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What Personal Jurisdiction Doctrine Does -- And What it Should Do

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WHAT PERSONAL JURISDICTION DOCTRINE DOES—AND WHAT IT SHOULD DO

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ABSTRACT

Commentators have routinely noted the complexity, opacity, and multiple functions of U.S. personal jurisdiction doctrine. Yet underlying this comparative chaos are two important concerns. Both commentary and Supreme Court cases have long recognized that a court's assertion of power over a particular defendant and case may have two undesirable consequences. First, the burden on the defendant of having to appear before a certain type of court or in a particular location may be unacceptably high. Second, a court's jurisdictional overreaching may encroach upon the sovereignty of other states or nations and in so doing, may foster uncertainty about which sovereign's substantive standards apply to particular conduct. Personal jurisdiction, to some extent, addresses both of these issues. But with respect to both goals, it has competition. Multiple protections, including venue and forum non conveniens, help to ensure that defendants are not unfairly burdened by litigation. An even greater variety of doctrines, such as dormant commerce clause protections, choice-of-law restrictions, and limits on punitive damages, restrict the ability of states to regulate distant conduct and thereby exceed their sovereign boundaries. In light of these additional protections, this Article suggests reorienting personal jurisdiction toward functions not well served by other doctrines, and proposes three possible goals that meet this standard: providing redundant protections to foreign defendants, screening out cases likely to create difficult questions of choice-of-law constitutionality, and adding the factor of purposeful availment to the analysis of defendant fairness. Surveying the four personal jurisdiction cases the Court has recently decided, this Article finds that they have addressed the first of these goals to some extent, but have slighted the second and third.

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I. INTRODUCTION

Commentators have routinely noted the complexity, opacity, and multiple functions of U.S. personal jurisdiction doctrine, which has been called "like an M.C. Escher print,"[1] "an irrational and unpredictable due process morass,"[2] and "a sort of jurisdictional stew."[3] Notably, the complicated nature of personal jurisdiction in the United States is at odds with the practice in most other parts of the world, where there generally exists a clear delineation between judicial jurisdiction—that is, the ability of a court to exercise power over particular litigants and subjects—and legislative jurisdiction, which is a sovereign's ability to substantively regulate conduct.[4] In the United States, however, the line between legislative and judicial jurisdiction is muddled, and personal jurisdiction is just one of a patchwork of overlapping doctrines that govern the limits of both.[5]

Yet underlying this comparative chaos are two important concerns. Both commentary and Supreme Court cases have long recognized that a court's assertion of power over a particular defendant and case may have two undesirable consequences.[6] First, the burden on the defendant of having to appear before a certain type of court or in a particular location

1. Donald L. Doernberg, *Resoling* International Shoe, 2 TEX. A&M L. REV. 247, 247 (2014).

2. Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1302 (2014).

3. Mary Twitchell, Burnham *and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 666 (1990).

4. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4, intro. note (AM. LAW INST. 1987) (delineating differences between the two forms of jurisdiction). Moreover, spheres of judicial and legislative jurisdiction are, in many countries, specified with a fair degree of explicitness. For example, if one is a victim of a tort in a European Union country, one may sue either in the country where the defendant is domiciled or in that where the tort occurred. *See* European Communities—European Free Trade Association: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Arts 2-3, Sept. 16, 1988, O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (1989). The law applied, unless the case falls into one of a few narrow exceptions, will be the law of the country "in which the damage occurs." *See id.* at Art 3.

5. For a discussion of the interrelationship of the various doctrines, see *infra* Part II.

6. *See* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. 1129, 1153 (2015) (discussing fairness and state sovereignty rationales).

may be unacceptably high.[7] Second, a court's jurisdictional overreaching may encroach upon the sovereignty of other states or nations[8] and in so doing, may foster uncertainty about which sovereign's substantive standards apply to particular conduct.[9]

These time-honored concerns map roughly to those at play in the distinction between judicial and legislative jurisdiction. Further, both sets of concerns have, at various times, found expression in personal jurisdiction doctrine. Thus, the Supreme Court has described personal jurisdiction doctrine as "perform[ing] two related, but distinguishable, functions"[10]: first, "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum" and second, "ensur[ing] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[11] The first of these rationales seems an obvious corollary of personal jurisdiction's roots in the Due Process Clause.[12] Although the second of these rationales was sidelined for many years, the Supreme Court's remarks in its recent flurry of personal jurisdiction cases indicate that it remains relevant.[13] Thus, to the extent personal jurisdiction doctrine has to do with policing the limits of state sovereignty, it would appear to serve in part—and in contrast to the situation in other countries—as a limit on *both* judicial and legislative jurisdiction.

This is an important point in itself. Even more significant, however, is the fact that the protections personal jurisdiction doctrine provides—with respect to both of its apparent functions—are somewhat redundant. Take, for example, the problem of litigating in a distant or inconvenient forum.[14] A defendant haled into a court where it would be burdensome to defend is certainly likely to raise personal jurisdiction concerns if applicable. But, at the same time, there are other ways of handling the problem. A defendant may do so prospectively, by negotiating a choice of forum clause with its contracting partners, which—at least

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7. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (discussing personal jurisdiction's function in protecting defendants).

8. *See id.* at 292 (discussing sovereignty function).

9. *See id.* at 297 (suggesting that a purpose of personal jurisdiction is to allow potential defendants "to structure their primary conduct").

10. *Id.* at 291-92.

11. *Id.* at 292.

12. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires . . . that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' ") (quoting Milliken v. Meyer, 311 U. S. 457, 463 (1940)).

13. In particular, Justice Kennedy's plurality opinion in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011), argues that personal jurisdiction implicates a "sovereign's legislative authority to regulate conduct."

14. *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

in federal court—will be punctiliously honored in most cases.[15] Or a defendant may, depending on the scenario, rely on the other devices designed to protect parties against inconvenience. First there is the basic requirement of venue, which in a large swath of federal cases[16] permits claims to be brought only in a state where all defendants reside or where significant events in the suit occurred (provided a district exists that satisfies one of these criteria).[17] If venue is inconvenient but nonetheless proper, there are backup provisions: the forum non conveniens doctrine[18] and, in federal court, transfer of venue provisions.[19] If the defendant is foreign, other factors—such as generalized principles of comity—may also come into play.[20]

Similarly, various doctrines restrain states from "reach[ing] out beyond"[21] the territorial limits of their sovereignty. A host of constitutional provisions, from the dormant commerce clause to the Due Process Clause, have been invoked to limit states' ability to regulate out-of-state events by both legislative and judicial means.[22] Moreover, the choice-of-law process that courts must undergo in deciding a case imposes boundaries at both constitutional and subconstitutional levels. On the constitu-

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15. *See* Atl. Marine Constr. Co. v. U.S. District Court, 134 S. Ct. 568, 575 (2013) (requiring federal courts to transfer cases to the parties' chosen forum unless "extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer").

16. State courts' venue requirements, while diverse, generally serve a similar function. To avoid interference with federal venue principles, many state venue statutes hue closely to the federal ones. *See* Fed. Deposit Ins. Corp. v. Greenberg, 487 F.2d 9, 12 (3d Cir. 1973); Diane Pamela Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 TEX. L. REV. 392, 418 (1976). The venue statutes of many large states mirror the federal ones nearly exactly. *See, e.g.*, § 47.011, Fla. Stat. (2015); 735 ILL. COMP. STAT. 5/2-101 (2015). Other states' venue statutes, while differently phrased, are similar. *See, e.g.*, CAL. CIV. PROC. CODE §§ 392-93, 395 (West 2015) (enumerating the following venue provisions: 1) where the person they are suing lives, if they are suing an individual, or does business, if they are suing a corporation; 2) where the events giving rise to the dispute arose; or 3) "where the real property that is the subject of the action" is located). Not all states, of course, impose precisely comparable restrictions. *See, e.g.*, 50 N.Y. C.P.L.R. §§ 503, 507 (McKinney 2015) (permitting plaintiffs to sue in any county if none of the parties resides in New York).

17. *See* 28 U.S.C. § 1391(b)(1)-(2) (2010). Only if no district within the United States satisfies these criteria may a plaintiff resort to the fallback provision, under which jurisdiction is available wherever "any defendant is subject to the court's personal jurisdiction." *See id.* § 1391(b)(3).

18. Forum non conveniens doctrine permits a court to dismiss a case entirely in favor of the courts of a different jurisdiction. Courts typically consider several factors of "private interest" and "public interest" in making this determination. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

19. 28 U.S.C. § 1404 (2012) (permitting transfer from one federal district to another "[f]or the convenience of parties and witnesses, in the interest of justice").

20. In some cases, courts have dismissed cases that potentially implicate other nations' interests on comity grounds. *See, e.g.*, Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994). *But see, e.g.*, Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d. Cir. 1997).

21. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

22. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 30-31 (1982); *see also infra* Part II.

tional front, the *Allstate*[23] and *Phillips Petroleum*[24] cases interpret the Due Process and Full Faith and Credit clauses as imposing real (if generally modest) limits on states' ability to apply their law to disputes lacking any connection with the forum. But even without these constitutional limits, it seems unlikely that under states' internal choice-of-law processes severe overreaching would happen frequently. In deciding which jurisdiction's law to apply, courts look for connections between the contending jurisdictions and the facts of the case. Some states focus on a single factor, such as the place of injury in tort cases; others engage in a more holistic, multifactor analysis.[25] Despite these differences, however, it is generally the case that such doctrines, if applied consistently, ensure that state law will not apply to conduct that is distant or unrelated to the state.[26]

Given the existence of such alternative protections, one might wonder why we ask so much of personal jurisdiction doctrine. Indeed, one might question why we need it at all. Especially because of the notorious complexity and unpredictability of personal jurisdiction analysis, it seems reasonable to ask whether a case exists for scrapping it entirely—perhaps in conjunction with revisiting and strengthening doctrines that perform its two related functions more directly.

At least one recent commentator has articulated a proposal along these lines. Stephen E. Sachs, arguing that "[p]ersonal jurisdiction is a mess, and only Congress can fix it,"[27] calls for Congress to provide "a system of nationwide federal personal jurisdiction, relieving federal courts of their dependence on state borders,"[28] with concerns of convenience and efficiency handled through "familiar venue considerations."[29]

Such suggestions are understandable in light of the muddled role of current personal jurisdiction doctrine. And indeed, a more broadly available federal forum offers many advantages. This Article argues, however, that despite the seeming superfluity of much personal jurisdiction doctrine, it should continue to have a significant place in U.S. procedural law.

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23. Allstate Ins. Co. v. Estate of Hague, 449 U.S. 302, 303-04 (1981).

24. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 798 (1985).

25. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 282 (2014) (presenting a table showing differences in state methodologies).

26. This is true because choice-of-law approaches are generally based on connections between the parties and the state. For example, the Second Restatement, used by a plurality of states, *see id.*, focuses on the search for the state with the "most significant relationship" to the dispute. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (AM. LAW INST. 1971).

27. *See* Sachs, *supra* note 2, at 1301.

28. *Id.* at 1303.

29. *Id.*

Personal jurisdiction doctrine remains relevant for at least three reasons. First, personal jurisdiction doctrine is important to foreign defendants who have the most to lose in the assertion of personal jurisdiction by a U.S. court and may be the least prepared to fight it. Many U.S. procedural doctrines are both exceptional, relative to those of other nations,[30] and highly parochial, forged in the sister-state context with little if any special treatment for the distinctive concerns of foreign litigants.[31] Against this backdrop, some redundancy in the procedural protections offered to foreign defendants is desirable.

Second, with respect to both of the functions articulated in *World-Wide Volkswagen* (and particularly the second one), personal jurisdiction serves an important gatekeeping role.[32] In the absence of personal jurisdiction doctrine, the risk that a defendant would be sued in an inconvenient forum or subjected inappropriately to the law of an overreaching state would increase. While other doctrines, as discussed above, can reduce both of these risks, such doctrines are sometimes patchy, inconsistently applied, and hard to monitor.

Finally, personal jurisdiction permits consideration of a key element that is missing from the other defendant-protective doctrines. Personal jurisdiction—and, more specifically, the concept of purposeful availment that is central to the specific jurisdiction analysis[33] —currently provides the only way in which courts can assess the degree to which a defendant's contacts with the forum are specific and deliberate. Where other doctrines that influence forum selection consider factors of convenience and efficiency in a more abstract, general way, purposeful availment casts them in terms of a bargain: The more a defendant has intentionally sought benefits from a particular forum, the fairer it is to subject the defendant both to that jurisdiction's law and the burdens of defending in its courts.[34] In a nation where multijurisdictional disputes are commonplace

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30. *See* Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1085 (2010) (noting distinctive features of U.S. litigation).

31. A particularly telling example of this phenomenon is the lack of distinction between sister-state and foreign-nation law in most states' choice-of-law analysis. *See* Katherine Florey, *Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles After* Morrison *and* Kiobel, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 197, 205 (2014) [hereinafter Florey, *Bridging the Divide*] ("[S]tate choice-of-law methodologies almost universally treat other-state and non-U.S. law identically.").

32. *See* Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1165 (2013) [hereinafter Sterk, *Personal Jurisdiction*] ("The cases in which the Court has held that the forum lacked personal jurisdiction have almost uniformly been cases in which application of forum law posed an unjustified threat to the regulatory scheme of another jurisdiction and a concomitant danger to defendants who assumed that their actions would be governed by that regulatory scheme.").

33. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (introducing concept of purposeful availment into personal jurisdiction analysis).

34. Perhaps the Court's clearest exposition of this notion is in *Burger King Corp. v. Rudzewicz* in which it explained: "[W]here the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and resi-

and territorial boundaries of authority are seldom clearly delineated, this focus on the defendant's intentional activities provides a reasonably fair and workable principle for allocating spheres of state judicial authority.

The fact that personal jurisdiction doctrine remains relevant, however, does not always mean that courts have used it in productive ways. In particular, the Supreme Court has, after decades of quiescence on the personal jurisdiction front,[35] recently decided a series of cases that suggest new directions in personal jurisdiction doctrine. The Court's recent decisions have attracted both criticism and praise from several perspectives.[36] This Article argues, however, that discussion about personal jurisdiction's current state, as well as prescriptions for its future, must be informed by an understanding of personal jurisdiction's distinct role and its relationship to other doctrines governing forum choice and choice of law. Viewing the doctrine through this lens provides both a metric for evaluating the Court's recent cases and a way to think about future directions the doctrine should take. Personal jurisdiction doctrine, in other words, should be tailored toward the particular ends that the doctrine serves well and those where other tools fall short. At the same time, however, personal jurisdiction principles should not merely duplicate functions that are better considered under, for example, the rubric of venue or choice of law.

This Article proceeds in four parts. Part I briefly reviews the history of personal jurisdiction doctrine in order to consider the goals that the doctrine has historically served. Part II discusses other legal doctrines and procedural devices that courts and defendants have at their disposal for achieving those goals. Part III attempts to pinpoint what is distinctive and necessary about personal jurisdiction doctrine. Part IV considers the extent to which the Supreme Court's recent personal jurisdiction cases do and do not point the doctrine in the direction of fulfilling its core functions. The Article concludes by suggesting ways in which personal jurisdiction doctrine can evolve more fruitfully in the future.

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dents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950)).

35. *See* Trammell & Bambauer, *supra* note 6, at 1130 ("After more than twenty years of silence, the Supreme Court has recently reentered the fray of personal jurisdiction.").

36. *See, e.g.*, Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 106-07 (2015); Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 108-09 (2015); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 246 (2014); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 235 (2014); Sachs, *supra* note 2, at 1304-07; Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 503-04 (2015).

II. THE HISTORICAL GOALS OF PERSONAL JURISDICTION DOCTRINE

Modern personal jurisdiction doctrine, starting in the *International Shoe* era, originally concentrated on considerations of defendant fairness, and such considerations remain the predominant focus of the doctrine. More recently, however, the Court has also returned to discussing personal jurisdiction as a way of allocating spheres of state authority. The following section explores this history.

A. The Development of the Minimum Contacts Test

The story of personal jurisdiction doctrine's development is a familiar one. Personal jurisdiction was originally characterized in territorial terms, as an assertion of a court's physical power over a defendant. Thus, where a defendant was nonresident, service of process within the forum was generally required to confer in personam jurisdiction. As the Court explained in *Pennoyer v. Neff*, the foundational 1878 case that developed the territorial model: "no State can exercise direct jurisdiction and authority over persons or property without its territory. . . . [T]he laws of one State have no operation outside of its territory, . . . and . . . no tribunal . . . can extend its process beyond that territory so as to subject either persons or property to its decisions."[37]

Pennoyer's formulation, however, proved unworkable in the modern landscape of multijurisdictional relationships and disputes. In *International Shoe v. State of Washington*,[38] the Court supplanted it[39] with a radically different model of personal jurisdiction[40] based on the defendant's contacts with the state. It held that "due process requires only that in order to subject a defendant to a judgment *in personam*, . . . he have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[41] That is, the *International Shoe* Court held, a nonresident defendant under certain circumstances might engage in activities within the state that could render it fair to subject the defendant to jurisdiction there, even in the absence of in-state service of process.

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37. 95 U.S. 714, 722 (1877).

38. 326 U.S. 310 (1945).

39. Although the Court introduced a different theoretical framework, it remains the case that some of the methods of gaining personal jurisdiction that the *Pennoyer* Court approved, such as service of the defendant within the forum state, remain valid. *See* Burnham v. Superior Court, 495 U.S. 604, 604 (1990) (unanimously holding that personal service within the forum state continues to suffice for personal jurisdiction in that forum).

40. *See* George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 348 (2001) (discussing radical changes *International Shoe* made to the territorial framework).

41. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U. S. 457, 463 (1940)) .

Although it has not been universally interpreted this way,[42] *International Shoe* suggested a general framework under which if a defendant had many contacts with the state, they need be less integrally related to the dispute, and vice versa.[43] This principle has been described as a "continuum" model of personal jurisdiction.[44]

International Shoe, however, did not explicitly endorse a continuum. Rather, it postulated, as Professors Rhodes and Robertson have observed, the existence of "three . . . situations supporting a nonresident defendant's amenability."[45] The first situation (and the one actually presented in *International Shoe*) involved a scenario in which the defendant's in-state activities were "continuous and systematic" and "also g[a]ve rise to the liabilities sued on."[46] A second scenario involved the "commission of some single or occasional acts" within the forum that nonetheless, "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit."[47] In a third scenario, the Court suggested there existed "instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action . . . entirely distinct from those activities."[48]

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42. *See, e.g.*, O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 321 (3d. Cir. 2007) (rejecting continuum model and stating that general and specific jurisdiction are "analytically distinct categories").

43. *See* Vons Cos. v. Seabest Foods, Inc., 926 P.2d 1085, 1097 (Cal. 1996) ("[A]s the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend." (quoting Cornelison v. Chaney, 525 P.2d 264, 266 (Cal. 1976))).

44. *See* GEOFFREY C. HAZARD ET AL., PLEADING AND PROCEDURE 127-28 (Robert C. Clark et al. eds., 11th ed. 2015) (stating that "[i]t can be argued that general jurisdiction should stand at one end of a continuous spectrum of cases," although recognizing that *Goodyear* may cast some doubt on this notion); Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 599-601 (2001) (reviewing and endorsing judicial approaches that adopt a sliding scale); William M. Richman, *Review Essay: Part I—Casad's Jurisdiction in Civil Actions, Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CALIF. L. REV. 1328, 1340-41 (1984) (explaining, and advocating for, the notion of a continuum in personal jurisdiction); Trammell, *supra* note 36, at 504 ("The seminal case of *International Shoe Co. v. Washington* essentially recognized two relationships that exist along different axes and define the personal jurisdiction continuum—first, the connection between the defendant and the forum; second, the connection between the lawsuit and the forum."); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 647-53 (1988) (discussing difficulty in categorizing cases involving forum contacts tangentially related to the claim, and the tendency of some courts to characterize analysis in some such cases as one of specific jurisdiction).

45. Rhodes & Robertson, *supra* note 36, at 235; *see also* Michael H. Hoffheimer, *General Personal Jurisdiction After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 60 U. KAN. L. REV. 549, 558-61 (2012) (noting that *International Shoe* discusses three scenarios in which personal jurisdiction over the defendant would be appropriate, and one scenario—namely, isolated acts that are not of the type that would give rise to jurisdiction—in which it would not).

46. *Int'l Shoe*, 326 U.S. at 317.

47. *Id.* at 318.

48. *Id.*

In later years, the first two scenarios mentioned above were described as instances of "specific" jurisdiction—that is, jurisdiction based on in-state contacts relating to the suit—and the third one as "general" jurisdiction, or a scenario in which the defendant's contacts with the forum were so extensive that the defendant could be sued even on unrelated matters.[49] It is worth noting, however, the significant difference between specific jurisdiction premised on "continuous and systematic" contacts and that based on "single or occasional acts."[50] The Court was vague about what "nature and quality" of single contacts might suffice to render a defendant susceptible to jurisdiction on their basis,[51] but one could presume that such contacts would have to be both significant and integrally related to the dispute. At least some commentators see the bulk of the Court's personal jurisdiction cases as falling within the "single or occasional" category.[52]

B. The Emergence of the Fairness and State Sovereignty Rationales

The years following *International Shoe* brought a significant amount of confusion about what exactly personal jurisdiction limits were intended to do: Did they simply exist to ensure fair treatment of the defendant, or did they also have a role in policing the outer limits of state sovereignty?[53] This issue can be said to date back as far as *Pennoyer*, even as it articulated a robustly territorial view of state courts' power, *Pennoyer* muddied the issue by holding that an improper assertion of personal jurisdiction could be challenged through the Due Process Clause (permit-

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49. This scheme was first (and famously) articulated in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-65 (1966). The Supreme Court has adopted the general/specific terminology. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

50. *See Int'l Shoe*, 326 U.S. at 317-18; *see also* Rhodes & Robertson, *supra* note 36, at 235-37 (explaining the distinction between the two sorts of specific jurisdiction).

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

52. *See* Rhodes & Robertson, *supra* note 36, at 236 ("Most of the Supreme Court's post-*Shoe* decisions have explored the outermost limits of specific jurisdiction premised upon a defendant's isolated forum activity, i.e., *International Shoe*'s third category."). It should be noted, however, that there is a distinction between the analysis of which forum activities are meaningful when determining whether contacts between the forum and the dispute exist (thus making specific jurisdiction at least potentially available) and the analysis of the ultimate question whether specific jurisdiction exists, in which courts may weigh the *degree* of relatedness in their analysis. *See* Peter Singleton, *Notes: Personal Jurisdiction in the Ninth Circuit*, 59 HASTINGS L.J. 911, 934 (2008) (noting that, in the Ninth Circuit, "[t]he finding of purposeful availment or purposeful direction, though, appears to be influenced by how closely related the cause of action is to the plaintiff's contacts with the forum").

53. *See* Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1706-07 (2011) (discussing the "lively debate" among scholars in the area and noting that "it remains unclear whether consideration of state sovereignty concerns or interests plays any independent role in determining the boundaries of state court jurisdiction").

ting the inference that the doctrine was linked to procedural fairness)[54] and suggesting that one purpose of personal jurisdiction limits was to ensure that out-of-state defendants received adequate notice.[55] Later, the Court in *International Shoe*, with its concern for "traditional notions of fair play and substantial justice"[56] and avoidance of any discussion of state sovereignty, seemed mostly concerned with this latter strand of thought. Subsequent cases, however, revived the notion that personal jurisdiction might also serve the end of restraining states from overreaching the (presumably territorial) bounds of their sovereignty. Perhaps most notably, the Court in *World-Wide Volkswagen Corp. v. Woodson* spoke of personal jurisdiction doctrine's "related, but distinguishable, functions": first, sparing the defendant "the burdens of litigating in a distant or inconvenient forum," and second, "act[ing] to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[57]

The Court, however, has mostly relied on the first rationale, and extended it further by introducing the concept of "purposeful availment" as a central factor in personal jurisdiction doctrine. In much-quoted language from *Hanson v. Denckla*, the Court noted that in minimum contacts analysis, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[58] Both the "purposeful" and "availment" parts of this formulation are significant. The "purposeful" element emphasizes the intentionality of the defendant's conduct, as opposed to connections made with the forum as a result of the "unilateral activity of those who claim some relationship with a nonresident defendant."[59] The "availment" portion suggests that a sort of bargain principle is at work in personal jurisdiction—that is, the greater degree to which the defendant has sought out connections with the forum for its benefit, the fairer it is to hold the defendant accountable for its actions in that state.[60]

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54. Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (noting that, following the adoption of the Fourteenth Amendment, litigants may challenge the validity of judgments "on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law").

55. *See id.* at 726 (noting that if service by publication were allowed, "in the great majority of cases, [it] would never be seen by the parties interested . . . [and] would be the constant instrument[] of fraud and oppression").

56. *See Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U. S. 457, 463 (1940)).

57. 444 U.S. 286, 291-92 (1980).

58. 357 U.S. 235, 253 (1958).

59. *Id.*

60. This version of "purposeful availment" seems most appropriate to contract or product liability cases involving defendants who have sought to enter into contractual relationships with or market products to residents of a particular forum. While it is a less comfortable fit for other causes of action, such as those involving intentional torts, jurisdiction in such cases may be seen as springing from a related concept of targeting a forum or "purposefully direct[ing]" activities

The Court has invoked and elaborated upon this notion in many subsequent cases. In *Burger King vs. Rudzewicz*, for example, the Court discussed the circumstances under which a long-term contract with a corporate resident in a forum could constitute purposeful availment,[61] an issue[62] to which this Article will return in Part IV. In *Asahi Metal Industry Co. v. Superior Court*,[63] all justices agreed (under varying rationales)[64] that a California state court lacked personal jurisdiction over an indemnity dispute between Asahi Industry, a Japanese manufacturer of valves used in motorcycle wheels, and Cheng Shin, a Taiwanese manufacturer that incorporated these parts into motorcycles that were then sold in the United States.[65] In considering this example of the notorious "stream of commerce" problem,[66] four justices would have held that Asahi's knowledge that a small but regular stream of its products was finding its way into the United States could potentially suffice to constitute minimum contacts.[67] Another four justices would have found that such "mere . . . awareness" was insufficient.[68] Justice O'Connor, in writing for this second set, enumerated the sort of additional acts that might suffice to confer personal jurisdiction over a defendant in this situation: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."[69] In enu-

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there. *See* Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985) (citing "purposeful direct[ion]" language from *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984), a case involving libel, in expounding on the concept of "purposeful availment" in a contract case).

61. 471 U.S. at 462.

62. Specifically, a question raised by the facts of *Burger King* and discussed more explicitly in *Walden v. Fiore* is whether a distinction exists between purposefully availing oneself of (or otherwise targeting) the forum versus interacting with a corporation or natural person who happens to be resident in the forum. *See infra* Section IV.C.4.

63. 480 U.S. 102 (1987).

64. Eight justices agreed that the "reasonableness" factors demanded dismissal of the case, with one justice (Justice Scalia) expressing no view on this question. The Court split 4-4-1 on the question whether minimum contacts were present. *See id.* at 102-04 (explaining breakdown of vote).

65. The main dispute, a product liability case between Zurcher and Asahi, had settled, leaving the indemnity claim by Asahi the only remaining claim before the court. *See id.* at 106.

66. *See id.* at 110 ("[L]ower courts have been confronted with cases in which the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum State . . . .").

67. *See id.* at 117 (Brennan, J., concurring) (finding that a defendant's knowledge of "the regular and anticipated flow of products from manufacture to distribution to retail sale [in the forum]" could suffice to constitute minimum contacts). These justices, however, nonetheless agreed that the dispute in question should be dismissed on "reasonableness" grounds. *See id.* at 102-04.

68. *See id.* at 111-12.

69. *Id.* at 112. Justice O'Connor described these activities as "act[s] of the defendant purposefully directed toward the forum State." *Id.* Although it is possible to construct a theoretical difference between "purposeful direction" and "purposeful availment," in practice the Court has used the terms more or less interchangeably. *See* Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (suggesting that "purposeful direction" might be better applied to tort cases

merating these possibilities, she focused in particular on the "purposeful[]" and "intent[ional]" nature of the defendant's conduct.[70]

Thus, notwithstanding its language in *World-Wide*, the Court, in its principal personal jurisdiction cases, has historically focused on personal jurisdiction limits as primarily a protection for the defendant. Elsewhere, in *Compagnie des Bauxites de Guinee*, the Court explicitly disclaimed, at least to some extent, its suggestions in *World-Wide*, characterizing the personal jurisdiction requirement as "represent[ing] a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[71] Accordingly, the Court found that personal jurisdiction requirements could be satisfied not just (as had always been the rule) by the defendant's waiver of objections to jurisdiction,[72] but also, in some cases, through litigation misconduct such as refusing to provide discovery relevant to the existence of minimum contacts.[73] *Compagnie des Bauxites* may have represented the zenith of the Court's rejection of the state sovereignty rationale; however, as the following section discusses, the Court has returned to it in its recent cases.

*C. The Sovereignty Rationale in the Post-*McIntyre *Era*

The focus on personal jurisdiction as a waivable protection in *Compagnie des Bauxites* caused some commentators to reject entirely the notion that personal jurisdiction has anything to do with state sovereign-

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and "purposeful availment" to contracts, but acknowledging that "purposeful availment" has been used as "shorthand" for both concepts). Notably, O'Connor's opinion in *Asahi*, after speaking of "purposeful[] direct[ion]," later noted, "respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market," explaining that Asahi did not "do business in California[,] . . . advertise or otherwise solicit business in California[,] . . . create, control, or employ the distribution system that brought its valves to California[,] . . . [or] design[] its product in anticipation of sales in California." *Asahi*, 480 U.S. at 112-13.

70. *Asahi*, 480 U.S. at 112 ("Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State.").

71. *See* Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). The Court went on to elaborate and defend this position, specifically referencing the language in *World-Wide*:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Id. at 702 n.10.

72. *See id.* at 703 ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

73. *See id.* at 709.

ty.[74] In general, however, the Court has failed to take a consistent position on the issue,[75] and recent cases make clear that, for at least some justices, the sovereignty concept still holds some weight. In *J. McIntyre Machinery, Ltd. v. Nicastro*,[76] Justice Kennedy's plurality opinion[77] somewhat awkwardly linked *World-Wide Volkswagen*'s two rationales by finding that "[d]ue process protects the defendant's right not to be coerced except by lawful judicial power."[78] Moreover, for Kennedy, the lawfulness of a court's authority hinged not on whether it improperly imposed procedural hardship on the defendant but on whether the state's power properly extended to the situation at hand. Outside the intentional tort context,[79] Kennedy argued, a sovereign exercises its power lawfully only when the defendant, through its actions, "submits to the judicial power of an otherwise foreign sovereign."[80] The defendant's purposeful availment of the forum state is one manner in which the defendant may manifest such submission.[81] Thus, "jurisdiction is in the first instance a question of authority rather than fairness."[82] Notably, Justice Kennedy linked state courts' legislative and judicial jurisdiction by arguing that the Due Process Clause protects defendants from unlawful use of both "the power of a sovereign to resolve disputes through judicial process" and "the power of a sovereign to prescribe rules of conduct for those within its sphere."[83]

It remains an open question how influential this authority-based conception of personal jurisdiction will be. Justice Kennedy's opinion did not command a majority of justices, and the themes he sounded for the most part have not been taken up by the Court in its other three recent opinions, all unanimous.[84] Moreover, the basic purposeful availment framework Justice Kennedy articulated for assessing the degree to which the defendant is subject to personal jurisdiction has been black-letter per-

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74. *See* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1016 (1983) (arguing that while "federalism is preserved merely as a by-product of the protection of litigants' rights" in personal jurisdiction cases, it "has no role in the decision of personal jurisdictional issues").

75. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 623-24 (2006). In conceptualizing personal jurisdiction doctrine as protecting in part against "arbitrary governmental action," *id.* at 629, Spencer to some extent anticipates Justice Kennedy's approach in *McIntyre*. *See infra* Section I.C.

76. 131 S. Ct. 2780 (2011).

77. *Id.* at 2783-85.

78. *See id.* at 2785.

79. *See id.* at 2787 ("[I]n some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws.").

80. *Id.* at 2788.

81. *Id.*

82. *Id.* at 2789.

83. *Id.* at 2786-87.

84. *See* discussion of these cases *infra* Part IV.

sonal jurisdiction law for decades.[85] The only novel element Justice Kennedy introduced was to tie this framework to a notion of lawful sovereign power.

Nonetheless, it seems fair to say that personal jurisdiction doctrine, even as it has been principally predicated on the rights of the defendant to be free from burdensome legal process, has also at least at times, incorporated a strand of concern about sovereignty. Further, this latter concern has in itself at least two dimensions: preserving the balance of power among states on the one hand,[86] and protecting defendants from overreaching states on the other (a rationale that the *McIntyre* plurality particularly emphasized).[87]

The degree to which personal jurisdiction doctrine does or should concern itself with one goal or both is a matter of continued debate. Underlying the debate, however, is a broader question: Do we have other tools that can do the job? If so, what remaining function does personal jurisdiction doctrine serve? The following section attempts to throw light on this problem by examining other doctrines that serve functions similar or related to personal jurisdiction.

III. OTHER DOCTRINES THAT SERVE PERSONAL JURISDICTION'S GOALS

The functions of personal jurisdiction doctrine have generally been examined from the inside out, by looking at the doctrine as it has evolved and attempting to discern what functions it does and should serve. In some cases, scholars have compared personal jurisdiction to specific doctrines that serve somewhat related functions, such as forum non conveniens,[88] venue,[89] or choice of law.[90] An alternative approach, however, is to consider personal jurisdiction doctrine against the backdrop of the broader procedural landscape, taken in its entirety. If protecting defendants from unfair burdens and limiting state power over distant events are worthy goals, to what extent do existing doctrines adequately serve them? Further, are there means other than personal jurisdiction by

85. The Court first described the "purposeful[] avail[ment]" framework in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

86. *World-Wide Volkswagen* suggests that this is the relevant rationale. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

87. *See McIntyre*, 131 S. Ct. at 2786 ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power.").

88. *See* Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259, 1324 (1986) (arguing that forum non conveniens functions could be fulfilled by personal jurisdiction doctrine).

89. *See generally* Sachs, *supra* note 2, at 1301 (arguing that many of personal jurisdiction's functions could be better addressed as questions of venue).

90. *See* Sterk, *Personal Jurisdiction*, *supra* note 32, at 1165-66 ("[B]oth the sovereignty and liberty bases for [personal jurisdiction] limits are rooted in choice-of-law concerns: balancing the forum state's interest against the power of the defendant's home state to regulate local activity, and the right of local actors to rely on their home state's regulatory scheme.").

which we might achieve these goals? The following section attempts to answer these questions by surveying the procedural landscape *external* to personal jurisdiction.

A. Doctrines That Protect Defendants

A variety of doctrines limit the degree to which defendants must be subjected to an inconvenient or hostile forum and give the defendant some control over where a suit occurs. Indeed, to some extent, defendants have the power to protect themselves—most notably, at least in contractual disputes, by drafting choice-of-forum clauses in advance. The Court's recent holding that federal courts are bound, except in rare circumstances, to transfer cases to the parties' chosen forum[91] makes the operation of such clauses even more predictable and gives added security to defendants. Even in scenarios, however, where choice-of-forum clauses are impossible (e.g., in a tort suit) or undesirable, defendants have many nonjurisdictional protections against being haled into an inconvenient forum. The following section describes these options.

1. *Venue Requirements*

As a starting point, the requirement of proper venue limits a federal litigant's choice of court significantly, at least in cases involving individual, as opposed to corporate, defendants. Unless the requirement is waived by the parties (or the fallback provision discussed below applies), federal suits must be brought in either a judicial district where a defendant resides, so long as all the defendants reside in one state, or alternatively in a district where "a substantial part of the events or omissions giving rise to the claim occurred," or where property at issue in the suit is located.[92] If even a single district exists that falls into one of these categories, the plaintiff must file suit there; if multiple districts satisfy these criteria, the plaintiff may choose among them.[93] Only if no federal district satisfies either criterion may the plaintiff rely on the fallback provision, which permits the plaintiff to sue in any district where one defendant is subject to personal jurisdiction.[94]

At least on its face, then, the venue statute increases the likelihood that, even apart from personal jurisdiction requirements, the federal district where the plaintiff may file will be one that is convenient to the defendant. Moreover, although states are obviously not bound by federal venue restrictions, many states have similar requirements, such as limit-

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91. *See* Atl. Marine Constr. Co. v. U.S. District Court, 134 S. Ct. 568, 575 (2013).

92. 28 U.S.C. § 1391(b) (2012).

93. *See id.* It is possible, for example, that multiple defendants might reside in different judicial districts in the same state, while most of the events at issue took place in a district outside the state. If that were the case, the plaintiff would have a variety of districts from which to choose.

94. 28 U.S.C. § 1391(b)(3).

ing venue in most suits to a place where the liability has arisen or where the defendant resides.[95]

To be sure, the venue statute is not entirely independent of personal jurisdiction's influence. Most importantly, corporate residence for venue purposes is defined as "any judicial district in which [a] defendant is subject to the court's personal jurisdiction with respect to the civil action in question."[96] This jurisdiction-based approach to residence is not applicable to individual defendants,[97] and it is only relevant in suits against corporations if there is only one defendant or if the corporate defendants, according to this definition, all "reside" in one state.[98] Nonetheless, this definition creates a fairly wide swath of cases in which venue exercises no real constraint independent of personal jurisdiction.[99]

The fallback provision further links venue to personal jurisdiction, at least at the margins, and frequently comes into play in cases involving foreign defendants or events[100]—often the cases in which personal jurisdiction is most fraught. Yet its application is exceptionally limited in domestic cases; it is never available if venue based on residence or substantial events exists in any federal district, and consequently, rarely applies in suits based on claims arising within the United States, which are likely to involve either significant events in one U.S. District or defendants residing in the United States, if not both.[101]

Thus, in many cases, venue requirements limit the plaintiff's ability to choose a forum inconvenient to the defendant (or, for that matter, completely unconnected to the forum), regardless of whether the forum has personal jurisdiction over the defendant. This is particularly clear in cases involving individual defendants for whom the venue statute defines residence as domicile.[102] If the plaintiff elects to make use of the residence-based venue provisions, such defendants will be sued in a place that is obviously convenient to them. But even basing venue on occur-

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95. *See* sources cited *supra* note 16.

96. 28 U.S.C. § 1391(c)(2).

97. 28 U.S.C. § 1391(c)(1) (defining residency as the judicial district of domicile for natural persons).

98. *See* 28 U.S.C. § 1391(b)(1) (providing for residency-based venue only where "all defendants are residents of the State in which the district is located").

99. Of course, the venue statute may still influence plaintiffs' choices by, for example, causing them to choose a district that satisfies the "substantial part of events" criterion if the defendants' residency is difficult to establish.

100. These cases will often trigger the fallback provision because one or more defendants may reside outside the United States rather than in any state, and relevant events may have occurred abroad, making the other two venue prongs impossible to satisfy. *See* James M. Wagstaffe, CAL. PRAC. GUIDE FED. CIV. PRO. BEFORE TRIAL CH. 4-E (2016) (ebook) (noting that the fallback provision primarily applies in cases involving foreign events or defendants).

101. 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3806.1 (4th ed. 2015) (explaining limited scope of fallback and noting that "[t]he grant of fallback venue is so broad precisely because the class of cases to which it applies is so narrow").

102. 28 U.S.C. § 1391(c)(1).

rence of a "substantial part" of relevant events protects defendants to some extent. True, a "substantial part" of the events at issue in the suit may have occurred in one or more places with which the defendant has no particular connection (this might be the case, for example, if a plaintiff sues for injury by a product that she herself has brought into a new jurisdiction).[103] All things being equal, though, the district or districts where events relevant to the suit took place are somewhat more likely to be places where the defendant has ties.

Moreover, there is some value to defendants in simply having an additional constraint, independent of personal jurisdiction, that limits where the plaintiff can bring suit. Venue often forces plaintiffs to choose among a fairly narrow range of districts, in some cases limiting them to a single one. As a result, even if venue requirements do not necessarily require plaintiffs to pick the most convenient forum for the defendant to be sued, they prevent plaintiffs (at least in most factual scenarios) from simply surveying the districts in which personal jurisdiction over the defendant exists and choosing the one the defendant will find *most* inconvenient. Thus, the requirements serve as an important limit on the plaintiff's power.

2. Transfer of Venue

In federal court, the federal transfer of venue statute, 28 U.S.C. § 1404, can be of significant aid to defendants even when the basic venue requirements permit the selection of an inconvenient forum. Even when a plaintiff files suit in a federal district where personal jurisdiction and venue are proper, defendants[104] are able in many circumstances to move the case to a place of their choosing. Section 1404 permits courts to transfer cases "[f]or the convenience of parties and witnesses, in the interest of justice"[105] to any federal district in which the action might have originally been brought—in other words, any place where personal jurisdiction over the defendant as well as venue are also proper.[106]

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103. For this reason, Stephen E. Sachs, who has urged Congress to establish nationwide personal jurisdiction in federal courts, also advocates concomitant changes to the venue statutes to reduce their reliance on personal jurisdiction concepts and to foreground the idea of convenience. *See* Sachs, *supra* note 2, at 1303.

104. The transfer statute does not specify who may use it, so plaintiffs may also invoke the transfer of venue provisions, as may courts sua sponte. *See* 28 U.S.C. § 1404 (2012). For purposes of comparison with personal jurisdiction doctrine, however, this discussion will focus on defendants.

105. 28 U.S.C. § 1404(a).

106. Whenever a litigant wishes to transfer a case from one federal district to the other, § 1404 rather than forum non conveniens is the proper device to use. Prior to the enactment of § 1404, federal courts relied on the device of forum non conveniens to achieve the same result. Indeed, the Supreme Court first adopted the forum non conveniens doctrine in cases involving purely domestic litigation in federal court. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509-12 (1947); Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 531-32 (1947).

A transfer under § 1404 may be initiated by any party, and such transfers are notable in that—unlike the standard minimum contacts inquiry—they involve a direct consideration of the parties' convenience. The transfer of venue statute is a relatively flexible one, and transfer may sometimes be granted on a lesser showing of inconvenience than is required in forum non conveniens dismissals.[107] Courts determining whether to grant transfer of venue consider a variety of factors. Many courts take into account the various so-called "public" and "private" factors that are also considered in forum non conveniens doctrine;[108] courts may take into account additional considerations as well, such as the possibility of consolidating related litigation involving the same parties in a single court.[109] In general, the fact that the plaintiff chose a particular forum is not weighed in the transfer of venue analysis, and courts have broad discretion to grant transfers so long as they fall within the statute's purposes.[110]

It appears likely that the availability of transfer benefits defendants. Although it is hard to establish definitive cause and effect,[111] one study found that plaintiffs win fifty-eight percent of cases that remain in their original forum but only twenty-nine percent of those that are transferred pursuant to § 1404.[112] Further, even if there were no evidence that transfer conferred substantive advantages for defendants, it seems fairly self-evident that transfer reduces defendants' costs by permitting them to move a case to a more convenient or familiar forum.

Transfer is not, of course, granted in every case. There certainly may be situations where a particular forum, though heavily burdensome to the defendant, is the best overall forum in which the case should be heard. Nonetheless, even if it does not save defendants trouble and expense in every case, the availability of transfer provides defendants a meaningful protection from the plaintiffs' choice of an arbitrary or deliberately inconvenient forum.

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107. Norwood v. Kirkpatrick, 349 U.S. 29, 30 (1955) (adopting the view that courts have a "broader discretion in the application of the [venue] statute than under the doctrine of forum non conveniens"). *But see* Atl. Marine Constr. Co. v. U.S. District Court, 134 S. Ct. 568, 580 (2013) (describing § 1404 as "merely a codification of the doctrine of forum non conveniens for the subset of cases in which the transferee forum is within the federal court system").

108. *Atl. Marine*, 134 S. Ct. at 580 (noting that transfer of venue relies on "the same balancing-of-interests standard" as forum non conveniens).

109. *See, e.g.*, Salinas v. O'Reilly Auto., Inc. 358 F. Supp. 2d 569, 573 (N.D. Tex. 2005) (finding the "pendency of related litigation in another forum" to be relevant to the "interests of justice").

110. *See Norwood*, 349 U.S. at 30 (emphasizing district courts' discretion).

111. *See* David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1482-84 (1997) (suggesting that factors other than transfer, such as the inclusion of default judgments in the analysis, may account for differences in win rates in the study referenced *infra* note 112).

112. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511-12 (1995).

3. Forum Non Conveniens

Both state[113] and federal[114] courts recognize the doctrine of forum non conveniens, as one of the "exceptional circumstances" in which a court may dismiss a case over which it has proper jurisdiction.[115] Forum non conveniens doctrine permits a court to dismiss a case when, for fairness and efficiency reasons, the case would be better heard in another jurisdiction.[116] In practice, forum non conveniens doctrine applies in federal court only where the alternative forum is outside of the United States. Although formerly governed by forum non conveniens principles, transfers from one federal court to another are now handled through the transfer of venue statute, 28 U.S.C. § 1404.[117]

Federal forum non conveniens factors permit courts to consider burdens on defendants both directly and indirectly. In *Gulf Oil*, the 1947 case in which the Court first concluded that federal courts had inherent power to grant forum non conveniens dismissals, the Court articulated influential public and private factors that courts should use in making their decision. Private factors include aspects of the case involving convenience and fairness to the litigants, such as the availability of witnesses and evidence.[118] Public factors encompass issues such as the crowdedness of the court's docket, the fairness of burdening local residents with jury service, the "local interest in having localized controversies decided at home," and the court's familiarity with the law to be applied.[119] Factors of convenience and fairness obviously permit consideration of the degree to which the defendant is burdened, both in personal ways such as the expense or difficulty of travel and in issues that affect the regularity of the proceedings, such as the difficulty of obtaining far-off evi-

113. *See* Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 914 (1947) ("At least as early as 1817 a state court asserted and exercised a discretionary power to deny its facilities to a cause . . . . It is these cases which must be relied on as establishing the doctrine of *forum non conveniens* in American law." (footnote omitted)).

114. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).

115. *Id.*

116. *Id.* at 507 (describing doctrine as serving "the convenience of witnesses and the ends of justice").

117. *See* Atl. Marine Constr. Co. v. U.S. District Court, 134 S. Ct. 568, 580 (2013) (discussing use of § 1404 to replace forum non conveniens doctrine when preferred forum is another federal court).

118. The Court noted that these factors included "sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil*, 330 U.S. at 508. Also under this category, the Court considered the degree to which a potential judgment might be enforceable, the "relative advantages and obstacles to fair trial," the degree to which the plaintiff might have chosen an inconvenient forum for purposes of harassment or oppression, and the general principle that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

119. *Id.* at 508-09.

dence.[120] The public factors may also often favor a defendant, particularly a foreign one, since issues such as the need to apply unfamiliar law may weigh in favor of dismissal.

While the Court in *Gulf Oil* took a somewhat hesitant position toward forum non conveniens dismissal, cautioning that "unless the balance [of factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed,"[121] a subsequent Supreme Court case, *Piper Aircraft Co. v. Reyno*,[122] took a more pro-dismissal stance by adding two important considerations to the analysis: first, that a non-U.S. plaintiff's choice of a U.S. forum should generally be given less weight, and second, that courts should not deny a forum non conveniens dismissal on the grounds that the law applied by the second forum might be less favorable to the plaintiff.[123] In the years since *Piper Aircraft*, the doctrine has become even broader, as "federal judges have been taking a lead in limiting access to U.S. courts by aggressively enforcing and expanding the doctrine of forum non conveniens."[124] Further, state and federal forum non conveniens doctrines have converged to some degree.[125] Historically, states had their own forum non conveniens doctrines, some of which were more deferential to the plaintiff's choice of forum than were federal courts,[126] but today many states have similar pro-dismissal tendencies, with a number of states applying the federal *Piper Aircraft* framework.[127]

A variety of commentators have noted similarities between forum non conveniens doctrine and aspects of personal jurisdiction.[128] There are par-

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120. *See id.* at 508 (noting that relevant considerations include "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses" and whether the defendant would suffer severely disproportionate "expense or trouble" in litigating the action).

121. *Id.* at 508.

122. 454 U.S. 235 (1981).

123. *Id.* at 261.

124. *See* Robertson, *supra* note 30, at 1084.

125. *See* Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 101-02 (2009) (noting that, after *Piper Aircraft*, states with plaintiff-friendly forum non conveniens policies became magnets for foreign litigation, and that many such states as a result changed their doctrine to be more congruent with federal law).

126. *See* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 518-19 (1993) [hereinafter Silberman, *Developments in Jurisdiction*] ("[S]tate courts have tended to freely define their own forum non conveniens standards or reject the doctrine altogether.").

127. *See* Lear, *supra* note 125, at 101-02 (noting that many state courts have "adopt[ed] the harsher *Piper* standard").

128. *See, e.g.*, Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 841 (1985) ("The limitations on judicial authority reflected in the forum non conveniens doctrine are not significantly different from the kinds of limitations reflected in rules governing subject-matter jurisdiction, personal jurisdiction, and venue."); Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non*

ticular echoes of forum non conveniens in the "reasonableness" prong for personal jurisdiction that the Court first put forward as a potentially determinative test in *Asahi*, which involves consideration of the plaintiff's and forum state's interest in the dispute, the burden on the defendant, and relevant interstate and international policies.[129] Even the basic minimum contacts analysis, however, has some overlap with forum non conveniens factors—the doctrine's consideration of "local interest in having localized controversies decided at home,"[130] for example, suggests that cases with fewer contacts to the forum are more likely to be dismissed. Therefore, in cases where the doctrine is available, it maps personal jurisdiction considerations closely.

B. Limits on State Overreaching

A second group of doctrines that potentially overlap with personal jurisdiction have to do with the regulation of state legislative jurisdiction. Legislative jurisdiction (also called prescriptive jurisdiction) means the power of a sovereign to apply its substantive law to a particular issue.[131] Legislative jurisdiction is opposed to so-called judicial jurisdiction, or the sovereign's power to authorize its courts to assert jurisdiction over a particular defendant and dispute.[132] While the term "legislative" may call to mind a state legislature passing a statute, a court may also be an instrument of the state's legislative jurisdiction[133] when it decides to apply forum law to the case before it.[134] To be sure, these concepts may be relat-

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Conveniens and the International Plaintiff, 77 CORNELL L. REV. 650, 666-67 (1992) ("The 'reasonableness' test described by the *Asahi* Court and the modern *International Shoe* 'minimum contacts' doctrine duplicate the forum non conveniens inquiry to a large degree and take the convenience of the defendant into account."); Michael T. Manzi, Comment, Dow Chemical Co. v. Castro Alfaro*: The Demise of Forum Non Conveniens in Texas and One Less Barrier to International Tort Litigation*, 14 FORDHAM INT'L L.J. 819, 856 (1990-91) ("If the court . . . properly employs the minimum contacts analysis and fairness factors, *forum non conveniens* becomes a redundant litigation tactic to defeat the plaintiff permanently.").

129. *See* Michael M. Karayanni, Response, *The Case for a State Forum Non Conveniens Standard*, 90 TEX. L. REV. SEE ALSO 223, 233 (2012) ("Th[e] reasonableness requirement has practically incorporated much of the forum non conveniens consideration within the jurisdictional inquiry itself, thereby making redundant forum non conveniens doctrine in such situations where reasonableness is thoroughly assessed.").

130. Atl. Marine Constr. Co. v. U.S. District Court, 134 S. Ct. 568, 581, n.6 (2013) (quoting Piper Aircraft Co. V. Reyno, 454 U.S. 235, 262 n.6 (1981).

131. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(b) (AM. LAW INST. 1987) (describing jurisdiction to adjudicate as the power of a state "to subject persons or things to the process of its courts or administrative tribunals").

132. *Id.* § 401(a) (describing prescriptive jurisdiction as a state's power "to make its law applicable to the activities, relations, or status of persons").

133. *Id.* (noting that jurisdiction to prescribe may be exercised "by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court").

134. Arguably this is true with regard to any substantive law the court applies to the case, including the state's body of common law, but the court's regulatory role is particularly apparent when the court makes a decision to apply a state statute to events occurring outside of the state, and even more so when the court grants prospective injunctive relief based on state law.

ed—and, within the United States, often are, in the sense that prevalent choice-of-law principles make it more likely that, if State A has judicial jurisdiction over a case, State A's substantive law will ultimately govern the parties' rights and obligations.[135] But it is nonetheless not difficult to separate these versions of jurisdiction conceptually. One might imagine circumstances, for example, in which a state court's jurisdiction over a defendant might be perfectly proper—say, through the use of "tag" jurisdiction, or by the defendant's consent or waiver[136]—but where the court might be compelled to apply another jurisdiction's substantive law.[137]

To the extent personal jurisdiction doctrine serves to limit the reach of state sovereign authority, this function would seem to be rooted in a concern about the state allowing its courts to exercise improper influence over a dispute. Thus, it seems most logical to regard this element of personal jurisdiction doctrine as a restriction on state legislative jurisdiction. Yet a variety of other doctrines also restrict states' legislative jurisdiction to some degree.

Restrictions on horizontal state sovereignty—or, as one might also phrase it, on extraterritorial state legislative jurisdiction[138]—have a long and somewhat murky history. The problem has multiple dimensions that have received extended scholarly treatment. A particularly rich subject has concerned the degree to which states may regulate their citizens' out-of-state conduct. For example, in a hypothetical world where states could ban abortion, could a state with such a restriction prohibit its citizens from traveling to a different jurisdiction to have an abortion? Many constitu-

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See generally Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1068 (2009) [hereinafter Florey, *State Courts*].

135. Choice-of-law principles vary from state to state, but tend to be biased at least to some degree in favor of forum law. *See* Florey, *Bridging the Divide*, *supra* note 31, at 205 (noting that a "preference for forum law" is a "common feature[]" of otherwise varied state choice-of-law methodologies).

136. *See* Simona Grossi, *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1, 6 (2013) (noting that still-acceptable traditional grounds for personal jurisdiction include "tag jurisdiction, voluntary appearance or waiver, [and] consent").

137. As Section II.B.2 *infra* will discuss, restrictions on a state court's choice-of-law decisionmaking are generally quite modest, and closely resemble the requirements for minimum contacts-based jurisdiction. Thus, once minimum contacts requirements have been satisfied, limits on choice of law do little to further constrain the court. Where personal jurisdiction is obtained through some other method, however, choice-of-law limits may be more meaningful. They are also more meaningful in class actions, in which courts are forced to consider the contacts of the class members and not simply the defendant in deciding which law to apply.

138. The question of what constitutes an "extraterritorial" assertion of state jurisdiction does not necessarily have a clear answer; potentially, however, it could be any dispute involving an out-of-state actor, an out-of-state effect, or out-of-state conduct. *See generally* Florey, *State Courts*, *supra* note 134, at 1064-94 (discussing difficulty of defining extraterritorial regulation).

tional provisions, from the right to travel to the Privileges and Immunities Clause, have been cited as potentially relevant to such questions.[139]

For purposes of this Article, however, the relevant dimension of the extraterritoriality problem is narrower, since we are concerned only with extraterritoriality restrictions motivated by concerns similar to those at play in personal jurisdiction doctrine. Thus, the illegitimate extensions of state sovereignty at issue in the personal jurisdiction context would presumably be those scenarios in which a state attempts inappropriately to apply its law to an out-of-state resident. So considered, there are important constitutional limits[140] on overreaching state regulation in this area.

First, the Court has held that the dormant commerce clause restricts states' ability to regulate out-of-state actors under certain circumstances. Although historically these restrictions have applied predominantly in the context of direct challenges to state legislation, there is a strong argument that they should also apply, at least to some extent, in a scenario in which state courts apply state law to nonresident defendants, and indeed, some recent cases have taken this approach. Second, the Court has imposed limits on courts' ability to apply a particular state's law to a dispute unless some connection exists between the case and the jurisdiction whose law is to be applied. Finally, in the punitive damages context, the Court has held that courts may not use punitive damages to punish defendants for out-of-state misconduct.

In addition to these constitutional limits, more informal protections exist: the tendency of choice-of-law principles to focus on contacts between the dispute and a particular jurisdiction, and the pressures venue statutes provide to file a dispute in a district with which it has a meaningful connection. The following sections consider these protections in turn.

1. *Dormant Commerce Clause Restrictions*

The most explicit (if not necessarily the clearest) restriction on states' legislative jurisdiction comes from a series of Supreme Court cases holding that the dormant commerce clause—perhaps in tandem with structural constitutional principles—limits the degree to which states can

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139. For an overview of this area and a summary of the potential applicability of various constitutional provisions, see Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 731-38 (2007).

140. In some circumstances, other limits may apply, although these tend to involve more state-to-state variation and be rooted in principles of comity or statutory interpretation rather than constitutional limits. For example, some states apply various interpretative canons that limit the extraterritorial reach of state statutes. *See* Florey, *Bridging the Divide*, *supra* note 31, at 207 ("[S]ome state courts have borrowed [the presumption against extraterritoriality] from federal extraterritoriality cases in interpreting the reach of state *statutes* outside state borders.").

regulate extraterritorially. These cases have nothing to do with ordinary dormant commerce clause jurisprudence, which deals principally with the problem of ensuring that states do not unreasonably discriminate against out-of-state commerce.[141] As a result, they have been something of a puzzle to courts and scholars.[142] Nonetheless, these cases retain some relevance in a variety of contexts today.

The Court first articulated the dormant commerce clause extraterritoriality principle in *Edgar v. MITE Corp.*,[143] in which the Court invalidated an Illinois statute that gave the Secretary of State the power to review and potentially deny registration to a tender offer targeting an Illinois-based corporation.[144] In a plurality opinion, four justices found that the dormant commerce clause permitted only "incidental regulation of interstate commerce"[145] and further "preclude[d] the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[146] The Illinois statute at issue, which regulated such commerce more than incidentally, fell into the latter category.[147]

Subsequently, the Court expanded the reach of this principle in two cases involving alcohol regulation, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*[148] and *Healy v. Beer Institute*.[149] In both cases, the Court held that the dormant commerce clause was inconsistent with so-called "price affirmation" statutes under which liquor sellers were required as a condition of making sales within a state, to affirm that they were not offering lower prices elsewhere.[150] Both cases likewise focused on the effect of the statute on the sellers' out-of-state activity, finding in *Brown-Forman*, for example, that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce."[151]

In reaching these results, the Court articulated two concerns, best elaborated in *Healy*, where the Court spoke of two dangers in permitting

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141. *See* Florey, *State Courts*, *supra* note 134, at 1084-85 (noting difference between this doctrine and conventional dormant commerce clause cases).

142. *See, e.g.*, Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884-87 (1987) (noting scholars' failure to make complete sense of these cases).

143. 457 U.S. 624 (1982).

144. *Id.* at 626-27. The statute applied to any corporation that was incorporated or headquartered in Illinois or had at least ten percent of its stated capital there. *Id.* at 627.

145. *Id.* at 640 (emphasis omitted).

146. *Id.* at 642-43.

147. *Id.* at 642 ("It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect.").

148. 476 U.S. 573 (1986).

149. 491 U.S. 324 (1989).

150. *See Brown-Forman*, 476 U.S. at 581-82; *Healy*, 491 U.S. at 337.

151. *See Brown-Forman*, 476 U.S. at 582.

extraterritorial regulation to stand: first, the idea that state overreaching is problematic in its own right, presumably for exceeding the permissible outer limits of state sovereignty;[152] and second, the danger of "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."[153]

Following its flurry of activity in the 1980s, the Supreme Court has not revisited the *Edgar*/*Healy* principle, causing both the viability and the reach of these cases to be somewhat in doubt.[154] Both courts[155] and commentators[156] have noted that implicit and explicit state regulation of out-of-state activities goes on all the time, generally attracting little constitutional concern.

At the same time, courts in recent years have continued to entertain and accept arguments founded on *Edgar* and subsequent cases;[157] indeed, the doctrine has been described as a currently "in vogue" method of attacking state statutes under the dormant commerce clause.[158] In *Sam Francis Foundation v. Christies, Inc.*, for example, the Ninth Circuit applied this line of cases to California's Resale Royalty Act, a clause of which imposed royalties on sales of fine art by California sellers, even when such sales took place outside the state of California.[159] The court found that this violated the *Healy* principle because, as applied, it "directly control[led] commerce" occurring outside California's boundaries.[160] In addition to the royalty itself, the Ninth Circuit was concerned about the statute's requirements that the seller "undertake affirmative efforts to locate the artist and, once found, pay the artist."[161] As the court observed,

> [I]f a California resident has a part-time apartment in New York, buys a sculpture in New York from a North Dakota artist to furnish her apartment, and later sells the sculpture to a friend in New York, the

152. *See Healy*, 491 U.S. at 336 (expressing concern about statutes whose effect is "to control conduct beyond the boundaries of the State").

153. *Id.* at 337.

154. *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789-90 (2001) (noting unclear reach of *Healy* and related cases and observing that some of their dicta is "clearly too broad").

155. *See, e.g.*, IMS Health Inc. v. Mills, 616 F.3d 7, 26 (1st Cir. 2010) ("[S]tate powers are not mechanically limited to conduct occurring within a state's physical borders.").

156. *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1522 (2007) ("[A] state's geographic territory does not mark the outer limit of its legitimate regulatory concern.").

157. *See, e.g.*, Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1331 (9th Cir. 2015); North Dakota v. Heydinger, 15 F. Supp. 3d 891, 911 (D. Minn. 2014); Teltech Sys., Inc., v. Barbour, 866 F. Supp. 2d 571, 576 n.3 (S.D. Miss. 2011).

158. *See Barbour*, 866 F. Supp. 2d at 576.

159. CAL. CIV. CODE § 986 (West 2015); *Christies*, 784 F.3d at 1322.

160. *Christies*, 784 F.3d at 1323.

161. *Id.* at 1324.

> Act requires the payment of a royalty to the North Dakota artist—even if the sculpture, the artist, and the buyer never traveled to, or had any connection with, California.[162]

Courts across the country have—infrequently, but regularly—accepted similar challenges in the past few years,[163] in one case specifically rejecting an argument that the court should not apply the "fairly unused and nuanced [*Healy*] test" on the basis that the test remained "a viable component of Commerce Clause analysis."[164]

The *Healy* test has attracted criticism for its broad and ambiguous language,[165] and its ultimate reach remains unclear. Nonetheless, as the previous cases suggest, *Healy* remains an avenue for policing the limits of state sovereignty that is still in current use by lower courts.

2. Hague *and Choice-of-Law Limits*

While the passage of a statute is the most obvious means by which a state can exercise its legislative jurisdiction, it is not the only way. When a court applies forum law to determine whether one party is liable to another, or grants an injunction requiring a party to perform or refrain from certain acts, it is implicitly regulating substantive conduct. As a result, constitutional limits on choice of law by state courts function as another check on states overextending their proper territorial reach.

Historically, the Supreme Court has found both the Full Faith and Credit Clause and the Due Process Clause to speak to the question of when a state may apply its law to a dispute via conflicts principles.[166] In *Allstate Insurance Co. v. Hague*, however, the Court both merged the inquiries under the two clauses into one[167] and articulated the modern

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162. *Id.* at 1323.

163. In *Heydinger*, for example, a federal district court upheld a *Healy* challenge to a state regulation that restricted imports of electricity from coal power plants in other states. *See* MINN. STAT. § 216H.03 (2014); *Heydinger*, 15 F. Supp. 3d at 895. Quoting *Healy*, the court held the state was exercising improper extraterritorial reach through the practical effect of "controlling conduct beyond the boundaries of the state." *Id.* at 910 (quoting Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995)). The court was also concerned about the possibility of inconsistent regulation. *Id.* at 911. In *Barbour*, another district court found Mississippi's Caller I.D. Anti-Spoofing Act, which prohibited transmission of false caller I.D. information with intent to deceive call recipients, to be invalid under *Healy*. MISS. CODE. ANN. § 77-3-805 (2011); Teltech Sys., Inc. v. Barbour, 866 F. Supp. 2d 571, 577 (S.D. Miss. 2011). Because of the growth of mobile phone usage and the portability of old phone numbers with outdated area codes, plaintiffs successfully argued that it was impossible for them to know when a recipient of their spoofed call was in Mississippi or some other state. *Id.* at 575-76. Since the practice remained legal in other states, the court found that the Act had the practical effect of regulating commerce occurring wholly outside of Mississippi. *Id.* at 577.

164. *Barbour*, 866 F. Supp. 2d at 576-77 (citation omitted).

165. *See, e.g.*, Goldsmith & Sykes, *supra* note 154, at 789-90.

166. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 307-312 (1981) (summarizing history of this jurisprudence).

167. *See id.* at 320 (announcing the same result under both clauses using a single test).

standard for when a state may permissibly choose to apply a particular jurisdiction's law:[168] "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[169] While only a plurality of justices signed on to this formulation in *Hague*,[170] a majority of the Court affirmed and extended it in a subsequent case, *Philips Petroleum v. Shutts*.[171]

A few points are worth noting about the *Hague* standard. First, at least outside the class action context, it is a relatively modest hurdle. In *Hague*, the Court considered a scenario in which Minnesota had applied a Minnesota law permitting "stacking" of insurance policies to a case involving a Wisconsin plaintiff arising from an accident in Wisconsin between two Wisconsin residents.[172] Despite the Wisconsin-centered nature of the dispute, the Court held that application of Minnesota law was proper based on a few slender contacts between the dispute and Minnesota: the accident victim was a "member of Minnesota's work force"; the defendant, Allstate, did business in Minnesota; and the victim's wife, the plaintiff in the case, was living in Minnesota at the time she filed suit.[173] Thus, *Hague* suggests that the "significant aggregation" standard is not particularly rigorous. While courts apply a more exacting choice-of-law scrutiny in the class action context,[174] *Hague*'s standard is easily satisfied in most litigation between individual parties.[175]

Second, *Hague*'s articulation of the choice-of-law standard echoes the famous formulation of the minimum contacts test in *International Shoe*, requiring that the defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[176] To be sure, there are

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168. *Id.* at 312-13. In practice, applications of this test have generally involved forum law (as in *Hague* itself), although the *Hague* formulation presumably applies to any choice-of-law decision, even in which a state court selects the law of an external jurisdiction.

169. *Id.*

170. *Id.* at 302 (listing the four justices who joined the opinion).

171. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822-23 (1985); Florey, *State Courts*, *supra* note 134, at 1079 ("*Shutts* makes clear, for example, that the fact that a defendant does business in a forum will not in itself support the application of forum law where the plaintiff and the claim lack connection to the forum. Further, *Shutts*' specific condemnation of the automatic application of forum law to nationwide class actions served to limit an important circumstance in which state law might otherwise have significant extraterritorial reach.").

172. *See Hague*, 449 U.S at 306.

173. *Id.* at 313, 317-18.

174. *See Shutts*, 472 U.S. at 808-10; Florey, *State Courts*, *supra* note 134, at 1078-79 (discussing *Phillips Petroleum* and the ways in which the class action context is treated differently).

175. *See* Florey, *State Courts*, *supra* note 134, at 1061 (describing *Hague* as a "broad authorization for the application of forum law").

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

slight differences: the *Hague* test considers the plaintiff's connections to the forum as well as the defendant's,[177] and it demands that contacts be "significant," while the minimum contacts test does not—although, as *Hague* itself demonstrates, the Court's threshold for significance does not seem terribly high.[178] Nonetheless, the standards are alike enough that it is improbable that, in individual litigation where personal jurisdiction is founded on minimum contacts, *Hague* would pose a barrier to a state's application of its own law.

Finally, it seems reasonable to suppose that *Hague*'s result was driven by the Supreme Court's somewhat hands-off position with respect to state choice-of-law principles.[179] The choice-of-law landscape in the United States could scarcely be more complicated; states apply a dizzying array of choice-of-law methods, with no single approach commanding even a narrow majority.[180] The forgiving standard of *Hague* ensures that the Supreme Court, for better or worse, is not in the business of policing the highly variable day-to-day conflicts choices of state courts. As Part III will discuss, the Court's move in the direction of avoiding such supervision has important implications for the role of personal jurisdiction doctrine.

3. Subconstitutional Choice-of-Law Rules

Even if *Hague* did not impose any limits at all on state choice-of-law decisionmaking, it seems unlikely that most such decisions would provide a serious opportunity for state overreaching, particularly in cases where domestic defendants are involved. To begin with, in the majority of cases, law from state to state simply does not differ enough to pose a problem of unfair surprise to a particular defendant or, to take a broader perspective, of interference with another state's prerogatives. Many trends toward standardization exist: States must all follow the Constitution, and all are subject to interstate influences, from model statutes to court decisions. As Michael Gottesman has observed, most choice-of-law conflicts tend to revolve around not "fundamental" clashes of values but instead such relatively technical issues as whether to apply contributory or comparative negligence.[181]

Moreover, while many states may have a bias toward forum law, they do not apply it automatically. Although states apply a hodgepodge of choice-of-law methods,[182] almost all of them try, in some fashion or an-

177. *See* Florey, *State Courts*, *supra* note 134, at 1078.

178. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 257 (1992) (describing limits imposed by *Hague* as essentially meaningless).

179. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 727-28 (1988) (disclaiming an interest in "constitutionalizing" state choice of law).

180. *See* Symeonides, *supra* note 25, at 281-82.

181. *See* Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 530 (2000).

182. *See* Symeonides, *supra* note 25, at 281-82.

other, to find connections between the case and the law applied. For example, the crux of the Restatement (Second) of Conflicts of Laws, used by nearly half the states,[183] lies in the search for the place with the "most significant relationship" to the dispute.[184] Applied neutrally, then, the Restatement and the many similar rules applied by state courts[185] provide a limit on the degree to which a court can apply state law in an aggressive matter.

The specter of a defendant summoned into state court and subjected to the operation of an unfamiliar and unpredictable law is not impossible. But it is highly improbable. Further, in the situations where it is most likely to occur, such as cases involving foreign defendants, courts are likely to be on heightened alert, often dismissing such cases on the basis of forum non conveniens or even vague notions like comity.[186]

The fear of state courts capriciously applying their own law may be justified in a minority of cases, mostly those involving foreign defendants.[187] In the bulk of cases, however, it is simply not a reasonable possibility.[188]

4. Punitive Damages and Out-of-State Conduct

The Court has also mentioned extraterritoriality concerns in its cases finding constitutional limits on the punitive damages that courts may impose. In two cases, *BMW of North America, Inc. v. Gore*[189] and *State Farm Mutual Automobile Insurance Co. v. Campbell*,[190] the Court announced and elaborated upon a three-part test for assessing whether punitive damages are excessive under the Due Process Clause: the degree of reprehensibility of defendant's conduct; the disparity between compensatory and punitive damages; and the difference between the punitive damages award and comparable civil penalties for the same conduct.[191]

Although the test on its face has nothing to do with extraterritoriality, both the Court's rationale for imposing the three-part test and the

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183. *See id.*

184. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, § 6 cmt. c (AM. LAW INST. 1971).

185. Indeed, the Restatement represents at least in part an effort at compromise among advocates of the various choice-of-law methods, indicating that it has some similarities to such methods. *See* Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1237 (1997) (describing the Restatement's drafting history and goals).

186. *See* cases cited *supra* note 20.

187. For a discussion of the subset of cases most likely to trigger concerns about choice-of-law overreaching, see Katherine Florey, *Big Conflicts, Little Conflicts*, 47 ARIZ. ST. L.J. 683, 752-53 (2015) [hereinafter Florey, *Big Conflicts*].

188. This does not mean, of course, that courts will always apply the most appropriate jurisdiction's law to a dispute, or that choice-of-law decisionmaking is not subject to criticism on other grounds (such as lack of predictability).

189. 517 U.S. 559 (1996).

190. 538 U.S. 408 (2003).

191. *See Gore*, 517 U.S. at 575.

particulars of the test's application suggest that the Court was concerned to a great degree with the use of punitive damages as an instrument of extraterritorial regulation. In *Gore*, for example, the Court struck down an Alabama court's award of $2 million in punitive damages against BMW based on its national policy of failing to disclose to prospective customers the information that certain cars had been damaged in transit and then repaired.[192] The plaintiff had argued that the large award was "necessary to induce BMW to change [its] nationwide policy" of nondisclosure.[193] But in finding the court's award of to be "grossly excessive," the Court reasoned:

> [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. . . . Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.[194]

Notably, the Court also acknowledged that courts may serve as implements of a state's legislative jurisdiction, recognizing that "penalties that a State . . . inflicts on those who transgress its laws . . .[may] take the form of [either] legislatively authorized fines or judicially imposed punitive damages."[195]

In addition to recognizing extraterritoriality concerns as an overarching rationale for its punitive damages decisions, the Court has also suggested that extraterritoriality issues should play a role in the assessment of reprehensibility in the three-part test. In *Gore*, for example, the Court noted that "the record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a $2 million award of punitive damages."[196] In other words, the fact that BMW's conduct was lawful outside Alabama, according to the Court, should diminish the degree to which an Alabama court was permitted to find it reprehensible.

In a sense, *Gore* might be seen as an additional limitation on courts' choice-of-law decisionmaking, a point perhaps elucidated by looking at its successor case, *Campbell*. In *Campbell*, the Court suggested that courts attempting to levy a penalty for out-of-state conduct "would need to apply [to out-of-state injured parties] the laws of their relevant jurisdiction."[197] Cementing the link between the punitive damages line of cases and choice

192. *Id.* at 574-75.

193. *Id.* at 572.

194. *Id.* at 572-73.

195. *Id.* at 572.

196. *Id.* at 578.

197. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421-22 (2003).

of law, the Court supported this statement with a citation to *Phillips Petroleum*, one of the principal constitutional choice-of-law cases.[198] This suggests that the Court sees the *Gore* principle as another constitutional barrier beyond *Hague* that courts must keep in mind when making choice-of-law decisions.[199]

Punitive damages cases obviously form only a subset of the scenarios in which state judicial power might be used as a means of regulating out-of-state events. Nonetheless, they are likely to be among the cases with the most power to affect defendant behavior and deter particular conduct. Thus, the limits on the degree to which states can punish out-of-state conduct eliminate one significant channel by which states might abuse their sovereign power.

5. The State Sovereignty Implications of Venue Requirements

Finally, it is worth noting that venue requirements serve not merely to protect defendants from inconvenient litigation but, in most circumstances, to ensure some degree of connection between the case and the place in which it is filed. As discussed above, a large percentage of cases will satisfy one of the first two venue provisions, and will thus be filed either in a state where all defendants reside or in a state where substantial conduct related to the lawsuit occurred (or where related property is located). A division of the right to regulate based on domicile, the location of conduct, or the presence of property comports both with international notions of the bounds of legislative jurisdiction[200] and with current choice-of-law practice, since most current state conflicts methodology relies heavily on the presence of such contacts.[201] Thus, venue requirements ensure that, in many cases, there is a reduced chance of state law being improperly extended into other sovereigns' domains.

Rules regarding transfer of venue also foster this connectedness. In the absence of the parties' agreement, a case may be transferred only to a place where venue would have been proper had the case been filed there initially. Further, when a case is transferred from a district in which venue is improper to one in which it was proper, the choice-of-law rules of the second forum govern the litigation.[202] Thus, in general, venue requirements increase the likelihood that the jurisdiction whose

198. *See id.* at 422 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)).

199. *See* Florey, *State Courts*, *supra* note 134, at 1097 (noting that many commentators have read *Campbell* this way).

200. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (AM. LAW INST. 1987) (enumerating possible bases on which nations may have the jurisdiction to prescribe); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 356-57 (2010) (discussing internationally accepted bases for the exercise of legislative jurisdiction).

201. *See* Symeonides, *supra* note 25, at 281-82 (cataloguing state choice-of-law approaches).

202. If venue is proper in the first forum, the choice-of-law rules that forum would have applied remain in effect. *See* Ferens v. John Deere Co., 494 U.S. 516, 519 (1990).

choice-of-law principles apply to the dispute will have a meaningful connection to it.

IV. WHAT'S LEFT FOR PERSONAL JURISDICTION TO DO?

The preceding section has described an extensive set of non-jurisdiction-based doctrines that seek to address precisely the same concerns that personal jurisdiction purports to: protecting defendants from unfair procedural burdens and cabining states' ability to regulate distant transactions. After surveying this landscape, it might be reasonable to ask whether personal jurisdiction doctrine is simply redundant.[203] Indeed, a recent proposal for personal jurisdiction reform has argued that in federal court, at any rate, state-specific personal jurisdiction requirements should be eliminated, in part because venue can serve many similar functions more precisely and efficiently.[204]

In further support of this position, one might argue that, at the time the Supreme Court first developed the personal jurisdiction framework, many current doctrines limiting courts' power over nonresidents did not exist, at least in their current form, and that the growing robustness of such doctrines renders personal jurisdiction outmoded and unnecessary. In 1945, for example, when the Court decided *International Shoe*, limits on state sovereignty were unclear,[205] forum non conveniens doctrine was less developed and more plaintiff-favorable,[206] and the federal transfer of venue statute did not exist.[207] With the growth of these alternative methods for serving personal jurisdiction's "two related . . . functions"[208] personal jurisdiction—it might be argued—has become increasingly unnecessary.[209]

There are two responses, however, to the idea that personal jurisdiction doctrine is outmoded. First, it is possible that the ends that personal jurisdiction doctrine is designed to serve are so important that some redundancy is necessary because of the significance of the

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203. Some scholars have argued that it is the doctrines that overlap with personal jurisdiction that are irrelevant. *See, e.g.*, Stewart, *supra* note 88, at 1324 (1986) (arguing that proposed modifications to personal jurisdiction doctrine would "obviate[] the need to examine separately the other concerns reflected in the doctrine of forum non conveniens; assuming such jurisdiction is proper, the suit ought be retained").

204. *See* Sachs, *supra* note 2, at 1303.

205. The Court, for example, did not articulate the dormant commerce clause-based extraterritoriality principle until the 1980s. *See generally* Edgar v. MITE Corp., 457 U.S. 624 (1982).

206. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the first U.S. Supreme Court case recognizing the doctrine, was decided in 1947. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Court made forum non conveniens dismissals easier to obtain by holding, inter alia, that courts should not give significant weight to an unfavorable change in remedy in deciding whether to dismiss a case.

207. The statute was first passed in 1948. *See* 28 U.S.C. § 1404 (2012).

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

209. Again, one could alternatively argue that it is instead the overlapping doctrines that are unnecessary.

value being protected, the concern that nonjurisdictional doctrines alone may provide inadequate protection, or both. The following section will make such an argument with respect to foreign defendants, positing that foreign defendants both provoke particular concern and require more extensive protections.

The second justification for existing personal jurisdiction doctrine is the more obvious one: Existing doctrines may simply fail to address a particular goal comprehensively, creating gaps that personal jurisdiction must be pressed into service to fill. The following section argues that there are two widely divergent areas in which personal jurisdiction serves a role that no other doctrine does. First, in the area of state sovereignty, personal jurisdiction fulfills an important gatekeeping function, ensuring that only rarely will the Court have to scrutinize state choice-of-law decisions for constitutional propriety. Second, in the realm of defendant fairness, personal jurisdiction allows consideration of the degree to which the defendant has intentionally affiliated itself with a forum—something that no other defendant fairness doctrine explicitly takes into account.

The following section elaborates on these rationales further, making the case that there exist several continuing roles for personal jurisdiction despite its overlap with other relevant doctrines.

A. *Needed Redundancy for Foreign Defendants*

The recent development of personal jurisdiction doctrine has been driven disproportionately by concerns that litigating in the United States poses a considerable burden for foreign defendants.[210] To a large extent, this is a reasonable concern. A variety of features of the U.S. legal system, including the availability of broad discovery and punitive damages, make it particularly plaintiff-friendly and defendant-unfriendly.[211] Such features no doubt attract foreign plaintiffs who might otherwise file closer to home; numerous commentators have noted the degree to which U.S. courts serve as a magnet for plaintiffs from abroad.[212]

Even when plaintiffs with legitimate non-strategic reasons for litigating in the U.S. bring suit, foreign defendants are burdened far more than domestic ones, not only because of the universal problems of travel and unfamiliarity with the legal system that foreign defendants face generally, but also because aspects of the U.S. legal system are significantly at

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210. *See generally* Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591 (2011) [hereinafter Silberman, Goodyear *and* Nicastro].

211. *See* Robertson, *supra* note 30, at 1085 ("U.S. courts . . . draw . . . plaintiffs through generous discovery, higher damages, and contingent fee representation.").

212. *See id.* at 1084 ("Academic scholarship has long noted the 'magnet effect' of U.S. courts.").

odds with norms in most other countries.[213] These problems can, in certain cases, be so severe as to raise significant foreign relations concerns.[214]

It is unsurprising, therefore, that three of the Court's four recent cases have involved foreign defendants, as did *Asahi*, its most recent elaboration of the minimum contacts standard prior to its recent activity.[215] Moreover, the Court's recent jurisprudence is full of references to the hardships of foreign defendants. *Asahi*, for example, called attention to the "severe" and "unique" burdens experienced by "one who must defend oneself in a foreign legal system,"[216] and advocated caution when "extending our notions of personal jurisdiction into the international field."[217] The more recent cases have taken up this banner. In *McIntyre*, for example, which produced no majority opinion, two concurring justices[218] worried about the "fundamental[] unfair[ness]" of requiring "a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer" to defend against product liability suits in the United States.[219] In *Daimler*, the Court described expansive theories of general jurisdiction as permitting U.S. courts to assert an "exorbitant" "global reach."[220]

Further, at least one case, *Asahi*, suggests that the Court itself has structured personal jurisdiction doctrine deliberately to provide redundant protections for foreign defendants. *Asahi*, for the first time,[221] layered a reasonableness prong onto the previously existing requirements for personal jurisdiction. Under the reasonableness analysis, jurisdiction may be found to be unreasonable even if minimum contacts are present;[222] the "burden on the defendant," the "interests of the forum State," the "plaintiff's interest in obtaining relief," the "most efficient resolution of controversies," and the "shared interest" of other states or nations in

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213. *See id.* (cataloging differences); *see also* Silberman, *Developments in Jurisdiction*, *supra* note 126, at 515-16.

214. *See* Robertson, *supra* note 30, at 1119-25 (discussing various foreign relations concerns that different institutional actors in the United States may perceive in cases involving foreign plaintiffs).

215. *See generally* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

216. *Id.* at 114.

217. *Id.* at 115.

218. The opinion was written by Justice Breyer and joined by Justice Alito. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring).

219. *Id.* at 2794.

220. *See* Daimler v. Bauman, 134 S. Ct. 746, 761-62 (2014).

221. The Court had first mentioned the reasonableness factors in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), and later in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985), but did not suggest until *Asahi* that the factors alone could defeat jurisdiction when a showing of minimum contacts had been made. *See Asahi*, 480 U.S. at 115-16 (noting the need for a reasonableness analysis in the jurisdiction inquiry and finding an assertion of personal jurisdiction to be unreasonable after analysis of the various factors).

222. Four justices in *Asahi* would have held that minimum contacts were present, but that the case should nonetheless be dismissed on reasonableness grounds. *See Asahi*, 480 U.S. at 116 (Brennan, J., concurring).

"furthering fundamental substantive social policies"[223] are all factors that play into the court's reasonableness analysis. In formulating this new test, the Court (as scholars have noted)[224] appeared to be incorporating into the personal jurisdiction analysis factors that would normally be considered as part of a forum non conveniens motion. Given the Court's preoccupation with the particular hardships experienced by foreign defendants in the United States, it seems reasonable to assume that the Court regarded some redundancy in protection as desirable. Notably, although the reasonableness test is not explicitly limited to foreign defendants, it has proven determinative in lower courts primarily in cases involving them.[225]

Why might foreign defendants in particular require redundant protections? One could make a few arguments in favor of such a system. First, as the Supreme Court has noted, foreign defendants face particular difficulties when they must appear in U.S. courts.[226] Insofar as personal jurisdiction is intended to protect the defendant from unfairly burdensome litigation, robust protections would seem to be more important the higher that burden actually is. In situations of particular burden, one might wish to allow the judicial system more than one chance to get it right—in this case, to consider the hardships to the defendant in the context of both a personal jurisdiction and a forum non conveniens determination. Moreover, a more searching personal jurisdiction inquiry might bring out facts that are relevant to a later forum non conveniens motion; a court, that is, might find personal jurisdiction to be present, but only marginally, and use that information in later deciding that a forum non conveniens dismissal is proper.

Second, for foreign litigants unfamiliar or only minimally familiar with the U.S. legal system, second chances might be particularly appropriate. Foreign litigants are presumably more subject to procedural defaults or tactical errors because of their lack of knowledge of U.S. courts. Allowing them more than one means of achieving dismissal of a burdensome suit might help them to compensate for the procedural advantages that the plaintiff—who, whether or not a U.S. citizen, has at least deliberately chosen a U.S. forum—is likely to have.

Finally, redundant protections increase the possibility that, one way or another, suits against foreign defendants will be dismissed. This pro-

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223. *Id.* at 113 (quoting World-Wide Volkswagen, 444 U.S., at 292).

224. *See* sources cited *supra* note 128.

225. *See* Silberman, Goodyear *and* Nicastro, *supra* note 210, at 594 (2012) ("[T]he post-*Asahi* cases in the state and federal courts did not limit the reasonableness prong to foreign-country defendants, although my own read of many of the cases suggests that most of the cases that ultimately invoke unreasonableness as the basis for rejecting specific jurisdiction actually involve foreign defendants.").

226. *See Asahi*, 480 U.S. at 114 (calling attention to the "unique" burdens experienced by foreign defendants).

motes predictability, giving foreign actors significant assurance that they will not be unexpectedly called to defend in the United States or to conform their conduct to U.S. standards.

Despite these arguments, it is important to note two countervailing points. To begin with, redundant personal jurisdiction protections have value only if we accept the ends that they are intended to serve—insulating foreign actors from U.S. jurisdiction to a significant degree and in a predictable fashion. Many of us may be sympathetic to this end when considering certain sorts of foreign defendants, such as the small artisanal producers Justice Breyer discussed in *McIntyre*.[227] However, when less savory sorts of foreign defendants—say, corporations guilty of human rights abuses or of manufacturing hazardous products—are haled into U.S. courts, we may be less inclined to grant them special protections.

Second, the special reasons one might feel solicitude for foreign defendants by definition do not apply to U.S. actors. In choosing to limit personal jurisdiction (in recent years, anyway) primarily in cases involving foreign defendants, and by imposing a reasonableness test with only minimal relevance in most fully domestic cases, the Court has suggested that foreign defendants are special and that the jurisdictional bar for them should be higher. As Part IV argues in greater depth, however, it is time for the Court to clarify the law in this area further, making explicit the ways in which personal jurisdiction analysis provides more stringent protections for foreign defendants. The Court cannot have it both ways; if a more stringent standard for foreign defendants is appropriate because of the special burdens they face, then the personal jurisdiction standard should be more lenient for domestic defendants.

B. Filling Gaps Inadequately Addressed by Other Doctrines

In addition to the deliberate redundancy justification described above, personal jurisdiction doctrine also serves as a way of filling gaps. It is true that other doctrines serve to address both the defendant fairness and state sovereignty rationales, and that in many situations such doctrines go far toward addressing the problem. But in other ways, those doctrines are haphazard and incomplete. The following discussion highlights two ways in which personal jurisdiction fulfills unique functions that no other doctrine does—by serving as a filter that saves courts from having to consider difficult extraterritoriality and choice-of-law issues, and by foregrounding the role of the defendant's intentional conduct in fairness considerations.

227. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring).

1. *Preventing Borderline Applications of Forum Law*

Although over the years some state statutes have deliberately targeted out-of-state events,[228] the primary way in which states apply their law extraterritorially is through the choice-of-law decisionmaking of their courts. Most state courts have at least some preference for applying forum law, even in some scenarios where the litigants or the events at issue are wholly or partially outside the state.[229] And the law applied by state courts rarely comes with explicit territorial limitations, either because it is common law or because the legislature is silent about a particular statute's territorial reach.[230] Thus, it is a routine occurrence in U.S. courts for the law of one state to govern out-of-state events.[231] The fact that federal courts normally follow the choice-of-law principles of the state in which they sit means that this is true in federal court as well.[232]

Of course, if state courts *only* applied forum law—in other words, if judicial and legislative jurisdiction were coextensive—then it would be a more straightforward matter to limit state court excesses. But such a scenario would create many problems of its own,[233] and, what is perhaps more important, it is simply not the regime we have in the United States. Rather, the choice-of-law landscape is almost unimaginably complex. State courts apply at least seven different conflicts methodologies,[234] and even courts that nominally use the same one often in practice interpret it in different ways and with a great degree of judicial discretion.[235]

Although the state choice-of-law decisionmaking process thus provides at least the potential for abuse, this Article has argued that such abuse is unlikely to be common in cases involving domestic litigants, both because often the law does not differ that much from state to state and because state choice-of-law methodologies tend to apply the law of a place to which

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228. *See, e.g.*, Healy v. Beer Institute, 491 U.S. 324 (1989) (discussing Connecticut statute that attempted to regulate liquor sellers' pricing outside the state).

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

230. *See* Florey, *Bridging the Divide*, *supra* note 31, at 206-07 (discussing the fact that much law in state conflicts cases is common law and that state courts lack mechanisms for determining the extraterritorial reach of state statutes).

231. *See* Florey, *State Courts*, *supra* note 134, at 1091 (discussing ways in which common choice-of-law principles frequently lead to the extraterritorial application of law).

232. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (establishing that under the *Erie* doctrine, federal courts apply the choice-of-law principles of the state in which they sit).

233. To apply forum law to all disputes would be essentially to make courts' jurisdiction to adjudicate coextensive with legislatures' jurisdiction to prescribe, a problematic scenario. *See* Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 9-10 (1988) (arguing that judicial and legislative jurisdiction provide distinct protections and should not be conflated).

234. *See* Symeonides, *supra* note 25, at 281-82.

235. Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 987 (1994) [hereinafter Sterk, *Marginal Relevance*] (noting that most modern choice-of-law theories allow for substantial and problematic judicial discretion).

the dispute has meaningful connections.[236] But in cases involving foreign defendants, and in a subset of domestic cases where the stakes are high,[237] it is important to ensure that states are not too often tempted to overextend the reach of their law.

In theory, of course, the Supreme Court has the power to check that abuse by reining in state courts when they threaten to overstep their territorial bounds. In reality, however, there are at least two problems with relying on the Supreme Court to impose an outer boundary on the application of forum law by state courts.

First, the limits established by the *Hague* standard are modest, especially outside the class action context; indeed, one commentator has described *Hague* as the "end of all meaningful limits" on state choice of law.[238] In particular, *Hague* imposes no requirement that the "contact[s]" or "aggregation[s] of contacts" sufficient to make the application of forum law acceptable have anything to do with the defendant.[239] In other words, a plaintiff's residence and employment in State A, for example, goes a long way toward making application of State A law to the entire dispute constitutionally proper[240] (particularly assuming individual litigation[241] in which the plaintiff is not seeking a large award of punitive damages).[242]

From the perspective of imposing limits on state sovereignty, this is a problem, regardless of whether one sees the key danger of overreaching states as treading on the prerogatives of sister states or as subjecting defendants to unfamiliar law.[243] *Hague*, that is, makes plaintiff choice

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236. *See supra* Section II.B.3.

237. For an argument that a subset of "big" conflicts decisions pose dangers that routine cases do not, see generally Florey, *Big Conflicts*, *supra* note 187.

238. *See* Laycock, *supra* note 178, at 257.

239. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

240. The Court in *Hague* relied heavily, for example, on the plaintiff's residence in the forum state and her deceased husband's employment there in finding application of forum law constitutionally acceptable. *See id.* at 313-14, 318.

241. The *Hague* standard has proved a more meaningful barrier in the class action context. *See supra* note 174 and accompanying text.

242. The Court has suggested that independent choice-of-law limits apply in the award of punitive damages. *See supra* Section II.B.4.

243. There are a number of ways in which one can conceptualize the dangers posed by the application of state law to overly distant events. The first is the practical problem of ensuring the orderly, efficient division of authority within a federalist system. If states reach out frequently to regulate conduct only tangentially connected to them, it is likely that many actors will be subject to multiple and sometimes inconsistent regulation, and the process of sorting out—either prospectively or retrospectively—which law should apply to a particular transaction will be difficult. A second concern at the bottom of the extraterritoriality issue is ensuring that states confine the exercise of their authority to their proper sphere. Given that states are coequal sovereigns, if, say, Alabama were to regulate activities occurring predominantly in Texas, it would be extending its power beyond its expected limits. There might be several potential victims of this. Texas and its citizens would lose a power that is rightfully theirs, and defendants might suffer dual harms: lacking notice of the law that will govern their actions before they act (because excessive extraterritorial regulation runs counter to our legitimate expectations)

potentially a substantial part of the assessment of the constitutionality of applying a given law—but because plaintiffs are unlikely to be concerned with the rights either of sister states or defendants, *Hague* is a less useful tool for protecting such rights.

Second, as a practical matter, choice-of-law limits have proven difficult for the Court to apply, given the degree to which conflicts doctrine in the United States is variegated and complex. Likely as a result, the Court has signaled its desire to take a hands-off approach to state choice-of-law decisionmaking;[244] indeed, this preference probably accounts for the result in *Hague*. Thus, if there is to be some mechanism for ensuring that states do not abuse the choice-of-law process to overextend forum law, *Hague* is a limited one.

Moreover, the Court's other doctrines policing extraterritoriality are also, in this context, incomplete. Although the *Edgar*/*Healy* cases do not seem logically limited to the context of state legislation, they have proven difficult to apply outside it.[245] And limits on massive punitive damages, while significant, place no limits on choice of law in cases where such damages are not awarded. Thus, while *Edgar* and *Healy* on the one hand and *Gore* and *Campbell* on the other illustrate the Court's concern with interstate extraterritorial regulation, they do not do enough to provide courts with the practical tools they need to assess its propriety.

Minimum contacts-based personal jurisdiction doctrine, however, fills a role that *Hague* and other doctrines are capable of performing only partially.[246] In theory, of course, personal jurisdiction doctrine has no direct relationship to choice of law. A defendant may be constitutionally haled into court in situations in which it would be improper for that court to apply forum law (this is particularly true in cases involving "tag" jurisdiction, in which the defendant's transient presence in a state is the sole basis for asserting personal jurisdiction).[247] And even in cases where application of forum law would be proper, the court may choose nonetheless to apply another jurisdiction's law. Nonetheless, in cases where personal jurisdiction is premised on minimum contacts, personal jurisdiction doctrine serves to ensure that, in most cases, the application of forum

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and being inappropriately held liable or otherwise punished for conduct by a state that has no authority to do so.

244. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (suggesting that states should have broad autonomy to make choice-of-law decisions).

245. *See* Goldsmith & Sykes, *supra* note 154, at 789-90 (discussing problems in applying the *Edgar*/*Healy* principle).

246. For a somewhat different argument that "both the sovereignty and liberty bases for [personal jurisdiction] limits are rooted in choice-of-law concerns," see Sterk, *Personal Jurisdiction*, *supra* note 32, at 1165-66.

247. *See* Burnham v. Superior Court, 495 U.S. 604, 613-14 (1990) (affirming continuing constitutionality of personal jurisdiction based on in-state service).

law will not violate *Hague*, and further that forum law will not be applied based almost entirely on the plaintiff's contacts.[248]

These facts have a few different implications. To begin with, personal jurisdiction's screening function helps to keep controversial conflicts problems from arising; in a typical case where personal jurisdiction is based on minimum contacts, application of forum law will generally comport with the *Hague* standard.[249] It is desirable from a couple of perspectives to settle the issue at the personal jurisdiction rather than the choice-of-law stage. Most obviously, personal jurisdiction issues are generally resolved at an earlier stage of the case,[250] making a decision on personal jurisdiction grounds more efficient. Moreover, in most cases, it will be easier for courts to assess the presence of minimum contacts than to determine whether a choice-of-law decision comports with *Hague*. This is because personal jurisdiction is fairly uniform across states,[251] whereas choice-of-law principles are diverse and complicated.[252]

Perhaps most importantly, the minimum contacts standard is, at least in some respects, a more stringent one than the *Hague* test. Thus, personal jurisdiction serves an important function by ensuring that, in the bulk of cases, enough contacts will be present that *Hague* is easily satisfied. Further, because the contacts used to satisfy personal jurisdiction are those of the defendant, who has no choice but to appear in a particular court, personal jurisdiction doctrine helps to avert a particular risk that the *Hague* standard presents—namely, that plaintiffs will use lawsuits to extend a particular state's law beyond its proper bounds by suing in a court that is likely to apply that law.

Thus personal jurisdiction doctrine has a screening function, which in turn both relieves courts of the burden of applying *Hague* routinely and helps to ensure that the limited check *Hague* provides is not subject to abuse. Indeed, *Hague* is arguably the more superfluous doctrine, although it can serve as a more meaningful limit in cases where parties are added to a case through means other than minimum contacts-based ju-

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248. Stewart Sterk argues that, relative to *Hague* limits, personal jurisdiction serves the additional function of protecting defendants not just from unwanted application of forum law, but from the "entire legal environment of the regulating state," such as excessive discovery or a biased jury pool. *See* Sterk, *Personal Jurisdiction*, *supra* note 32, at 1175-76. While this point may be true, it should be noted that other doctrines, such as forum non conveniens and venue, can serve the function of protecting defendants from unfriendly state courts.

249. *See supra* notes 176-78 and accompanying text.

250. In federal court, for example, defendants must assert personal jurisdiction objections within twenty-one days after service of the complaint. *See* FED. R. CIV. PROC. 12(1)(A)-(B) (2015).

251. The availability of personal jurisdiction will differ to some degree between states because states assert long-arm jurisdiction over nonresidents to varying degrees. However, these differences are relatively minor; as of 2004, thirty out of fifty states asserted personal jurisdiction to the limits of due process. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. Rev. 491, 525 (2004).

252. *See* Symeonides, *supra* note 25, at 281-82.

risdiction, such as tag jurisdiction or the certification of a class of unnamed members.[253] The screening role of personal jurisdiction can, of course, free court resources to concentrate on these more difficult cases. In any event, however, the strictures imposed by personal jurisdiction requirements provide one explanation for the relatively smooth functioning of the somewhat anarchic state choice-of-law process in the United States.[254] Without personal jurisdiction doctrine, it seems likely that state courts would either issue more choice-of-law decisions that extend state law to a controversial degree or that the choice-of-law process would require more direct policing by the Supreme Court.

2. Adding the Purposeful Availment Bargain to Fairness Analysis

What if we turn to the realm of defendant fairness? On the one hand, personal jurisdiction doctrine might seem fairly superfluous in this regard. Basic venue requirements are likely to ensure that, in most instances, a case will be brought in a place with a significant connection to the defendant or its conduct; when this protection fails, venue transfer and forum non conveniens doctrines will frequently afford the defendant a chance to raise issues of burden. Taken as a whole, these doctrines tend to be flexible and multifaceted, permitting courts to look at a variety of issues relating to convenience and efficiency. Though the previous section has argued that burdens on foreign defendants are great enough that special protections are necessary, the same cannot be said of most domestic defendants, who will have the advantages—wherever the suit is brought—of knowing that proceedings will be conducted in a familiar language, that all courts will be bound by the U.S. Constitution,[255] and so forth.

Yet for all the manifold considerations that venue and forum non conveniens principles permit courts to weigh, there is one factor that is notably absent. In no case do any of the available doctrines give much consideration to the question of the degree to which the defendant has voluntarily affiliated itself with the forum. This has traditionally been a key element of personal jurisdiction doctrine, which has rested on a kind of implicit bargain—the idea that a defendant who intentionally associates itself with a state, presumably reaping benefits of some sort from doing

253. *See supra* notes 136-37 and accompanying text.

254. Many commentators have argued that state choice of law is entirely lacking in doctrinal coherence. *See, e.g.*, Sterk, *Marginal Relevance*, *supra* note 235, at 987 ("[M]odern choice of law theory provides ample authority to permit a court to reach virtually any result in any litigated case.").

255. In support of this view, Michael H. Gottesman argues that many differences among state laws are fairly inconsequential, making the observation that "[i]n part, that is because we are a nation whose fundamental values are shared nationwide. But perhaps more important, it is because we have an overarching constitution that assures that excesses will be reined in." Gottesman, *supra* note 181, at 530.

so, takes on the corresponding obligation of being compelled to answer in that state's courts if something goes wrong.[256] The defendant's conduct thus informs our idea of burden; what is in the abstract a fairly modest burden might seem unreasonable to impose on a defendant who has no connection to the forum, while a relatively severe burden may seem perfectly fair when borne by a defendant who has been doing substantial business in the forum for years. All things being equal, that is, it is fairer to require defendants to litigate in places with which they have intentionally sought connection, and less fair to require defendants to litigate in places they have avoided.

Venue and forum non conveniens doctrines simply do not address this issue directly. To be sure, they may be capacious enough in some circumstances to permit defendants to argue, for example, that the minimal nature of their connection to the forum requires transfer "in the interests of justice," or for plaintiffs to argue that the defendant's availment of the forum creates a local interest that militates against forum non conveniens dismissal. But venue and forum non conveniens analyses lend themselves more to a consideration of the total amount of burden the defendant might suffer, rather than to view it in proportion to the degree to which the defendant has targeted the forum.[257]

By contrast, the idea of targeting, through the purposeful availment factor, is a touchstone of the personal jurisdiction canon. Consider *Burger King Corp. vs. Rudzewicz*,[258] for example, in which the defendant was a struggling franchise owner who was so desperate for income that he attempted to continue running his restaurant even after being terminated by the national Burger King office[259] and who had never set foot in Florida.[260] The Court nonetheless found that suit in Florida was fair, largely because he had chosen to enter into a long-term relationship with a Florida corporation that would require close supervision from the Florida office.[261] Looked at from the perspective of burden, the result in *Burger King* makes no sense; the Court imposed a significant burden on

256. This formulation is more or less of a paraphrase of language in the Court's cases discussing purposeful availment. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 117 (1987) (Brennan, J., concurring) ("Nor will . . . litigation [in a scenario where a defendant has sold products in the forum state via the stream of commerce] present a burden for which there is no corresponding benefit."). While it is most obviously applicable in cases where someone conducts business in a state or directs products there, one can expand the concept to cover other scenarios as well. A person who directs a libelous statement to a particular forum, for example, may get some intangible satisfaction from the knowledge that she is damaging the reputation of someone who lives there; this is, in some sense, a benefit.

257. For a discussion of the operation of these doctrines, *see supra* Section II.A.1-3.

258. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

259. *See id.* at 468.

260. *See id.* at 479.

261. *See id.* (evaluating factors of "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" in determining that the defendant had "purposefully established minimum contacts within the forum").

the defendant even in a scenario where it was not necessarily more efficient for the case to be heard in Florida, because significant witnesses and evidence were likely to be in Michigan.[262] The finding that personal jurisdiction was proper could only be sustained by relying on the defendant's high degree of purposeful availment.

Failing to account for the defendant's intentional activities—the degree to which the defendant has willingly affiliated itself with the forum state—runs the risk of overprotection. Conversely, a focus solely on burden may under protect as well; there may be scenarios where traveling to a foreign state is only slightly more burdensome for the defendant, but where the defendant's lack of affiliation with that forum makes even a modest burden unfair. Thus, purposeful availment is a distinctive factor that adds considerably to courts' ability to make fair personal jurisdiction determinations.

V. PERSONAL JURISDICTION'S FUNCTIONS AND THE COURT'S CURRENT DIRECTION

The foregoing analysis suggests that personal jurisdiction doctrine serves three important functions that no other doctrine can fully accomplish. First, it provides an additional layer of protection for foreign defendants who may be less familiar with the U.S. legal system and particularly burdened by litigating within it. Second, it serves as a choice-of-law screen, ensuring that in the majority of cases where a court has valid personal jurisdiction over the defendant, the choice of that state's law will be constitutionally acceptable. Finally, it provides a mechanism for weighing any burden that a defendant will suffer in litigating in a particular forum against the benefits that the defendant has previously obtained, or sought to obtain, by associating itself with that forum.

Identifying these functions suggests a corollary principle that personal jurisdiction doctrine should be geared primarily toward serving these roles, as opposed to fulfilling functions that are adequately met by other doctrines. More specifically, personal jurisdiction doctrine should, in order to serve the first role, focus on providing special protections to foreign defendants in particular. To fulfill the second, it should strive to identify the sort of connections between defendant and forum that are likely to serve in addition as a sufficient constitutional basis for applying forum law. And finally, personal jurisdiction should provide a means for viewing the burden on the defendant in the context of the defendant's deliberate associations with the forum.

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262. Even aside from Rudzewicz, his business partner, and the physical location of the franchise, there were other Michigan contacts; the Court accepted as true, for example, that the direct supervision of Rudzewicz "emanat[ed] from Burger King's district office in Birmingham, [Michigan,]" and that Rudzewicz had engaged in some initial negotiations with that office as well. *See id.* at 480-81.

Further, it is worth noting that the latter two functions can be linked—and historically have been—through the concept of purposeful availment. By focusing on the defendant's intentional acts of affiliation, purposeful availment facilitates analysis of the benefit-burden "bargain" on which the third role centers.[263] It is likewise relevant to the choice-of-law screening function. When we worry about states applying forum law too broadly, our concern is based on two principal issues—first, that a state will try to extend its power to conduct in which it has no legitimate interest, and second, that there may be cases in which defendants lack adequate notice of which state's law will apply to their conduct. A purposeful availment requirement addresses both problems. A decision by a given actor to seek out a particular state affirmatively and enjoy its benefits creates a state interest in regulating that person's conduct that will in most cases be sufficient for the state to apply its own law. At the same time, a defendant who deliberately seeks out the benefits of a particular state will almost certainly be on notice that that state's law may apply to its conduct.

Inquiring into personal jurisdiction's roles, then, provides a metric for assessing the current state of personal jurisdiction doctrine, particularly the recent cases the Court has decided. Given that, how do the Court's recent adjustments to personal jurisdiction doctrine map to the areas where personal jurisdiction doctrine is most useful?

The following section surveys the recent case law and finds the Court's record to be mixed. On the one hand, the Court has focused primarily on foreign defendants, and has generally been solicitous—perhaps oversolicitous—of their interests. At the same time, however, the Court has not delineated any protections that apply specifically to foreign defendants, or even doctrines that can be easily tailored to the foreign or non-foreign status of the defendant.

An even more serious problem, however, is that at least some members of the Court have shown a disturbing move toward a more rigid and formalistic conception of state territoriality and away from the traditional purposeful availment bargain. The Court has done this by conceptualizing purposeful availment as a "submission" to state authority rather than simply a use of state resources, complicating the question of whether the specific/general jurisdiction divide can be regarded as a continuum, and narrowing the "effects test" that serves as purposeful availment's equivalent for intentional torts. These trends have negative consequences in both the screening and defendant fairness realms.

263. *See supra* Section III.B.2.

A. *Redundant Protections and Foreign and Domestic Defendants*

Three out of the four cases the Supreme Court decided involved foreign defendants, and many of the new limits the Court fashioned on personal jurisdiction appear to be crafted with foreign defendants particularly in mind. In all cases, the Court reached a result protective to foreign defendants, finding that a U.S. court lacked jurisdiction over them. Further, in all three cases, the result and reasoning seemed significantly driven by the defendant's foreign status.

Perhaps most important, the Court's opinion in *Goodyear Dunlop v. Brown* articulated a new standard for general jurisdiction, encapsulated in the notion that in order to be subject to such jurisdiction, the party must have contacts "so 'continuous and systematic' as to render [it] essentially at home in the forum State."[264] *Goodyear* did not discuss any considerations specific to foreign defendants, but did note the slight ties that the defendants at issue—foreign subsidiaries of Goodyear in Turkey, France, and Luxembourg—had to the United States.[265]

In *Daimler*, the Court developed and elaborated the "essentially at home" test announced in *Goodyear*. It had been clear in *Goodyear* that the foreign defendants, whose only contacts with the forum were several thousand specialty tires shipped there annually, were not in any way "at home" there.[266] In *Daimler*, however, the case was a much closer one; the Court assumed *arguendo* that Mercedes-Benz USA's contacts with California (which were substantial)[267] could be attributed to its parent company Daimler, and then sought to assess whether those contacts rendered Daimler essentially "at home there."[268] The Court then resolved this question in the negative. The key issue was not so much that Daimler's contacts with California were insufficient in themselves, but that Daimler (given that its headquarters, place of incorporation, and center of manufacturing were all in Germany)[269] had more substantial contacts elsewhere. As the Court explained, the general jurisdiction inquiry involved "an appraisal of a corporation's activities in their entirety, nationwide and worldwide," grounded in the recognition that "[a] corporation that operates in many places can scarcely be deemed at home in all of them."[270] Thus, because Daimler's activities in California were not par-

264. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

265. *See id.* at 2857 (noting defendants' "attenuated connections" to North Carolina).

266. *See id.*

267. Indeed, the Court assumed for this discussion that MBUSA would qualify as "essentially at home" in California. *See* Daimler v. Bauman, 134 S. Ct. 746, 758 n.11 (2014).

268. *See id.* at 760.

269. *See id.* at 752.

270. *See id.* at 762 n.20.

ticularly significant relative to its activities elsewhere, it was not subject to California's general jurisdiction.[271]

The Court's somewhat novel approach[272] seemed driven in substantial part by concern for the plight of foreign defendants. The Court worried about the "global reach" of a doctrine that would find general jurisdiction over Daimler in every state where MBUSA did substantial business, an idea the Court found "exorbitant."[273] In particular, the Court suggested that such a doctrine would create uncertainty for out-of-state defendants as to how to "structure their primary conduct."[274] Although the Court did not specify that this latter concern applied to non-U.S. defendants in particular, it seems fairly self-evident that foreign defendants unfamiliar with any U.S. law are likely to be far more concerned with this issue than domestic defendants who must generally deal only with minor state-by-state variations. The example the Court used to illustrate the problematic aspects of expansive general jurisdiction also highlighted its particular negative effects on foreign defendants; as the Court reasoned, "under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California."[275]

In *McIntyre*, the Court, dealing with a foreign defendant in a specific jurisdiction case, also seemed motivated to reach a pro-defendant result by the special issues faced by non-U.S. litigants. This was true in Justice Kennedy's plurality opinion, which insisted that McIntyre's contacts be considered on a state-by-state basis rather than looking to its attempts to target the United States as a whole[276]—an approach bound to favor foreign defendants looking to do business with the United States as a unified market rather than focusing on a particular state.[277] But it was also evident in Justice Breyer's concurrence, which provided critical votes for the plurality's result. The concurrence noted that its hesitance to announce broader jurisdictional rules was driven by concern for small foreign manufacturers: "a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling

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271. In her concurrence, Justice Sotomayor criticized this approach, arguing that a consideration of "the relative magnitude of [forum] contacts in comparison to the defendant's contacts with other States" would be unwieldy, unpredictable, and potentially unfair. She would instead have grounded the result in a finding that asserting jurisdiction over Daimler in these circumstances would be unreasonable. *See id.* at 767 (Sotomayor, J., concurring).

272. *See id.* (Sotomayor, J., concurring) (noting the Court's departure from precedent).

273. *See id.* at 761.

274. *See id.* at 761-62 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

275. *See id.* at 751.

276. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789 (2011) ("[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.").

277. *See id.* at 2794 (Breyer, J., concurring).

its products through international distributors."[278] Such defendants, Breyer argued, might find it particularly challenging to learn not only "the tort law of every State, but also the wide variance in the way courts within different States apply that law."[279] Though Breyer did not say so, this is presumably a greater concern for foreign defendants than domestic ones, who might be supposed to be more familiar both with state tort-law variations and with the broader differences among state legal systems.

This Article has argued that personal jurisdiction doctrine has a particular role to play in providing redundant protections for foreign litigants, particularly the more vulnerable ones like those catalogued in Justice Breyer's concurrence. Thus, the Court's recent opinions in many ways provide helpful guidance in this regard, particularly to the extent that they clarify the standards for general jurisdiction and assure foreign defendants that they are unlikely to be haled into U.S. courts on a general-jurisdiction basis provided their principal activities are conducted outside the United States. Nonetheless, the Court's recent opinions have a clear limitation, which is their failure to deal explicitly with the concerns particular to foreign defendants. Although it is at times clear that members of the Court have been primarily driven by concern for non-U.S. defendants, the Court in its recent cases has not made any formal distinction between the doctrine applicable to foreign defendants and U.S. ones, nor has it discussed particular considerations that might be relevant when the defendant hails from outside of the United States. This is in sharp contrast, most notably, to *Asahi*, where the Court both created a new strand of doctrine (the reasonableness test) that would be at least principally relevant to foreign defendants[280] and also discussed the particular considerations, including the "procedural and substantive interests of other nations" and the "Federal Government's interest in its foreign relations policies," that should be relevant to application of this test.[281] Interestingly, the *Daimler* Court appeared to affirm the reasonableness test's viability[282] (after *McIntyre*, by failing to

278. *Id.* To be sure, Justice Breyer also mentions the example of an "Appalachian potter" whose products are sold through a distributor in Hawaii, *see id.* at 2793, but this example of U.S. geographical and cultural difference seems unusually extreme, suggesting that it will be primarily foreign and not U.S. defendants who are subject to the sorts of burdens Breyer fears.

279. *Id.* at 2794.

280. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (noting the "international context" as a key factor in finding that jurisdiction in the scenario at hand was unreasonable).

281. *Id.* at 115.

282. *See* Daimler v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) (accepting that *Asahi* created a reasonableness test, but noting that it is only "to be essayed when *specific* jurisdiction is at issue").

mention it, had to some extent called it into doubt),[283] but specifically rejected its applicability to general jurisdiction cases.[284]

The risk of failing to make explicit the considerations particularly relevant to foreign defendants is twofold. First, of course, is the possibility that courts will fail to take into account fully the issues faced by foreign defendants, thus perhaps underprotecting them. The second risk is that courts will heedlessly apply principles forged in cases involving foreign defendants to domestic defendants as well, thus providing them redundant protection they do not need and depriving plaintiffs of the chance to be heard.

In the wake of *Daimler* and *McIntyre*, both scenarios are possible. First, the general principles articulated in both cases can be applied to domestic defendants, despite the fact that (for example) it may not seem obviously unfair to subject a domestic defendant with extensive multistate operations to general jurisdiction in any location where it does substantial business.[285] Even foreign corporations, if they are large and operate on a global scale, are often in a position to be well-informed about and able to prepare for litigation in the United States, and thus less in need of special protection than other foreign defendants may be. At the same time, courts may not be adequately alerted to the problems faced by small producers of the sort Justice Breyer had in mind. Thus, while the recent cases show the Supreme Court to be properly concerned with the special problems of foreign defendants, the protections the Court has extended to those defendants are imprecisely tailored to those issues.

B. State Sovereignty and the Screening Function

Although the recent personal jurisdiction cases have not been entirely clear or consistent on this point, Justice Kennedy's opinion in *McIntyre* suggests that at least some members of the Court continue to see policing the limits of state sovereignty as a core concern of personal jurisdiction doctrine. A look at personal jurisdiction's place in the larger doctrinal landscape, however, suggests that it would be a mistake to view personal jurisdiction as primarily about state sovereignty. As the foregoing discussion has illustrated, there are, to begin with, a large number of doctrines that can be invoked to prevent states from attempting to over-

283. *See* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1265-66 (2011) [hereinafter Borchers, *Incoherence of the Minimum Contacts Test*] (noting that none of the justices in *Goodyear* mentioned the test, leaving its status "unclear").

284. *See Daimler*, 134 S. Ct. at 762 n.20.

285. The Court suggested that the "essentially at home" formulation closely maps domicile, meaning that corporations would have one or at most two places (the state where their headquarters is located and, probably, their place of incorporation) where general jurisdiction over them could be obtained. Although the Court recognized the possibility of an "exceptional case" in which a place not a defendant's technical domicile might qualify as "essentially at home," it also found that "Daimler's activities in California plainly do not approach that level." *See id.* at 761 n.19.

reach in regulating extraterritorially. Where legislation is concerned, courts continue to see the *Healy* line of cases as a meaningful limit on state regulation of conduct outside state borders.[286] *Gore* and *Campbell* stop states from using large punitive damages awards—which might otherwise be a powerful tool—to control out-of-state conduct.[287] And the *Hague* principle, weak as it may be, prevents the most outrageous abuses of state power through applying forum law to distant events.

Against this backdrop, the preceding section has argued that personal jurisdiction has the limited function of screening out at an early stage cases that might otherwise raise difficult *Hague* questions, because the contacts between the case and the forum (particularly the defendant's contacts) are few.[288] This is certainly an important function; a system in which *Hague* issues arose frequently would both be inefficient and would require time-consuming and undesirable supervision of state choice-of-law decisionmaking by the Supreme Court.[289] But it is important to note that it is also a limited function. Even if one believes that such state overreaching is a serious problem (a position that in itself might be subject to question), personal jurisdiction is not the ultimate backstop against states' improper efforts to regulate beyond their borders. Instead, a multiplicity of doctrines, from *Healy* to *Gore* to *Hague* to venue restrictions,[290] helps to ensure that defendants will not be subject to the unlawful exercise of state power.

Personal jurisdiction is thus most useful, this Article has argued, not as an ultimate limit on state sovereignty but as a way to keep difficult *Hague* questions away from courts. For the doctrine to serve its screening function effectively, presumably the best course is to focus on the personal jurisdiction factors that most resemble the concerns of the *Hague* test—that is, the defendant's contacts and affiliations with the forum state.[291] To see personal jurisdiction as a direct limit on state sovereignty, rather than an indirect one in a system with multiple layers of protection, moves the analysis away from personal jurisdiction's core concerns.

Viewing personal jurisdiction as a state sovereignty limit has a number of undesirable consequences. Most obviously, it may result in unnecessarily limiting the degree to which states may exercise judicial jurisdic-

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286. *See* cases cited *supra* note 157.

287. *See supra* Section II.B.4.

288. *See supra* Section III.B.1.

289. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (expressing hands-off approach state choice of law).

290. *See supra* Section II.B.

291. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (specifying that, for a choice-of-law decision to be proper, there must exist "a significant contact or significant aggregation of contacts, creating state interests, such that choice of [that state's] law is neither arbitrary nor fundamentally unfair").

tion over cases, ignoring the fact that judicial and legislative jurisdiction are not synonymous, and that it would be undesirable to view them as such.[292] More subtly, it may distort the way the Court regards personal jurisdiction generally, shifting its focus toward abstract limits on state power and away from the actual activities of defendants. The following section considers this second possibility in more detail, surveying the ways in which the Court's recent cases have de-emphasized the traditional idea of purposeful availment.

C. The Court's Sidelining of Purposeful Availment

In many ways, the Court's treatment of the purposeful availment issue in its recent cases has been troubling. The following section looks at the history of purposeful availment as a jurisdictional factor and discusses how the Court's recent decisions may have altered the status quo.

1. *The Emergence of Purposeful Availment*

Although purposeful availment is not mentioned in *International Shoe*, the Court has since highlighted the concept of purposeful availment in most of its major personal jurisdiction decisions. The term first comes[293] from the 1958 case *Hanson v. Denckla*,[294] which involved a Delaware trustee who had established a trust for a woman, Dora Browning Donner, who subsequently moved to Florida.[295] The Court held that the defendant's continuing to act as trustee for Mrs. Donner after the move was, standing alone, an insufficient contact with Florida, in a case involving the validity of the trust agreement, because Mrs. Donner's move had been unilateral.[296] The Court found that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[297]

The Court has alluded to the notion of purposeful availment many times since, perhaps most extensively in *Asahi*. Despite the Court's failure to produce a majority opinion on the minimum contacts issue in *Asahi*, the debate between *Asahi*'s two plurality opinions[298] illuminates the concept of purposeful availment in some ways better than any other sin-

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292. *See* Hay, *supra* note 233, at 9-10 (explaining why separating these two forms of jurisdiction is desirable).

293. *See* Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 51 (2012) (noting that the Court's first discussion of the purposeful availment concept was in *Hanson*).

294. 357 U.S. 235 (1958).

295. *Id.* at 238.

296. *Id.* at 251-52.

297. *Id.* at 253.

298. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 103-04 (1987) (explaining breakdown of vote).

gle case. The question with which both opinions concerned themselves was the notorious "stream of commerce" problem: If a seller or manufacturer puts a product into commerce that passes through an intermediary before reaching the end user, does personal jurisdiction over it exist at the place where the end user bought or was injured by the product?[299]

The specific facts of the case involved the Japanese tire valve manufacturer Asahi Metal, a small portion of whose products were incorporated into tires in Taiwan for export to California. Asahi was aware of the California destination of some of its products, but did nothing affirmatively to solicit further business or otherwise increase the use of its products in California. The Court split 4-4 on the question of whether such contacts were sufficient to establish that Asahi had minimum contacts with California.[300] For the justices who joined the opinion authored by Justice Brennan, Asahi's awareness of "the regular and anticipated flow of products from manufacture to distribution to retail sale" was sufficient to find minimum contacts.[301] For the justices joining Justice O'Connor's opinion, however, "something more"[302] than this "mere awareness"[303] was necessary; for minimum contacts to be present, the defendant would have to have taken additional steps such as advertising in or designing a product specifically for the forum state.[304]

Although the justices' split has subsequently proved vexing for lower courts,[305] it is worth noting that, in some sense, the justices agreed on the basic notion of purposeful availment; they simply differed on what actions might be sufficient to constitute such availment (or, alternatively, how much availment sufficed to be regarded as "minimum contacts"). Justice Brennan suggested that the knowing and steady, if passive, benefit to a manufacturer from the use or sales of its goods in a distant place was a sufficient act of profiting from the forum, whereas Justice O'Connor believed that more active efforts to solicit business in the forum were necessary. In both cases, however, the justices were examining the same sorts of conduct—deliberate actions that invoked the "benefits and protections" of a particular forum.[306] Indeed, Justice Stevens's brief

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299. *See id.* at 110-112 (discussing "stream of commerce" problem).

300. The case was ultimately decided not on this issue but on the reasonableness test, which eight justices agreed precluded personal jurisdiction in California over Asahi in these circumstances. *See id.* at 103-04.

301. *See id.* at 117 (Brennan, J., concurring).

302. *See id.* at 111.

303. *See id.* at 105.

304. *See id.* at 112.

305. *See* Borchers, *Incoherence of the Minimum Contacts Test*, *supra* note 283, at 1249 ("Lower courts struggled to decide whether to apply the O'Connor or the Brennan test and, predictably, split.").

306. *See Asahi*, 480 U.S. at 109 (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)). Indeed, Justice Brennan specifically invoked the language of the purposeful availment bargain by noting that defendants knowingly serving a market in a particular forum state via

concurrence pointed out this continuum, noting that no "unwavering line" existed between awareness of a product's end destination and purposeful availment of the forum.[307] The justices, then, all saw the case through the purposeful availment lens, even as they differed on precisely how much availment was required.

2. McIntyre *and Purposeful Availment*

The Court's first post-*Asahi* effort to grapple with specific jurisdiction was in 2011's *J. McIntyre Machinery v. Nicastro*,[308] involving a similar fact pattern: A British manufacturer of scrap metal processing machines used a U.S.-based distributor to market its products in the United States,[309] and one of those products found its way to New Jersey, where it caused an injury.[310] The case on its face seemed to present an identical, or near-identical, stream of commerce issue as had existed in *Asahi*, and most commentators expected the Court to use the occasion to resolve the *Asahi* justices' split.[311] In fact, however, the Court did no such thing. Rather, it produced another set of fractured opinions—two concurrences and a dissent[312]—that are notable for their differences both with the *Asahi* Court and with each other on the notion of purposeful availment.

The opinion that commanded the largest number of justices was the one authored by Justice Kennedy,[313] who wrote a fairly broad opinion suggesting that there was unlikely to be personal jurisdiction over a foreign manufacturer in McIntyre's situation. The Kennedy opinion, however, is perhaps most notable for the ways in which it appears to reconceptualize purposeful availment not as a defendant's obtaining benefits from a state, but as a defendant choosing to "submit[] to the judicial power of an otherwise foreign sovereign."[314] For Justice Kennedy, purposeful availment was significant only insofar as it reinforced what for him was the "central concept of sovereign authority" in personal jurisdiction.[315] He took pains to distinguish that concept from general fairness considerations, noting that

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the stream of commerce had received a "corresponding benefit" for any litigation burden they might suffer. *See id.* at 117 (Brennan, J., concurring).

307. *See id.* at 122 (Stevens, J., concurring).

308. 131 S. Ct. 2780 (2011).

309. *See id.* at 2786.

310. *See id.*

311. *See* Rick Handel, *A Conceptual Analysis of Nexus in State and Local Taxation*, 67 TAX LAW. 623, 635 (2014) ("There was hope (perhaps irrational) in 2011 that the United States Supreme Court would resolve all of the personal jurisdiction . . . confusion when it took the . . . *McIntyre Machinery* case[].").

312. *See McIntyre*, 131 S. Ct. at 2785 (explaining breakdown of votes).

313. *Id.*

314. *See id.* at 2788.

315. *See id.*

fairness could, for example, be ensured by "carefully crafted judicial procedures [that] could . . . protect the defendant's interests."[316]

Although Justice Kennedy's perspective is consistent with past opinions in distinguishing considerations of purposeful availment from a mere burden on the defendant, his view differs from them in seeing purposeful availment less as a bargain and more as an instance of voluntary submission to state authority. In this sense, Justice Kennedy's interpretation seems far too narrow. The point of purposeful availment as discussed in cases like *Asahi* is that its presence makes it fair to ask the defendant to appear in the state, not that it indicates, in Kennedy's words, "submi[ssion] to a State's authority"[317] or "to the laws of the forum State."[318] It is true that the purposeful availment requirement does, in some cases, serve to protect defendants from being subjected to unpredictable regulation. Nonetheless, purposeful availment as the Court has previously conceived it is not centrally about state sovereignty; it is about the relationship between the defendant and the forum and the particular fairness considerations that attach to that relationship. In apparently viewing purposeful availment as a sort of implicit consent, Justice Kennedy departs from prior analysis that has divorced purposeful availment from consent.[319]

The controlling concurrence[320] by Justice Breyer, joined only by one other justice,[321] differs significantly from Justice Kennedy's opinion in the framework it applies, but does not squarely rebut Justice Kennedy on the purposeful availment issue. The Breyer opinion was deliberately restrained in scope, finding the case an "unsuitable vehicle for making broad pronouncements,"[322] and rested its agreement with the result on the notion that a "single isolated sale" to New Jersey did not rise even to the level of the "regular . . . flow" of products found sufficient by Justice Brennan in *Asahi*.[323]

Even the dissent, while diverging sharply from Justice Kennedy's perspective on other points, did not squarely address the question of

316. *See id.* at 2789.

317. *See id.* at 2787.

318. *See id.*

319. Justice Ginsburg's dissent criticized this perspective as inconsistent with established personal jurisdiction doctrine. *See id.* at 2799 (Ginsburg, J., dissenting) ("[T]he plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. . . . [I]nvocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful.").

320. *See* Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1, 3 (2014) ("[T]he Court achieved the remarkable feat of further confusing the issue by splitting four to two to three on the rationale. Strangely, this left Justice Breyer's two-vote concurrence in the judgment as the controlling opinion . . . .").

321. *McIntyre*, 131 S. Ct. at 2791 (noting concurrence of Justices Breyer and Alito).

322. *Id.* at 2793.

323. *See id.* at 2792.

purposeful availment, although it did implicitly criticize the plurality's attempt to revise it. In her dissenting opinion (joined by two other justices), Justice Ginsburg's primary argument was that McIntyre's aggressive efforts to market its products in the United States as a whole should count strongly in the jurisdictional analysis, despite the fact that they were not targeted specifically at New Jersey.[324] Justice Ginsburg strongly criticized the plurality's focus on state sovereignty issues, asserting that "no issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case," and "the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."[325] She also criticized the plurality's focus on an implied consent fiction, which she argued "draws no support" from prior Court decisions.[326] Instead, Justice Ginsburg argued, the legitimacy of personal jurisdiction should simply be based on the sufficiency of contacts.[327] Further, she contended that because McIntyre treated the United States as a "single market," its contacts with the United States should not be arbitrarily subdivided by state.[328]

There is much worthwhile in Justice Ginsburg's view that, with regard to non-U.S. defendants, some mechanism should be available for assessing minimum contacts on a nationwide basis. Indeed, in a few such situations, nationwide jurisdiction is available in federal court.[329] In the garden-variety case involving a domestic defendant, however, Justice Kennedy's state-by-state focus is less troublesome than his movement away from traditional notions of purposeful availment and toward state sovereignty/implied consent concerns.

Justice Kennedy's opinions, of course, may not be shared by a majority of the Court, or even fully by the three other justices who joined his opinion. Nonetheless, the Court's unanimous opinions in *Walden* and *Daimler* provide other indications that the Court has ignored some traditional elements of purposeful availment.

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324. *Id.* at 2795 (Ginsburg, J., dissenting). Justice Ginsburg did note, however, that New Jersey processes the most scrap metal among all fifty states. *See id.*

325. *Id.* at 2798.

326. *Id.* at 2799.

327. *Id.* (arguing that "a forum can exercise jurisdiction when its contacts with the controversy are sufficient").

328. *See id.* at 2801.

329. Such service was implicitly accepted by the Court in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 107-08 (1987), in which it declined to find that Congress had impliedly authorized nationwide service of process in the case before the Court, but noting that Congress has elsewhere authorized such service.

3. Daimler *and the Continuum vs. Discrete Categories Issue*

By elaborating upon the "essentially at home" formula the Court had first introduced in Goodyear, *Daimler* brought some much-needed clarity to the question of when general, all-purpose jurisdiction might exist over a corporation doing extensive business in multiple locations. *Daimler* makes clear that the issue does not merely involve tallying the absolute number of contacts the defendant has with the state, but looking at those contacts relative to the defendant's ties to other jurisdictions. A place where a defendant is "essentially at home" is presumably a place that is in some way special to the defendant and accordingly is easily distinguishable from other places where it may conduct activities.[330] Further, the Court has suggested that only rarely if at all will places other than the defendant's technical domicile meet this criterion.[331]

This standard is refreshingly straightforward, and there is much to be said in its favor. It provides clear guidance to defendants on how to structure their activities to avoid general jurisdiction, and it reins in the excesses of courts that had found general jurisdiction on the basis of relatively modest contacts. At the same time, however, it puts obvious pressure on specific jurisdiction doctrines. As the Court has moved decisively to narrow the permissible use of general jurisdiction, it has created incentives for plaintiffs to argue that the defendant's contacts with the forum are related to the dispute and that specific jurisdiction is thus available.[332] Yet the Court has never elaborated on what constitutes sufficient relatedness for specific jurisdiction to be available, raising numerous troublesome scenarios.[333] Suppose, for example, that the defendant sells thousands of a particular product in California annually; the plaintiff then purchases that same product in Nevada and is injured by it. If the plaintiff wishes to bring a product liability suit, can she argue that specific jurisdiction is available in California based on the defendant's sales of a similar product? Lower courts have provided varying answers to this and similar questions,[334] but prior to *Goodyear* and *Daimler*, the question was a less urgent one, since the wide availability of general jurisdiction over defendants who did business in a forum often made the relatedness

330. *See* Daimler v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) ("A corporation that operates in many places can scarcely be deemed at home in all of them.").

331. *See id.* at 761 n.19 (describing this scenario as an "exceptional case").

332. *See* Rhodes & Robertson, *supra* note 36, at 228 ("After *Bauman*, the 'connectedness' or 'relatedness' requirement [of specific jurisdiction] is likely to emerge as the central battleground in personal jurisdiction litigation.").

333. *See* Rhodes & Robertson, *supra* note 36, at 230 ("[T]he Court has never detailed the reach of the necessary relationship, rendering this requirement jurisdiction's 'least developed prong.' " (quoting Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994)).

334. *See* Rhodes & Robertson, *supra* note 36, at 230-43 (summarizing various judicial and scholarly approaches to the relatedness problem).

question moot. The status quo in this regard, however, is likely to change substantially.

Compounding this problem is another issue that the recent cases raise: whether the "continuum" model of personal jurisdiction—the notion that the more substantial the defendant's contacts with the forum, the less related to the dispute they need be—is more or less relevant in the wake of *Goodyear* and *Daimler*. The idea of at least some variety of sliding scale seems an unquestionable part of *International Shoe*'s framework, with its pronouncements that some "single or occasional" contacts can serve as the basis for what is now known as specific jurisdiction provided they are closely related to the dispute,[335] while at the same time "continuous activit[ies]" if "substantial and of . . . a [particular] nature" can support all-purpose jurisdiction.[336] *International Shoe*, however, does not clearly address the most troublesome category—a scenario under which the defendant has many contacts that are only loosely related to the dispute.[337] Some commentators and courts had previously accepted the idea that general and specific jurisdiction were a continuum, with many contacts/no relatedness on one end and single contact/high relatedness on the other;[338] others have rejected this approach.[339] At first glance, *Goodyear* and *Daimler* appear to side with the second camp, making clear that general jurisdiction is a separate category bearing little relationship to specific jurisdiction,[340] and introducing a new element—relative strength of contacts as compared to contacts with

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335. *See* Int'l Shoe v. Washington, 326 U.S. 310, 318 (1945).

336. *Id.*

337. *See* Rhodes & Robertson, *supra* note 36, at 242 (recognizing that *International Shoe* delineates but does not discuss this category, and suggesting an approach under which defendants should be subject to personal jurisdiction when they are "conducting extensive forum activities similar to the episode in dispute" in cases that "implicate[] another sovereign state interest" and are not unduly burdensome).

338. *See, e.g.*, Chew v. Dietrich, 143 F.3d 24, 29 (2d Cir. 1998) (finding that the "[general/specific] dichotomy is [not] as stark as it may at first appear," and noting that "[w]here the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. . . . Where the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury."); *supra* notes 43-44 and accompanying text.

339. *See, e.g.*, O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 321 (3d Cir. 2007) ("At the outset, then, we must state that the 'sliding scale,' 'substantial connection,' and 'discernible relationship' tests are not the law in this circuit. . . . Our cases . . . have always treated general and specific jurisdiction as analytically distinct categories, not two points on a sliding scale.").

340. *See* HAZARD ET AL., *supra* note 44, at 127 (noting that *Goodyear* can be read as replacing the "relatively nuanced" approach of prior cases with an "on-off switch" model of general jurisdiction, thus undermining the continuum concept); Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1078 (2012) ("[I]n *Goodyear*, the Court articulated general and specific jurisdiction as two distinct categories.").

other jurisdictions—that is not part of the specific jurisdiction inquiry.[341] This has provoked mixed reactions, with some commentators arguing that *Goodyear* and *Daimler* are compatible with a continuum model[342] and others arguing the opposite.[343]

Although *Daimler* does indeed appear to recognize various categories of specific jurisdiction, at least some of its policy rationale would seem to undermine the continuum notion.[344] Because there are relatively few cases where a defendant's contacts are *entirely* unrelated to the suit, *Daimler*'s protections would be undermined if defendants could be subject to specific jurisdiction based on extensive activities loosely related to the suit; such a result would simply shift the battle to new ground.

To some extent, a continuum view seems more compatible with the purposeful availment bargain, which suggests that, once a defendant has engaged in purposeful activity in a state, the state's courts have power over the defendant with respect to those activities. This necessary relationship between the activity and the fairness of subjecting the defendant to personal jurisdiction means that questions of relatedness affect issues of purposeful availment. It is important to know how related a contact must be to a suit to count in the purposeful availment analysis with respect to that suit.[345] Moreover, the purposeful availment idea is easily adapted to the continuum model; the more a defendant has associated itself with a particular jurisdiction, the fairer it seems to subject that defendant to a broader range of suits. A decisive movement away from the continuum, then, would seem to sideline purposeful availment.

Daimler does not speak directly to these questions, and certainly one can read *Daimler* to preserve a hybrid or continuum model in some form.[346] But the issue requires fairly urgent clarification. One possible resolution might be to specify a reasonably high standard for determining that a contact is dispute-related in the first place and then to apply a sliding scale to the contacts that cross this threshold. Such a result would preserve the central role of purposeful availment in specific juris-

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341. *See* Daimler v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) (basing general jurisdiction on "an appraisal of a corporation's activities in their entirety, nationwide and worldwide").

342. *See* Genetin, *supra* note 36, at 143-44 (arguing that *Daimler* supports the continuum idea by suggesting that there are many varieties of specific jurisdiction).

343. *See* Hoffheimer, *supra* note 45, at 572-73 (arguing that Justice Ginsburg's opinion in *Goodyear* "exclud[es] any intermediary class or hybrid category of jurisdiction"); *see also* Andrews, *supra* note 340, at 1078 (arguing, post-*Goodyear*, that "policy analysis argues against jurisdiction based on either a sliding scale or hybrid theory. . . . [A]s to a sliding scale theory, an intermediate level as to both essential elements does not make jurisdiction fair.").

344. *See Daimler*, 134 S. Ct. at 751 (noting that due process constrains the exercise of "exorbitant" uses of personal jurisdiction such as the one contemplated by the *Daimler* plaintiffs).

345. *See* source cited *supra* note 332.

346. *See* source cited *supra* note 342.

diction while also still cordoning off true "essentially at home" jurisdiction in other forms.

4. Walden: *Undermining the* Burger King *View of Purposeful Availment?*

Finally, the Court's decision in *Walden v. Fiore* raises troubling questions about a different kind of "relatedness"—that is, what sorts of contacts manifest sufficient connection with the forum to count in the jurisdictional analysis. To think about this problem, consider the fact that some contacts will seem particularly associated with distinctive qualities of a particular state, while others will be more incidental. Imagine, for example, a producer of bulky sweaters who is looking to expand his business through marketing and advertising. He is more likely to focus his efforts on Maine rather than Florida. Having directed his products toward a Maine audience, he is subsequently more likely to be found to have purposefully availed himself of the benefits of doing business in Maine.

In some sense, the terminology of purposeful availment calls to mind just this sort of example—that is, a scenario where the defendant seeks to profit from the distinctive resources or characteristic attributes of a state. In this situation, the defendant is seeking out the attributes that differentiate that state from others. It is easy to see why such contacts are related to the state, and they also seem to fit neatly into the purposeful availment "bargain" model.

Nonetheless, there are other types of contacts defendants can form with a state, most particularly through relationships with that state's citizens or residents. Prior to *Walden*, it was apparent that, under appropriate circumstances, those contacts were relevant to purposeful availment as well. Take, for example, the *Burger King* case, involving a franchise owner in Michigan who dealt primarily with the regional Michigan Burger King office but who also associated himself with Burger King's headquarters in Miami by entering into a long-term franchise agreement with the national corporation,[347] sending his partner to Florida for training,[348] and negotiating rent reductions with the Miami office.[349] For the Court, this was sufficient purposeful availment of Florida to support a finding of personal jurisdiction.[350]

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347. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479-80 (1985) ("Rudzewicz . . . negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization.").

348. *See id.* at 479 n.22 (suggesting that Rudzewicz's "participat[ion] in the decision" to send his partner to Florida might constitute a meaningful contact).

349. *See id.* at 481 (describing rent negotiations).

350. *See id.* at 480-81. The Court also found it significant that the agreement contained a Florida choice-of-law clause. *See id.* at 482.

In some sense, the defendant's contacts with Florida could be seen as arbitrary. Presumably the franchise owner wanted to establish a relationship with Burger King, the well-known national corporation, and not with the state of Florida, and presumably the defendant would have had approximately the same dealings with Burger King had it been headquartered in New Mexico or North Dakota. Nonetheless, the Court found the Burger King-related contacts to be decisive in establishing personal jurisdiction over the defendant; in fact, it did not even flag the distinction between contacts with a forum-headquartered corporation and contacts with the forum itself. Based on the Court's previously articulated understanding of purposeful availment, this makes sense. Some of a state's advantages derive from the fact that it contains notable residents and businesses, and by establishing contact with those people or entities, a defendant also avails itself of the benefits of the state.

Again, prior to *Walden*, this point was apparently so obvious that the Court did not consider it worth commenting on. In *Walden v. Fiore*,[351] however, the Court introduced a new feature to the analysis, as it attempted to distinguish between actions targeted toward the forum (which may suffice to permit the exercise of personal jurisdiction) and actions targeted toward plaintiffs known by the defendant to be associated with the forum (which are insufficient).[352]

Walden involved a *Bivens* action by two professional gamblers, residents of Nevada, against a deputized DEA agent[353] who had seized a large amount of cash from them at a Georgia airport and then allegedly drafted a false affidavit in support of forfeiture of the funds.[354] The funds were eventually returned.[355] Because the defendant met the plaintiffs at the gate for their flight to Las Vegas[356] and received a call the next day from their Nevada attorney,[357] he was presumably aware that they resided in Nevada. The Ninth Circuit determined that personal jurisdiction existed under the so-called "effects test," discussed below, based on the defendant's drafting of the false affidavit with knowledge that it would have harmful consequences for the plaintiffs in Nevada.[358]

The Court, however, unanimously rejected this theory, finding that the Nevada court lacked personal jurisdiction.[359] In reaching this conclusion,

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351. 134 S. Ct. 1115 (2014).

352. *See id.* at 1122 (distinguishing between contacts with the forum state and with its residents).

353. The defendant was a Georgia police officer who had been deputized as a DEA agent. *Id.* at 1119.

354. *Id.* at 1119-20.

355. *Id.* at 1120.

356. *Id.* at 1119.

357. *Id.*

358. *See id.* at 1120.

359. *Id.* at 1121.

the Court distinguished between contacts with the state and contacts with its residents, stating that "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[360] Later, the Court elaborated that the agent's "actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections."[361]

To be sure, the Court in *Walden* was applying the "effects test," a different basis for personal jurisdiction that is generally considered a separate category from purposeful availment-based jurisdiction.[362] Because it dealt with a scenario in which the effects at issue were so minor and attenuated, it is possible that *Walden* may be confined to its relatively narrow context (more on that below). Nonetheless, because of the timeliness of its subject matter, *Walden* has the potential to have broader consequences.[363]

To begin with, the effects test is not entirely dissimilar from the purposeful availment analysis, and in fact might benefit from being considered according to the same general rubric.[364] The effects test asks whether a defendant committed an "intentional . . . action[]"[365] that was "expressly aimed" at the forum state,[366] and whether "the harm [was] suffered"[367] in the forum state in a way that defendants could have anticipated.[368] First articulated in two defamation cases decided on the same

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360. *Id.* at 1122.

361. *Id.* at 1125.

362. *See* Rhodes & Robertson, *supra* note 36, at 224 ("The *Calder* effects test generally applies when the defendant does not have any of the traditional contacts demonstrating purposeful availment, but has allegedly committed a tort or engaged in other conduct that has an effect within the forum.").

363. *See id.* at 252-53 (noting that *Walden* is likely to be "highly influential," because the number of effects-test cases is "large and growing").

364. *See* 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, 612 (2006) ("Although *Calder* itself never relies on the purposeful availment standard, some post-*Calder* personal jurisdiction cases have treated the effects test as an alternative way to establish purposeful availment."). Not all courts have regarded the tests as equivalent, although even courts that do not may see them as related. *See* Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004).

365. *See* Calder v. Jones, 465 U.S. 783, 789 (1984).

366. *See id.*

367. *See id.* at 789. In *Calder*, the Court noted that the "brunt" of the harm was suffered in California. *Id.* at 789-90. The Ninth Circuit, however, has forcefully questioned the idea that the "brunt"—that is, the majority—of the harm must be suffered in the forum state so long as significant harm was felt there, and argued that Supreme Court case law need not be read this way. *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1207 (9th Cir. 2006) (en banc) ("We take this opportunity to clarify our law and to state that the 'brunt' of the harm need not be suffered in the forum state. If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.").

368. *See Calder*, 465 U.S. at 789-90.

day, *Keeton v. Hustler Magazine*[369] and *Calder v. Jones*,[370] the effects test has proven particularly useful in the defamation context,[371] but has also been applied (as *Walden* illustrates) to other intentional torts and even to non-tortious activities.[372]

Although phrased in terms of causing harm rather than reaping benefits, the effects test is a close cousin to purposeful availment in many respects. As with a purposeful availment analysis in a case like *Burger King*, its focus is the connection the defendant deliberately formed with the forum state or (in various pre-*Walden* cases) its residents. While the effects test defendant generally aims to do harm[373] in the forum state rather than merely benefiting from its resources, the general idea that the defendant aims to deliberately affiliate itself with the forum state remains the same. Indeed, one could link the tests still more closely if one supposes that the defendant may derive some sort of psychic or reputational benefit from, say, defaming a state's resident.

Thus, because the tests parallel each other so closely, *Walden*'s approach to assessing contacts potentially also reflects something of the Court's view toward the personal jurisdiction analysis more generally. For that reason, it is worth noting how *Walden*'s approach represents a sharp departure not only from previous effects tests cases such as *Calder* but also from canonical purposeful availment cases such as *Burger King*.

Commentators have already noted that *Walden* appears to be at least in some tension with the notion of the effects test articulated in *Calder v. Jones*.[374] In *Calder*, the Court found unanimously that California had personal jurisdiction over a suit by actress Shirley Jones over a *National Enquirer* reporter and editor who had worked on an article that had allegedly libeled her.[375] The editing and most of the reporting had occurred exclusively at the *Enquirer*'s office in Florida, although the reporter had made some calls to California sources.[376] The Court nonetheless upheld jurisdiction over the defendants on the basis that they knew the alleged libel would cause harm to Jones in California, where her life and career were centered. As the Court reasoned, the defendants "wrote and . . . ed-

369. 465 U.S. 770 (1984).

370. 465 U.S. 783 (1984).

371. *See* Rhodes & Robertson, *supra* note 36, at 253 ("The typical effects-test case involves defamation and internet publication.").

372. *See Yahoo! Inc.*, 433 F.3d at 1208 (applying effects test and stating that the court must "analyze all of [defendants'] contacts with California relating to [the dispute], irrespective of whether they involve wrongful actions").

373. Some courts have found that all acts directed at the forum state, even if not wrongful, may be considered as relevant contacts for purposes of the effects test. *See id.* at 1207-08.

374. *See, e.g.*, Rhodes & Robertson, *supra* note 36, at 226 (noting that distinguishing *Walden* from *Calder* was a "difficult challenge").

375. *See Calder*, 465 U.S. at 784-85.

376. *Id.* at 785-86.

ited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation."[377]

The *Walden* Court made a tepid effort to distinguish *Calder* on the grounds that, in that case, the "reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff."[378] In other words, the Court seemed to see reputation as something that is uniquely grounded geographically in a particular community, thus giving the *National Enquirer* defendants a connection to the state itself, not merely to the plaintiff who lives there. This makes little sense, however—if Jones's career was somehow physically grounded in California, then surely the *Walden* plaintiffs' careers as gamblers were also physically grounded in Las Vegas, and the loss of what they alleged was their gambling "bank"[379] affected them in the same way.

Further, it is worth noting that *Walden* is at odds not only with the line of effects test cases but also with cases like *Burger King*. It is hard to see how the *Burger King* defendant, who had never set foot in Florida and had essentially no contacts there beyond his franchise agreement, had any contacts with Florida as opposed to contacts with the plaintiff. Indeed, it is hard to see how one could draw a consistent distinction in any context between the state and its residents. Even the sort of contact that would uncontroversially count in the purposeful availment analysis, such as, say, placing television ads intended to reach a particular market, could be reframed as simply a connection to the state residents who might see it.

None of this means the Court got the result wrong; the defendant's connections with Nevada in *Walden* were undoubtedly slim. The Court could easily have decided the case on this basis rather than drawing the confusing resident/forum distinction. In other words, the Court could have concluded that the defendant's actions, while aimed at the forum in some sense, simply did not rise to the level sufficient to constitute minimum contacts. Further, the Court could have pointed out that the causal relationship here was attenuated. The defendant agent presumably did not seize, and make out a false affidavit relating to, the plaintiffs' cash with the purpose of harming their gambling careers, which were clearly centered in Nevada, or even the knowledge that it would do so.

Walden can be seen as continuing *McIntyre*'s problematic focus on state sovereignty rather than purposeful availment. Both cases suggest, in different ways, that a defendant's contacts only count when they manifest a conscious desire to seek a particular relationship with one state as

377. *Id.* at 789-90.

378. Walden v. Fiore, 134 S. Ct. 1115, 1123-24 (2014).

379. *See id.* at 1119.

opposed to others. That, however, is a narrow view of both minimum contacts and purposeful availment. Purposeful availment should encompass any situation in which a defendant targets either a state or those the defendant knows to be its residents, for purposes either of reaping a benefit or causing a harm. The implicit bargain created by the fact that the defendant has somehow profited from its association with the state is the unique factor that purposeful availment contributes to the fairness analysis. So long as the defendant deliberately accepted that bargain, it should not matter whether the benefit the defendant sought was intimately connected to the specifics of a particular state (i.e., the sweater manufacturer seeking to sell in Maine) or merely incidentally so (the prospective franchisee seeking to do business with a national fast food corporation, regardless of where it might be located).

VI. CONCLUSION

Personal jurisdiction doctrine is one means of both restraining state sovereignty and ensuring that defendants are treated fairly. But in serving both of these goals, it has competition. Defendants can take advantage of a diverse set of nonjurisdictional doctrines that protect them from litigating in forums that are inconvenient or otherwise unfair. A similar welter of doctrines limits the degree to which states can engage in aggressive extraterritorial regulation.

In light of this reality, it might be reasonable to argue that personal jurisdiction doctrine is largely superfluous. Instead of abandoning the personal jurisdiction requirement, however, this Article advocates orienting personal jurisdiction doctrine toward the narrow set of purposes that are *not* served by any other doctrine: providing deliberately redundant protection for foreign defendants, ensuring that courts do not have to decide difficult questions of choice-of-law constitutionality, and incorporating purposeful availment into the calculus of defendant fairness. Although the Supreme Court's recent cases go some way toward serving the first of these goals, they have at times ignored or frustrated the second and third.

It is likely that the next few years will bring further activity in the Supreme Court on the personal jurisdiction front. To promote greater clarity about the doctrine's core functions and purposes, the Court should give consideration to personal jurisdiction's place on the broader doctrinal landscape of fairness and state sovereignty.