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Recommended Citation

Allan Erbsen, Personal Jurisdiction's Moment of Opportunity: A Reform Blueprint for Originalists and Nonoriginalists, 75 Fla. L. Rev. 415 (2023)

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PERSONAL JURISDICTION'S MOMENT OF OPPORTUNITY: A REFORM BLUEPRINT FOR ORIGINALISTS AND NONORIGINALISTS

Allan Erbsen[*]

Abstract

Personal jurisdiction doctrine is broken, but there is a moment of opportunity to repair it. The Supreme Court has struggled for decades to explain why constitutional law sometimes prevents states from providing local remedies for local injuries. Basic questions lack satisfying answers. Should doctrine emphasize liberty or federalism? Is the Due Process Clause the proper foundation for limits on state power or are other clauses more relevant? What harms should limits on state power prevent and what harms should limits avoid creating? Decisions addressing these questions rely on jargon rather than a coherent account of how to allocate jurisdictional power in a federal system.

Reform may be possible. In 2021, the Court decided *Ford Motor Co. v. Montana Eighth Judicial District Court*, which unanimously rejected Ford's extravagant challenge to jurisdiction in states where it sold thousands of cars. Unanimity masked Justices' simmering frustration with precedents that made Ford's challenge more plausible than it should have been. Two Justices went so far as to suggest reconsidering settled precedent from an originalist perspective. Nonoriginalist Justices will be wary of using historical analysis to interpret the Due Process Clause, but may otherwise be open to revisiting foundational assumptions about state jurisdiction.

This Article provides a blueprint for reforming personal jurisdiction doctrine that can appeal to both originalists and nonoriginalists. Finding common ground is essential at a time when the meaning of due process is contested and personal jurisdiction precedent is unstable. Part I uses *Ford* as a case study to illustrate how current rules governing personal jurisdiction excessively shield defendants from accountability. I argue that precedent undervalues state interests and horizontal federalism concerns, overvalues the importance of purposeful contacts with the forum, needlessly distinguishes between suit-related and state-related contacts, and relies on a categorical rather than sliding scale approach to specific and general jurisdiction. Part II explains why some Justices are willing to embrace reform. Part III identifies challenges that confront efforts to rebuild personal jurisdiction doctrine on a more stable and sound foundation. A common theme uniting these challenges is that an

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originalist inquiry into personal jurisdiction must navigate the same complexities that have undermined nonoriginalist jurisprudence. There is a risk that originalist methods will elide these complexities and create a veneer of reform that obscures doctrinal incoherence. Similarly, there is a risk that nonoriginalists will gloss over these complexities rather than join with originalists to find a mutually acceptable path toward reform. The Article therefore proposes eight criteria for rebuilding personal jurisdiction doctrine that Justices should consider regardless of the interpretive methodology they employ. This framework can help the Court seize an opportunity to repair a broken field of constitutional law.

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INTRODUCTION

An iconic precedent is on a collision course with iconoclastic arguments. Since 1945, the United States Supreme Court's decision in

International Shoe Co. v. Washington[1] has imposed constitutional limits on personal jurisdiction in state courts. Generations of judges, lawyers, and law students have taken *Shoe* for granted, accepting its premise while debating its implications. But that premise is now in doubt. Two Justices recently invoked originalism to question *Shoe*'s interpretation of the Due Process Clause.[2] Their discontent resonates with the Court's growing inclination to reconsider due process jurisprudence from the perspective of "history and tradition."[3] This Article discusses the promise and peril of reconsidering the meaning of due process in the context of personal jurisdiction.

The Supreme Court has struggled to explain how and why the Constitution limits personal jurisdiction in state courts.[4] Basic questions lack satisfying answers. Should doctrine emphasize liberty or federalism? Is the Due Process Clause the proper foundation for limits on state power or are other clauses more relevant? What harms should limits on state power prevent and what harms should limits avoid creating?

Rather than answering those questions, opinions have relied on thinly reasoned categorical distinctions (such as "specific" versus "general" jurisdiction)[5] and ill-defined jargon (such as "purposeful availment").[6] The ensuing jurisprudence resembles a black hole: as precedents accrete into dense doctrine, the field becomes more massive and less illuminating.

Amidst this dislocation, a recent development created a moment of opportunity for the Court to jettison flawed assumptions that subvert personal jurisdiction doctrine. The Court should seize the opportunity before it fades. This Article proposes a blueprint for reform while noting pitfalls that the Court should avoid.

The opportunity for change arises from the Court's 2021 decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*.[7] The unanimous result in *Ford* masks simmering disagreement about the origins, purposes, and contours of rules governing personal jurisdiction. In particular, Justice Neil Gorsuch's concurrence in the judgment invites "future litigants and lower courts" to investigate the "original meaning"

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1. 326 U.S. 310 (1945).

2. *See infra* Part II. This Article uses the term "Due Process Clause" to refer to a provision of the Fourteenth Amendment rather than the Fifth Amendment.

3. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)).

4. This Article focuses on how the Constitution limits jurisdiction in state courts. Analogous concerns, with added complexities, are relevant in federal courts. *See generally* A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979 (2019).

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

6. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

7. 141 S. Ct. 1017 (2021).

of constitutional provisions addressing state judicial power.[8] The explicit goal of this enterprise is to reconsider *Shoe*.[9] Justice Clarence Thomas joined Justice Gorsuch's concurrence, and Justice Samuel Alito partially endorsed it.[10] Even Justices who signed the majority opinion seem unenthusiastic about the doctrinal regime that the opinion implements.[11] Lawyers have heeded Justice Gorsuch's call for originalist arguments, leading the Court to grant certiorari in another personal jurisdiction case.[12]

Originalism has often functioned as a spike strip on the jurisprudential highway. Supreme Court Justices seeking to constrain judicial discretion have deployed originalism to halt what they perceive as runaway doctrines.[13] Originalism stalls the momentum that stare decisis otherwise provides and guides development of replacement rules.[14] Justice Gorsuch's invitation to reconsider personal jurisdiction arises in this context of constraint and renewal.

Of course, critics contest whether originalism is actually as constraining as some of its proponents claim.[15] The merits of that critique are beyond the scope of my inquiry. My goal is not to assess whether originalism can ever provide a coherent account of the Constitution's meaning. That road is already well traveled.[16]

Instead of evaluating the merits of originalism, I recognize the reality that some Justices are considering how originalism might inform personal jurisdiction doctrine. I respond by engaging with these Justices'

8. *Id.* at 1039 (Gorsuch, J., concurring in the judgment).

9. *See id.* at 1036–39.

10. *See infra* Sections I.A, II.C.

11. *See infra* Section I.D (discussing how the majority acknowledged but did not resolve difficult questions in *Ford*); *see also* Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 269 (2017) (Sotomayor, J., dissenting) (criticizing the decision on which *Ford* later relied).

12. *See infra* Section II.D.

13. *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2471 (2018) (overruling precedent in part because it was not "supported by the original understanding of the First Amendment").

14. *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1864–75 (2013) (discussing the role of stare decisis in distinct strands of originalism).

15. *See, e.g.*, Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 475–81 (2016) (surveying critiques of public meaning originalism by legal theorists and historians). Some originalists have responded to these critiques by contending that originalism is viable even if it does not constrain judges. *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2215–17 (2017).

16. A list of generative scholarship would fill pages. For a recent summary of the discussion by a prominent exponent of originalism and a response by a prominent critic, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) and Eric J. Segall, *The Concession that Dooms Originalism: A Response to Professor Lawrence Solum*, 88 GEO. WASH. L. REV. ARGUENDO 33 (2020).

reasoning rather than by questioning their methodological commitments. The Article assumes that originalism can be a helpful interpretative method in some circumstances. The difficult question is whether Justice Gorsuch's opinion in *Ford* has identified one of those circumstances. The Article therefore explores how reassessing personal jurisdiction from an originalist perspective would create risks and opportunities.

The Article also does not prioritize any of originalism's competing variants, such as original public meaning, original intent, original methods, and living originalism, each of which has subvariants.[17] Nor does the Article address the nascent distinction between originalism as a "standard" for assessing "legal truth" and originalism as a "procedure" that courts use to resolve disputes about truth.[18] Justice Gorsuch invoked originalism in a general sense, focusing on "original meaning" without foreclosing consideration of additional interpretative methods and normative considerations.[19] This Article discusses originalism at that same level of abstraction. It focuses on the topics that originalists should explore rather than the precise tools that originalists should use to illuminate them. The Article therefore does not purport to offer an originalist account of personal jurisdiction. Instead, it provides a framework for considering what issues an originalist would need to address in order to generate a persuasive interpretation of the Constitution. And if originalism turns out to be unhelpful or incapable of attracting the requisite five votes, the Article considers alternative and complementary opportunities for reform.

Ford provided an alluring opportunity to reconsider precedent because it should have been easy to resolve, but convoluted doctrines made the case more difficult. Despite the Ford Motor Company's

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17. *See* Solum, *supra* note 16, at 1253; Segall, *supra* note 16, at 35. Professor Larry Solum's definition of originalism conveys the central ideas that are likely to animate reevaluation of personal jurisdiction from an originalist perspective:

> Constitutional originalism is a family of constitutional theories united by two ideas, the *Fixation Thesis* and the *Constraint Principle*. . . . The Fixation Thesis is the claim that the communicative content of the constitutional text is fixed at the time each provision is framed and ratified. . . . The Constraint Principle is a normative principle that maintains that the legal content of constitutional doctrine should be constrained by the original meaning of the constitutional text.

Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1964 (2021). However, some judges may implement a version of originalism that is less focused on the Constitution's text and more focused on its structure. *See infra* Section III.B.2.

18. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 779 (2022); *see also* Gary Lawson, *Equivocal Originalism*, 27 TEX. REV. L. &. POL. 309, 312 (2023) ("In essence, Professor Sachs has pointed to the broad distinction between originalism as a descriptive enterprise and originalism as a normative enterprise.").

19. *See infra* Section II.B.2.

extensive contacts with the two states where it was sued, its lawyers crafted a surprisingly plausible argument against jurisdiction. The Court unanimously agreed that Ford should lose because its clever exegesis of precedent defied common sense. But justifying the holding without radically overhauling precedent required the Court to dodge tricky conceptual questions that will inevitably recur. Rather than addressing the cause of doctrinal incoherence, the Court papered over the symptoms with a cosmetic patch. In contrast, Justice Gorsuch was willing to consider a more systemic cure.

Justice Gorsuch's willingness to revisit *Shoe* is bold. *Shoe* is a nearly eighty-year-old citadel of civil procedure that has been cited in at least 29,000 judicial opinions.[20] It is the foundation for a field of law that is theoretically fascinating and practically important. Questioning *Shoe* seems like heresy.

Yet in some respects Justice Gorsuch's invitation to revisit *Shoe* is not bold enough. The inquiry he proposes has a narrow focus that would overlook the root causes of current doctrine's incoherence. This approach risks replicating the Court's prior errors by decanting old wine into a new bottle with a shiny originalist label. But Justice Gorsuch wants litigants to benefit from the fruits of the intellectual labor that would go into revisiting *Shoe*. Crafting a justifiable rule will require a much broader inquiry than Justice Gorsuch suggests. Yet a broader approach risks becoming too bold because it would allow ancient limits on state power to block courts from remedying modern threats to state residents. Accordingly, originalism might be a helpful tool for rebuilding aspects of personal jurisdiction doctrine, but there are reasons to doubt its suitability as a foundation for the field.

This Article explains why reconsidering personal jurisdiction doctrine from an originalist perspective seems promising, but might not be as fruitful as proponents hope. The Article straddles two literatures: a long line of scholarship analyzing personal jurisdiction,[21] and an emerging line

20. This estimate is from Westlaw's "Keycite" feature, calculated on April 25, 2023.

21. *See, e.g.*, John Leubsdorf, *Against Personal Jurisdiction Law*, 72 DEPAUL L. REV. 65 (2022); Jonathan Remy Nash, *The Rules and Standards of Personal Jurisdiction*, 72 ALA. L. REV. 465 (2020); Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 MINN. L. REV. 679 (2020); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004); Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981).

of scholarship analyzing civil procedure from an originalist perspective.[22] It contributes to both literatures by revealing flaws in current doctrine, assessing their causes, and considering the risks and opportunities that an originalist approach may provide. It concludes by suggesting a blueprint for both originalists and nonoriginalists that is broader than what Justice Gorsuch proposes, but the minimum necessary to generate a theoretically sound replacement for current doctrine. Less sweeping incremental changes would not qualify as "originalist" in originalism's purest form, but could be a helpful compromise between the need for change and a desire for stability.

The Article has three Parts: a diagnosis of current doctrine's infirmities, an explanation of Justice Gorsuch's proposed cure, and an analysis of why that cure might be insufficient and how it can be improved. Each Part makes an original contribution to scholarship about personal jurisdiction. Collectively, these discussions chart a path for doctrinal reform at a time when reform seems attainable.

Part I explains how current doctrine transformed *Ford* from an easy case into a hard case. In particular, it contends that current precedent undervalues state interests and horizontal federalism concerns, overvalues the importance of purposeful contacts with the forum, needlessly distinguishes between suit-related and state-related contacts, and relies on a categorical rather than sliding scale approach to specific and general jurisdiction. Part II discusses why Justice Gorsuch believes that an originalist reassessment of *Shoe* might address the doctrinal flaws that complicated *Ford*. This Part explores ambiguities in Justice Gorsuch's opinion that foreshadow difficulties in constructing an originalist approach to personal jurisdiction. Part III identifies challenges that confront efforts to rebuild personal jurisdiction doctrine on a more theoretically coherent foundation. It focuses on the indeterminacy of the Due Process Clause, the potential relevance of other constitutional clauses, and the importance of situating personal jurisdiction in the broader context of horizontal federalism, which governs the relationship between coequal states in the federal system. A common theme uniting these challenges is that an originalist inquiry into personal jurisdiction must navigate the same complexities that have undermined nonoriginalist jurisprudence. There is a risk that originalist methods will elide these complexities and create a veneer of reform that masks doctrinal incoherence. Similarly, there is a risk that nonoriginalists will continue to gloss over these complexities rather than joining with originalists to find a mutually acceptable path toward reform. An agenda for reform must

22. *See* Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941, 945 (2023) (noting a "growing stream of recent originalist scholarship").

therefore identify factors that Justices should consider regardless of the interpretive methodology they employ.

Doctrine governing personal jurisdiction in state courts would benefit from reassessment. But that reassessment should consider all aspects of the problem, not just a narrow slice. And because personal jurisdiction doctrine is itself a narrow slice of horizontal federalism jurisprudence, the reassessment should include analogous doctrines. Originalism might provide useful insights for this reassessment, but the inquiry will not be as tidy as proponents may assume. Moreover, if the Court asks the wrong questions, the answers will be no more satisfying than the doctrines they displace. On the other hand, Justice Gorsuch's invitation to rethink personal jurisdiction from first principles provides a welcome opportunity to begin rebuilding a broken field of constitutional law.

I. CONTEXT FOR THE INVOCATION OF ORIGINALISM IN *FORD*: FLAWED DOCTRINES THAT TRANSFORMED AN EASY CASE INTO A HARD CASE

Personal jurisdiction doctrine relies on tests that are arbitrary and lack a clear guiding theory. Ford's skilled lawyers gamed the tests to create a colorable argument against jurisdiction. But their gambit backfired. Not only did Ford lose, its aggressive position inadvertently exposed weaknesses in current doctrine. That revelation prompted Justice Gorsuch to consider whether corporations should have fewer due process rights.[23] This is a development that Ford probably regrets. Ford's decision to seek certiorari thus may have replicated the Erie Railroad's ill-fated decision to seek certiorari in *Erie Railroad Co. v. Tompkins*.[24] In both cases, a large corporation sought to rely on precedent that lower courts had allegedly misapplied. Erie's petition led to the overruling of that precedent, which ultimately harmed the railroad.[25] Ford's petition may have a similar effect, depending on whether and how Justice Gorsuch's concurrence gains traction.

This Part does not discuss originalism, which may be surprising in an Article with "Originalists" in the title. The omission is deliberate. One cannot understand how originalism might—or might not—fix personal jurisdiction doctrine unless one understands what is broken. This Part focuses on what is broken and why those flaws exist. The discussion lays a foundation for Part II, which considers what Justice Gorsuch is challenging under the banner of originalism, and Part III, which considers

23. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring in the judgment) ("[I]t seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.").

24. 304 U.S. 64 (1938).

25. *See* TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 146 (1981) ("For attorneys faced with the prospects of defending nonresident corporations in local courts . . . [*Erie*] was bad news indeed.").

how any challenge to personal jurisdiction doctrine—whether originalist or not—should unfold.

Section I.A outlines the doctrinal question that *Ford* presented. The parties in *Ford* agreed that a suit "must arise out of or relate to the defendant's contacts with the forum" to warrant specific jurisdiction.[26] But they disagreed about whether the relatedness rule required a causal link between the defendant's contacts and the suit.[27] Section I.B explains why *Ford* should have been an easy case if one focuses on constitutional values rather than the nuances of precedent. Ford could not articulate any plausible reason why jurisdiction offended an important constitutional value. Section I.C identifies the flawed aspects of modern doctrine that transformed an easy case into a hard case. This Section explores rules discounting the importance of state interests and horizontal federalism concerns, requiring purposeful contacts directed at the forum, distinguishing suit-related from non-suit-related contacts, and rejecting a sliding scale approach to specific and general jurisdiction. These rules enabled Ford's lawyers to cobble together an argument that was grounded in precedent but divorced from principle. Finally, Section I.D discusses how the Court resolved the dispute about relatedness with a cosmetic patch that treats a symptom of dysfunctional precedent without remedying the cause.

In sum, this Part shows that *Ford* is fascinating both in isolation and in the broader context of personal jurisdiction. *Ford* is a pivotal link in a chain of jurisprudence that reveals mistakes of the past and foreshadows disputes in the future.

A. Ford*'s Facts*

The *Ford* decision addressed two consolidated suits against the Ford Motor Company arising from car accidents in Montana and Minnesota.[28] Both suits share materially similar facts. To avoid duplication, this Article focuses on the Montana suit.

Ford designed the Ford Explorer sport utility vehicle in Michigan and manufactured it in Kentucky.[29] It sold Explorers throughout the United States, including in Montana.[30] To encourage these sales, Ford advertised nationally, including in Montana.[31] Ford also sought to enhance the value of its Explorers by facilitating a nationwide market for used vehicles, including in Montana.[32] Thirty-six dealers affiliated with Ford sold new

26. *Ford*, 141 S. Ct. at 1025 (internal quotation marks and citation omitted).
27. *See id.* at 1026.
28. *See id.* at 1023.
29. *See id.*
30. *See id.*
31. *See id.* at 1022–23.
32. *See id.* at 1028.

and used Explorers in Montana, Ford provided repair services in Montana, and Ford sold replacement parts in Montana.[33]

At some point, Ford sold an Explorer in Washington.[34] That vehicle later entered the secondary market and was eventually purchased in Montana by a Montana resident.[35] The purchaser's daughter, Markkaya Jean Gullett, was also a Montana resident.[36] In 2015, Gullett was driving the Explorer in Montana when it lost stability and rolled over into a ditch.[37] Gullett died at the scene.[38] Her estate sued Ford in Montana alleging design defects, negligence, and failure to warn.[39]

Ford contested personal jurisdiction because its contacts with Montana were not the "proximate-cause" of the plaintiff's injury and therefore were not "related to" the suit.[40] The conduct underlying the design defect claims occurred in Michigan or Kentucky, and the conduct underlying the failure to warn claim occurred in Washington. Ford conceded that jurisdiction would be proper in those three states.[41] But Ford argued that Montana lacked jurisdiction because Ford's conduct in Montana did not deceive the plaintiff or cause the accident.[42]

The plaintiff attacked Ford's proposed causation standard and rebutted Ford's characterization of the record. The plaintiff first contended that due process did not require causation.[43] Instead, purposeful contacts with the forum were sufficient if they were merely related to the suit.[44] Alternatively, the plaintiff argued that even if causation was required, Ford's conduct in Montana at least partially caused the plaintiff's injury.[45] Ford's local advertising and dealer services promoted a favorable impression of Explorers.[46] This conduct in Montana

33. *See* Brief of Respondents at 6–7, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369).

34. *See Ford*, 141 S. Ct. at 1023.

35. *See* Brief of Respondents, *supra* note 33, at 8.

36. *See id.* at 7–8.

37. *See Ford*, 141 S. Ct. at 1023.

38. *See id.*

39. *See id.*

40. Brief for Petitioner at 11, 43, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369).

41. *See* Reply Brief for Petitioner at 2, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369) ("The State of first sale is a proper forum . . . ."); Transcript of Oral Argument at 22, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369) ("[Y]ou can bring it where the vehicle was designed, Michigan; where the vehicle was assembled, Kentucky . . . .").

42. *See* Brief for Petitioner, *supra* note 40, at 46–47.

43. *See* Brief of Respondents, *supra* note 33, at 1, 12.

44. *See id.* at 10.

45. *See id.*

46. *See id.* at 24.

facilitated the secondary market transaction in Montana and obscured the vehicle's defects.[47]

Ford failed to convince the Montana courts and the U.S. Supreme Court.[48] The Supreme Court rejected Ford's challenge to jurisdiction for reasons discussed below in Section I.D. The holding was unanimous, but the reasoning was not. Only five Justices signed the majority opinion,[49] and one of those—Justice Stephen Breyer—has retired. Three Justices concurred only in the judgment: Justice Alito wrote a separate opinion, and Justice Gorsuch wrote another that Justice Thomas joined.[50] Justice Amy Coney Barrett did not participate.[51] Depending on the views of Justices Barrett and Ketanji Brown Jackson, *Ford*'s vitality may be fleeting.

B. Ford *Should Have Been an Easy Case Because Jurisdiction Did Not Offend Any Apparent Constitutional Principle*

Both Ford and the plaintiff focused their arguments on the nuances of personal jurisdiction doctrine. That emphasis on precedent was sensible because the parties anticipated that Justices would operate within the constraint of stare decisis.

Scholarship has the luxury of a broader perspective. Accordingly, pretend for a moment that you are not aware of the Court's nuanced precedents governing personal jurisdiction. Instead, try to imagine what the facts in *Ford* might look like to a nonexpert who is familiar with the federal system, but has not been indoctrinated with *Shoe* and its progeny. From that perspective, *Ford* is an easy case.

In *Ford*, one of the largest corporations on Earth—with $134 billion in annual revenue[52]—asked its home nation's highest court to enforce the nation's founding document against a state. An observer considering this solemn claim might ask: What is the serious problem that the Constitution must solve? The answer is that the suit against Ford in Montana does not seem to raise any problem of constitutional magnitude. To see why, consider eight potential problems that are not present.

First, the problem is not that Montana lacked a legitimate interest in providing a forum. Montana had a clear interest: Ford's misconduct

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47. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1033 (Alito, J., concurring in the judgment) (observing that the "relationship between Ford's activities and these suits . . . is causal in a broad sense of the concept").

48. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 443 P.3d 407, 411 (Mont. 2019); *Ford*, 141 S. Ct. at 1022.

49. *Ford*, 141 S. Ct. at 1022.

50. *See id.*

51. *See id.*

52. *See* FORTUNE, *Global 500: Ford Motor Company Profile* (2022), https://fortune.com/company/ford-motor/global500/ [https://perma.cc/QBQ8-3ZWN] (noting that Ford was the world's forty-seventh largest company by revenue as of 2021).

allegedly killed a Montana resident on a Montana road. Moreover, the Montana resident died while driving a vehicle model that Ford was still selling in Montana in both the new and used markets. Given that "[m]otor vehicles are dangerous machines" that are "attended by serious dangers to persons and property,"[53] Montana had a "significant interest[]" in "enforcing [its] own safety regulations."[54] Montana likewise had an interest in opening its courts to its own citizens seeking redress for local injuries. The Supreme Court has repeatedly recognized this remedial interest in several contexts.[55] Moreover, basic principles of due process acknowledge the importance of ensuring access to local remedies tied to a local injury.[56]

Second, the problem is not that Montana overreached its role as a coequal state in the federal system. To the contrary, thirty-nine states—led by Texas's Republican Attorney General and Minnesota's Democratic Attorney General—filed an amicus brief endorsing Montana's assertion of jurisdiction.[57] The brief observed that "an injury

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53. Hess v. Pawloski, 274 U.S. 352, 356 (1927).

54. *Ford*, 141 S. Ct. at 1030.

55. *See, e.g.*, Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 643 (1985) ("That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride."); Belknap, Inc. v. Hale, 463 U.S. 491, 512 (1983) (noting in the context of labor relations "the interest of the State in providing a remedy to its citizens for breach of contract"); Martinez v. California, 444 U.S. 277, 282 (1980) (extolling state's "paramount" interest "in fashioning its own rules of tort law"). Montana's constitution enshrines a broader version of this interest in providing local remedies for local injuries. *See* MONT. CONST. art. II, § 16 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.").

56. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005) (contending that the Due Process Clause requires states to provide "a body of law that empowers individuals to seek redress against persons who have wronged them"). In Europe, "due process" supports a "fair trial principle" that "protects the plaintiff against the unjustified denial of jurisdiction." Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1053 (2006) (emphasis omitted). Justice Black seems to have endorsed this broader European view, but without framing it as such. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 323 (1945) (opinion of Black, J.) (contending that denying jurisdiction in the circumstances of *Shoe* would "depriv[e] a State's citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation"); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.") (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)); Lafayette Ins. Co. v. French, 59 U.S. 404, 407 (1855) (holding that "[i]t cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum" against a nonresident defendant who breached a contract with an Ohio resident).

57. *See* Brief for Minnesota et al. as Amici Curiae in Support of Respondents at 2, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369). No state supported Ford.

within the forum to a forum resident makes the forum State's interest particularly strong."[58]

Third, the problem is not that Montana undermined national interests. The United States filed an amicus brief supporting Ford that tried to rely on national interests but could not articulate an argument. The United States invoked an "interest in preventing risks to interstate and foreign commerce posed by state courts' unduly expansive assertions of jurisdiction."[59] This three-line reference to federal interests appeared on page two of the brief and was never mentioned again. The United States did not even try to explain how Montana's exercise of jurisdiction over Ford undermined commerce, let alone to a degree that violated due process. A negative effect on commerce was implausible because Ford directly sold Explorers in Montana. Those local sales entangled Ford with Montana tort law and Montana courts without raising any concerns about interstate commerce.[60] Expanding that entanglement to include a few Explorers sold outside the state might in theory have a marginal effect on commerce. But that effect defies quantification and seems vanishingly small.[61] The United States also did not consider that the Dormant Commerce Clause would be a stronger foundation than the Due Process Clause for an argument about protecting commerce, as this Article suggests in Part III.

Fourth, the problem is not that jurisdiction in Montana imposed a significant burden on the defendant. Ford wisely did not attempt such an extravagant argument. When Justice Breyer asked Ford's counsel "what's unfair" about being sued in Montana, counsel responded "even if you don't think [there is] a significant burden on Ford because Ford's a big company, the rule you'll announce in this case applies to much smaller manufacturers."[62] This response was deft sleight of hand. The relevant question was not whether jurisdiction over other defendants would be burdensome on other facts. Instead, the relevant question was whether jurisdiction over Ford would be burdensome on the present facts.[63] Ford never answered that question.

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58. *Id.*

59. Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Ford*, 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369).

60. *See id.* at 26 (endorsing jurisdiction in the state where a car is first sold).

61. The analysis might differ if Ford offered distinct versions of the same model tailored to different state markets. In that scenario, applying Montana law to a hypothetical "Washington Model" might burden interstate commerce. There is no evidence that state-specific tailoring occurred in *Ford*.

62. Transcript of Oral Argument, *supra* note 41, at 15–16.

63. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (noting that the due process reasonableness factors apply on a case-by-case basis).

Ford avoided the question of burdens in part because it routinely defends itself in civil litigation nationwide.[64] There is no evidence that slight variations in the allocation of cases across the states would impose any burden on Ford, let alone a constitutionally significant burden. Nor is there evidence that allowing jurisdiction in cases such as *Ford*—which addressed a robust nationwide secondary market for expensive items—will have a noticeable effect on the national distribution of cases. Presumably, many multistate transactions will cancel each other out and will therefore not affect case distributions. If the migration of a product from State *X* to State *Y* can authorize jurisdiction in State *Y*, then the migration of a product from State *Y* to State *X* can authorize jurisdiction in State *X*. Allocation concerns might arise only if the entry and exit of products is asymmetrical in *X* or *Y*, or if plaintiffs with a choice between *X* and *Y* systematically prefer one over the other. Ford did not attempt to quantify that risk. The absence of any apparent burden led Justice Alito, who often sympathizes with business defendants,[65] to uphold jurisdiction and ask rhetorically: "Can anyone seriously argue that requiring Ford to litigate these cases in Minnesota and Montana would be fundamentally unfair?"[66]

Fifth, the problem is not that Ford had a special reason to avoid Montana. One can imagine situations where a corporation structures its conduct to bypass a particular state that threatens its interests. For example, perhaps a state has unique laws with which the corporation does not want to comply, imposes taxes that the corporation does not want to pay, or operates courts that the corporation perceives as biased. Corporations might carefully steer clear of these states and would want courts to respect that planning process. Assuming that such concerns have weight,[67] Ford could not raise them. Ford had thirty-six dealers in Montana, advertised in Montana, and offered repair and financial services in Montana.[68] This enthusiastic embrace of Montana is inconsistent with an effort to minimize Ford's jurisdictional footprint.

Sixth, the problem is not that Ford never consented to suit in Montana. The Court sometimes invokes "consent" as a due process value, such that

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64. *See* FORD MOTOR CO., 2021 ANNUAL REPORT 28–29 (2021), https://s201.q4cdn.com/693218008/files/doc_financials/2021/ar/Ford-2021-Annual-Report.pdf [https://perma.cc/8G6J-9H28] (summarizing common fields of litigation, including products liability, consumer protection, and asbestos).

65. *See* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013) (comparing Justice Alito to other Justices).

66. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1032 (Alito, J., concurring in the judgment).

67. *See* Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 152–54 (2010) (criticizing the notion that narrow limits on jurisdiction are necessary to facilitate planning).

68. *See supra* text accompanying note 33.

a forum lacks power over a nonresident whose conduct does not manifest implied consent to jurisdiction.[69] Emphasizing consent is misleading. As I noted in a related context, "[t]he existence of 'consent' masquerades as a fact question but is really a policy question that requires an antecedent theory of what factors justify the assertion of state power. Once one develops that antecedent theory, the fiction of consent becomes superfluous."[70]

For example, consider whether Ford's thirty-six local dealerships manifested consent to jurisdiction in Montana. To answer that question, we would need a theory about whether states have adjudicative power over nonresident corporations whose physical presence in the forum is only tangentially connected to a suit. If states have such power, then opening the dealerships manifested consent to suit. If states lack such power, then opening the dealerships did not manifest consent to suit. The question of power precedes the question of implied consent. Yet once we know whether power exists, we no longer have a reason to consider consent.

Similar reasoning explains why there should be no issue about whether Ford manifested "submission"[71] to Montana's authority or established an "affiliation"[72] with Montana. These concepts are euphemisms for consent and therefore require an antecedent theory of state power. If a state has power, then actors who violate an exercise of that power submit to the consequences of the violations whether they wanted to or not. They become affiliated with the state based on their conduct rather than conscious or fictional recognition of state authority.

Seventh, the problem is not that Ford's contacts with Montana were too limited to satisfy *any* form of due process inquiry. The Due Process Clause governs both legislative and adjudicative jurisdiction. The test for legislative jurisdiction sets a low bar for applying state law.[73] Montana could have applied local product liability law to the plaintiff's claim

69. *See* Shaffer v. Heitner, 433 U.S. 186, 202 (1977) (characterizing "implied consent" as a "fiction[]"); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 901 (2011) (Ginsburg, J., dissenting) (contending that the plurality relied on "consent" as an "animating concept").

70. Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 430 (2015) [hereinafter Erbsen, *Local Effects*]; *see also* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304 (1989) ("[T]heories of tacit consent assume almost exactly what they set out to prove.").

71. *Nicastro*, 564 U.S. at 880 (plurality opinion).

72. Walden v. Fiore, 571 U.S. 277, 286 (2014).

73. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion) (holding that a state may apply its law when it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"); *see also id.* at 313–20 (plurality opinion) (applying the test to uphold application of Minnesota law to an insurance policy issued in Wisconsin to a Wisconsin resident who died after an accident in Wisconsin involving other Wisconsin residents; the insured worked in Minnesota and his widow moved to Minnesota after the accident).

against Ford without violating the Due Process Clause.[74] Thus, Ford was in effect arguing that Montana can regulate Ford's out-of-state conduct, but cannot compel Ford to appear in a suit arising from that regulated conduct. That is a dubious line to draw. There is a strong argument that a state's legislative and adjudicative jurisdiction should be coextensive when jurisdiction does not unduly burden the defendant.[75]

Finally, the problem is not that the plaintiff was somehow gaming the system to Ford's disadvantage. Opportunistic behavior by plaintiffs is probably an insufficient basis for rejecting personal jurisdiction.[76] But even if opportunism was relevant, there was no opportunism in *Ford*. The plaintiff was the estate of a Montana resident who died in Montana from injuries sustained in Montana.[77] There is no sense in which choosing to sue in Montana was abusive. On the other hand, Ford was gaming the system by creating obstacles to suit, knowing that if it could "escape jurisdiction," it might also "escape liability."[78]

The prior paragraphs reject eight potential constitutional problems with Montana's assertion of jurisdiction. So what is left? What constitutional values did Montana offend? If Montana has a legitimate interest that other states support, there is no countervailing federal interest, the plaintiff is behaving reasonably, and Ford is not unduly burdened, where is the constitutional problem? The purported problem emerges only when we abandon the perspective of a curious nonexpert and start closely examining doctrinal nuances. The fact that these nuances complicate an easy case raises a question about whether the extra complexity serves a defensible purpose.

C. Ford *Became a Hard Case Because It Arose at the Intersection of Four Flawed Strands of Personal Jurisdiction Doctrine*

The prior Section contends that Ford should not have been able to mount a serious challenge to jurisdiction in Montana. Yet the case went all the way to the Supreme Court, the United States filed an amicus brief

74. *Cf.* RESTATEMENT (SECOND) CONFLICT OF LAWS § 146 cmt. e (AM. L. INST. 1971) (noting that the "law of the state of injury has usually been applied to particular issues in a case although the conduct occurred elsewhere," including in product liability actions). It is not clear from the record that Montana actually would have applied local law under its choice of law rules.

75. *See* Erbsen, *Local Effects*, *supra* note 70, at 432–35; Joseph William Singer, *Hobbes & Hanging: Personal Jurisdiction v. Choice of Law*, 64 ARIZ. L. REV. 809, 815–16 (2022) ("A state's adjudicative jurisdiction should not be narrower than its legislative jurisdiction.").

76. *Compare* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 779–80 (1984) (upholding personal jurisdiction despite the plaintiff's blatant forum-shopping), *with* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1031 (suggesting that jurisdiction is more appropriate when plaintiffs sue in the "natural State" and are not "forum-shopping").

77. *See Ford*, 141 S. Ct. at 1023; Brief of Respondents, *supra* note 33, at 8.

78. Brief for Minnesota et al., *supra* note 57, at 30.

supporting Ford, and the Court did not produce a unanimous opinion. There must be more to Ford's position than meets the eye.

Ford was more complicated than it should have been because doctrine limiting state power to provide a forum is undertheorized and overformalized. The Court treats factors that should be important as marginal and treats factors that should be unimportant as dispositive. Four of these doctrinal faults coalesced to elevate Ford's arguments. Ford tried to exploit the Court's: (1) uncertainty about the role of state interests and horizontal federalism in the jurisdictional calculus; (2) requirement of purposeful contact with the forum; (3) distinction between suit-related and state-related contacts; and (4) rejection of a sliding scale test for cases straddling the boundary between specific and general jurisdiction.

This Section explains how those four aspects of doctrine breathed life into Ford's otherwise weak objections to jurisdiction. *Ford* requires extending two judicial aphorisms: "hard cases make bad law" and "easy cases make bad law."[79] Here, bad law makes an easy case hard.

1. Erratic Focus on State Interests and Horizontal Federalism Concerns

Section I.B explained that an ostensibly strong argument for jurisdiction in Montana is that Montana had an interest in providing a forum, and this interest was consistent with Montana's status as a coequal state in the federal system. The problem is that current doctrine acknowledges but does not focus on state interests and federalism. The Court therefore could not primarily rely on the strongest argument for jurisdiction in Montana without altering precedent.

The Court's weighing of state interests in the jurisdictional calculus has been haphazard. The Court sometimes expressly cites state interests as a justification for upholding jurisdiction. For example, the Court has extolled the importance of allowing states to provide a local forum in suits against nonresidents regarding local workers' compensation taxes,[80] insurance contracts,[81] and libel laws.[82] In contrast, the Court sometimes concludes that seemingly compelling state interests are insufficient to warrant jurisdiction. In *Kulko v. Superior Court*, the Court rejected jurisdiction when a mother living in California filed an action in

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79. O'Bannon v. Town Ct. Nursing Ctr., 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in the judgment).

80. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 321 (1945).

81. *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 649 (1950) ("The Due Process Clause does not forbid a state to protect its citizens from . . . injustice.").

82. *See* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 777–78 (1984) (stressing "the combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States in the application of the 'single publication rule'").

California seeking child support from her nonresident ex-husband.[83] The opinion concluded that the father's desire to avoid traveling to California outweighed California's interest in requiring him to support his children living in California.[84] In *J. McIntyre Machinery, Ltd. v. Nicastro*, a machine in New Jersey severed four of a worker's fingers.[85] The worker sued the manufacturer in New Jersey.[86] A plurality of the Court dismissed New Jersey's interests as mere "expediency."[87] Other cases amplify confusion by ignoring state interests entirely, even when a dissenting opinion relies on state interests. Examples include decisions rejecting jurisdiction in suits about a local car accident[88] and a local estate.[89]

The uncertain status of state interests mirrors the uncertain relevance of federalism. Early decisions acknowledged the importance of federalism.[90] The Court then backtracked,[91] and then reversed course again.[92] Federalism is now clearly relevant,[93] but its role is uncertain.[94]

Accordingly, precedent tied the Court's hands in *Ford*. The Court could consider state interests and federalism. But the Court could at most observe that these factors were important in an undefined, general sense that did not foreclose a more elaborate analysis of other factors. *Ford* ultimately adopted this equivocal approach. The Court acknowledged

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83. *See* Kulko v. Super. Ct., 436 U.S. 84, 88 (1978).

84. *See id.* at 100–01.

85. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 894 (2011) (Ginsburg, J., dissenting).

86. *See id*. at 878 (plurality opinion).

87. *Id.* at 887.

88. *Compare* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (failing to mention Oklahoma's interest in providing a remedy for a local accident), *with id.* at 305 (Brennan, J., dissenting) ("The State has a legitimate interest in enforcing its laws designed to keep its highway system safe . . . .").

89. *Compare* Hanson v. Denckla, 357 U.S. 235 (1958) (failing to mention Florida's interest in administering a local estate), *with id.* at 259 (Black, J., dissenting) (emphasizing Florida's interest).

90. *See World-Wide Volkswagen*, 444 U.S. at 294 (stating that the Due Process Clause acts as an "instrument of interstate federalism"); Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945) (evaluating jurisdiction "in the context of our federal system of government").

91. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) ("The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, 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."); *Nicastro*, 564 U.S. at 884 (plurality opinion) ("Personal jurisdiction, of course, restricts 'judicial power not as a matter of sovereignty, but as a matter of individual liberty' . . . .") (quoting *Bauxites*, 456 U.S. at 702).

92. *See* Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 263 (2017) (citing *World-Wide Volkswagen* but not *Bauxites*).

93. *See infra* Section I.D.

94. *See* Linda Sandstrom Simard et al, Ford*'s Hidden Fairness Defect*, 106 CORNELL L. REV. ONLINE 45, 47 (2020) (noting that "the Court has still failed to articulate a consistent explanation of the underlying interests" that tests promote).

that Montana's interests were "significant" and recognized that "interstate federalism" was important.[95] But these observations came in a single paragraph at the end of the Court's analysis.[96] They appeared to be explanations for why a result reached on other grounds was not unfair.[97] Thus, consideration of state interests and federalism was not central to the due process inquiry in *Ford*. This marginalization enabled Ford to frame the jurisdictional inquiry in a way that made its extravagant position seem plausible.

Accordingly, Ford's position would have been weaker if the Court had been able to focus more directly on state interests and federalism. As Part III discusses, Justice Gorsuch's willingness to reconsider precedent creates room for arguments that state interests and federalism should be the foundation of personal jurisdiction analysis rather than an ambivalently invoked component.

2. Needless Emphasis on Purposeful Contacts

The prior Section showed that the Court marginalizes arguments that favor states. This Section shows that the Court emphasizes arguments that favor defendants.

A central factor in modern personal jurisdiction doctrine is what I have termed "volitional localization."[98] This concept encompasses tests that ascribe a geographic dimension to a defendant's decisions.[99] Courts ask where a defendant "purposefully directed" its conduct,[100] whether a defendant "reasonably anticipate[d]" entangling itself with a particular state,[101] and whether a defendant focused its conduct on "the forum State itself" as opposed to "persons who reside there."[102] These inquiries presume that respecting liberty under the Due Process Clause requires finding an "affiliation" with the forum state.[103] Jurisdiction cannot exist under current doctrine if a defendant's choices do not establish a connection to the forum.[104]

A hypothetical scenario illustrates why linking jurisdiction to volitional localization is not sensible. Suppose that a startup company in

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95. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1030 (2021).

96. *See id.* (prefacing these statements with "Finally, . . .").

97. *See id.*

98. Erbsen, *Local Effects*, *supra* note 70, at 392–93.

99. *See id.* at 393.

100. Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984).

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

102. Walden v. Fiore, 571 U.S. 277, 285 (2014).

103. *Id.* at 286.

104. *See* Richard D. Freer, *From Contacts to Relatedness: Invigorating the Promise of "Fair Play and Substantial Justice" in Personal Jurisdiction Doctrine*, 73 ALA. L. REV. 583, 588 (2022) (summarizing precedent to mean that "until a purposeful contact is found, a court simply cannot consider factors of fair play and substantial justice" or "the interest of the forum").

Michigan manufactures a prototype electric car using a battery that it knows is prone to spontaneous combustion. The manufacturer is desperate to appease investors. It therefore puts the prototype into production despite the danger, reasoning that it will fix the flaw in later models. To focus on building cars, the manufacturer outsources distribution to a third party and provides no input on where cars will be sold. One of the cars is sold in Montana, catches fire, and kills a family. In this scenario, the manufacturer has no purposeful contacts with Montana: it never thought about Montana, let alone voluntarily affiliated itself with Montana. Yet it is difficult to see why that lack of volitional localization should matter if the plaintiff sues the manufacturer in Montana. The manufacturer knew that its cars might cause harm *somewhere* in the United States, and Montana is where that somewhere turned out to be. Montana's interest in protecting its residents from harm arises from the harm itself, rather than from ascribing a fictional locus to the defendant's reckless decisionmaking process. If jurisdiction in the hypothetical suit in Montana would be burdensome, then a separate "reasonableness" inquiry can address that problem.[105] Likewise, if jurisdiction in Montana would undermine national interests, then a separate preemption inquiry would be necessary.[106] Otherwise, the suit should proceed in Montana despite the lack of volitional localization.

A similar argument would have been sensible in the *Ford* case. Ford allegedly manufactured Explorers knowing that they might roll over.[107] It did not know where they would roll over. The states where rollovers eventually occur have a remedial interest that is no different from the remedial interest of states confronted with combustible batteries. The relevant question in a suit against Ford should be whether the forum state has a legitimate reason to adjudicate, rather than whether Ford metaphorically affiliated itself with the state.[108] Again, if litigation in

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105. *See* Maggie Gardner et al., *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 476–77 (2022) (discussing how the Court's "reasonableness" factors protect defendants).

106. *See* Brief of Respondents, *supra* note 33, at 6.

107. A complication is that early in a case when jurisdiction is an issue, the Court confronts unproven allegations that a defendant risked entangling itself with other states due to misconduct. If the misconduct is not proven, then in hindsight the predicate for jurisdiction may appear weak. For analysis of this problem, see Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 1000 (2006) and Erbsen, *Local Effects*, *supra* note 70, at 448.

108. Accepting this argument does not necessarily require overruling *World-Wide Volkswagen Corp. v. Woodson*, which held that Oklahoma lacked jurisdiction over two corporations that sold an allegedly defective car in New York which later caught fire in Oklahoma. *See* 444 U.S. 286, 288–91 (1980). Depending on how one frames justifications for product liability law, states may have a greater interest in regulating nonresident manufacturers than they do in regulating nonresident dealers. *But cf.* Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1554 (2012) (noting that jurisdictional rules requiring plaintiffs to sue in a distributor's home state might incentivize manufacturers to use distributors in states

Montana would be unduly burdensome or undermine national interests, then separate inquiries can address those concerns.

A complicating factor is that inquiries into state interests and volitional localization partially overlap. For example, the intensity of a state's interest might vary with the extent to which an alleged wrongdoer targeted a state. If so, then the jurisdictional inquiry will be more difficult than the foregoing examples suggest. Nevertheless, treating volitional localization as a subset of a state interest inquiry would give states more flexibility than the current approach, which allows the lack of volitional localization to overcome strong state interests.

Even if volitional localization is important, Ford still faced an uphill battle because of its extensive contacts with Montana aside from the incidental location of the plaintiff's accident. To avoid that problem, Ford relied on yet another nuanced strand of precedent. A corollary to the volitional localization requirement is a rule conditioning personal jurisdiction on a relationship between the suit and the defendant's contacts with the forum. The next Section discusses Ford's reliance on this flawed rule.

3. Inexplicable Distinctions Between Suit-Related and State-Related Contacts

To "narrow the class of claims over which a state court may exercise specific jurisdiction," the Supreme Court requires a "connection" between the suit and the defendant's contacts with the forum.[109] In theory, if a defendant has 100 distinct purposeful contacts with the forum, but only one is "related" to the suit, then courts ignore the other ninety-nine. Thus, state-related contacts do not matter if they are not also suit-related. Ford invoked this quirk to minimize the jurisdictional consequences of its large footprint in Montana.

The relatedness requirement relies on a distinction between "specific" and "general" jurisdiction.[110] If a defendant has "continuous and systematic" contacts with a state that render it "at home," then the state has "general jurisdiction" over all suits against the defendant.[111] But if

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with suboptimal consumer protection laws). There is a separate concern that car dealerships should not be burdened by suits in distant states with which they would not have anticipated contact. However, the low probability of a distant suit will have a correspondingly low effect on premiums for liability insurance, and the insurer rather than the dealer will bear most of the burden of distant litigation.

109. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021) (citation omitted). This is one of three nexus requirements that doctrine intermingles. There must be a connection between: (1) the defendant's conduct and the suit; (2) the defendant's conduct and the forum; and (3) the forum and the suit. *See* Scott Dodson, *Personal Jurisdiction, Comparativism, and* Ford, 51 STETSON L. REV. 187, 193–94 (2022).

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

111. *Id.*

the defendant's contacts with the state are not as robust, then the state may exercise only "specific jurisdiction."[112] For specific jurisdiction to satisfy the Court's understanding of due process, there must be a nexus between the suit and the defendant's contacts with the state. In other words, contacts with the state matter only if they "arise out of or relate to" the suit.[113]

The practical effect of the relatedness requirement is that defendants sometimes have a due process right to avoid a particular *suit* rather than a particular *state*. To see how this rule operates, imagine two corporations: InsiderCo and OutsiderCo. InsiderCo has a factory in Pennsylvania but is incorporated and headquartered elsewhere. OutsiderCo has no contacts with Pennsylvania. If sued in Pennsylvania, InsiderCo and OutsiderCo each have a different flavor of due process objection. OutsiderCo would argue that due process creates blanket immunity from Pennsylvania's power, such that OutsiderCo can never be sued in Pennsylvania. However, InsiderCo cannot invoke blanket immunity. Due process allows some litigation against InsiderCo in Pennsylvania because of its local factory. InsiderCo can argue only that it has limited immunity from Pennsylvania's power. Under current precedent, the existence of limited immunity depends on whether the suit is related to InsiderCo's factory.

Framing the relatedness requirement in terms of limited immunity from state power highlights an often overlooked question. Suppose that a state has a strong interest in providing a forum because an injury occurred in the state and the state can apply its substantive law to address out-of-state misconduct. Once we recognize that the state's interest creates sufficient power to overcome limited immunity if the defendant's local contacts are related, why would immunity still be available if contacts are unrelated? Why do the strong state interests in providing a forum when the defendant has related contacts not also justify providing a forum when the defendant has the same or greater amount of unrelated contacts?

The Court has never raised this question about relatedness, let alone answered it. Pre-*Shoe* caselaw did not need a relatedness requirement because doctrine focused on presence in the forum rather than the nature of the defendant's contacts.[114] *Shoe* switched focus from presence to contacts. Dicta in *Shoe* suggested that only suit-related contacts could

112. *Id.*

113. Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 262 (2017) (alterations and citation omitted).

114. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 614–15 (1988) ("Prior to the twentieth century, English and American courts justified almost all exercises of jurisdiction in terms of the sovereign's relationship with the defendant or his property, rather than in terms of the character of the suit itself. . . . Courts did not consider themselves to be exercising general jurisdiction; they simply did not regard the character of the dispute as relevant to personal jurisdiction analysis.").

establish specific jurisdiction but did not explain why the relatedness requirement was necessary. The *Shoe* Court stated that jurisdiction "can, in most instances, hardly be said to be undue" when "a corporation exercises the privilege of conducting activities within a state" and thus incurs correlative "obligations" that "arise out of or are connected with the activities within the state."[115] That observation is sensible for the subset of cases where the defendant has local suit-related contacts. But nothing in that defense of jurisdiction when contacts are related explains why jurisdiction should not exist when contacts are unrelated, if other factors support jurisdiction and jurisdiction is not burdensome. Post-*Shoe* caselaw has not provided the missing explanation.

A potential justification for the relatedness requirement might be what commentators have called the "anti-busybody principle."[116] This idea cannot salvage the current relatedness requirement, but could replace it. The insight behind the anti-busybody principle is that states have no legitimate interest in providing a forum for suits that are not meaningfully related to the state.[117] The theory thus reframes relatedness in a subtle but important way. Under the anti-busybody principle, a suit must relate to conduct that occurred in or affected the forum state. But under current doctrine, a suit must relate to the defendant's contacts with the state. That subtle distinction between a state's contacts *with the suit* and a state's contacts *with the defendant* often will not matter. In most cases, plaintiffs allege facts that tie both the suit and the defendant to the state. But the distinction between suit-contacts and defendant-contacts will matter in some cases because defendants can cause harm in a state despite lacking a direct connection to the state. The following hypothetical scenario illustrates the problem.

Suppose that a supplier to Chrysler and Boeing operates two factories in Florida: one sells automobile engine components that Chrysler installs in Michigan, and one sells airplane wing components that Boeing installs in Washington. The supplier has no other contacts with Washington. A defective engine component causes a Chrysler automobile to crash in Washington, injuring a Washington resident who sues the supplier in Washington. The suit would relate to Washington because of the local accident. However, the suit probably would not relate to the supplier's extensive contacts with Boeing in Washington. After all, the suit in Washington is about car engines, but the supplier's connection to Washington is linked to airplane wings. The plaintiff could contend that selling parts for airplane wings is somehow linked to selling parts for car engines—perhaps the supplier's reputation for producing quality wing

115. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

116. Howard M. Erichson et al., *Case-Linked Jurisdiction and Busybody States*, 105 MINN. L. REV. HEADNOTES 54, 76 (2020).

117. *See id.*

components led Chrysler to purchase engine components—but that assertion would be a stretch without detailed evidence. Accordingly, the strength of the supplier's objection to jurisdiction in Washington would depend on the precise framing of the relatedness inquiry. The supplier would have a strong objection under a relatedness theory that analyzes connections between the suit and the defendant's local contacts.[118] But the supplier could not plausibly object under a relatedness theory that analyzes connections between the suit and the state. Accordingly, an anti-busybody principle would help the plaintiff obtain jurisdiction in Washington by showing that Washington is not being a busybody because the suit relates to Washington. But this anti-busybody argument does not resonate with the Court's current framing of the relatedness inquiry.[119]

In sum, current relatedness doctrine emphasizes whether a suit relates to the defendant's contacts with the forum, rather than whether a suit relates to the forum itself. This distinction enables defendants to avoid jurisdiction even when the forum state has an interest in adjudicating the suit. Relying on an anti-busybody principle would mitigate this problem, but adopting an anti-busybody principle would require reframing the current relatedness inquiry.

Ford's strongest argument against jurisdiction thus relied on the bifurcation of due process immunity into two flavors: blanket and limited. Ford claimed limited immunity from Montana's power despite lacking blanket immunity. In effect, Ford can be fairly paraphrased as contending: 'We have extensive contacts with Montana and in many circumstances can be sued in Montana. But the Court must pretend that these contacts with Montana do not exist. Instead, the Court must assume that Ford's only contacts are those that are deemed related, and since those are relatively small, jurisdiction is unfair.' Most of this strained argument was successful. The Supreme Court agreed with Ford that unrelated contacts were irrelevant.[120] Ford lost only because the Court had a broader view of whether Ford's contacts with Montana were related

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118. Even if a plaintiff suing in Washington cannot rely on the supplier's local contacts with Boeing, the plaintiff might still obtain jurisdiction by arguing that suppliers of components have purposeful, suit-related contacts with states where a finished product causes injuries. Courts have not developed a consistent approach to this kind of argument. For example, courts have reached competing conclusions about whether the supplier of an allegedly defective component in a water heater is subject to jurisdiction in the state where the heater explodes. *Compare* Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766–67 (Ill. 1961) (upholding personal jurisdiction), *with* Hodge v. Sands Mfg. Co., 150 S.E.2d 793, 801–02 (W. Va. 1966) (rejecting personal jurisdiction).

119. *See* Erichson et al., *supra* note 116, at 78 (acknowledging that the current relatedness inquiry forecloses jurisdiction even when states have legitimate interests in providing a forum).

120. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021).

to the suit.[121] In contrast, Justice Gorsuch was skeptical about the need to compartmentalize Ford's contacts with Montana. He instead considered whether a doctrine grounded in original meaning would require such line-drawing.[122] As Part III will discuss, Justice Gorsuch is probably correct about the lines that an originalist approach would draw, but he could have defended similar lines without invoking original meaning.

4. Incorrect Rejection of a Sliding Scale Approach to Relatedness and Minimum Contacts and Inadvertent Undermining of the Specific Jurisdiction Test

The theoretical distinction between specific and general jurisdiction should mark endpoints on a spectrum. At one extreme, the defendant's contacts with the forum are so extensive that relatedness is unnecessary for jurisdiction. At the other extreme, the defendant's contacts are so minimal that relatedness is essential for jurisdiction. In the middle of the spectrum are hard cases where the defendant's contacts are more than minimal but less than systematic, and some of those contacts are suit-related and some are not.

Distinguishing the endpoints should not obscure the difficulty of hard cases in the middle.[123] Yet modern doctrine erases the middle by treating all cases as implicating specific jurisdiction unless they satisfy the extreme standard for general jurisdiction.[124] The Court recognizes only pure specific jurisdiction and pure general jurisdiction. It does not recognize a hybrid that combines specific jurisdiction's focus on related contacts with general jurisdiction's focus on extensive contacts.

The specific/general distinction emerged from a 1966 law review article by Professors Arthur von Mehren and Donald Trautman that continues to influence the Court.[125] But the article is more subtle than the Court's caricature. The specific/general framework allowed von Mehren and Trautman to identify relatively simple cases at the endpoints that provided a template for considering more complex cases in the middle. Their article supported flexibility in complex cases by encouraging a

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121. *See id.* at 1028–29.

122. *See infra* Section II.C.

123. *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1464 (1988) (distinguishing the middle from the poles).

124. The middle of the spectrum until recently encompassed fewer cases because the test for general jurisdiction was easier to satisfy. When the Court tacked an "at home" requirement onto the "continuous and systematic" contacts test, it shifted many suits involving unrelated contacts from the extreme end of the spectrum into the middle. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

125. *See* Daimler AG v. Bauman, 571 U.S. 117, 127–28 (2014) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–64 (1966)).

"functional" rather than "mechanical" approach to jurisdiction.[126] They advocated "wise and understanding judgments respecting the policies in play in any given complex of facts."[127] More importantly, they observed that plaintiffs who "lead highly localized lives" should obtain jurisdiction in local courts over defendants whose "commercial involvement in multistate activity has led, although the chain of circumstances is long, to an intrusion in plaintiff's affairs."[128]

Accordingly, the conceptual distinction between specific and general jurisdiction was designed to illuminate subtle dimensions of difficult questions rather than to identify ironclad criteria for pigeonholing cases. The Supreme Court overlooked this limit on the distinction's utility, allowing the spectrum's end points to eclipse its middle.

A sensible means of handling hard cases in the spectrum's middle would be to use a sliding scale rather than rigid categorical distinctions. Jurisdiction would be easier to obtain as the magnitude and relatedness of contacts increase, and harder to obtain as they decrease. The Due Process Clause tolerates this sort of multivariate analysis. For example, the Court embraced a sliding scale when applying the due process "reasonableness" test for specific jurisdiction,[129] and when applying the *Mathews v. Eldridge* procedural due process balancing inquiry.[130]

The Court considered and rejected the possibility of a "sliding scale" relatedness test in *Bristol-Myers Squibb Co. v. Superior Court of California* (*BMS*).[131] In *BMS*, the Court reiterated its prior holding that due process required recognizing two distinct forms of jurisdiction: specific and general.[132] The Court then observed that a sliding scale would create a "spurious form of general jurisdiction."[133]

The Court's reference to "spurious" general jurisdiction misses the point of what sliding scales accomplish. Sliding scales by design erode the boundary between endpoints on a spectrum. The elimination of boundaries enables values animating the endpoints to operate concurrently in the middle. A sliding scale approach to relatedness thus

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126. von Mehren & Trautman, *supra* note 125, at 1164.

127. *Id.* at 1166.

128. *Id.* at 1171.

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

130. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest . . . .").

131. 582 U.S. 255, 264 (2017).

132. *See id.* at 262.

133. *Id.* at 264.

does not create a new form of general jurisdiction. Instead, a sliding scale recognizes that "general" and "specific" are merely labels for extreme points on a spectrum that encompasses myriad hybrids. The sliding scale allows doctrine to more effectively address hybrids by blending considerations that animate relatively pure examples of specific and general jurisdiction.

Attacking a sliding scale for eroding categorical boundaries between specific and general jurisdiction is persuasive only if the boundary is worth preserving. Yet the Court provided literally no explanation in *BMS* for why a sharp boundary between specific and general jurisdiction implemented any constitutional principle. That omission is ironic because the Court adopted this boundary from a law review article that rejects "mechanical" tests in favor of "functional" analysis rooted in relevant "policies."[134] Over time, a functional distinction has ossified into a mechanical rule.

The Court in *BMS* defended its rigid distinction between specific and general jurisdiction by noting that the lower court decision upholding jurisdiction illustrated the "danger" of a sliding scale.[135] The evidence of danger was that the lower court gave weight to certain factors that the Supreme Court deemed irrelevant.[136] The implication seems to be that the sliding scale test is too amorphous for lower courts to implement properly.

The Court's characterization of the sliding scale test as dangerously amorphous calls all of the Court's specific jurisdiction precedent into question. The Court in *BMS* failed to recognize that the sliding scale test is essentially identical to the specific jurisdiction test, but with one change: the sliding scale eliminates an artificial constraint that the general/specific distinction imposes. To see why the sliding scale test that *BMS* rejected is a close sibling of the specific jurisdiction test that *BMS* embraced, consider how the current specific jurisdiction test actually operates.

The current version of the *Shoe* test can be understood as involving two inquiries. First, there is a bar for jurisdiction set at a "minimum" level.[137] This level is not a fixed point. Instead, the bar rises or falls depending on a test that considers the "quality and nature" of contacts "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[138] Courts must therefore decide in each case whether the defendant's contacts with the forum are above or below the "minimum" bar. Second, the Court assesses

134. *See supra* text accompanying note 126.

135. *Bristol-Myers*, 582 U.S. at 264.

136. *See id.* at 264–65.

137. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

138. *Id.* at 319.

relatedness to determine which contacts factor into the "quality and nature" test. Related contacts become grist for the "quality and nature" test; unrelated contacts do not. Accordingly, current law requires two tests performed in sequence: a relatedness test, followed by a "quality and nature" test that determines whether related contacts are in the aggregate sufficiently "minimum."

A sliding scale would change only one aspect of the Court's current approach. Instead of *sequencing* the relatedness and "quality and nature" tests, a sliding scale *combines* them. In a sliding scale framework, deeming a contact unrelated diminishes its weight in the "quality and nature" test rather than excluding it from the "quality and nature" test. But under both the *BMS* approach and the sliding scale approach, the same two inquiries still occur for every contact; there is a discussion of relatedness and a discussion of "quality and nature." The virtue of the sliding scale test is that the relatedness inquiry occurs within the context of analyzing "the fair and orderly administration of the laws which it was the purpose of the due process clause to insure,"[139] rather than in isolation. This context grounds the inquiry in the "policies" that the architects of the specific/general distinction cared about, rather than treating the relatedness test as a freestanding exercise in mechanical line drawing. *BMS* never considered this virtue of a sliding scale. Worse, the Court never noticed that by condemning the sliding scale as dangerously imprecise, it was also condemning its own approach to personal jurisdiction. *BMS* thus inadvertently endorses reliance on imprecise calculations while also isolating those calculations from context that could make them more precise.[140]

The Court's rejection of a sliding scale test enabled Ford to argue that most of its contacts with Montana did not count. Its advertising, dealers, and repair services supposedly became irrelevant because they were not related to the suit.[141] Justice Sonia Sotomayor's dissent in *BMS* predicted this gambit. She explained that the majority's emphasis on relatedness emboldened litigants to deny that "even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail

139. *Id.*

140. If the Court had noticed the similarity between a sliding-scale approach and current doctrine, it might have tried to defend current doctrine as being simpler because it weighed fewer variables. For example, suppose that a defendant has ten contacts with a state, four of which are related to the suit. Under a sliding-scale approach, all ten contacts matter. Under current doctrine, only four contacts matter. Analyzing four contacts is simpler than analyzing ten. Whether that simplicity is a virtue depends on how much effort it saves and whether it is likely to affect outcomes in a substantial number of cases. These inquiries are beyond the scope of this Article, although arbitrarily ignoring evidence is probably not a sensible way of improving the quality of decision-making.

141. *See* Ford Motor Co. v. Mont. Eigth Jud. Dist. Ct., 141 S. Ct. 1017, 1023, 1026 (2021).

himself of that State's courts to redress his injuries."[142] The Court in *Ford* rejected this narrow view of relatedness,[143] but Section I.D shows that *BMS* limited the Court's maneuvering room and therefore complicated its analysis.

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This Section has demonstrated that Ford had a plausible objection to personal jurisdiction in Montana for four dubious reasons: doctrine undervalues Montana's interests and federalism concerns, overvalues the importance of volitional localization, needlessly distinguishes between suit-related and state-related contacts, and improperly ignores contacts that are not suit-related rather than merely adjusting their weight.

These problems are not unique to *Ford*. They explain why the single mother in *Kulko* could not sue for child support in the state where she lived, and why the worker in *Nicastro* could not sue for damages in the state where he was maimed. Many other plaintiffs with compelling jurisdictional arguments will continue to lose in lower courts until doctrine changes. The blueprint for reform in Part III is therefore relevant independent of *Ford*. It should appeal to both originalists and nonoriginalists seeking a more coherent approach to personal jurisdiction.

D. Ford *Addressed the Disconnect Between Precedent and Sound Principles with a Cosmetic Patch*

The rejection of a sliding scale in *BMS* meant that the distinction between specific and general jurisdiction was critical in *Ford*. Precedent established that Ford's contacts with Montana were insufficient to warrant general jurisdiction.[144] So the question was whether Montana could exercise specific jurisdiction based on Ford's suit-related contacts.

Analyzing Ford's suit-related contacts revealed that the Court had painted itself into a corner.[145] On the one hand, a strict definition of relatedness would exclude all of Ford's contacts with Montana, and Ford would therefore win. Allowing Ford to evade accountability in Montana was unpalatable for the reasons discussed above in Section I.B. On the other hand, a lax definition of relatedness would eviscerate the sharp distinction between specific and general jurisdiction. If most of Ford's contacts were deemed "related" despite having a tenuous connection to

142. Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 277 n.3 (2017) (Sotomayor, J., dissenting).

143. *See Ford*, 141 S. Ct. at 1026.

144. *See id.* at 1024 ("general jurisdiction over Ford (as all parties agree) attaches in Delaware and Michigan—not in Montana").

145. Kevin Clermont originated this metaphor for the Court's dilemma. *See* Marin K. Levy et al., *Open Road?* Ford *Reroutes Personal Jurisdiction*, 105 JUDICATURE, no. 3, 2021, at 78.

the suit, then the relatedness inquiry would be a back door to achieving the "spurious form of general jurisdiction" that the Court condemned in *BMS*.[146]

A painter who has trapped themself in a corner has two options: repaint the floor to ensure wall-to-wall consistency or tiptoe out of the room while patching the ensuing mess. The Court opted for tiptoeing and patching. It did not revisit the sharp distinction between specific and general jurisdiction that made the relatedness inquiry both dispositive and difficult. A footnote observed that the Court was unwilling to "transfigure our specific jurisdiction standard," but did not explain why.[147] Instead, the Court finessed the problem by crafting a relatedness test that is not too strict and not too lax, but also not very informative.

The gist of *Ford*'s relatedness holding is that "the connection" between a plaintiff's claim and the defendant's "activities" in the forum must be "close enough to support specific jurisdiction."[148] The Court tried to provide more guidance than "close enough," but not much more. The Court explained that a "strict causal" connection between the defendant's forum contacts and the suit is unnecessary for specific jurisdiction.[149] Whether causation is still sufficient is an open question.[150] When causation is missing, contacts must "relate to" the suit, which entails "real limits" that ensure "a strong relationship among the defendant, the forum, and the litigation."[151] The precise nature of "real limits" is a mystery because the record in *Ford* did not require deep analysis. Ford's Explorer-related contacts with Montana were so extensive that they satisfied any plausible definition of relatedness that did not require causation.[152]

146. *Bristol-Myers*, 582 U.S. at 264.

147. *Ford*, 141 S. Ct. at 1027 n.3.

148. *Id.* at 1032.

149. *Id.* at 1026.

150. *See id.* at 1035 (Gorsuch, J., concurring in the judgment) ("[T]he majority [does not] tell us whether its new affiliation test supplants or merely supplements the old causation inquiry."). Some commentators suggest that *Ford* might have adopted a "sliding scale" test in which a plaintiff suing a defendant with limited forum contacts must establish causation, while a plaintiff suing a defendant with extensive contacts need only establish relatedness. *See* Patrick J. Borchers et al., Ford Motor Company v. Montana Eighth Judicial District Court*: Lots of Questions, Some Answers*, 71 EMORY L.J. ONLINE 1, 9 (2021). That sophisticated parsing of the relatedness inquiry might emerge in future cases but is not clear from the brief discussion in *Ford*. The Court in *Ford* observed that specific jurisdiction is easier to obtain when the defendant has "continuous" rather than "isolated" contacts with the forum but did not expressly link that observation to the application of a causation test. *Ford*, 141 S. Ct. at 1028 n.4.

151. *Ford*, 141 S. Ct. at 1026, 1028 (citation and internal quotation marks omitted).

152. *See id.* at 1028 (summarizing how Ford's contacts with Montana were related to the suit).

Elaboration of the relatedness test therefore will await future cases raising harder questions.[153]

The "close enough" test is an ironic capitulation to complexity given that *BMS* had recently noted the "danger" of indeterminate standards.[154] Moreover, the *Ford* majority opinion fails to acknowledge why the relatedness inquiry is difficult. The analysis above in Sections I.C.3 and I.C.4 provides the missing explanation: relatedness is difficult because it should often be irrelevant and because the inquiry occurs in a vacuum divorced from the policies underlying *Shoe*.

Finding sensible criteria to influence drawing a doctrinal line requires understanding why the line is being drawn. Here, it is not clear why the relatedness line exists and what factors should influence the line's location in hard cases. For example, suppose that Ford's contacts with Montana had been slightly less connected to the suit. Perhaps its Montana advertising did not mention Explorers, or the model of Explorer sold in Washington differed from the model sold in Montana, or Ford did not sell replacement Explorer parts in Montana. At some point under a "close enough" test, an aggregation of these small differences will matter even though other factors—such as state interests—support jurisdiction. Yet as Sections I.B and I.C suggested, subtle questions about relatedness are a distraction when state interests and horizontal federalism concerns warrant a local forum, there is no substantial threat to interstate commerce, the plaintiff is not forum shopping, and the defendant is not significantly burdened. In these circumstances where jurisdiction is otherwise clear, the Court would be parsing the text of advertisements, analyzing vehicle schematics, and wading through parts catalogs to answer a question that the Due Process Clause does not ask.

Future cases will tug at the patch that the majority relied upon to elide difficult questions about how the relatedness test applies in hard cases. The next Part considers Justice Gorsuch's suggestion that originalism can obviate such inquiries by restoring doctrine to pre-*Shoe* foundations.

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153. Scholars have already begun to consider questions about relatedness that the Court left open. *See, e.g.*, Adam N. Steinman, *Beyond* Bristol-Myers*: Personal Jurisdiction over Class Actions*, 97 N.Y.U. L. REV. 1215 (2022) (considering relatedness in the context of claims by members of a class); Borchers et al., *supra* note 150, at 21–25 (discussing relatedness in the context of "vacation cases" in which a plaintiff injured while out of state wants to sue in their home state); *see also* Christine P. Bartholomew & Anya Bernstein, Ford*'s Underlying Controversy*, 99 WASH. U. L. REV. 1175, 1178 (2021) (contending that *Ford* resolved an open question about relatedness by defining the relevant "claim" based on "real-world transactions, occurrences, and events—not causes of action or their elements"). For a discussion of values that the relatedness test seeks to implement, see Brilmayer, *supra* note 123; Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867 (2012).

154. Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 264 (2017).

II. Justice Gorsuch Responded to the *Ford* Majority's Patch by Invoking Originalism as a Potential Salve for Underlying Defects in Personal Jurisdiction Doctrine

This Part considers the nuances of Justice Gorsuch's concurrence. By focusing on what he said and did not say, and where he was ambiguous, we can see inklings of the problems that will complicate an originalist rethinking of personal jurisdiction. This Part therefore serves both to explain the *Ford* decision and set up the more abstract discussion in Part III. Section II.A situates Justice Gorsuch's invocation of originalism at the intersection of four converging trends. Section II.B analyzes ambiguities in Justice Gorsuch's discussion of originalism and personal jurisdiction that leave the door open for nonoriginalist challenges to precedent. Section II.C explains why Justice Alito's separate concurrence in the judgment foreshadows headwinds that might hinder an originalist inquiry. Section II.D concludes by noting how the prospect of an originalist revision of *Shoe* is already shaping the Court's docket.

A. *Context for Justice Gorsuch's Invocation of Originalism: Ford's Overly Aggressive Defense Collided with Four Converging Trends*

Ford was an excellent vehicle for a concurrence challenging modern doctrine from an originalist perspective. The facts were extreme and the time was right.

The facts of *Ford* support a critical inquiry into precedent. As Section I.B demonstrated, Ford's position was so aggressive that it raised a question of how doctrine evolved to a point where Ford thought it could win. Moreover, Ford's contacts with Montana were so extensive that the case seemed easier under *Pennoyer v. Neff*'s one-factor presence test[155] than *Shoe*'s multi-factor "minimum contacts" test.[156] The Court's unanimity on the judgment also provided cover for Justice Gorsuch by making his doubts about *Shoe* seem less disruptive. After all, he was still agreeing with everyone else about the outcome.

The time was right because of four converging trends about personal jurisdiction and originalism.

First, Justices seem increasingly aware that personal jurisdiction doctrine is deeply unsatisfying. Scholars have for decades criticized the hodgepodge of jargony tests as arbitrary and untethered to sound

155. Pennoyer v. Neff, 95 U.S. 714, 722 (1878) (holding that service of process "within" the forum state's "territory" was necessary to establish jurisdiction).

156. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

theory.[157] In recent years Justices have cited some of these critiques.[158] This engagement with criticism occurred contemporaneously with another development: the Court's realization that doctrine is ill-suited to address technology that can expand the jurisprudential footprint of relatively unsophisticated actors. The Court's concern is evident in caveats that acknowledge the difficulty of extending personal jurisdiction holdings to the internet.[159] The concern also is evident in an expanding list of hypothetical scenarios that some Justices think pose difficult jurisdictional questions. Examples include suits against a "retired guy" who "carves decoys"[160] or against an "Appalachian potter" who sells "cups and saucers."[161]

Additional evidence of the Court's frustration emerges from its decision in *Nicastro* and from that decision's subsequent desuetude. In *Nicastro*, the Court granted certiorari to resolve what seems like a straightforward question: whether a worker injured by a machine could sue the manufacturer in the state where the injury occurred if the machine entered that state through the "stream of commerce."[162] The Court was unable to reach a consensus, leading to a 4–2–3 split.[163] The inability to agree on foundational questions was apparently disquieting. Despite several opportunities in the succeeding twelve years, no majority opinion has even mentioned *Nicastro*'s plurality opinion.[164]

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157. *See, e.g.*, Weinstein, *supra* note 21, at 171 ("Although the extensive body of commentary on federally imposed limitations of state court jurisdiction agrees on very little, the one point of consensus is that Supreme Court personal jurisdiction doctrine is deeply confused.").

158. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1036 n.2 (2021) (Gorsuch, J., concurring in the judgment) (citing "[r]ecent scholarship" about the constitutional foundation of modern personal jurisdiction doctrine); BNSF Ry. v. Tyrrell, 581 U.S. 402 n.1 (2017) (Sotomayor, J., concurring in part and dissenting in part) (citing scholarship discussing the theoretical foundation of general jurisdiction); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 901 (2011) (Ginsburg, J., dissenting) (noting "academic debate over the role of consent in modern jurisdictional doctrines").

159. *See, e.g.*, *Ford*, 141 S. Ct. at 1028 n.4 ("And we do not here consider internet transactions, which may raise doctrinal questions of their own."); Walden v. Fiore, 571 U.S. 277, 290 n.9 (2014) ("[T]his case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular state.").

160. *Ford*, 141 S. Ct. at 1028 n.4 (citation omitted).

161. *Nicastro*, 564 U.S. at 891 (Breyer, J., concurring in the judgment). These scenarios are actually not very difficult. The "reasonableness" prong of personal jurisdiction doctrine can adequately protect small sellers like the decoy and mug artisans without needing to muddle contacts analysis. *See* Gardner et al., *supra* note 105, at 476–77.

162. *Nicastro*, 564 U.S. at 877–88 (plurality opinion).

163. *See id.* at 876.

164. Two dissents have cited *Nicastro*, and a majority opinion by Justice Ginsburg cited her *Nicastro* dissent. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1432 n.18 (2020) (Alito, J., dissenting) (citing *Nicastro* in a list of plurality decisions); Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 272 (2017) (Sotomayor, J., dissenting) (citing the *Nicastro* plurality); Daimler AG v. Bauman, 571 U.S. 117, 132 (2014) (citing the *Nicastro* dissent).

Second, as Section I.C.4 explained, *BMS*'s rejection of a sliding scale placed the specific/general distinction on a collision course with the relatedness requirement. The *Ford* majority did not acknowledge that problem. Justice Gorsuch did acknowledge it, observing that the "dichotomy" between specific and general jurisdiction is "looking increasingly uncertain."[165]

Third, while defects in personal jurisdiction doctrine have become clearer, scholars have concurrently begun to apply originalist methods to aspects of civil procedure, including personal jurisdiction.[166] Justice Gorsuch cited a prominent example of this new approach,[167] and one of his questions at oral argument closely tracked originalist scholarship.[168] Other scholars have focused on the role of history and tradition in the development of personal jurisdiction doctrine without adopting an overtly originalist perspective.[169]

Finally, Justice Gorsuch's *Ford* concurrence is a familiar iteration of an opinion-writing trend invoking originalism. A long string of concurrences and dissents by Justices Thomas, Alito, and Gorsuch cite

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165. *Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring in the judgment).

166. *See, e.g.*, *supra* note 22 and accompanying text; Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 534–37 (2022); Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1638–41 (2018); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1314 (2017).

167. *See Ford*, 141 S. Ct. at 1036 n.2 (Gorsuch, J., concurring in the judgment) (citing Sachs, *supra* note 166, at 1255).

168. Before oral argument, a leading originalist scholar suggested in a blog post that "[p]erhaps one of the Justices will ask counsel how this case would be decided under the original public meaning of the Due Process Clause of the Fourteenth Amendment" and outlined two approaches to framing that inquiry: one based on state long-arm statutes, and one based on contemporary understanding of due process in 1868. Lawrence Solum, *Two Suggestions re* Ford Motor Company v. Montana Eighth Judicial District Court *(Personal Jurisdiction Case to Be Argued Tomorrow)*, LEGAL THEORY BLOG (Oct. 6, 2020, 8:22 AM), https://lsolum.typepad.com/legaltheory/2020/10/two-suggestions-re-ford-motor-company-v-montana-eighth-judicial-district-court.html [https://perma.cc/H95C-LUDU]. Justice Gorsuch asked a similar question with the same two frames. *See* Transcript of Oral Argument, *supra* note 41, at 28–29. For a discussion of how blogs and other informal commentary can shape doctrine, see Jeffrey L. Fisher & Allison Orr Larsen, *Virtual Briefing at the Supreme Court*, 105 CORNELL L. REV. 85 (2019).

169. A brief wave of scholarship considered historical questions in the wake of Justice Antonin Scalia's reliance on "tradition" to justify tag jurisdiction in Burnham v. Superior Court, 495 U.S. 604, 609–11 (1990) (plurality opinion). *See, e.g.*, Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory — A Comment on* Burnham v. Superior Court, 22 RUTGERS L.J. 689, 696–98 (1991) (discussing "original understanding" of the Due Process Clause). For an early suggestion that historically focused scholarship was necessary, see Linda S. Mullenix, *The Influence of History on Procedure: Volumes of Logic, Scant Pages of History*, 50 OHIO ST. L.J. 803, 817–18 (1989) ("Historical development of jurisdictional theory is similarly wanting. Especially concerning personal jurisdiction, Supreme Court jurisdictional 'history' essentially means doctrinal history extending back to *International Shoe*. For many proceduralists this seminal case marks the point at which they, too, fall into the great historical void.").

originalism as a justification for fundamentally altering established doctrines. Rather than criticizing the majority for misapplying precedent, these opinions consider abandoning precedent. Recent targets include precedents governing the Establishment Clause,[170] the Free Exercise Clause,[171] the Speech Clause,[172] the Double Jeopardy Clause,[173] the Appointments Clause,[174] the Takings Clause,[175] Article III,[176] the Fourth Amendment's definition of "searches,"[177] and the Sixth Amendment's definition of "jury."[178]

The iconoclastic trend was especially evident in April 2022. In a single case, Justices Thomas and Gorsuch separately invoked originalism to challenge two different aspects of settled law. The two concurrences in *United States v. Vaello Madero*[179] illustrate how originalism can have distinct substantive connotations depending on how it is deployed. Justice

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170. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring) (suggesting that the Court should "correct course" by revisiting interpretations of the Establishment Clause that are "unmoored from the original meaning of the First Amendment"); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring in the judgment) ("I would take the logical next step and overrule the *Lemon* test in all contexts," in part because the "test has no basis in the original meaning of the Constitution").

171. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1888 (2021) (Alito, J., concurring in the judgment) (contending that the Court should "reconsider" its "interpretation of the Free Exercise Clause" in light of "the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption").

172. *See* Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from denial of cert.) ("The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine."); McKee v. Cosby, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in denial of cert.) (suggesting reconsideration of the "actual-malice rule" in light of "the original meaning" of the First Amendment).

173. *See* Gamble v. United States, 139 S. Ct. 1960, 1996 (2019) (Gorsuch, J., dissenting) (contending that "original public meaning" requires abandoning the "separate sovereigns exception").

174. *See* Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1666 (2020) (Thomas, J., concurring in the judgment) ("I would resolve these cases based on the original public meaning of the phrase 'Officers of the United States' in the Appointments Clause.").

175. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) ("[I]t would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause . . . or the Privileges or Immunities Clause . . . .").

176. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) (stating that "[t]he Constitution's original public meaning supplies the key" to understanding Article III).

177. *See* Carpenter v. United States, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting) (contending that the Court should overrule a prominent precedent that "distorts the original meaning" of "search").

178. *See* Khorrami v. Arizona, 142 S. Ct. 22, 25 (2022) (Gorsuch, J., dissenting from denial of cert.) (contending that the Sixth Amendment's "original public meaning" included a right to a jury with twelve members).

179. 142 S. Ct. 1539 (2022).

Thomas challenged precedent that expanded civil rights,[180] while Justice Gorsuch challenged precedent that contracted civil rights.[181] A Justice's embrace of originalism thus does not necessarily foreshadow an outcome with a particular ideological valence.[182] Indeed, an originalist revival of *Pennoyer* could be progressive or regressive depending on its scope. A rule *authorizing* jurisdiction based on presence would help plaintiffs at the expense of business defendants that often fare well in the Court's civil procedure rulings.[183] In contrast, a rule *limiting* jurisdiction based on non-presence would harm plaintiffs and provide a windfall for defendants.

The foregoing context indicates that Justice Gorsuch's opinion in *Ford* should not come as a surprise. Personal jurisdiction doctrine is unstable. Originalism is a potent tool for toppling unstable doctrines. Commentators increasingly focus on applying that tool to civil procedure. And Justice Gorsuch is inclined to reach for that tool when he confronts instability. Section II.B considers how he wielded originalism in *Ford*, how he might wield it in future cases implicating personal jurisdiction, and how he may be open to nonoriginalist arguments if originalism is not the optimal tool for fixing personal jurisdiction.

B. *Justice Gorsuch's Invocation of Originalism: Broad Implications of Narrow Observations*

Justice Gorsuch's opinion has four components. First, he suggested that originalism would be a helpful tool for analyzing how the Constitution restricts personal jurisdiction. Second, he explained why he agreed with the majority's conclusion but rejected its reasoning. Third, he offered narrowly focused observations about why current doctrine is

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180. *See id.* at 1544 (Thomas, J., concurring) (expressing doubt about whether "the premise that the Due Process Clause of the Fifth Amendment contains an equal protection component whose substance is 'precisely the same' as the Equal Protection Clause of the Fourteenth Amendment . . . comports with the original meaning of the Constitution").

181. *See id.* at 1555 (Gorsuch, J., concurring) (contending that the "Insular Cases" should be overruled in part because of their "departure from the Constitution's original meaning").

182. *See, e.g.*, Lawrence B. Solum, *Progressives Need to Support Justice Ketanji Brown Jackson*, BALKINIZATION BLOG (Dec. 9, 2022), https://balkin.blogspot.com/2020/06/mcclain-symposium-10.html [https://perma.cc/6M7W-TSKQ] (distinguishing "progressive originalism" from "conservative juristocracy"). For a defense of progressive originalism, see JACK M. BALKIN, LIVING ORIGINALISM (2011). However, scholars have observed that originalism is prone to selective application in ways that reinforce preferences for particular outcomes. *See, e.g.*, Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality* 18 (2023) (available at https://ssrn.com/abstract=4347334) (defining "selective originalism"); *id.* at 20–30 (providing examples of selective originalism); Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 163 (2016) (discussing Justice Scalia's nonoriginalist rejection of affirmative action).

183. *See* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 178 (2017) ("In the past 15 years, plaintiffs are losing, and business defendants are winning, a huge majority of Federal Rules private enforcement cases, and this field is the locus of increasingly intense conflict among the justices.").

flawed. Fourth, he made several statements with substantially broader implications than his narrow observations might suggest. Whether or not Justice Gorsuch intended this breadth, lawyers are likely to seek the maximum mileage from the fuel that he provided.

Moreover, as Part III explains, questioning the premise of one aspect of personal jurisdiction doctrine calls all aspects into question because they share the same foundation. In effect, Justice Gorsuch proposes pulling the tablecloth from a table with multiple place settings. He might be focused on shattering one dish, but all of them are vulnerable.

1. Rationale for Joining the Holding but Not the Reasoning

The majority upheld jurisdiction for a combination of two reasons: the relatedness requirement did not require causation, and plaintiffs could easily prove relatedness without the obstacle of causation.[184] Justice Gorsuch hedged his objections to this reasoning. His analysis implies three potential grounds for concurring only in the judgment.

First, Justice Gorsuch may have concluded that the majority erred by rejecting a causation requirement. He stated that rejecting causation "seems unnecessary" and "pretty pointless" because if the record is read in a certain light, causation is clear.[185] But he never expressly stated that current precedent required causation.

Second, Justice Gorsuch may have concluded that although relatedness did not require causation, the majority's relatedness test was insufficiently precise. He observed that the majority's test was "far from clear" and created "new layers of confusion."[186] However, he did not apply an alternative relatedness formulation to Ford's conduct.

Third, Justice Gorsuch may have concluded that the Due Process Clause does not require suit-related contacts. This view is consistent with his citation to pre-*Shoe* precedent that focused on the defendant's presence in the forum without considering whether that presence was related to the plaintiff's claims.[187] Disavowal of relatedness would also explain why Justice Gorsuch did not conduct a relatedness inquiry. Instead, he stated that "[t]he parties have not pointed to anything in the Constitution's original meaning or its history" that would support rejecting jurisdiction.[188] On the other hand, if relatedness were irrelevant, then Ford would be subject to suit in Montana even in suits that have no connection to Montana. Yet Justice Gorsuch never suggested this possibility. Moreover, Justice Gorsuch did not explicitly state that he

184. *See supra* Section I.D.

185. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1035–36 (2021) (Gorsuch, J., concurring in the judgment).

186. *Id.* at 1034–35.

187. *See id.* at 1036.

188. *Id.* at 1039.

would restore rules that *Shoe* displaced. Instead, Justice Gorsuch seems to be leaning toward modifying aspects of *Shoe*, but is open to persuasion about whether and how to do so.

Given that none of the foregoing rationales are definitive alone, they probably aggregate into an explanation. Justice Gorsuch apparently believed that Ford should lose under every relevant theory: causation, all forms of non-causal relatedness, and presence. The aggressiveness of Ford's position created leeway for Justice Gorsuch to discuss multiple theories without committing himself in future cases.

2. An Embrace of Originalism in an Unstated Form with an Unstated Subject, and Potential Openness to Nonoriginalist Arguments

Justice Gorsuch used only a few pages to make the points discussed in Section II.B.1.[189] But he did not end there. He proceeded to use the facts in *Ford* to explore why the case was difficult, asking "how we got here and where we might be headed."[190] He then invited "future litigants and lower courts" to consider whether originalist methods could help the Court unwind the "tangles" of modern personal jurisdiction doctrine.[191] However, close scrutiny reveals that he did not expressly identify the role that he thinks originalism should play and the objects that originalists should study. His references to "original meaning" thus have both a formal and informal dimension. He is interested in what the Fourteenth Amendment meant when it was ratified because that meaning has formal significance under originalist theories of interpretation. But he also invokes original meaning more informally as a proxy for peeling back layers of precedent that have obscured important first principles.

The role of originalism is unclear because Justice Gorsuch is willing to consider factors aside from original meaning. The concurrence states that "the right question" is "what the Constitution as originally understood requires."[192] But the concurrence also suggests that the post-adoption "history" is relevant in addition to "original meaning."[193] These "lessons of history," combined with "the Constitution's text," may help the Court address "the challenges posed by our changing economy."[194] Whether other Justices will share this view of how post-ratification

189. *See id.* at 1034–36.
190. *Id.* at 1036.
191. *Id.* at 1039.
192. *Id.* at 1036 n.2.
193. *Id.* at 1039.
194. *Id.*

history influences originalist inquiry is unclear, as Justice Barrett recently noted.[195]

Accordingly, Justice Gorsuch seems eager to study how original meaning might be relevant to personal jurisdiction, but reluctant to anchor doctrine entirely to the past if doing so would aggravate challenges of the present. This preference for choosing interpretative methods *à la carte* is either a feature or bug of originalism. Depending on one's viewpoint, originalism's coexistence with other interpretative methods illustrates that originalism is refreshingly adaptable or arbitrarily manipulable. To avoid an appearance of arbitrariness, some originalist scholars would deny the "originalist" moniker to partial originalists.[196]

The object that originalists should study is also unclear because the concurrence uses "due process" and "the Constitution" interchangeably. Some sentences focus on what "due process requires" and how "due process was usually understood."[197] But other sentences ask "what the Constitution . . . requires" and whether "anything in the Constitution" supports Ford's argument.[198] That ambiguity is important because focusing solely on due process may produce very different answers than zooming out to consider the Constitution as a whole. Part III explores this problem in more depth, explaining that the Due Process Clause is the wrong starting point for originalist analysis.

The fact that Justice Gorsuch did not commit to a specific and pure form of originalism creates potential common ground with nonoriginalists. The concurrence can be understood as a statement of frustration and desire for reform. One of Justice Gorsuch's preferred ways of framing a call for change is to invoke original meaning. Yet he notably did not say anything akin to "originalism or bust." He therefore left open the possibility of joining with other Justices on a path to reform that blends originalist and nonoriginalist insights.[199] Lawyers should consider framing arguments in a way that facilitates such cooperation.

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195. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Barrett, J., concurring) (noting the Court's uncertainty about "the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution").

196. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006) (contending that a Justice who allows competing methods to displace original meaning is "simply not an originalist").

197. *Ford*, 141 S. Ct. at 1036, 1036 n.2 (Gorsuch, J., concurring in the judgment).

198. *Id.* at 1036 n.2, 1039.

199. For an example of such cooperation, see United States v. Haymond, 139 S. Ct. 2369 (2019) (plurality opinion), in which Justice Gorsuch wrote a plurality opinion joined by Justices Ginsburg, Sotomayor, and Kagan that was criticized by four dissenters on originalist grounds.

3. Narrow Concerns About Existing Doctrine Governing Large Corporations that Are Present in the Forum

Justice Gorsuch's concurrence seeks to reconsider *Shoe*. But precisely what he wants to revisit is not clear. The concurrence can be read broadly, as the next Section explores, or narrowly. The narrow reading posits that Justice Gorsuch is focused on two specific fact patterns: when a large corporation has sufficient contacts with the forum to satisfy a presence test, and when a corporation's agent is served with process while present in the forum. Most of his concurrence focuses on these fact patterns, discussing the "presence" test under *Pennoyer v. Neff*,[200] "tag" jurisdiction under *Burnham v. Superior Court*,[201] and the countervailing "ploys" of corporations seeking "special protections" from state power.[202]

If the concurrence has a narrow focus, then it is notable for bypassing aspects of personal jurisdiction that do not involve presence in the forum or tag jurisdiction. For example, the concurrence does not discuss jurisdiction based on committing an intentional tort directed at a target in the forum, negotiating contracts related to activity in the forum, or considering the familial obligations of nonresidents. This omission is not surprising because *Ford* did not involve any of those issues. But as Part III explains, these and other aspects of personal jurisdiction are relevant to the inquiry that Justice Gorsuch proposes. Scrutinizing only discrete aspects of personal jurisdiction defers rather than avoids considering other aspects because pulling on one thread loosens all of them.

The concurrence is also notable for not addressing the full range of causes contributing to the doctrinal problem that Justice Gorsuch seeks to fix. As Section I.C discussed, Ford's position relied not only on the relatedness rule, but also on modern doctrine's marginalization of state interests and prioritization of purposeful contacts. Part III will show that focusing on these aspects of the problem can help reveal a wider range of solutions than resuscitating *Pennoyer* or expanding *Burnham*.

4. Broader Implications

Although one can read Justice Gorsuch's concurrence as focusing narrowly on two fact patterns, one can also read it broadly. Some of the opinion's language sweeps far beyond the context of *Ford*. It purports to address "the world of personal jurisdiction,"[203] "personal jurisdiction

200. *Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring in the judgment) (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1878)).

201. *Id.* at 1038, 1038 n.4 (citing Burnham v. Super. Ct., 495 U.S. 604, 610–11 (1990)).

202. *Id.* at 1037, 1039 n.5.

203. *Id.* at 1034.

jurisprudence,"[204] and the specific/general "dichotomy" that animates the entire *Shoe* test.[205] Justice Gorsuch even contemplates the possibility that *Pennoyer*'s presence test was "mostly right."[206] If so, then *Shoe* might be mostly wrong.[207]

Accordingly, Justice Gorsuch was ambiguous about whether he seeks to tweak *Burnham* or demolish *Shoe*. Perhaps Justice Gorsuch could resolve all his concerns by allowing tag jurisdiction over corporate agents or by enforcing registration statutes. Alternatively, perhaps only dismantling the modern edifice of personal jurisdiction would create the coherence that he seeks. Time will tell. As Section II.D discusses, that time may be approaching.

C. *Headwinds Against Originalism: Justice Alito, Pragmatism, and the Tension Between Justice Gorsuch's Opinion and* Bristol-Myers Squibb

Justice Alito joined neither the majority nor Justice Gorsuch.[208] That choice is intriguing because Justice Alito acknowledged in *Ford* that "for the reasons outlined in Justice Gorsuch's thoughtful opinion, there are grounds for questioning the standard that the Court adopted in [*Shoe*]."[209] Those reasons were apparently strong enough to praise, but not strong enough to fully endorse. Justice Alito's unwillingness to commit to Justice Gorsuch's proposal illuminates at least three headwinds that will hinder an originalist revision of *Shoe*.

The central point of Justice Alito's concurrence was that precedent governing relatedness included a loose causation requirement that the majority needlessly jettisoned.[210] In his view, contacts are suit-related only when the "common-sense relationship" connecting the defendant's "activities" and the suit is "causal in a broad sense of the concept."[211] Justice Alito believed that Ford's contacts with Montana easily satisfied this causation requirement, obviating the Court's "potentially boundless" reformulation of the relatedness inquiry.[212]

Having made this point, Justice Alito could have gone further and considered whether the causation requirement was consistent with original meaning. But he did not. There are at least three reasons why

204. *Id.* at 1039.

205. *Id.*

206. *Id.* at 1036 n.2.

207. *See* Sachs, *supra* note 166, at 1314 (contending that if *Pennoyer* was right, *Shoe*'s basic dictates "might" still be viable, but also might be irrelevant).

208. *See Ford*, 141 S. Ct. at 1032 (Alito, J., concurring in the judgment).

209. *Id.*

210. *See id.* at 1032–33.

211. *Id.* at 1033.

212. *Id.* at 1034.

Justice Alito might resist a broad originalist revision of *Shoe* despite being sympathetic to aspects of originalism.

First, Justices who embrace originalist arguments do not necessarily believe that originalism is the only appropriate method of interpretation. Justice Alito is an example. He is a "methodological pluralist" who relies on "original meaning" alongside other interpretative tools.[213] This "inclusive originalism" enables him to consider the practical implications of a proposed rule in addition to its historical pedigree,[214] although flexibility invites charges of inconsistency.[215]

An originalist account of personal jurisdiction that is attractive from a theoretical perspective might fail to convince inclusive originalists if there are countervailing practical concerns. Indeed, originalism itself may allow consideration of practical concerns if a text's original meaning anticipates dynamic application to evolving circumstances.[216] These practical concerns lead to the next point.

Second, as Part III explains, personal jurisdiction doctrine must adapt to new circumstances. Political, social, technological, and economic evolution leads to new kinds of claims that imbue the assertion of state power with new costs and benefits. An originalist account of jurisdiction may stall this innovation. Justice Alito is especially sensitive to that concern. In *Ford*, he framed his willingness to reconsider *Shoe* by stressing that doctrine should be "well suited for the way in which business is now conducted."[217] This echoes his position in *Nicastro*, where he did not join the plurality opinion because it was "unwise to announce a rule of broad applicability without full consideration of the modern-day consequences."[218] Justice Gorsuch's emphasis on the past will therefore collide with Justice Alito's emphasis on the present and future.

Third, although not addressed in his concurrence, Justice Alito confronts the same problem that the majority confronted regarding the

213. Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J.F. 164, 166–67 (2016).

214. Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 512 (2019).

215. *See* Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2036 (2012) (book review) ("An inconsistent originalism that accommodates change sometimes but not always thereby sacrifices originalism's claim to constrain judges and its claim to be the exclusive legitimate source of interpretive guidance. Without these qualities, one may as well simply jettison originalism in favor of an approach that builds accommodation to change into the theory's core.").

216. *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2356 (2015) (contending that "[o]riginalism might incorporate other legal doctrines into itself," which would enable Justices who embrace originalism to also embrace ostensibly nonoriginalist arguments).

217. *Ford*, 141 S. Ct. at 1032 (Alito, J., concurring in the judgment).

218. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 887 (2011) (Breyer, J. joined by Alito, J., concurring in the judgment).

distinction between general and specific jurisdiction. As noted in Section I.C.4, authorizing personal jurisdiction based on unrelated contacts would create a regime akin to what *BMS* labeled "spurious" general jurisdiction.[219] Justice Gorsuch's proposed substitution of a presence test for the relatedness requirement would have the same effect. Indeed, a presence test might have led to the opposite outcome in *BMS*, depending on the threshold that Justice Gorsuch would set for deeming a corporation to be present in a state.[220] Justice Alito wrote the *BMS* opinion and might be unwilling to abandon the specific/general distinction at its core. Accordingly, Justice Gorsuch's effort to break the cage of precedent may face headwinds from architects of that precedent who agree with its central premises.

Headwinds against originalism are not necessarily inconsistent with tailwinds for reform. The foregoing analysis suggests that Justice Alito may resist a sweeping originalist reassessment of *Shoe*. However, his apparent discomfort with current doctrine may make him amenable to incremental changes. Perhaps there is room for compromise on something less than a comprehensive, purely originalist approach to personal jurisdiction.

D. *Justice Gorsuch's Opinion Has Had and Will Continue to Have Practical Effects*

In April 2022, the Supreme Court granted a petition for a writ of certiorari in another personal jurisdiction case. Justice Gorsuch's influence is evident from the very first words of the successful petition in *Mallory v. Norfolk Southern Railway*. The petition begins: "Question Presented. 'Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.' *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1038 (2021) (Gorsuch J., concurring)."[221] The petition went on to cite Justice Gorsuch by name three times[222] and mentioned the Constitution's "original" meaning seven times.[223]

The issue in *Mallory* is whether states can compel corporations to consent to personal jurisdiction as a condition of doing business in the state.[224] This issue implicates Justice Gorsuch's concern that post-*Shoe*

219. Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 264 (2017).

220. *See id.* at 1778 (noting that the defendant employed at least 410 people in the forum and operated six local facilities).

221. Petition for a Writ of Certiorari at i, Mallory v. Norfolk So. Ry. (2021) (U.S. No. 21-1168).

222. *See id.* at 9, 27.

223. *See id.* at 21, 26–27.

224. *See id.* at i.

jurisprudence needlessly insulates corporations from jurisdiction that *Pennoyer* would have tolerated under a simple presence test.[225] The petition embraced that originalist framing by contrasting modern and historical approaches to corporate consent.[226] *Mallory* is therefore amenable to a holding that revisits the theoretical foundation of jurisprudence limiting state power over nonresident corporations.

Originalism was a prominent subject of discussion in briefing and oral argument, which is not surprising given the petition's framing. The merits briefs repeatedly invoked originalism,[227] counsel raised it at oral argument without prompting,[228] and Justices asked about it.[229]

Originalism might influence the outcome in *Mallory*, but there is scant evidence on which to base a prediction. None of the Justices tipped their hand about the relevance of originalism during oral argument, except possibly Chief Justice John Roberts. The Chief Justice seemed skeptical of originalist arguments when he suggested that *Shoe* overruled prior cases with an "inconsistent . . . approach" to personal jurisdiction and "relegate[d] that body of cases to the dust bin of history."[230] Two other Justices—Brett Kavanaugh and Amy Coney Barrett—have not publicly expressed views about personal jurisdiction since joining the Court. They are amenable to interpreting the Due Process Clause in light of history, as evidenced by their votes in *Dobbs*.[231] But Justice Barrett did not participate in *Ford*, Justice Kavanaugh did not join a concurrence in *Ford*, and neither has written a Supreme Court decision about personal jurisdiction. Moreover, Justice Kavanaugh's decision not to join Justice Gorsuch in *Ford* is not a strong signal of his position because joining

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225. *See id.* at 27.

226. *See id.* at 27.

227. *Compare* Brief for the Petitioner, 142 S. Ct. 2646 at 10, *Mallory v. Norfolk So. Ry.*, (No. 21-1168) (U.S. 2022) ("The original public meaning of the Fourteenth Amendment supplies a clear answer . . . ."), *with* Respondent's Brief at 39, *Mallory*, 142 S. Ct. 2646 (No. 21-1168) ("Original public meaning does not support Mallory.").

228. Petitioner's counsel invoked "original meaning," "original public meaning," and "originalism" five times in the first moments of his argument. *See* Transcript of Oral Argument at 3–4, *Mallory*, 142 S. Ct. 2646 (No. 21-1168). Counsel for the United States as amicus curiae mentioned "original meaning" in his fourth sentence. *Id.* at 100. Counsel for the respondent mentioned "history," "tradition," and "historical tradition" several times. *Id.* at 57, 64, 69.

229. Justice Thomas asked about "history." *Id.* at 5. Chief Justice Roberts asked about "history and tradition." *Id.* at 9. Justice Alito asked about the "historical argument." *Id.* at 15. Justice Gorsuch asked about "historical tradition." *Id.* at 22, 66. Justice Barrett asked about "original meaning." *Id.* at 49. Justice Kavanaugh asked about "original public meaning." *Id.* at 91.

230. *Id.* at 9–10.

231. Justices who joined the majority opinion in *Dobbs* embraced the importance of history and tradition but did not necessarily embrace originalism. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 1, 21 (2023) ("Justice Alito's opinion for the Court in *Dobbs* is a decided mix of originalist and nonoriginalist use of history and tradition.").

would have deprived the majority of a fifth vote. He might therefore have prioritized creating relatively clear guidance for lower courts while waiting to see what effect Justice Gorsuch's opinion would have on advocacy in future cases.

Accordingly, at least four outcomes are possible in *Mallory*. A majority might embrace originalism; conflicting views about originalism might prevent a majority from forming and create uncertainty for lower courts;[232] originalism might animate separate opinions, as happened in *Ford*; or originalism might become a non-issue based on a nuanced assessment of the question presented.[233] The possibility of *Mallory* being anticlimactic is plausible. Professor Stephen Sachs—who wrote a critique of *Shoe* that Justice Gorsuch cited in *Ford*[234]—filed a brief in *Mallory* suggesting a resolution that relies on settled precedent and avoids reconsidering *Shoe*.[235] Originalists could therefore join nonoriginalists in *Mallory* while deferring a debate about *Shoe* to a future case.

An outcome in *Mallory* that does not materially alter the *Shoe* framework would not mean that Justice Gorsuch's call for reform has failed. The concerns that Justice Gorsuch raised in *Ford* will not simply vanish. A growing cohort of lower court judges who support originalism are in a position to build on Justice Gorsuch's analysis.[236] Scholars who study jurisdiction and support originalism may also keep the issue alive,[237] as will nonoriginalist scholars who continue to criticize current doctrine.[238] Even without this momentum, lawyers are attentive to judicial cues and will challenge precedent when doing so helps their clients. These lawyers will have plenty of opportunities because personal jurisdiction doctrine is both unstable and ubiquitous, which is a recipe for creative litigation.

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232. *Cf.* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 887 (2011) (Breyer, J., concurring in the judgment) (separate opinion by two Justices with idiosyncratic views about personal jurisdiction that deprived the Court of a majority).

233. For an example of a recent case that seemed like it might present an opportunity to revisit settled procedural norms, but that instead resulted in a narrow, unanimous opinion, see Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502 (2022) (discussing choice of law in federal court).

234. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1036 n.2 (2021) (Gorsuch, J., concurring in the judgment).

235. *See* Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 2–3, 9, Mallory v. Norfolk So. Ry. Co., 142 S. Ct. 2646 (2022) (No. 21-1168); *see also* Brief of Scholars on Corp. Registration and Jurisdiction as Amici Curiae in Support of Neither Party at 2–3, *Mallory*, 142 S. Ct. 2646 (No. 21-1168) (proposing a narrow holding that avoids extreme arguments by the parties).

236. *See* Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257, 263 (2022) ("[O]riginalist theories seem likely to find a receptive audience among at least a significant portion of lower court judiciary.").

237. *See supra* note 166 and accompanying text.

238. *See supra* note 157 and accompanying text.

The narrow question in *Mallory* is therefore a distraction from the bigger picture. As Part III explains, the question about corporate consent that *Mallory* raises is merely one of dozens of questions that personal jurisdiction doctrine must address. Short of including treatise-length dicta, even a disruptive opinion in *Mallory* will not settle most of the difficult questions that currently orbit *Shoe*. No matter what happens in *Mallory*, the issues addressed in Part III will be salient in future cases.

In sum, originalism is an issue with which courts assessing personal jurisdiction will inevitably contend, both soon and over the coming decades. The next Part considers the risks and opportunities inherent in that enterprise and how nonoriginalists must confront similar arguments.

III. Rebuilding Personal Jurisdiction Doctrine from First Principles While Recognizing Obstacles to an Originalist Inquiry

Viewing personal jurisdiction through a new methodological lens will not suddenly convert a complex topic into a simple topic. The hard questions that confronted nonoriginalists implementing *Shoe* will also confront originalists reconsidering *Pennoyer*.

This Part considers how the Court should approach difficult questions about the sources of constitutional law limiting state jurisdiction and the values those sources protect. Section III.A cautions against allowing cases like *Ford*, where jurisdiction was clearer under *Pennoyer*'s presence test than under *Shoe*'s contacts test, to obscure the need for flexible rules governing cases where jurisdiction is clearer under *Shoe* than *Pennoyer*. This Section also discusses the importance of allowing jurisdictional rules to adapt to social, economic, and technological changes that threaten state interests. Section III.B explores potential sources of constitutional limits on jurisdiction. It concludes that doctrine should rely on horizontal federalism principles rather than the Due Process Clause. Section III.C briefly revisits the analysis in Section I.C to stress the importance of linking doctrinal reform to the causes of doctrinal failure.

A. *Focusing on Scenarios Where* Pennoyer *Authorizes Broader Jurisdiction than* Shoe *Obscures the Difficulty of Scenarios Where* Shoe *Authorizes Broader Jurisdiction than* Pennoyer

The narrow way in which Justice Gorsuch framed the need to reassess doctrine creates a risk that originalists will overlook important dimensions of personal jurisdiction. As Section II.B.3 explained, Justice Gorsuch focused on fact patterns in which a corporation is either served in the forum or has extensive physical contacts with the forum. These scenarios were relatively easy to address under *Pennoyer*'s territorial approach because the defendants were present in the forum. But these

scenarios can be needlessly difficult under *Shoe*'s contacts approach, as *Ford* illustrated. Justice Gorsuch's suggestion that *Shoe* is a step backward therefore is appealing in the narrow context of the fact patterns on which he focused.

The problem is that many recurring fact patterns implicating *Shoe* are more complicated than *Ford*. Defendants often challenge personal jurisdiction when they are not served in the forum and are not physically present in the forum, despite having caused harm in the forum. Examples include defendants who commit intentional torts aimed at forum residents while residents are in the forum[239] or outside the forum,[240] breach contracts with forum residents,[241] deliver products into the stream of commerce that later enter the forum,[242] own intangible property in the forum,[243] fail to fulfill obligations to family members who reside in the forum,[244] or commit torts in the forum and then leave before being served.[245]

Jurisprudence governing these additional fact patterns would benefit from reappraisal for the reasons that Part I explained: doctrine is fundamentally broken. However, Justice Gorsuch's emphasis on presence is a poor fit for cases that are more complex than *Ford*. Homogenizing diverse scenarios under the umbrella of a presence inquiry would risk creating the sort of "one-size-fits-all test" that Justice Gorsuch has criticized in other contexts.[246] Moreover, these fact patterns are the inverse of what Justice Gorsuch addressed in *Ford*. The tag and presence fact patterns that Justice Gorsuch cited raise concerns about whether jurisdiction is appropriate when nineteenth-century precedent recognized *more* state power than *Shoe*. But these other fact patterns raise concerns about whether jurisdiction is appropriate when nineteenth-century precedent recognized *less* state power than *Shoe*.

An originalist revision of *Shoe* must therefore consider whether originalism is a one-way ratchet. Should originalist insights merely expand jurisdiction to include what *Pennoyer* allowed, or should originalism also contract jurisdiction to exclude what *Pennoyer* forbade? Each approach will be controversial for different reasons.

If Justice Gorsuch contends that *Pennoyer*'s presence test is a basis for expanding jurisdiction past *Shoe*'s limits, he will encounter the same problem that Justice Antonin Scalia encountered in *Burnham*. Four

239. *See* Calder v. Jones, 465 U.S. 783, 788–89 (1984).

240. *See* Walden v. Fiore, 571 U.S. 277, 279–80 (2014).

241. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464–66 (1985).

242. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011) (plurality opinion).

243. *See* Shaffer v. Heitner, 433 U.S. 186, 189, 213 (1977).

244. *See* Kulko v. Super. Ct., 436 U.S. 84, 86 (1978).

245. *See* Hess v. Pawloski, 274 U.S. 352, 353–54 (1927).

246. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1603–04 (2022) (Gorsuch, J., concurring in the judgment).

Justices in *Burnham* refused to sign Justice Scalia's opinion extolling a "traditional"[247] account of personal jurisdiction.[248] They foresaw that allowing states to exercise power whenever a countervailing right lacks a traditional basis would have unwanted implications.[249] *Dobbs* confirmed their trepidation about reading the Due Process Clause in light of "history and tradition."[250] Justice Gorsuch theoretically can obtain a five-Justice majority for reviving *Pennoyer* without the three *Dobbs* dissenters (substituting Justice Jackson for Justice Breyer). But Justice Alito's concurrence in *Ford* suggests that even Justices who are sympathetic to historical arguments might balk at destabilizing personal jurisdiction on purely historical grounds.[251]

If Justice Gorsuch additionally contends that *Pennoyer*'s presence test is a basis for contracting jurisdiction below *Shoe*'s threshold, then at least three additional problems will arise.

First, *Pennoyer* collapsed for good reasons. Resurrecting a rule that prevents states from providing remedies to residents harmed by outsiders would undermine deterrence, burden victims, and disrespect federalism.

Second, restoring nineteenth-century rules would require a justification for anchoring state power to archaic limits that did not anticipate the scope of modern interstate activity. That justification may be impossible to develop because the ability to evolve is ingrained in personal jurisdiction doctrine's DNA. The common law process of doctrinal development from the Founding to *Ford* has treated doctrine's adaptability as a feature rather than a bug. The Court has observed that "new problems not envisioned by rules developed in another era" can "necessitate[]" departure from "well-established" precedents governing personal jurisdiction;[252] that "fundamental transformation of our national economy over the years" requires "expanding the permissible scope of state jurisdiction;"[253] and that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over

247. Burnham v. Super. Ct., 495 U.S. 604, 619 (1990) (plurality opinion).

248. *See id.* at 628 (Brennan, J., concurring in the judgment).

249. *See id.* at 629 ("Although I agree that history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements, I cannot agree that it is the *only* factor such that all traditional rules of jurisdiction are, *ipso facto*, forever constitutional.") (emphasis omitted).

250. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)).

251. *See supra* Section II.C. Chief Justice Roberts has likewise expressed skepticism about reviving pre-*Shoe* rules that were "relegate[d] . . . to the dust bin of history." Transcript of Oral Argument, *supra* note 228, at 9–10.

252. Honda Motor Co. v. Oberg, 512 U.S. 415, 431 (1994).

253. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) ("The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.").

nonresidents has undergone a similar increase."[254] Even Justice Stephen Field—who wrote the majority opinion in *Pennoyer*—noted the importance of repudiating historical limits on service of corporate agents in order to avoid "inconvenience and injustice."[255]

An originalist might respond that the Court's embrace of evolution in the face of social, economic, and technological change is atextual. But that response begs the question of what text is relevant and what that text means. The next Section addresses this question. Moreover, absent clear text freezing the common law's development—analogous to the Preservation Clause in the Seventh Amendment[256]—there is no reason to think that a Constitution "intended to endure for ages to come" eviscerated state power to adapt to new threats.[257] Indeed, Founding-era English law preserved more legislative discretion to authorize extraterritorial service than *Pennoyer*'s presence rule.[258] This suggests that *Pennoyer* may have wrongly stifled doctrinal evolution and should not be revived.[259]

Some variants of originalism recognize that although the semantic meaning of text is fixed at its enactment, this meaning can encompass

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254. Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) ("At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.").

255. St. Clair v. Cox, 106 U.S. 350, 355 (1882). Justice Field did not link this observation to constitutional interpretation and did not mention the Due Process Clause. His endorsement of reform is nevertheless interesting because it shows that he did not perceive traditional limits on service as entirely immune from legislative revision. Similarly, just twenty years after *Pennoyer*, the Court observed that local business conducted by nonresident corporations had become so prevalent that "justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the State where the business was done . . . ." Conn. Mut. Life Ins. v. Spratley, 172 U.S. 602, 619 (1899).

256. U.S. CONST. amend. VII ("the right of trial by jury shall be preserved"); *see also* Dimick v. Schiedt, 293 U.S. 474, 487 (1935) (citation omitted) ("The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, *qua* common law, but to alter the Constitution.").

257. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

258. *See* Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 990 (1999) (noting that England's Parliament had authority to authorize extraterritorial service).

259. *See id.* at 977 (suggesting that *Pennoyer*'s presence rule should have been treated as federal common law rather than as a constitutional requirement); Weinstein, *supra* note 21, at 175, 190 n.87 (disagreeing with Professor Harold Korn about the novelty of *Pennoyer*'s presence requirement but agreeing that it should be treated as federal common law derogable by Congress rather than as a due process requirement).

dynamic standards that enable adaptation to new circumstances.[260] Accordingly, narrowing jurisdiction based on an originalist embrace of *Pennoyer* would face two methodological hurdles: proponents must justify relying on originalist rather than nonoriginalist arguments, and proponents must justify relying on a version of originalism that produces a static rather than dynamic rule.

Third, the prospect that an originalist repudiation of *Shoe* would restore *Pennoyer*'s presence test risks replicating the unstable pre-*Shoe* regime under a new moniker. During the nearly seventy years between *Pennoyer* and *Shoe*, the Court struggled to translate the concept of "presence" to incorporeal entities—such as business organizations—and intangible assets. That effort to regulate the twentieth-century economy with a nineteenth-century concept relied on arbitrary legal fictions. As Judge Learned Hand explained, "[w]hen we say . . . that a corporation may be sued only where it is 'present,' we understand that the word is used, not literally, but as shorthand for something else."[261] *Shoe*'s innovation was to replace fictions with doctrinal tests that more directly addressed relevant constitutional values.[262] If originalists revive presence as a doctrinal guidepost, they will need to develop euphemisms and fictions akin to what courts developed before *Shoe*. This risks an outcome that Justice Gorsuch warned against when he lamented the use of "new words to express . . . old ideas" that should be discarded rather than relabeled.[263]

Instead of resurrecting old ideas that failed, the Court should consider revitalizing doctrine with new ideas. Section III.B.2 will suggest an

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260. *See* Jack M. Balkin, *Translating the Constitution*, 118 MICH. L. REV. 977, 980–81 (2020) (discussing subtle variations in how several originalist theories address adaptation from the past to the present); Baude, *supra* note 216, at 2357 ("[T]he Constitution's terms may have significantly more flexibility than the simplest conception of originalism would imply."); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 558 (2006) ("Common law originalism regards the strands of eighteenth-century common law not as providing determinate answers that fix the meaning of particular constitutional clauses but instead as supplying the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively. It suggests further that the interpretation of common law phrases should be responsive to certain alterations in external conditions, rather than static and inflexible."); *cf.* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 324 (2021) ("Founding-Era constitutionalists by and large were not positivists. They tended to think that much of law was 'out there'—like the principles of mathematics or natural philosophy—awaiting discovery through reason and observation."); William S. Dodge et al., *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163, 1173 (2023) ("It is often not possible to look back at history to find the 'pure' version of a procedural rule as those rules were constantly changing.").

261. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).

262. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–18 (1945).

263. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039 (Gorsuch, J., concurring in the judgment).

approach to jurisdiction based on horizontal federalism that changes the central focus of the personal jurisdiction inquiry in a way that might appeal to both originalists and nonoriginalists.

B. *The Absence of a "Personal Jurisdiction Clause" in the Constitution Complicates Efforts to Identify a Target for Originalist Analysis*

The form of originalism discussed in this Article is a method of ascertaining meaning. Originalists therefore need something to study—an object upon which they can deploy their analytical tools. That object might be a text, a body of common law, or a structural arrangement. But it must be something. The range of potential sources is broad, as Professor Keith Whittington explained:

> Originalist arguments need not be clause-bound. Arguments drawn from the design of the Constitution, the background assumptions of the Constitution, or even the 'ethos' or traditions of the people may well be appropriate from an originalist standpoint, so long as the aim is to illuminate the meaning of the constitutional rules put in place by those who created the document. Examining the constitutional design for clues about original constitutional meaning is, in principle, as useful as examining the constitutional text.[264]

Finding the relevant object for originalists to interpret in the context of personal jurisdiction is difficult. The Constitution does not contain any express references to personal jurisdiction or service of process. If an "original meaning" emerges from the Constitution's silence, it must arise from abstract propositions that permeate the Constitution's text and structure, or from common law that fills textual gaps.

The relatively ethereal foundation of original meaning in the personal jurisdiction context creates at least two vexing problems. First, original meaning is notoriously elusive and prone to conflicting interpretations as it becomes less grounded in an explicit text.[265] An originalist reassessment of *Shoe* might therefore be less straightforward than Justice Gorsuch hoped.

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264. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 390 (2013). Some originalists disagree with Whittington and would more closely link originalism and text. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 15 (2013) (criticizing "New Originalists" for relying on values extrinsic to the Constitution as an aid to construction).

265. *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1429 (2021) ("[O]riginal constitutional meanings that are ascertainable as a matter of historical fact . . . do not exist in forms capable of resolving any historically or reasonably disputed issue.").

Second, the absence of a clear foundation for originalist analysis risks what social scientists call the "streetlight effect."[266] This effect occurs when a "search is rendered less accurate because of the tendency to look for answers where it is easiest to see but not necessarily where the answers are most likely to be."[267] The term arises from a classic joke: a person searching for lost keys at night beneath a streetlamp admits that the keys were dropped far away, but states that the search is occurring near the lamp because that is where the light is.

The streetlight effect may explain why courts and commentators have focused on the Due Process Clause as a source of constitutional law governing personal jurisdiction. The important and amorphous clause casts a bright light, which makes it a deceptively attractive source of rules for subjects about which it might not have much to say.

This Section considers how the difficulty of grounding original meaning complicates an originalist inquiry into personal jurisdiction. Section III.B.1 explains that the Due Process Clause should not be the starting point for an originalist analysis of personal jurisdiction. Section III.B.2 contends that constructing a coherent account of personal jurisdiction doctrine requires integrating personal jurisdiction into the broader context of horizontal federalism.

1. The Due Process Clause Is the Wrong Starting Point for an Inquiry into Personal Jurisdiction

Originalist commentary about constitutional limits on personal jurisdiction in state courts generally begins with the Due Process Clause.[268] Justice Gorsuch even used "due process" and "the Constitution" interchangeably when discussing original meaning.[269] However, the Due Process Clause is the wrong starting point for four reasons.

First, a basic principle of constitutional interpretation is that amendments do not occur in a vacuum. Instead, amendments modify the Constitution and become integrated into the preexisting constitutional framework.[270] Understanding what an amendment accomplishes requires

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266. Donald L. Drakeman, *Is Corpus Linguistics Better Than Flipping a Coin?*, 109 GEO. L.J. ONLINE 81, 89 (2020).

267. *Id.*

268. *See* Solum & Crema, *supra* note 166, at 536 (discussing the "constitutional law of personal jurisdiction" through the lens of due process); Jacobs, *supra* note 166, at 1593 (focusing on the "original meaning of the Fourteenth Amendment's Due Process Clause").

269. *See supra* text accompanying notes 197–98.

270. *Cf.* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 22 (noting interpretative complications arising from the fact that amendments are appended rather than interlineated).

understanding what the Constitution meant prior to the amendment's adoption.

An inquiry into how the Due Process Clause affected personal jurisdiction must build on an antecedent inquiry into how the Constitution limited state adjudicative power at the Founding. The only way to avoid analyzing the Founding would be to argue that the Constitution was silent about personal jurisdiction in state court until ratification of the Due Process Clause. Yet there is no evidence clearly establishing such silence. Moreover, the next Section contends that the Founding-era Constitution should be interpreted to limit state jurisdiction even if courts did not always enforce those limits or identify their origins. Originalists therefore must engage with pre-Fourteenth Amendment original meaning, and nonoriginalists likewise should consider its potential relevance.

Once judges have a theory of how the Founding-era Constitution regulated personal jurisdiction, arguments based on due process might become less attractive. As the next few points demonstrate, the modern fixation on due process as a source of nuanced multi-factored tests is ahistorical and thinly reasoned. The emphasis persists due to inertia that reinforces the streetlight effect. A new theory of Founding-era jurisdictional rules can disrupt that inertia and permit a fresh assessment of how due process is relevant. And the relevance of due process might be narrow, limited to ensuring compliance with statutory notice and service requirements.[271]

Second, precedent's emphasis on the Due Process Clause in the personal jurisdiction context may be a historical accident and a function of a flawed clause-centric mindset in constitutional law. Justice Field's majority opinion in *Pennoyer* cited the Due Process Clause as a source of principles that he had previously articulated in *Galpin v. Page*,[272] which did not cite or rely on the Due Process Clause.[273] Justice Field thus did not perceive the Due Process Clause as creating a new jurisdictional standard. Instead, he observed that the Clause was a mechanism for enforcing preexisting law. The jurisdictional standard in *Galpin* and *Pennoyer* thus embodied the pre-Fourteenth Amendment "rules and

271. *See* Solum & Crema, *supra* note 166, at 495–500.

272. 85 U.S. 350 (1873).

273. *Compare* Pennoyer v. Neff, 95 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse."), *with Galpin*, 85 U.S. at 367 (stating, without mentioning the Due Process Clause, that "[t]he tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy"). *Galpin* is consistent with earlier precedent framing limits on state jurisdiction over outsiders as "rules of public law." Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 406 (1855).

principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."[274]

Justice Field's emphasis on pre-Fourteenth Amendment standards is not surprising. Evidence from the Fourteenth Amendment's framing and ratification does not indicate that personal jurisdiction was a salient issue during the drama of Reconstruction. Indeed, recent thorough accounts of the Fourteenth Amendment's origins are notable for not discussing personal jurisdiction or citing *Pennoyer*.[275] There is no evidence that the Fourteenth Amendment's drafters or ratifiers thought that the amendment would fill a lacuna in the original Constitution by setting new limits on personal jurisdiction.

Yet constitutional jurisprudence is a moth drawn to the illumination of clauses. *Pennoyer* was attracted to the Due Process Clause even though *Galpin* had reached the same conclusion without relying on the Clause. Stare decisis then led the Court to remain under the due process streetlight without much analysis of why the clause was relevant and why other clauses and structural arguments were irrelevant.

Originalists and nonoriginalists should analyze whether the Due Process Clause deserves the central role that history has given it in personal jurisdiction cases. A holistic review of the entire Constitution would counter the tendency of originalism to "anchor" questions to a particular text before considering whether the text is relevant.[276] A broad scope would also be consistent with historical research contending that the Constitution's approach to complex problems is much less clause-bound than conventional wisdom posits.[277]

Third, the Court's current reliance on due process is thinly reasoned. Theories of personal jurisdiction based on the Due Process Clause depend on the idea that the Fourteenth Amendment prevents deprivations of liberty (or in some cases property).[278] This emphasis on liberty creates two possibilities: the Due Process Clause might be the source of relevant liberty interests, or the Due Process Clause might create a remedy for enforcing liberty interests that arise from other sources.

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274. *Pennoyer*, 95 U.S. at 733.

275. *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT (2021); GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT (2013).

276. Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1319 (2019).

277. *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 128–30 (2018) (analyzing how the Founding generation conceptualized the adaptability of a written constitution).

278. Shaffer v. Heitner, 433 U.S. 186, 206 (1977) (noting in the context of applying the Due Process Clause to in rem jurisdiction that "an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court").

The idea that the Due Process Clause itself creates substantive liberty interests is controversial among originalists.[279] And this idea is certainly not what Justice Thomas had in mind when he signed Justice Gorsuch's *Ford* concurrence. Justice Thomas has a longstanding objection to substantive due process and did not abruptly abandon it for the sake of tweaking personal jurisdiction doctrine.[280] Justice Gorsuch also might be hesitant to use an originalist reconsideration of *Shoe* as an opportunity to retrench rather than constrict substantive due process.[281] Accordingly, Justices amenable to originalism are likely to focus on theories that posit a source of liberty interests and countervailing state interests that is exogenous to the Due Process Clause. Nonoriginalists might similarly prefer to sidestep controversy about substantive due process if a more compelling theory is available. The hard question is how to construct a theory of constitutional liberty that could animate personal jurisdiction doctrine.

Nicastro illustrates the problem with framing personal jurisdiction in terms of liberty. The *Nicastro* plurality invoked a "liberty" interest that immunized the manufacturer of a dangerous product from jurisdiction in New Jersey.[282] However, the plurality did not hold that all manufacturers of such products have a liberty interest that prevents jurisdiction in all states. Instead, the plurality held that a particular manufacturer had a liberty interest in avoiding jurisdiction in a particular state under a particular set of circumstances.[283]

Accordingly, the Court's identification of a "liberty" interest in *Nicastro* was an imprecise way of making an underdeveloped point. The Court was really saying that the relationship between the defendant and the state was insufficient to authorize the state to impose obligations on the defendant. For that conclusion to be persuasive, the plurality would have needed criteria for answering at least three questions: (1) when do states acquire a legitimate interest in issuing binding directives to

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279. *Compare* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (contending that substantive due process is consistent with an originalist approach to the Fourteenth Amendment), *with* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (rejecting this argument).

280. *See* McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and in the judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.").

281. *See* Browder v. City of Albuquerque, 787 F.3d 1076, 1078 (10th Cir. 2015) (Gorsuch, J.) ("Some suggest [that substantive due process] doctrine with the paradoxical name might find a more natural home in the Privileges and Immunities Clause; others question whether it should find a home anywhere in the Constitution. But, the Supreme Court clearly tells us, home it has and has where it is.").

282. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 887 (2011) (plurality opinion).

283. *See id.*

nonresidents; (2) when do nonresident recipients of an otherwise binding directive have a legitimate reason to resist; and (3) when a seemingly legitimate directive collides with a seemingly legitimate grounds for resisting, how are competing interests weighed? The *Nicastro* plurality neither asked nor answered any of these questions. Instead, the plurality allowed the majestic invocation of "liberty" to obscure uncertainty about the origin and scope of underlying interests.[284]

In sum, when substantive due process is off the table, the Due Process Clause enforces exogenous limits on state authority. Identifying those limits requires more than a conclusory invocation of the word "liberty." Instead, the Court must identify and balance competing state and individual interests. But once the Court focuses on competing interests, the concept of "due process" does not add useful information. This may explain why decisions like *Nicastro* are prone to conclusory assertions rather than nuanced reasoning.

Fourth, consistent with the prior point, scholars have identified other clauses of the Constitution that define state interests and individual rights that might be relevant to personal jurisdiction. These include the Commerce Clause,[285] the Privileges and Immunities Clause of Article IV,[286] and the Full Faith and Credit Clause.[287] The broader structure of the Constitution is also relevant to defining how horizontal federalism principles shape limits on personal jurisdiction.[288]

Similarly, Professor Steve Sachs contends that Founding-era general common law limited state jurisdiction and that the Due Process Clause created a remedy for enforcing those limits before judgment rather than in a post-judgment collateral attack.[289] Professors Lawrence Solum and Max Crema contend that Professor Sachs did not conduct "comprehensive research into the meaning of the phrase 'due process of law'" and therefore did not consider "the implications of the original meaning of the constitutional text for the constitutional law of personal jurisdiction."[290] However, as this Section suggests, an inquiry into the Founding-era understanding of state interests and individual prerogatives is in fact an inquiry into the original meaning of the Constitution. An originalist account of personal jurisdiction must assess the original

284. *See* Allan Erbsen, Wayfair *Undermines* Nicastro: *The Constitutional Connection Between State Tax Authority and Personal Jurisdiction*, 128 YALE L.J.F. 724, 737–39 (2019).

285. *See* John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 123 (2016).

286. *See* Alan B. Morrison, *Safe at Home: The Supreme Court's Personal Jurisdiction Gift to Business*, 68 DEPAUL L. REV. 517, 559 (2019).

287. Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 851–52 (1989).

288. *See infra* Section III.B.2.

289. *See* Sachs, *supra* note 166, at 1252–53.

290. Solum & Crema, *supra* note 166, at 487.

meaning of everything that came before the Due Process Clause in order to understand what the Due Process Clause added to the equation. An originalist assessment might deem various clauses and concepts relevant or irrelevant, but there is no way to know until the assessment occurs.[291]

The foregoing arguments suggest that Justice Gorsuch's request for an originalist reassessment of *Shoe* might not be bold enough—or might be too bold. If his intent was merely to revisit the Due Process Clause, then the inquiry would be insufficiently deep in time and insufficiently broad in context. But if the inquiry extends back to the Founding and considers the Constitution as a whole, its expansive scope may deter Justices wary of broad implications beyond the context of personal jurisdiction. A nonoriginalist approach that uses the Founding era as a source of context rather than a binding guidepost may be more palatable to a majority of the Court.

2. A Coherent Account of Personal Jurisdiction Requires a Coherent Account of Horizontal Federalism, Which Complicates an Originalist Reassessment of *Shoe*

The Constitution allocates regulatory power among fifty coequal states with overlapping authority. Efforts to police this allocation implicate horizontal federalism. In contrast, the relationship between states and the national government implicates vertical federalism.[292]

Personal jurisdiction is a quintessential horizontal federalism problem. In complex suits, relevant activities often occur in several states. Specific jurisdiction is proper in some of those states, but not in others. Drawing a line that distinguishes states with specific jurisdiction from states without specific jurisdiction requires a theory of how the Constitution allocates specific jurisdiction among states in a federal system. For example, the question in *Ford* was whether the Constitution allocated specific jurisdiction only to Michigan, Kentucky, and Washington, or also to Montana.[293]

Framing personal jurisdiction as a horizontal federalism problem reveals its kinship with nominally distinct fields of constitutional law. These fields encompass doctrine limiting each state's power to apply its substantive law to civil disputes, tax nonresidents, and regulate

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291. Justice Kavanaugh made a similar point when he suggested that an originalist assessment of the Dormant Commerce Clause should not overlook the relevance of the Export/Import and Privileges and Immunities Clauses. *See* Transcript of Oral Argument at 38–39, *Nat'l Pork Producers Council v. Ross*, No. 21-468 (Oct. 11, 2022) ("You couldn't just say, oh, let's get rid of all those cases because they're mislabeled without thinking about the other clauses.").

292. For a more detailed discussion of horizontal and vertical federalism, see Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008).

293. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1022–24 (2021).

extraterritorial conduct. Thinking about these fields holistically rather than in isolation can lead to more persuasive and resilient rules.

A hypothetical scenario illustrates the importance of viewing horizontal federalism holistically. Suppose that several corporations located outside California manufacture widgets and sell them to consumers nationwide through the internet. California is concerned about widgets for several reasons: widgets are dangerous; the process of manufacturing widgets contributes to global climate change; and sellers often fail to pay sales taxes on widgets shipped to California. California therefore enacts a statute with four sections focused on four goals. California might already have other statutes that achieve some of these goals. But for purposes of this hypothetical, we can assume that the statute is novel. Section 1 authorizes California courts to exercise personal jurisdiction over nonresident widget manufacturers in civil suits arising from accidents in California. Section 2 establishes choice of law rules requiring application of California's substantive law to claims alleging that defective widgets caused accidents in California. Section 3 requires e-commerce sites selling widgets to collect and remit California taxes on sales to California residents. Section 4 bars shipment of widgets into California unless the manufacturer complies with specified practices that mitigate climate change.

Courts evaluating the constitutionality of California's hypothetical statute would confront four issues implicating discrete silos of doctrine: personal jurisdiction, choice of law, interstate taxation, and extraterritorial regulation. But at a higher level of abstraction, there is only one issue. All four sections of the statute presume that California can extend its law beyond its borders to assert power over nonresidents whose conduct affects California.[294] Objections to these four sections all reduce to a single assertion: California has exceeded its authority as a coequal state in the federal system. Entities challenging the statute can frame this objection in terms of limits on California's sovereignty, federal preemption of state overreaching, or rights belonging to nonresidents. These three arguments are different paths to the same destination. All three paths consider how the Constitution balances state, national, and individual interests arising from interstate activities. Analyzing each path—sovereignty, preemption, and rights—for each section of the statute requires explaining how the Constitution's approach to horizontal federalism constrains state power, augments national power, and protects individuals.

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294. One might not think that exercising personal jurisdiction over a nonresident extends state law beyond its borders. But that is literally what a long-arm statute does: it authorizes serving a summons that invokes state law to compel the recipient's appearance. *See, e.g.*, CAL. CIV. CODE § 412.20(a)(3)-(4) (West 2022) (stating that a summons "direct[s]" the defendant to appear under threat of default).

Addressing the hypothetical statute by narrowly focusing on discrete categories rather than the broader landscape of horizontal federalism risks inconsistency and incoherence. For example, suppose that the Court revives *Pennoyer* and concludes that California cannot exercise personal jurisdiction over widget sellers that are not physically present in the state. That holding would raise several questions if viewed from a horizontal federalism perspective, including:

- Would linking personal jurisdiction to presence require overruling *South Dakota v. Wayfair*, which holds that presence in the state is not a prerequisite for taxation?[295]
- If *Wayfair* correctly holds that states can tax nonresidents who are not physically present, then might California also have personal jurisdiction in a suit to collect unremitted taxes, meaning that presence is not the touchstone for personal jurisdiction? Or would the Court instead hold that the Constitution empowers California's legislature to impose tax obligations that the Constitution bars California's courts from enforcing?
- If states can tax entities that are not present, can California's choice of law rules favor local product liability law in suits against nonresident manufacturers?
- If California can apply its product liability law, then would reviving *Pennoyer* be sensible? Should the existence of California's regulatory power mean that manufacturers lack immunity from personal jurisdiction when they violate an exercise of that regulatory power? If the answer is that immunity exists because limits on personal jurisdiction protect defendants from burdensome litigation even when states could apply local law, then why should the personal jurisdiction inquiry consider a defendant's presence in the forum? Why not focus only on the two apparently relevant factors: the state's interests and the burden on the defendant?

Thinking about these questions concurrently highlights how the foundations of any one aspect of horizontal federalism doctrine can shape the others.

Shoe itself illustrates how horizontal federalism concerns animate personal jurisdiction doctrine. Some accounts of *Shoe* emphasize Chief Justice Harlan Stone's focus on contacts rather than presence as "an entirely new approach to the due process analysis."[296] However, this shift was not as novel as commentators assume. It was a new approach to

295. 128 S. Ct. 2080, 2099 (2018).

296. Donald L. Doernberg, *Resoling* International Shoe, 2 TEX. A&M L. REV. 247, 260 (2014); *see also Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 911, 923 (1960) ("Chief Justice Stone discarded the presence and consent theories as mere legal conclusions that the assumption of jurisdiction was reasonable. In place of these he offered a new standard . . . .").

personal jurisdiction, but it was not a new approach to due process in the context of horizontal federalism. Six years before *Shoe*, Chief Justice Stone used similar reasoning and language in *Curry v. McCanless*, which was a case about due process limits on state authority to tax intangible property that lacked a physical nexus with the state.[297] *Curry* held that due process did not require "attributing a single location to that which has no physical characteristics."[298] Instead, states acquired power when the owner "extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws . . . in such a way as to bring his person or property within the [state's] reach."[299]

Chief Justice Stone reused language from *Curry* in *Shoe*, which held that "[s]ince the corporate personality is a fiction . . . its 'presence' without . . . the state of its origin can be manifested only by activities carried on in its behalf."[300] A defendant therefore was subject to state power when it "exercise[d] the privilege of conducting activities within a state, [such that] it enjoy[ed] the benefits and protection of the laws of that state."[301] *Shoe* linked these observations about state power to horizontal federalism by stating that "contacts" made jurisdiction "reasonable" only when evaluated "in the context of our federal system of government."[302] *Shoe* thus treated a question about personal jurisdiction in roughly the same way as *Curry* treated a question about interstate taxation. This similarity should not be surprising because both are subfields of horizontal federalism.

The current Court has drifted from *Shoe*'s integration of personal jurisdiction into the broader landscape of horizontal federalism. Opinions about personal jurisdiction tangentially reference "interstate federalism" but do not rely on it as an organizing principle that can shape doctrine.[303] The Court in *Ford* came tantalizingly close to recognizing a point that I have long advocated, which is that limits on personal jurisdiction are best understood as "allocating" power among states.[304] However, the Court mentioned allocation without expressly accepting or rejecting its importance.[305]

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297. 307 U.S. 357, 366 (1939).

298. *Id.* at 362–63.

299. *Id.* at 367.

300. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

301. *Id.* at 319.

302. *Id.* at 317.

303. *See supra* text accompanying notes 95–97.

304. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1030 (2021); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 61 (2010) ("[C]onstitutional law limiting the scope of personal jurisdiction in state courts in cases involving domestic actors and events serves an *allocational* function: it defines which states can and which states cannot provide a forum to issue binding judgments.").

305. *See Ford*, 141 S. Ct. at 1030.

The foregoing analysis of horizontal federalism is not based on originalist methods. It relies on a normative theory rather than evidence of original meaning. I have previously defended using horizontal federalism as a frame for considering the scope of state power over outsiders without invoking originalism.[306] The fact that a normative argument supports framing personal jurisdiction in terms of horizontal federalism creates three complications for Justice Gorsuch's proposal to revisit *Shoe* from an originalist perspective.

First, a court employing originalist methods might construe its mission narrowly and focus on personal jurisdiction in isolation. That narrow approach would be undesirable for the reasons noted above. But it also would not be a sensible implementation of at least one form of originalism that the Court often embraces. Many judicial invocations of originalism in cases about vertical federalism focus on the structure of the Constitution rather than the text of a specific clause.[307] There is no apparent reason to deemphasize structure when shifting from vertical federalism to horizontal federalism. Both types of federalism rely on complex atextual mechanisms for allocating a wide range of powers.[308] At a minimum, the Court would need to justify any methodological inconsistency between its approaches to vertical and horizontal federalism. Moreover, as Section III.B.1 noted, the Constitution does not contain a clause that expressly mentions personal jurisdiction, but does contain several clauses that address personal jurisdiction obliquely. The abundance of relevant clauses scattered throughout the Constitution suggests that only a structural account of personal jurisdiction can capture all of the relevant nuances.[309]

Accordingly, if a Justice writes an "originalist" opinion narrowly focusing on personal jurisdiction without exploring horizontal federalism, the Justice would need an originalist explanation for ignoring the broader context. Originalists might try to articulate such an

306. *See* Erbsen, *supra* note 292; Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After* Walden v. Fiore, 19 LEWIS & CLARK L. REV. 769 (2015).

307. *See* Colby, *supra* note 276, at 1306–09. Although judges often blend originalism and structural analysis, many academic originalists prefer to ground doctrine in the language of a specific text. *See* Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156 (2017) (noting and critiquing this preference).

308. *See* Heather K. Gerken, *The Taft Lecture: Living Under Someone Else's Law*, 84 U. CIN. L. REV. 377, 378 (2016) (noting that vertical and horizontal federalism "are both preoccupied with the same problem: what happens when one government invades another's turf").

309. The word "structure" can have several meanings in the context of constitutional interpretation. Here, I am using it in the sense of "interpretative holism," which attempts to discern how various provisions of the Constitution fit together and can shade into considering whether unwritten norms fill gaps in the text. Michael C. Dorf, *Interpretative Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 835 (2004).

explanation through the process of "construction," which originalists use to address indeterminacy that "interpretation" of a specific text cannot resolve.[310] However, this approach risks diluting originalism's appeal by injecting a large dose of discretion.[311]

Second, if a Justice assesses personal jurisdiction from an originalist perspective in the broader context of horizontal federalism, the inquiry could quickly snowball. Instead of revisiting only precedents about personal jurisdiction, an opinion would need to engage with precedent about choice of law, taxation, and extraterritorial regulation (among others). If those precedents are themselves not justified by originalism, then those precedents might become vulnerable. Unraveling modern personal jurisdiction doctrine might therefore require unraveling all aspects of horizontal federalism doctrine that do not survive originalist scrutiny. Otherwise, the Court would be arbitrarily deploying originalism in some but not all related contexts, creating an originalist island in a nonoriginalist sea. Yet a broad inquiry into all aspects of horizontal federalism seems far beyond what Justice Gorsuch envisioned in *Ford* and probably beyond what a majority of the Court is willing to pursue.

Third, the Court could avoid destabilizing multiple fields if it instead uses originalist insights to nudge personal jurisdiction in a more sensible direction without trying to rebuild doctrine on a nineteenth-century foundation. That flexible approach would allow the Court to roll back unwarranted innovations—such as the "special protection" of corporations that Justice Gorsuch criticized—while enabling doctrinal standards to evolve side-by-side with the political, social, economic, and technological forces that the standards address. This flexible approach emphasizing structural connections between different doctrines would be consistent with how "Judicial Originalism" is often more diluted than "Academic Originalism."[312]

Critics of originalism contend that structural analysis conducted under the banner of originalism is often unconstrained and susceptible to motivated reasoning.[313] Whether that assessment is accurate is a question

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310. Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 611 (2004).

311. Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 537 (2017) ("The problem is that many originalists seem to vary the level of generality at which they seek meaning, from constitutional provision to provision or issue to issue, in ways that cannot be explained by simple reference to the level of generality at which the text is expressed.").

312. Solum, *supra* note 16, at 1254 ("If the label 'originalism' is applied to the actual decisional practice of self-identified judicial originalists, the content of the theory is likely to diverge from the versions of originalism advocated by legal scholars.").

313. *See* Colby, *supra* note 276, at 1324; *see also* Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 686 (2008) ("There is something attractive about structural arguments. They raise the line of discussion toward greater abstraction, and this draws attention to basic constitutional values. . . . Alongside such potential to inspire consensus, however, structural arguments' abstraction also yields interpretive flexibility.").

beyond the scope of this Article. However, the same criticism applies to whatever unarticulated method the Court is currently using to decide personal jurisdiction cases. Decisions like *Ford*, *BMS*, and *Nicastro* announce rules that stand majestically on the stilts of precedent, but those stilts are sinking into mud. Rethinking personal jurisdiction from a horizontal federalism perspective would be no more subjective than current law. And a broader context can provide guidance that would give doctrine a more precise, coherent, and stable foundation.[314]

In light of horizontal federalism's relevance, Justice Gorsuch's call for an originalist reappraisal of *Shoe* signals both peril and promise. The peril is that an originalist inquiry will be narrower than it needs to be. This narrowness would replicate the mistakes of prior decisions that failed to fully situate personal jurisdiction in the context of horizontal federalism. Alternatively, an overly broad inquiry that uproots vast swaths of horizontal federalism doctrine could be needlessly disruptive. That potential for disruption may stifle any effort at reform. The promise is that an inquiry motivated by a desire to rethink doctrine from first principles, whether framed as originalist or normative, may broaden the Court's perspective. An expanded perspective could enrich the Court's analysis of personal jurisdiction and related fields without anchoring a twenty-first-century world to a nineteenth-century vision of state power.

C. *Reforms Must Address the Reasons that Current Doctrine Needlessly Transformed* Ford *into a Difficult Case*

Even if Justices identify constitutional text and values that animate personal jurisdiction doctrine, difficult obstacles to reform will remain. Text and values alone cannot resolve difficult cases. Instead, courts filter thousands of annual disputes about personal jurisdiction through doctrinal rules that determine who wins and loses. Sensible answers require sensible rules. Yet as Section I.C explained, the rules that implement *Shoe* are not sensible. *Ford* became needlessly difficult because the Court forced itself to consider dubious factors such as volitional localization, relatedness, and the categorical distinction between specific and general jurisdiction.

Invoking originalism will not magically dispel these dubious factors or prevent similarly dubious replacements. If the Court retreats to a presence test, it will need rules to parse between sufficient and

314. S*ee* Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 105 (2009) (noting that although "broad structural inference raises real dangers of indeterminacy and untethered judicial discretion, I believe that it can also yield helpful insights about the nature of our constitutional order").

insufficient presence, especially for incorporeal entities.[315] And if the Court continues to scrutinize contacts, it will need rules to parse between sufficient and insufficient contacts. A strict version of *Pennoyer*, where only clear physical presence establishes jurisdiction, would be relatively easy to implement. But the bright line would harm states and plaintiffs and is unlikely to attract five votes.[316] Some doctrinal flexibility seems inevitable, so the Court will need nuanced rules to ensure that flexibility is not arbitrary.

Accordingly, meaningful reform of personal jurisdiction doctrine requires more than merely applying a new interpretative method, identifying relevant text, and articulating foundational values. Reform requires a precise understanding of why current doctrine is flawed. Otherwise, there is a risk that new doctrine will reinvent a broken wheel. Yet none of the three opinions in *Ford* fully acknowledge why the case was needlessly difficult under current doctrine. The majority tried to harmonize *Ford* with precedent rather than criticizing precedent, Justice Alito likewise applied rather than criticized precedent, and Justice Gorsuch focused on interpretative method rather than doctrinal nuances.[317] This unwillingness to engage with personal jurisdiction's core doctrinal flaws is an obstacle to effective reform for both originalists and nonoriginalists. The factors discussed in Section I.C should therefore be part of any reform agenda.

CONCLUSION

Personal jurisdiction doctrine has been staggering haphazardly without a compass for decades. A new source of guidance would be welcome, but only if that guidance is worth following. Justice Gorsuch believes that an originalist reassessment of *Shoe* might provide a more stable and illuminating foundation for future decisions. But an originalist inquiry is only as compelling as the quality of the questions it asks. Asking the wrong questions risks creating the illusion of progress while replicating past failures.

Whether framed as originalist or not, an inquiry into reforming personal jurisdiction should include the following eight characteristics distilled from Part III. First, it must produce doctrine that is coherent in the full range of cases that raise difficult issues about personal jurisdiction, and not just in cases like *Ford*. Second, it must address the elements of modern doctrine that made *Ford* needlessly difficult, including the undervaluing of state interests, overvaluing of volitional

315. For a discussion of complex issues that arose under *Pennoyer*'s presence test before *Shoe*, see William F. Cahill, *Jurisdiction over Foreign Corporations and Individuals who Carry on Business Within the Territory*, 30 HARV. L. REV. 676, 696–711 (1917).

316. *See supra* text accompanying notes 251–55.

317. *See supra* Section I.D and Part II.

localization, dubious distinction between suit-related and state-related contacts, and artificial distinction between specific and general jurisdiction. Third, it must analyze the Founding-era Constitution before analyzing due process. Fourth, it must consider *whether* the Due Process Clause is relevant before it jumps to *how* the Due Process Clause is relevant. Fifth, it must consider whether other constitutional provisions, constitutional structure, and common law are also relevant. Sixth, it must determine whether the Constitution creates a dynamic rather than static standard of jurisdiction that adapts to social, economic, and technological challenges. Seventh, it must justify any limits that eighteenth- or nineteenth-century concepts place on doctrinal evolution. Finally, it must consider whether and how to integrate personal jurisdiction doctrine with other aspects of horizontal federalism jurisprudence.

If this agenda is daunting, then originalists might be tempted to take shortcuts and ask only a few of these questions. But then they would not really be engaging in an originalist enterprise. According to originalists, "halfway originalism" is not real originalism, as the Court cannot "apply the Constitution's supposed original meaning only when it suits" a majority.[318] If the Court wants personal jurisdiction doctrine to be cloaked in whatever legitimacy originalism provides, then doctrine must consider how originalism informs the answer to all relevant questions.

The Court could also decide not to frame a review of *Shoe* in originalist terms while still drawing insights from history. These insights might be illuminating for a reason Justice Scalia articulated: when both "the tradition in place when the constitutional provision was adopted" and "subsequent practice" support a particular state power, then only a "strong" due process objection can overcome state interests.[319] From this perspective, the fact that Ford's challenge to Montana's jurisdiction would have failed for all of the nation's history is a reason to doubt Ford's grandiose theory of corporate liberty. In contrast, stronger arguments support enforcing rights that emerge through a process of social transformation.[320]

318. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2470 (2018).

319. Sun Oil Co. v. Wortman, 486 U.S. 717, 730 (1988) (citation omitted).

320. The Court elaborated on the importance of social change in *Obergefell v. Hodges*:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Even a limited appeal to nineteenth-century jurisdictional precedent would need to explain why nothing relevant has changed. In that respect, originalist and nonoriginalist arguments might converge. History would be relevant because it helps in crafting a normative explanation for when jurisdiction should exist, and not because results that were valid in the past are automatically valid in the present.

Accordingly, Justice Gorsuch's call for an originalist reassessment of *Shoe* might not result in doctrine that satisfies pure academic standards of originalism. Yet Justice Gorsuch's concurrence might still be very helpful. His openness to new arguments may inspire judges, lawyers, and scholars to consider how current doctrine made *Ford* needlessly difficult and to explore alternative approaches. These inquiries could provide the Court with a richer context for answering difficult questions about personal jurisdiction in a "responsible way" that considers "the challenges posed by our changing economy in light of the Constitution's text and the lessons of history."[321] Both originalists and nonoriginalists should seize the moment and welcome an opportunity to reform personal jurisdiction doctrine.

576 U.S. 644, 664 (2015). *See also* Reva B. Siegel, *Memory Games:* Dobb*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1193 (2023) (discussing how transformation in the law's treatment of women undermines modern reliance on nineteenth-century norms).

321. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039 (Gorsuch, J., concurring in the judgment); *see also* Stephen N. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994) (considering the benefits of combining multiple methods of interpretation).