BMS exercised in the forum state would produce much greater obligations and destroy specific jurisdiction's tacit quid pro quo.<sup>292</sup>

*B. Despite the Court's Criticisms, the Sliding Scale Approach Remains a Viable, Compelling Method for Assessing the Requisite Threshold of Relatedness*

In *Bristol-Myers Squibb*, the Supreme Court of the United States reversed the California Supreme Court's exercise of jurisdiction which applied the sliding scale approach.<sup>293</sup> While Justice Alito regarded the sliding scale approach as resembling "a loose and spurious form of general jurisdiction,"<sup>294</sup> there is a sharp disconnect between the ends these concepts respectively reach. The defining characteristic of general jurisdiction is that it reaches claims *unrelated* to a defendant's "substantial" and "continuous" forum contacts.<sup>295</sup> The sliding scale approach only reaches claims *related* to a defendant's forum contacts.<sup>296</sup> Sliding scale's mere consideration of unrelated forum contacts to determine the appropriate measure of related-

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288. *Int'l Shoe*, 326 U.S. at 319.

289. William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 602 (1993).

290. 326 U.S. at 319 (observing that when "a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state," and that "so far as . . . obligations arise out of or are connected with the activities within that state, a procedure which requires the corporation to respond to suit brought to enforce them can, in most instances, hardly be said to be undue").

291. See *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 908 (Cal. 2016) (Werdegar, J., dissenting) ("[E]nforcing a meaningful relatedness requirement ensures some degree of reciprocity . . . the liabilities to which the defendant is exposed in the forum will tend to bear a relationship to the benefits it has sought in doing business there."), *rev'd*, 137 S. Ct. 1773 (2017).

292. See *id.*

293. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1784 (2017).

294. *Id.* at 1781.

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

296. See Richman, *supra* note 289, at 615 (noting that, under sliding scale, "a weaker connection between the claim and defendant's contacts should be permissible" when forum contacts increase—not a complete lack of connection altogether (emphasis added)).



ness fails to bridge this divide.<sup>297</sup> It follows that sliding scale is not a “form” of general jurisdiction at all.<sup>298</sup> It was an expansive reading of “relate to”—not the sliding scale approach—which allowed the courts below to reach claims unrelated to BMS’s forum contacts under the guise of a specific jurisdiction inquiry.<sup>299</sup> In this sense, the Court appears to misdirect its aversion for sliding scale in general when the Court’s actual cause for concern was the use of sliding scale to reach a dubiously low threshold of relatedness under an expansive reading of “relate to.”<sup>300</sup> In so doing, the Court failed to recognize both the dilemma lower courts have faced in attempting to assess the requisite threshold of relatedness and the adeptly fair solution offered by the sliding scale approach.<sup>301</sup>

Although it is true that the lower courts had “found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents’ claims,”<sup>302</sup> this was not a fault of the sliding scale approach. A finding of relatedness by virtue of a defendant’s relationships with third parties is not an indispensable facet of the sliding scale approach.<sup>303</sup> The sliding scale approach adjusts the measure of relatedness in accordance with the quantity and quality of the defendant’s cumulative fo-

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297. See Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 601 (2001) (noting that, under the sliding scale approach, “the distinction between general jurisdiction and specific jurisdiction is preserved”).

298. See *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

299. See *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 896 (Cal. 2016) (Werdegar, J., dissenting) (“[B]y reducing relatedness to mere similarity and joinder, the majority expands specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction.”), *rev’d*, 137 S. Ct. 1773 (2017).

300. See *supra* Section IV.A.

301. See Moore, *supra* note 297, at 600–01 (noting that the sliding scale approach avoids the debate of which categorical approach governs the relatedness inquiry and “neatly shifts the balancing point” through “a judicially manageable standard”).

302. *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

303. Relatedness by virtue of a defendant’s relationship with a third party constitutes just one type of relatedness on a spectrum of endless variations. See William M. Richman, *Part I—Casad’s Jurisdiction in Civil Actions, Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CAL. L. REV. 1328, 1340–41 (1984) (book review) (proposing several hypothetical variations of relatedness). Professor Richman offers the following hypothetical as an example of one of the many types of relatedness:

Suppose the defendant, an Illinois corporation, manufactures a nonprescription antacid tablet in Illinois. Its plant, warehouse, central offices, and sales manager are all in Illinois. It ships its product into every state, including California, and obtains substantial revenue from its sales there. Further, it has assigned five salesmen or detail men to the California territory; they call on doctors, hospitals, and pharmacies in California and solicit orders for the product. The plaintiff, a California resident who has taken the medication for years, attends a convention in New York, where he purchases the impure or adulterated drug and is injured. He sues the defendant in California.

*Id.* at 1344.

rum contacts.<sup>304</sup> By reasoning that “a defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction,”<sup>305</sup> the Court made clear that similarity relationships and a defendant’s course of conduct offer no measure of relatedness for the sliding scale approach to gauge.<sup>306</sup> Removing these expansive interpretations from the spectrum of relatedness still leaves a vast expanse of relatedness “variations and gradations . . . too numerous to catalogue.”<sup>307</sup>

Within this spectrum of “variations and gradations,” as relatedness strays further from a direct causal relationship, maintenance of the suit in the forum becomes less reasonable.<sup>308</sup> Nevertheless, the Court continues to employ broad language to describe the requisite threshold of relatedness. In *International Shoe*, the Court required that the suit “arise out of or [be] connected with” the defendant’s contacts.<sup>309</sup> In *Bristol-Myers Squibb*, the Court required “a connection” or an “adequate link.”<sup>310</sup> This language rejects the notion that a direct causal connection is required in every case.<sup>311</sup> The relatedness requirement is framed broadly for good reason—claims that are not proximately caused by a defendant’s forum contacts may nonetheless implicate a state’s legitimate sovereign interest.<sup>312</sup> Granted that the Court’s broad language sweeps up an immense amount of activity that can be said to, in some sense, “relate to” a claim, *some* methodology is required to ascertain whether or not a link is “adequate.”<sup>313</sup> A defendant’s cumula-

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304. *Id.* at 1345 (“As the quantity and quality of the defendant’s forum contacts increase, a weaker connection between the plaintiff’s claim and those contacts is permissible . . .”).

305. *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (omission in original) (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

306. *See id.* (observing that there is a complete lack of a connection between the nonresidents’ claims and the forum).

307. Richman, *supra* note 303, at 1340.

308. *Compare* *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) (“If the connection between the defendant’s forum related activities is ‘too attenuated,’ the exercise of jurisdiction would be unreasonable . . .” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980))), *rev’d on other grounds*, 499 U.S. 585 (1991), with *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) (“Certainly, jurisdiction that is premised on a contact that is a legal cause of the injury underlying the controversy . . . is presumably reasonable . . .”).

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

310. 137 S. Ct. at 1781.

311. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 653–54 (1988) (“The Supreme Court did not limit the specific jurisdiction *quid pro quo* rationale in *International Shoe* to claims ‘directly arising out of’ forum activities; it noted that due process would be satisfied ‘in most instances’ if the ‘obligations arise out of or are connected with’ the activities within the state.” (quoting *Int’l Shoe*, 326 U.S. at 319)).

312. *See, e.g., Nowak*, 94 F.3d at 715–16.

313. *See* Robert J. Condlin, “Defendant Veto” or “Totality of the Circumstances”? *It’s Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 125–26 (2004) (“Many lower courts treat these [‘arise out of’ or ‘relate to’] alternative definitions as equally acceptable, and act as if they are free to choose between them

tive forum contacts provide a suitable metric for determining the adequacy of a link because the defendant's contacts, related or not, bear upon the question of whether maintenance of the suit in the forum is reasonable and, by extension, whether or not the state's vindication of its sovereign interest unduly impinges on the defendant's liberty.<sup>314</sup>

The aggregate of a defendant's forum contacts alters the reasonableness of jurisdiction in a number of ways.<sup>315</sup> First, a state's interest in adjudicating a dispute increases as a defendant makes more contacts with the forum state because greater numbers of forum residents come into contact with the defendant.<sup>316</sup> The forum state has a greater interest in ensuring that its residents obtain convenient, effective relief and that the defendant is not rendered judgment proof by virtue of its amenability to suit solely in a distant forum.<sup>317</sup> Second, it is less burdensome to require a nonresident to defend suit in a forum if they have drawn a great deal of benefit from the forum state through significant contacts.<sup>318</sup> For a nonresident defendant whose forum contacts are few and far between, the costs associated with defending suit in a foreign jurisdiction may very well outweigh the benefits

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without having to justify the choice."); *Maloney*, *supra* note 270, at 1271 ("The 'arise from or relate to' requirement is the essence of specific personal jurisdiction because it defines the necessary relationship between the defendant and the forum state. . . . [A] misapplication of 'arise from or relate to' is tantamount to a misapplication of due process.").

314. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985) (observing that the "fair play and substantial justice" factors "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required"); *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994) (observing that "the reasonableness prong of the due process inquiry evokes a sliding scale" wherein "an especially strong showing of reasonableness may serve to fortify a borderline showing of relatedness and purposefulness"); *Moore*, *supra* note 297, at 599–600 ("[A] defendant's contacts (both seeking benefits for the defendant and creating risks to others) in a state justify that state asserting jurisdiction over that defendant. . . . [T]he contacts must outweigh the possible judgment and the costs of defending for the assertion of personal jurisdiction to be fair."). But see *Brilmayer*, *supra* note 268, at 88 (construing related contacts and unrelated contacts as "independent threshold tests" wherein "a greater quantum of unrelated activity does not compensate for attenuated related contacts").

315. See *Richman*, *supra* note 303, at 1345 (noting that a defendant's unrelated contacts factor into the determination of whether a forum's exercise of specific jurisdiction is fair by highlighting "the defendant's benefits from the forum, the foreseeability of forum litigation, lack of inconvenience, and the defendant's initiation of the relationship with the forum").

316. See *EMI Music Mex., S.A. de C.V. v. Rodriguez*, 97 S.W.3d 847, 860 (Tex. App. 2003) (observing that the forum state has a substantial interest in adjudicating a case concerning a negligent out-of-state car accident because the defendant travels to the forum state "six to eight times a year to meet musicians . . . [and] coordinate promotional events in Mexico").

317. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) ("When claims [a]re small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.").

318. See *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 715–16 (1st Cir. 1996) (holding that contacts which constitute a but-for cause of a plaintiff's injuries are enough to warrant departure from the proximate cause approach when a defendant "directly targets residents in an ongoing effort to further a business relationship, and achieves [that] purpose").

derived, making litigation in the forum state more burdensome.<sup>319</sup> Third, a defendant's contacts with the forum state tend to demonstrate the lack of a burden in being required to respond to suit in the forum.<sup>320</sup> Fourth, it is more foreseeable that a nonresident defendant will be haled before a court in a state that the defendant has made significant contacts with.<sup>321</sup> Last, a defendant's significant contacts tend to show that the defendant initiated a deliberate relationship with the forum state.<sup>322</sup>

In these ways the sliding scale approach looks to the defendant's unrelated forum contacts while retaining specific jurisdiction's focus on "the defendant, *the forum*, and the litigation."<sup>323</sup> Granted that there is a forum contact by the defendant connecting the forum with the litigation that is not a relationship solely between the defendant and a third party, the defendant's relationship with third parties is not "standing alone" as the basis for jurisdiction.<sup>324</sup> The lower courts in *Bristol-Myers Squibb* missed the mark in this regard by failing to identify BMS activity within the forum state that bore a connection with anyone other than third parties.<sup>325</sup> Once those contacts are properly relegated to determining a low threshold of relatedness—not serving as the related contact itself—there is simply no act by BMS in the forum with respect to the nonresidents' claims for sliding scale to gauge, even at that low standard.<sup>326</sup> This total absence of a related contact made California's assertion of specific jurisdiction improper because the

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319. See Rhodes & Robertson, *supra* note 287, at 237 (observing that a nonresident defendant with isolated and sporadic forum activities will suffer greater hardship through in-state litigation than a nonresident operating on a continuous and systematic basis); cf. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (noting the reciprocal give-and-take between a defendant deriving benefit from a state and the obligation of responding to suit in that state).

320. See *Benson v. Rosenthal*, 116 F. Supp. 3d 702, 713 (E.D. La. 2015) (noting that the defendant had traveled to the forum state on several occasions, which tended to show that he would not be unduly burdened by being required to travel to the forum to defend himself in litigation).

321. See, e.g., *Del Ponte v. Universal City Dev. Partners, Ltd.*, No. 07-CV-2360, 2008 WL 169358, at \*11 (S.D.N.Y. Jan. 16, 2008) (observing that the defendant could have reasonably anticipated becoming a party in the forum's courts because the defendant made substantial contacts with the forum state); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 483 (S.D.N.Y. 2001) (reasoning that the totality of the circumstances concerning a defendant's connections with the forum state warranted a finding that the defendant should reasonably have anticipated being haled into court there).

322. See *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 (2d Cir. 2002) (noting that there is nothing fundamentally unfair about requiring a firm to defend itself in the forum state when a dispute arises from its representation of a forum state client and the representation developed in a market the firm had deliberately cultivated and voluntarily undertook).

323. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (emphasis added).

324. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (noting that a defendant's relationship with a third party may not "stand[] alone" as the basis for jurisdiction (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014))).

325. See *supra* Section IV.A.

326. See *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (observing that there is a total lack of a connection between the nonresidents' claims and the forum).

forum had no interest in regulating conduct it was totally unconnected with.<sup>327</sup>

While it is somewhat true that the sliding scale approach is “difficult to square” with Supreme Court precedent in the sense that it is a specific jurisdiction inquiry that considers a defendant’s unrelated contacts, those unrelated contacts bear on the fairness of requiring the defendant to respond to suit in the forum, which is, after all, the minimum contacts doctrine’s fundamental inquiry.<sup>328</sup> Under the sliding scale approach, a finger is kept on the pulse of fairness by allowing the measure of relatedness to inure to the benefit of a defendant that has not made significant forum contacts.<sup>329</sup> A defendant with limited forum contacts would be subject to suit in that forum only where the plaintiff’s injury is proximately caused by those contacts.<sup>330</sup> Conversely, where a defendant’s forum contacts are significant, a defendant is amenable to suit in the forum where the plaintiff’s injury is not proximately caused by the defendant’s claim-related forum contacts.<sup>331</sup> Low measures of relatedness allow states to effectively vindicate their legitimate sovereign interests with respect to defendants that have made significant forum contacts such that it would not be undue to require defense of a suit with a borderline showing of relatedness in the forum.<sup>332</sup> The fact that courts have followed this sliding scale approach for years indicates that the common law process can sort out the requisite thresholds of activity that warrant the varying levels of relatedness without unduly sacrificing effi-

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327. See *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 899 (Cal. 2016) (Werdegar, J., dissenting) (“A mere resemblance . . . creates no sovereign interest in litigating those claims in a forum to which they have no substantial connection.”), *rev’d*, 137 S. Ct. 1773 (2017).

328. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (noting that reasonable-ness considerations “sometimes serve to establish . . . jurisdiction upon a lesser showing of minimum contacts than would otherwise be required”); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (observing that when obligations arise out of or relate to a defendant’s forum contacts “a suit brought to enforce them can, in most instances, *hardly be said to be undue*” (emphasis added)); Richman, *supra* note 289, at 613 (describing the pre-litigation contacts requirement as “a bright-line test” making the fairness requirement more concrete).

329. See *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 207 (1st Cir. 1994) (“[T]he relatedness requirement . . . authorizes the court to take into account the strength (or weakness) of the plaintiff’s relatedness showing in passing upon the fundamental fairness of allowing the suit to proceed.”); see also *Rose*, *supra* note 271, at 1559 (“[A]ny restrictions on plaintiffs’ ability to select a forum will, by definition, force some plaintiffs to give up their optimum forum. Such restrictions are basically a transfer of wealth from plaintiffs to defendants.”).

330. *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998).

331. *Id.*

332. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 312 (1980) (Brennan, J., dissenting) (“If a plaintiff can show that his chosen forum State has a sufficient interest in the litigation (or sufficient contacts with the defendant), then the defendant who cannot show some real injury to a constitutionally protected interest should have no constitutional excuse not to appear.” (citation omitted)).

ciency in the name of fairness.<sup>333</sup> Yet such a loose standard in close harmony with fairness met inexplicable disdain from the Court,<sup>334</sup> which ultimately went on to echo the familiar yet imprecise language of *International Shoe* and evade the weighty question of precisely what standard governs the relatedness inquiry.<sup>335</sup>

Staying true to the broad understanding of relatedness envisioned by *International Shoe* while also keeping to the minimum contacts doctrine's theme of fairness requires *some* explication that does not narrow that broad understanding in all instances.<sup>336</sup> If it is presumptively fair for a forum to exercise specific jurisdiction over a suit arising directly out of the defendant's forum contacts and less so with respect to a suit that is only "related to" the defendant's contacts,<sup>337</sup> fundamental fairness requires a means of assessing when more relatedness is required before jurisdiction can be properly asserted.<sup>338</sup> Apart from the California courts' use of sliding scale to reach the dubious understanding of "relate to" that the Court resolved to be flatly deficient, it is unclear why sliding scale met such sharp disapproval.<sup>339</sup> These are two separate issues. Adherence to the sliding scale approach would be a gain for the minimum contacts doctrine's function of fairness while also not detracting from a defendant's ability to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."<sup>340</sup> It should come as no shock to defendants that they have a greater spectrum of liability in states

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333. See *supra* notes 227–230 and accompanying text.

334. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) ("Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction.")

335. See *id.* ("What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.")

336. See *Rhodes & Robertson*, *supra* note 287, at 243 (arguing that since *Daimler* circumscribed the scope of general jurisdiction, "courts need to be cognizant of the need to exercise specific jurisdiction over tenuously related contacts of those corporations conducting the quantity and quality of substantial in-state business" that used to suffice for general jurisdiction "[i]n order to achieve the ultimate due process goal of 'fairness'" (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 768 (2014) (Sotomayor, J., concurring))). But see *Rose*, *supra* note 271, at 1586 ("Balancing tests . . . are not the proper approach to personal jurisdiction because the value of certainty and predictability outweighs the advantage of getting the 'right' answer in individual cases.")

337. See *Condlin*, *supra* note 313, at 127 ("Linguistically, if the Court meant to require only a 'related to' relationship . . . there would have been no need for it to use the expression 'arise out of'—'arise out of' is simply a lesser included category of 'related to'—and presumably everything said in the opinion was intended to be given effect.")

338. See *Richman*, *supra* note 303, at 1346 (noting that "claim-relatedness . . . is simply an analytical tool—a convenient summary of some of the factors that make an exercise of jurisdiction fair or unfair")

339. See *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (describing sliding scale as resembling "a loose and spurious form of general jurisdiction" that is "difficult to square" with precedent).

340. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

where they have cultivated an extensive relationship.<sup>341</sup> In sum, if the Court was interested in guiding courts in their task of picking out an “adequate link” from the vast expanse of contacts that can be said to be, in some sense, connected with a claim, the Court’s reproach of sliding scale for the fixable fault of sliding too far may have caused it to pass over the best means of doing so.<sup>342</sup>

## V. CONCLUSION

In *Bristol-Myers Squibb*, the Supreme Court of the United States held that California lacked specific jurisdiction over claims brought by nonresidents for out-of-state injuries that arose out of the defendant’s entirely out-of-state conduct. The Court found that the nonresidents’ claims lacked a connection with the forum notwithstanding the fact that the defendant engaged in a nationwide course of similar conduct, giving rise to claims brought by forum residents that were identical to the nonresidents’ claims. The Court reasoned that California’s exercise of specific jurisdiction over the nonresidents’ claims violated the Due Process Clause because a relationship between the defendant and a third party is not enough to establish a connection between the claims and the forum.<sup>343</sup> The Court reached the correct result because asserting specific jurisdiction over claims so tenuously connected with the forum exploits an expansive understanding of “relate to” that is incompatible with the objectives of due process and long-standing Supreme Court precedent.<sup>344</sup> Although reaching the correct conclusion, the Court made a cursory evaluation of the sliding scale approach and may have passed over the method of assessing relatedness that best comports with fairness, the minimum contacts doctrine’s fundamental inquiry.<sup>345</sup>

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341. See *id.* (holding that the foreseeability that is critical to due process analysis is that which can be attributed to the defendant’s conduct and connection with the forum state); C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 635 (2006) (“[T]he relationship requirement . . . is calculated to place the defendant on notice of the scope of the risk that its conduct has created with respect to a particular jurisdiction.”); Moore, *supra* note 297, at 601 (observing that sliding scale “neatly shifts the balance point depending on the closeness of the contacts to the claim” and arguing that “balancing is not an impossible task . . . it is certainly preferable to categorical approaches”). But see Rose, *supra* note 271, at 1584 (“Each case would turn on its own particular facts and thus predictability, one of the major policy goals applicable to personal jurisdiction, would disappear.”).

342. See *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (observing that the courts below had failed to “identify[] any adequate link between the State and the nonresidents’ claims”).

343. *Id.* at 1781–82.

344. See *supra* Section IV.A.

345. See *supra* Section IV.B.