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Mallory v. Norfolk Southern Railway Co., Due Process and Strange Bedfellows

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ABSTRACT

[As the 2022 Supreme Court term waned, the press and public waited with trepidation or excitement for noteworthy cases that addressed important policy questions, including affirmative action, student loan forgiveness, and conflicts between religious freedom and gay rights. Fewer people shared the concerns of Civil Procedure scholars who anxiously awaited the Court's decision in Mallory v. Norfolk Southern Railway Co.

For over a decade, the Court found that states violated due process in asserting personal jurisdiction over various defendants despite the lack of any meaningful burden on the defendant's ability to defend against claims in the plaintiff's choice of forum.

Mallory raised concerns because of some of the Justices' questions during oral argument and because the Court did not issue its decision until the end of the term. This led to speculation that the Court was about to radically alter its due process analysis in personal jurisdiction cases based on the original public meaning of the Fourteenth Amendment.

When the Court published Mallory, one could hear a collective sigh of relief. The Court found that the state court had jurisdiction

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based on its consent statute. But Mallory produced a good bit of head-scratching. The Court divided 5-4. The Justices did not split along the political line exposed in most of the Court's important decisions. Further, Justice Gorsuch wrote the lead opinion, but gained a majority for only part of his reasoning.

This article explores what if? What if the Court adopted an originalist approach to personal jurisdiction? For example, this article explores whether an original understanding of personal jurisdiction makes sense given modern transportation, interstate commerce, and communication. It argues against incorporating the Dormant Commerce Clause analysis into personal jurisdiction and concludes that incorporation will reflect another attempt to favor defendants by closing the courthouse door to injured plaintiffs.

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I. INTRODUCTION

As the 2022 Supreme Court term was ending, members of the press and public waited with trepidation or excitement for high visibility cases that would address important public policy questions, including affirmative action,[1] student loan forgiveness,[2] and the conflict between religious freedom and gay rights.[3] No doubt fewer members of the public and media shared the same concerns as did Civil Procedure scholars, who awaited with uncertainty the Court's decision in *Mallory v. Norfolk Southern Railway Co.*[4]

Mallory involved an important question, relating to the assertion of jurisdiction over a corporation based on its filing of papers allowing it to do business in-state.[5] Many states require corporations to consent to the state's courts' jurisdiction when they file papers to do business in those states.[6] State statutes vary on the scope of jurisdiction. For example, some statutes limit suits to those claims that arise from forum conduct.[7] But others create, in effect, general jurisdiction over corporate defendants, allowing an injured plaintiff to sue on a claim that arose from activity outside the forum.[8] In *Daimler AG v. Bauman,* led by Justice Ginsburg, the Court narrowed general jurisdiction dramatically by holding that it was proper basically only in the corporation's state of incorporation or where it had its principal place of business.[9]

For over a decade, the Court found that states violated due process in asserting personal jurisdiction over various defendants.[10] Many commentators have expressed concern that, as cross-border commerce, travel, and communication become increasingly easy, the Court has made it more difficult for a plaintiff to find a convenient forum in which to sue a defendant, especially a corporate defendant, despite the lack of any

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[1] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).

[2] Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[3] 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

[4] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 143 S. Ct. 2028 (2023). The public almost always reacts more viscerally when the Court announces decisions dealing with substantive rights than it does when the Court decides cases on procedural grounds. MICHAEL VITIELLO, ANIMATING CIVIL PROCEDURE 3–6 (2017).

[5] *Mallory*, 600 U.S. at 125.

[6] *Id.* at 130.

[7] *Id.*

[8] *Id.*

[9] Daimler AG v. Bauman, 571 U.S. 117 (2014).

[10] *See* discussion *infra* Part I.

meaningful burden on the defendant's ability to defend against the plaintiff's claim in the plaintiff's choice of forum.[11]

While the Court's 2021 decision upholding state jurisdiction over Ford Motor Company created some optimism that the Court's string of pro-defendant decisions had ended,[12] *Mallory* began raising concerns, initially because of some of the Justices' questions during oral argument,[13] and then because the Court did not issue its decision until the end of the Court's term.[14] The latter led to speculation that the Court was about to render an opinion that would radically alter its due process analysis in personal jurisdiction cases.[15] In the plaintiff's brief on the merits, Mallory's attorney had argued that the assertion of jurisdiction over the corporate defendant was justified based on the original public meaning of the Fourteenth Amendment.[16] The Justices' questions during oral

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[11] Michael Vitiello, *Due Process and the Myth of Sovereignty*, 50 U. PAC. L. REV. 513, 532 (2019) [hereinafter Vitiello, *Due Process*]; VITIELLO, *supra* note 4, at 27; Jenny Bagger, *Dropping The Other Shoe: Personal Jurisdiction and Remote Technology in the Post-Pandemic World*, 73 HASTINGS L.J. 861, 909 (2022).

[12] Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021); *see* discussion *infra* Part I.

[13] James M. Beck, *Mallory Oral Argument – Litigation Tourists' Last Stand?*, DRUG & DEVICE L. (Nov. 22, 2022), https://www.druganddevicelawblog.com/2022/11/mallory-oral-argument-litigation-tourists-last-stand.html [https://perma.cc/6476-E9QK]; Tanya Monestier, *Consent and Personal Jurisdiction: The Mallory Oral Argument*, TRANSNATIONAL LITIG. BLOG (Nov. 10, 2022), https://tlblog.org/consent-and-personal-jurisdiction-the-mallory-oral-argument/ [https://perma.cc/US9H-VWH4]; Matthew Bush & Paul Weeks, *Mallory Argument: Plaintiff Seeks To "Change The Jurisdictional Landscape"*, KING & SPALDING (Nov. 11, 2022), https://www.kslaw.com/news-and-insights/mallory-argument-plaintiff-seeks-to-change-the-jurisdictional-landscape [https://perma.cc/PSB2-BC4V].

[14] *See, e.g.*, Maggie Gardner, *Waiting for Mallory*, TRANSNATIONAL LITIG. BLOG (May 16, 2023), https://tlblog.org/waiting-for-mallory/ [https://perma.cc/D9T7-ZZ72].

[15] Thomas Distanislao & Denver Smith, *High Court PA. Case Could End Personal Jurisdiction Divide*, BUTLER SNOW (Nov. 11, 2022), https://www.butlersnow.com/news-and-events/high-court-pa-could-end-personal-jurisdiction-divide [https://perma.cc/4VZZ-86EM] (stating that "the court appears likely confirm that corporate defendants remain safe 'at their homes' and not those of their registered agents.").

[16] Brief for Petitioner at 10–11, Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023) (No. 21-1168), 2022 WL 2612372, at *10. Although Mallory argued that the original public meaning would support the assertion of jurisdiction, many scholars question whether adherence to the originalism in this context would expand jurisdiction as a general matter. Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941, 953 (2023) (arguing that there is no guarantee that originalism will produce any particular consequence as applied to civil procedure, because it is "flexible and capacious enough to support a wide range of outcomes, including retention of the status quo").

argument left observers uncertain whether any of the Justices would accept that method of analysis.[17] In *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, Justice Gorsuch had written separately to suggest that this might be the time to revisit personal jurisdiction to reexamine the original intent of the drafters of the Fourteenth Amendment.[18] Given that some of the Justices have used originalism to strike down abortion rights and to uphold Second Amendment rights,[19] the possibility existed that some Justices would accept the plaintiff's theoretical argument, as well.

When the Court finally published its *Mallory* opinions, one could hear a collective sigh of relief, at least from some scholars.[20] The Court found that the state court did have jurisdiction based on its consent statute, suggesting that, as with its *Ford* decision, the Court was no longer going to narrow state courts' ability to assert personal jurisdiction over out-of-state defendants.[21]

Upon a closer look, however, *Mallory* has produced a good bit of head-scratching since its publication.[22] The result of the decision left the

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[17] Beck, *supra* note 13; Monestier, *supra* note 13 (suggesting that the Respondent's "registration is not consent" argument did not seem compelling to the Court).

[18] Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring).

[19] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (abortion rights); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment rights).

[20] Alan B. Morrison, *Plaintiffs and Precedent Win the Day in Norfolk Southern Case*, BLOOMBERG L. NEWS (Jun. 29, 2023, 3:00 AM), https://news.bloomberglaw.com/us-law-week/plaintiffs-and-precedent-win-the-day-in-norfolk-southern-case [https://perma.cc/U4TD-ABC2]; Charles P. Pierce, *The Supreme Court Just Handed Down an Opinion That Shocked Corporate Lawyers Down to Their Loafers*, ESQUIRE (June 28, 2023), https://www.esquire.com/news-politics/politics/a44378705/supreme-court-mallory-v-norfolk-southern/ [https://perma.cc/3FN8-U4AY]; Rayna Kessler & Ethan Seidenberg, *Mallory Gives Plaintiffs a Better Shot at Justice*, ROBINS KAPLAN LLP (July 27, 2023), https://www.robinskaplan.com/-/media/pdfs/publications/mallory-gives-plaintiffs-a-better-shot-at-Justice.pdf?la=en [https://perma.cc/UJJ6-TTFB].

[21] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 146 (2023); *Ford Motor Co*., 141 S. Ct. at 1038.

[22] Thomas P. Kurland & Dakotah M. Burns, *'Mallory' Decision Could Have Profound Implications for Out-of-State Companies Registered to Do Business in NY*, PATTERSON BELKNAP WEBB & TYLER (July 11, 2023), https://www.pbwt.com/ny-commercial-division-blog/mallory-decision-could-have-profound-implications-for-out-of-state-companies-registered-to-do-business-in-ny [https://perma.cc/8FPC-WGBY]; Carolyn Nussbaum et al., *Personal Jurisdiction Examined in* Mallory v. Norfolk Southern Railway Co.*—Did SCOTUS go off the rails?*, NIXON PEABODY (June 30, 2023), https://www.nixonpeabody.com/insights/alerts/2023/06/30/personal-jurisdiction-examined-in-mallory-v-norfolk-southern-railway-co [https://perma.cc/RM2Q-H8S5].

Court divided at 5-4.[23] Notably, the Justices did not divide along the now expected political line observed in most of the Court's important decisions.[24] Further, Justice Gorsuch wrote the lead opinion but gained a majority for only part of his reasoning.[25] As such, *Mallory* reminds us that we live in unusual times. This article explores some of the questions that *Mallory* answered but also focuses on some uncertainties created by the divided Court.

Part I rehashes the Supreme Court's personal jurisdiction over the past decade.[26] The Court failed to grant certiorari in any personal jurisdiction case between 1990 and 2010 because the Court was deeply divided over the Justices' approach to personal jurisdiction. While Justice Stevens' was on the court, his idiosyncratic views on personal jurisdiction prevented the Court from achieving consensus on an approach to its due process analysis.[27] Since his retirement in 2010, the Court has been active in addressing personal jurisdiction questions. Between 2011 and 2021, the Court consistently narrowed personal jurisdiction.[28] Despite this tendency, it often failed to achieve consensus on its analysis.[29] Finally, in *Ford*, the Court upheld state courts' jurisdiction over the corporate defendant.[30] As many commentators recognized, however, Justice Kagan's decision invited more questions than it answered.[31] Part I also

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[23] *Mallory*, 600 U.S. at 147 (Jackson, J., concurring); *id*. at 150 (Alito, J., concurring); *id*. at 163 (Barrett, J., dissenting).

[24] William D. Kennedy et al., *Consent to General Jurisdiction by Registration Affirmed . . . But Only in Pennsylvania, and Perhaps Not for Long*, WHITE AND WILLIAMS LLP (Jun. 28, 2023), https://www.whiteandwilliams.com/resources-alerts-Consent-to-General-Jurisdiction-by-Registration-Affirmed-But-Only-In-Pennsylvania-and-Perhaps-Not-for-Long [https://perma.cc/4PME-LRSH] (suggesting that in *Mallory* some of the usually polarized Justices aligned themselves with colleagues from the opposite wing).

[25] Only Parts I and III–B of the opinion delivered by Gorsuch were joined by Thomas, Alito, Sotomayor, and Jackson. *See Mallory*, 143 S. Ct. at 2030.

[26] *See* discussion *infra* Part I.

[27] *Id.* at 210.

[28] Michael Vitiello, *The Supreme Court's Latest Attempt at "Clarifying" Personal Jurisdiction: More Questions Than Answers*, 57 TULSA L. REV. 395, 410 (2022) [hereinafter Vitiello, *"Clarifying" Personal Jurisdiction*].

[29] *See* discussion *infra* Part I.

[30] *See* discussion *infra* Part I.

[31] Vitiello, *"Clarifying" Personal Jurisdiction*, *supra* note 28; 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 (2021); Anthony Petrosino, *Rationalizing Relatedness: Understanding Personal Jurisdiction's Relatedness Prong in the Wake of* Bristol-Myers Squibb *and* Ford Motor Co., 91 FORDHAM L. REV. 1563 (2023) (suggesting that the new framework created by the court in Ford muddied the water of an already confusing doctrine); Taylor M. McAuliffe, *Not Too Specific: Personal Jurisdiction After* Ford Motor Co. v. Montana Eighth Judicial District Court, MILES & STOCKBRIDGE (Apr. 22, 2021), https://www.mslaw.com/mslaw-blog/not-

argues that part of the problem with the Court's personal jurisdiction case law is the absence of any coherent view of the meaning of due process.[32]

Part II begins with a discussion of *Mallory*'s facts and the issues that the case seemed to present.[33] Further, it explores some of the arguments that appeared to interest the Justices during oral argument and that Mallory's counsel argued in his brief.[34] Thereafter, that section recounts the Court's opinions in *Mallory*.[35] It concludes with the following observation: for a case that seemed to presage a new approach to the Court's due process analysis, the decision instead relied on precedent over 100 years old.[36] Viewed superficially, one might conclude that *Mallory* was, therefore, an easy decision. In reality, the case is anything but easy.[37] In discussing *Mallory*, we focus on Justice Alito's concurring opinion in which he invites defendants to argue in the future that the Dormant Commerce Clause provides them with constitutional protections separate from questions of due process convenience.[38] Other Justices left that question unanswered.[39]

Part III turns to questions that *Mallory* raises without clear answers. Part III(a) considers why Justices did not adopt Mallory's counsel's originalism argument.[40] We explore whether resuscitating the original understanding of due process would make sense in a modern economy.[41] Although Mallory's argument supported greater access to a court of the plaintiff's choosing, adherence to the original meaning of due process

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too-specific-personal-jurisdiction-after-ford-motor-co-v-montana-eighth-judicial-district-court [https://perma.cc/X76F-TNTD]; Linda Sandstrom Simard et al., Ford Motor Co.: *The Murky Doctrine of Personal Jurisdiction*, AM. CONST. SOC'Y (2020–2021), https://www.acslaw.org/analysis/acs-journal/2020-2021-acs-supreme-court-review/ford-motor-co-the-murky-doctrine-of-personal-jurisdiction/ [https://perma.cc/SK45-2FU2].

[32] *See* discussion *infra* Part I.

[33] *See* discussion *infra* Part II.

[34] *See* discussion *infra* Part II.

[35] *See* discussion *infra* Part II.

[36] *See* discussion *infra* Part II.

[37] *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023). One gets a sense that *Mallory* is not an easy case by examining the unusual alignment of Justices:

Gorsuch delivered the opinion of the Court with respect to Parts I and III–B, in which Thomas, Alito, Sotomayor, and Jackson, and an opinion with respect to Parts II, III–A, and IV, in which Thomas, Sotomayor, and Jackson joined. *Id.* Jackson filed a concurring opinion. *Id.* at 147. Alito filed an opinion concurring in part and concurring in the judgment. *Id.* at 150. Barrett filed a dissent, in which Roberts, Kagan and Kavanaugh joined. *Id.* at 163.

[38] *See* discussion *infra* Part II.

[39] *See* discussion *infra* Part II.

[40] *See* discussion *infra* Part III.

[41] *See* discussion *infra* Part III.

likely would have the opposite effect in many cases.[42] Then we consider why Justices like Clarence Thomas might not have taken the bait despite their commitment to originalism, very much on display during the recently completed term of Court.[43] Part III(b) turns to the Dormant Commerce Clause question.[44] As indicated above, we are skeptical about the use of due process to limit a plaintiff's access to a convenient forum when a defendant, especially a far-flung corporation, can easily defend a lawsuit in the plaintiff's choice of forum.[45] Some scholars see such holdings as more evidence of pro-corporate bias than as evidence of a coherent view of due process.[46] In Part III(b), we speculate whether Justice Alito's view offers another way to help corporate defendants frustrate plaintiffs' selections of convenient venues.[47]

II. MODERN DUE PROCESS ANALYSIS

During most of the twentieth century, state courts and legislatures sought to expand the jurisdictional reach of their courts.[48] This principle came as no surprise: modern commerce increasingly crossed state lines and modern transportation reduced any claim of inconvenience on defendants who had to defend in an out-of-state venue.[49] Although the Court claimed at times that somehow due process protected interests of the states,[50] it also recognized that the key to due process protection is the receipt of fair notice and the opportunity to defend the lawsuit.[51]

The Supreme Court seemed to accept the expansion of state court power until a period of retrenchment in the 1980s.[52] The process of

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[42] *See* discussion *infra* Part III.

[43] *See* discussion *infra* Part III.

[44] *See* discussion *infra* Part III.

[45] Vitiello, *Due Process*, *supra* note 11, at 515.

[46] VITIELLO, *supra* note 4, at 69–70; Deborah J. Challener, *Teaching and Learning Personal Jurisdiction After the Stealth Revolution*, 70 FLA. L. REV. F. 96, 99 (2018) (suggesting that regardless of whether a conservative Supreme Court with a pro-defendant bias is a good thing, there is no explanation for why a plaintiff cannot sue in a forum that is clearly convenient for that plaintiff and does not burden the defendant); Mark Walsh, *Making it Personal*, 103 A.B.A. J. 20, 21 (2017) (noting that some legal analysts describe the decisions on jurisdiction as part of a pro-business pattern under the Court led by Chief Justice Roberts).

[47] *See* discussion *infra* Part III.

[48] Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y. 209, 210 (2015) [hereinafter Vitiello, *Limiting Access*].

[49] *Id.*

[50] Pennoyer v. Neff, 95 U.S. 714 (1877).

[51] McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); VITIELLO, *supra* note 4.

[52] Vitiello, *Limiting Access*, *supra* note 48, at 221 (suggesting that the Court and lower courts often ignored *Hanson* for over twenty years).

retrenchment was evidenced in *World-Wide Volkswagen v. Woodson*; the Court held that, absent a defendant's purposeful conduct directed at the forum state, the assertion of personal jurisdiction violated due process.[53]

Often during the decade of the 1980s, the Court was deeply divided in cases involving personal jurisdiction. *Asahi Metal Industry Co. v. Superior Court of California* provides a glimpse into that division.[54] There, the plaintiff was seriously injured when his motorcycle tire failed.[55] He sued the tire manufacturer, which sought to bring Asahi, the alleged manufacturer of the tire-valve stem, into the suit as a third-party defendant.[56] Asahi challenged the state court's assertion of personal jurisdiction.[57]

The case seemed to present the Supreme Court with a classic stream of commerce analysis: state courts had asserted jurisdiction over component part manufacturers even the manufacturers had not directly shipped the harm-causing product into the state where the injury occurred.[58] *World-Wide Volkswagen*'s insistence that a defendant must purposefully direct activity towards the forum created uncertainty about the status of the stream of commerce theory.[59] The Court granted the writ of certiorari to answer the question centered around stream of commerce.[60] Eight Justices found that the assertion of jurisdiction failed based on factors that focused on the fairness of asserting jurisdiction.[61] Given the need to address the stream of commerce question in light of the grant of certiorari, Justice O'Connor in her lead opinion,[62] and Justice Brennan in his concurring opinion,[63] addressed the stream of commerce theory. They divided evenly on the issue, with Justice O'Connor's opinion insisting that only if a defendant acted with purpose in creating forum contact could a court assert jurisdiction over the component parts manufacturer.[64] Justice Brennan disagreed and would have held that placing the product in the

[53] World-Wide Volkswagen Co. v. Woodson, 444 U.S. 286, 299 (1981).

[54] 480 U.S. 102 (1987).

[55] *Id.* at 106.

[56] *Id.* at 102

[57] *Id.*

[58] Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 767 (Ill. 1961).

[59] *See Asahi*, 480 U.S. at 110 (noting lower-court uncertainty as to whether *World-Wide Volkswagen* required purposefully targeting a market or if it was enough for an item to enter the market through the stream of commerce without more).

[60] *Id.* at 109.

[61] *Id*.

[62] *Id*. at 102–16.

[63] *Id*. at 116–21 (Brennan, J., concurring).

[64] *Id.* at 112 (majority opinion).

stream of commerce satisfied the minimum contacts prong of the Court's analysis.[65]

Justice Stevens would have addressed only the fairness question and agreed that the assertion of jurisdiction over Asahi was unreasonable.[66] Seemingly to give lower courts some guidance, he also indicated that the placement of a sufficient amount of a product into the stream of commerce could satisfy due process.[67]

Suffice it to say, Justice Stevens' idiosyncratic approach provided lower courts with little guidance in cases where a defendant's contacts with the forum came about through the stream of commerce without more.[68] Matters became worse in 1990s in *Burnham v. Superior Court of California*.[69] There, the Court revisited the traditional rule that a state court could assert jurisdiction over a non-consenting, non-resident defendant if the defendant was served with process both in-hand and in-state.[70] Again, as in *Asahi*, the Court here was unanimous in upholding jurisdiction.[71] But the Justices were again deeply divided upon the rationale.[72] Unlike *Asahi*, where Justice Stevens provided a modicum of guidance on the stream of commerce question, his concurring opinion in *Burnham* offered no guidance on how he might vote in a case that presented harder facts for the Court.[73]

No doubt aware that the Court would be unable to bring coherence to its due process analysis as long as Justice Stevens remained on the Court, the Court failed to grant the writ of certiorari on any case involving personal jurisdiction until 2010, after he resigned from the Court.[74] The decade after Justice Stevens resigned, the Court not only actively decided personal jurisdiction cases, but to many of us, surprisingly, it routinely

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[65] *Id.* at 121 (Brennan, J., concurring).

[66] *Id.* at 121–22 (Stevens, J., concurring).

[67] *Id.*; Vitiello, *Limiting Access*, *supra* note 48, at 234.

[68] Vitiello, *Limiting Access*, *supra* note 48, at 234; Amanda Iler, *Bridging the Stream of Commerce: Recommendations for Living in the Post-Nicastro Era*, 45 MCGEORGE L. REV. 407, 410–11 (2013).

[69] 495 U.S. 604 (1990).

[70] *Id.* at 608.

[71] *Id.* at 628.

[72] Speaking for four Justices, Justice Scalia held in-hand, in-state service of process was sufficient to satisfy due process based on tradition. *Id.* at 607, 609–10. Also writing for four Justices, Justice Brennan, relying upon dicta from Shaffer, insisted that all assertions of jurisdiction must satisfy due process. *Id.* at 629–30. Justice Brennan found the defendant's contacts were sufficient to make the assertion of jurisdiction reasonable. *Id.* at 637.

[73] *Id.* at 640 (Stevens, J., concurring) (asserting the "unnecessarily broad reach" of Justice Scalia and Justice Brennan's opinions made Justice Stevens concerned to join either opinion).

[74] Vitiello, *Limiting Access*, *supra* note 48, at 210.

found against plaintiffs in favor, typically, of corporate defendants.[75] Between 2011 and 2021, the Court decided seven personal jurisdiction cases.[76] That was surprising for a number of reasons.

When the Court decided *McGee v. International Life* in 1957, the Court underscored the changes that had occurred in the then-modern world, making travel less burdensome.[77] By the 1980s, that trend was even truer.[78] By the beginning of the twenty-first century, the ease of conducting business in faraway places and of traveling had changed exponentially.[79] Consider, for example, how easily one can conduct business via internet commerce, expanding the chances for disputes crossing state and international borders.[80] One would have expected that

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[75] Michael Vitiello, *Reflections on Hoffheimer's The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. F. 31 (2018) [hereinafter Vitiello, *Reflections*].

[76] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (plurality opinion); Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014); BNSF Ry. Co. v. Tyrrell, 581 U.S. 402 (2017); Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255 (2017); Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

[77] 355 U.S. 220 (1957).

[78] Travel greatly increased in the mid-1950s. In June of 1956, President Eisenhower signed the Federal Aid Highway Act to meet the challenge of the growing number of automobiles on the nation's highways. The act created a special system of direct interregional highways. *Interstate Highway System*, DWIGHT D. EISENHOWER, PRESIDENTIAL LIBR., https://www.eisenhowerlibrary.gov/research/online-documents/interstate-highway-system#:~:text=It%20was%20not%20until%20June,travel%20on%20the%20German%20autobahns [https://perma.cc/XPF2-LNUW] (last visited Dec. 21, 2023).

[79] A prominent example of this notion is Amazon.com, Inc., a vast internet-based enterprise that sells various goods. Amazon's annual revenue in 2022 was $513.983 billion, a 9.4% increase from 2021 and a 21.7% increase from 2020. *Amazon Revenue 2010-2023*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/AMZN/amazon/revenue#:~:text=Amazon%20annual%20revenue%20for%202022,a%2037.62%25%20increase%20from%202019 [https://perma.cc/YA85-4AA2] (last visited Dec. 21, 2023).

[80] Continuing with the Amazon.com, Inc. example, new sellers "can easily start up their own successful businesses on Amazon." *How to Start an Amazon Business if You are Just a Beginner*, AMZSCOUT, https://amzscout.net/blog/how-to-start-an-amazon-business/#:~:text=As%20a%20new%20seller%2C%20you,of%20quitting%20their%20day%20job [https://perma.cc/ZK2C-9QW3] (last visited Dec. 12, 2023). Currently, Amazon has approximately 9.7 million sellers worldwide. *The Most Surprising Amazon Seller Statistics and Trends in 2023*, GITNUX, https://blog.gitnux.com/amazon-seller-statistics/#:~:text=Amazon%20has%20about%209.7%20million%20sellers%20worldwide.&text=It%20speaks%20to%20the%20immense,audience%20and%20grow%20their%20business [https://perma.cc/2AA3-83GP] (last visited Aug. 13, 2023).

the Court's view of due process would have favored plaintiffs seeking to sue closer to home. As the Court's tally indicates, that was not the case.[81]

An important point to note, and one that has stayed viable from the past, is that the Court failed to articulate a coherent theory explaining its results. A few examples underscore the problem.

In *World-Wide Volkswagen* and *Asahi*, Justices differed on their analysis of the necessary sufficient minimum contacts in specific jurisdiction cases. Justices taking the narrowest view insisted that a defendant had to act with purpose in creating the forum contact.[82] Thus, in *Asahi*, Justice O'Connor would have required more than placement of a product into the stream of commerce, even if the defendant was aware the product would end up in the forum.[83] Justice White stated as much in *World-Wide Volkswagen.*[84] There, Justice White insisted that, although due process included an assessment of "fairness" factors, the minimum contacts parts of the analysis protected states' interests.[85] Of course, the problem with that analysis was that the Due Process Clause was enacted to limit, not protect, state power.[86] It took Justice White and the Court only two years to confess error: due process protects an individual's interest, not a state's interest.[87]

Fast-forward to 2011. The Court granted certiorari in a case rising out of New Jersey.[88] An employee in a scrap metal processing company lost part of his hand in a machine that was manufactured by British machinery company, J. McIntyre Machinery, Ltd., and imported by its exclusive distributor.[89] While the company shipped machinery to several states in the United States and had other contacts with the United States,

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[81] *See* discussion *infra* Part III.

[82] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287–99 (1980); *see also* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 105–16 (1987).

[83] *Asahi*, 480 U.S. at 112.

[84] 444 U.S. 286 (1980).

[85] *Id.* at 292, 297.

[86] *See* Vitiello, *Due Process*, *supra* note 11, at 524–26.

[87] Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

[88] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (plurality opinion).

[89] *Id.* at 878. The British company used McIntyre Machinery America, Ltd. to distribute its product in the United States. *Id.* Plaintiff made no efforts in the trial court to show the nature of the relationship between the two companies. *Id.* at 889 (Breyer, J., concurring) ("There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction . . . the factual record leaves many open questions . . . ."). Had the plaintiff made a showing that, in effect, the British Company directed the American company's activities, the Court most likely would have found the American company's contacts with New Jersey attributable to the British company. *See* VITIELLO, *supra* note 4, at 58–61. The injured plaintiff never recovered for his injuries and the American company went bankrupt. *Nicastro*, 564 U.S. at 896 n.2 (Ginsburg, J., dissenting).

the record developed in the state trial court was thin on connections between the defendant and New Jersey.[90] The court concluded that at most, a few of its machines arrived in New Jersey.[91] Thus, the New Jersey courts upheld jurisdiction.[92]

Many observers believed that the Court would revisit the stream of commerce theory when it granted review in *J. McIntyre Mach., Ltd. v. Nicastro.*[93] Like the situation before Justice Stevens' retirement, the Court could not achieve consensus on its analysis other than to agree that the case did not present a stream of commerce question.[94]

Justice Kennedy wrote for only four Justices in finding that New Jersey's assertion of jurisdiction violated due process.[95] Acknowledging that the defendant was aware that its product ended up in the forum, Justice Kennedy found that the contacts were insufficient to establish purposeful affiliation with the forum.[96] As Justice O'Connor insisted in her lead opinion in *Asahi*, a defendant must act with purpose in creating the forum

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[90] *Nicastro*, 564 U.S. at 886.

[91] Given New Jersey is one of the leading scrap metal states in the country, it seems unlikely the Plaintiff fully developed the trial court record. *The Scrap-Heap Rollup Hits New Jersey*, NJBIZ (Aug. 9, 2005), https://njbiz.com/the-scrap-heap-rollup-hits-new-jersey/#:~:text=New%20Jersey%20has%20long%20been,will%20send%20their%20processed%20scrap [https://perma.cc/H8AJ-5S7Z].

[92] *Nicastro*, 564 U.S. at 877 ("The Supreme Court of New Jersey, relying in part on *Asahi*, held that New Jersey's courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer 'knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.'").

[93] Vitiello, *Limiting Access*, *supra* note 48, at 258; *see, e.g.*, Jonathan A. Berkelhammer, *Supreme Court to Readdress Stream of Commerce Theory of Personal Jurisdiction*, 78 DEF. COUN. J. 350, 351 (2011) ("The contours of the stream of commerce theory of personal jurisdiction . . . have remained uncertain, at least, perhaps, until now."); Kendall Gray, J. Mcintyre Machinery v. Nicastro*: Declarifying* Asahi, 1 NAT'L L. REV. 180 (2011) ("Professors and law nerds everywhere had the vapors because the Supreme Court of the United States had a chance to clear [*Asahi*] up in *J. Mcintyre Machinery Ltd. v. Nicastro*.").

[94] *Nicastro*, 564 U.S. at 877–78 (Justice Kennedy noted how the New Jersey Supreme Court issued "an extensive opinion with careful attention to this Court's cases and to its own precedent, [but] the 'stream of commerce' metaphor carried the decision far afield. Due process protects the defendant's right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

[95] *Id.* at 876.

[96] *Id.* at 886–87.

conduct;[97] knowledge, on that view, is insufficient.[98] Justice Kennedy tried to explain why purpose, not knowledge, is required.[99] Instead of relying on the discredited notion that states' rights are somehow involved,[100] he seemed to reintroduce the widely discredited "implied consent" theory.[101] Justice Kennedy took "a radical new approach that seemed to require a corporate defendant to establish personal jurisdiction through some act of willful submission to the forum state's sovereignty."[102] Given the questionable nature of "implied consent," Justice Kennedy did not secure a fifth vote for his position in the case.[103]

The Court was able to secure a full majority in cases involving general jurisdiction and in *Bristol-Meyers Squibb Co. ("BMS") v. Superior Court of Cal.*[104] In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court first signaled that it would limit the scope of general jurisdiction.[105] It then did so in *Daimler AG v. Bauman.*[106] In *Daimler,* the plaintiffs were Argentinians, victims, or family members of victims of the Argentine government's "Dirty War."[107] They sought to sue Daimler based on its contacts with the United States created by Mercedes-Benz USA, LLC, for Daimler's collaboration with the Argentinian government.[108] The Court had other ways to resolve the case without radically narrowing general jurisdiction.[109] Despite that, Justice Ginsburg's majority opinion held that a defendant is subject to suit in all-purpose jurisdiction (i.e., general jurisdiction) only in the state of

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[97] Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987).

[98] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877–78 (2011) (plurality opinion).

[99] *Id.* at 881–82.

[100] *See* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–30 (1982).

[101] Some time ago states used different devices to expand the jurisdictional reach of their courts, including the now-widely rejected implied consent theory that allowed a state court to exercise jurisdiction over a person who conducted business in the state or used state highways. *See* Olberding v. Ill. Cent. R. Co., Inc., 346 U.S. 338, 341 (1953) ("[T]o conclude from [the] holding [in *Hess*] that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued . . . is surely to move in the world of Alice in Wonderland.").

[102] Vitiello, *"Clarifying" Personal Jurisdiction*, *supra* note 28, at 411.

[103] *Id.*; *Nicastro*, 564 U.S. at 900–01 (Ginsburg, J., dissenting).

[104] Daimler AG v. Bauman, 571 U.S. 117; Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255 (2017).

[105] 564 U.S. 915 (2011).

[106] 571 U.S. 117 (2014).

[107] *Id.* at 120–21.

[108] *Id.* at 121.

[109] *Id.* at 142–60 (Sotomayor, J., concurring).

incorporation or state where it has its principal place of business, absent some truly unusual circumstances.[110]

Part of the problem with the Court's general jurisdiction case law is the absence of any explanation for the role of general jurisdiction.[111] *Perkins v. Benguet Consolidated Mining Co.*, the case most frequently cited for upholding general jurisdiction, seemed to be an outlier, being a case of jurisdiction by necessity.[112] The plaintiff's claim arose out of contact that took place in the Philippines during World War II when the Japanese controlled that nation.[113] But subsequent cases did not define general jurisdiction so narrowly.[114]

Scholars have attempted to explain what justifies and limits general jurisdiction.[115] But the Court has not done so.[116] Justice Ginsburg did not attempt to do so in either *Goodyear* or *Daimler*.[117] And, if due process is about having notice and an opportunity to be heard, a corporate defendant with continuous and systematic contacts in a state cannot seriously claim that it lacks such opportunities.[118]

In *Bristol-Myers Squib*, Justice Alito achieved a nearly unanimous Court.[119] There, plaintiffs from California and over thirty other states joined as plaintiffs in a suit against Bristol-Myers Squib ("BMS").[120] They filed the action in California state court and claimed that they were users of the BMS blood thinner drug Plavix, which they claimed was defectively manufactured.[121] The defendant moved to dismiss the claims against the non-California residents.[122] The California courts found that the assertion

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[110] *Id.* at 137 (majority opinion).

[111] Vitiello, *Limiting Access*, *supra* note 48, at 237.

[112] 342 U.S. 437 (1952).

[113] *Id.* at 447–48.

[114] Even though the Court found that a Texas court lacked personal jurisdiction based on an accident that took place in Peru, the Court's analysis focused on whether the defendant's contacts with the forum were continuous and systematic. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 415–16 (1984). While lower courts divided on the precise formulation of the test for general jurisdiction, most courts began the analysis with the same question: were the contacts with the forum continuous and systematic. Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 894 (2004).

[115] *See* Vitiello, *Reflections*, *supra* note 75, at 31–33.

[116] *Id.*

[117] *Id.* at 33.

[118] *Id.*

[119] Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255 (2017). Justice Sotomayor was the lone dissent. *Id.* at 269–79 (Sotomayor, J., dissenting).

[120] *Id.* at 259 (majority opinion).

[121] *Id.*

[122] *Id.*

of jurisdiction did not violate due process.[123] The Supreme Court disagreed.[124]

BMS is one of the largest pharmaceutical companies in the world.[125] Its footprint in California is large. As the record indicated, BMS has five laboratories in California where about 160 employees work, a sales force of about 250 people in the state, and a state-government advocacy office in Sacramento.[126] Over a ten-year period, BMS's sales revenue was over $900 million from sales of Plavix in California.[127] Beyond doubt, BMS sold many other drugs in California, as well.[128] Objectively viewed, the railroad's contacts with the forum state in *Mallory* seem comparable to those in *BMS*.[129]

The majority found that the out-of-state plaintiffs' claims lacked sufficient connection with BMS's forum activity.[130] The most important discussion for purposes of this paper is Justice Alito's discussion of federalism.[131] During oral argument, BMS's counsel admitted, as counsel had to, that defending the lawsuits in California was not inconvenient.[132]

Unlike the analysis in some cases, the Court did not make a distinction between contacts and the reasonableness factors.[133] Justice Alito observed that of the various factors, the defendant's burden was the most important consideration.[134] In light of BMS's counsel's concession, however, Justice Alito had to explain the Court's conclusion that jurisdiction was improper by reference to something other than the

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[123] *Id.* at 260–61.

[124] *Id.* at 269.

[125] Elaine Silvestrini, *Bristol-Myers Squibb*, DRUGWATCH (Sept. 5, 2023), https://www.drugwatch.com/manufacturers/bristol-myers-squibb/ [https://perma.cc/FC76-XJPK].

[126] *Bristol-Myers Squibb Co.*, 582 U.S. at 258–59.

[127] *Id.* at 259.

[128] BMS Company manufactures, markets, and/or distributes more than thirty-six drugs in the United States. *Bristol-Myers Squibb Company*, DRUGS.COM, https://www.drugs.com/manufacturer/bristol-myers-squibb-company-33.html#:~:text=Bristol%2DMyers%20Squibb%20Company%20manufactures,drugs%20in%20the%20United%20States [https://perma.cc/7F5E-MC5T] (last visited Dec. 22, 2023).

[129] *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 126–27 (2023); *Bristol-Myers Squibb Co.*, 582 U.S. at 259.

[130] *Bristol-Myers Squibb Co.*, 582 U.S. at 265.

[131] *Id.* at 263.

[132] Transcript of Oral Argument at 59, Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255 (2017) (No. 16-466).

[133] Vitiello, *Due Process*, *supra* note 11, at 518.

[134] *Bristol-Myers Squibb Co.*, 582 U.S. at 263.

difficulty that the defendant faced in launching an in-state defense.[135] His analysis wove federalism into his explanation, as indicated below:

> Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." And at times, this federalism interest may be decisive. As we explained in *World-Wide Volkswagen,* "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."[136]

Despite Justice Alito's claim that the Court was applying only traditional due process principles, his assertion has produced a good bit of jaw-dropping consternation.[137]

As indicated above, Justice White had also sought to explain part of the due process analysis in federalism terms.[138] But he, and the rest of the

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[135] *Id.*

[136] *Id.* (internal citations omitted).

[137] *See* Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction,* 70 FLA. L. REV. 499 (2018); Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251 (2018); Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 23–28 (2018); Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U ANN. SUR. AM. L. 23 (2018); Richard D. Freer, *Justice Black Was Right About International Shoe, But for the Wrong Reason*, 50 U. PAC. L. REV. 587, 603–04 (2019); Vitiello, *Due Process*, *supra* note 11; Matthew P. Demartini, Comment, *Stepping Back to Move Forward: Expanding Personal Jurisdiction by Reviving Old Practices*, 67 EMORY L.J. 809, 814 (2018).

[138] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293–94 (1980).

Court, confessed error a mere two years later.[139] Due process protects individual liberty interests; not states' interests.[140]

Finally, in *Ford Motor Company v. Montana Eighth Judicial District Court*, the Court upheld the assertion of jurisdiction over an out-of-state defendant.[141] In two similar cases, in-state plaintiffs bought Ford vehicles out-of-state and brought them to the forum state.[142] Both vehicles were involved in serious accidents.[143] Ford argued that the claims did not arise out of forum contact.[144] After reviewing Ford's massive amount of forum activity, the Court found that the claims were sufficiently related to that activity to comply with due process.[145]

Notably, many scholars and some lower courts have argued the *Ford* decision raises more questions than it answers.[146] Some have suggested that the opinion read as if the Court woke up to the fact that its recent case law had painted the Justices into a corner and by an *ipsa dicta*, the Court made the problem vanish.[147] But as with the Court's other due process case law, *Ford* does not suggest that the Court has achieved a coherent explanation of its diverse due process analyses.[148]

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[139] Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

[140] *Id.* at 702 ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

[141] Ford Motor Company v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1032 (2021).

[142] *Id.* at 1022.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1029–30.

[146] For scholars, *see* Scott Dodson, *Personal Jurisdiction, Comparativism, and* Ford, 51 STETSON L. REV. 187, 195 (2022) (noting the ambiguity surrounding the role of the fairness factors after *Ford*); Gregory C. Cook & Andrew Ross D'Entremo, *No End in Sight? Navigating the "Vast Terrain" of Personal Jurisdiction in Social Media Cases After* Ford, 73 ALA. L. REV. 621, 634 (2022) ("[T]he Court's discussion bifurcating the independent bases for personal jurisdiction [i.e., 'arise out of' and 'relate to,'] may very well perplex courts, []especially in the social media context"); Vitiello, *"Clarifying" Personal Jurisdiction*, *supra* note 28; Borchers et al., *supra* note 31; 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, 600–01 (2022) [hereinafter Freer, 73 ALA. L. REV.] ("Without doubt, *Ford* leaves a good many unanswered questions"). For lower courts, *see* Sierra T. Horton, *Can't Relate: Why* Ford Motor Co. *Should Not be the End of the Road for Specific Jurisdiction*, 54 U. PAC. L. REV. 421, 439–44 (2023).

[147] Vitiello, *"Clarifying" Personal Jurisdiction*, *supra* note 28, at 420, 423.

[148] One might argue that *Ford* supports the view that a company like Ford derives such significant benefits from in-state activity that it cannot claim any procedural or other disadvantages when it faces a suit in a state where it engages in extensive

Enter *Mallory v. Norfolk Southern Railway Co.*[149] There, as developed in more detail in the next section, a plaintiff sued the railway in Pennsylvania despite the fact that the plaintiff's injuries resulted from the defendant Railway's conduct in states other than Pennsylvania.[150] Had Mallory needed to rely on the Court's narrow general jurisdiction test, jurisdiction would have failed.[151] Had he needed to assert specific jurisdiction, his claim was not sufficiently related to Railway's forum contacts.[152] Instead, he relied on a state law that required out-of-state businesses to register with the state and, in doing so, to appoint an agent for receiving service of process.[153] The state court held that the assertion of jurisdiction violated due process.[154] The Supreme Court disagreed.[155]

Among other things, what makes *Mallory* important for this article is the discussion of the original public meaning of the Fourteenth Amendment.[156] Counsel for Mallory contended that the Pennsylvania Supreme Court's holding that the assertion of jurisdiction violated due process is inconsistent with the "original public meaning" of the Fourteenth Amendment.[157]

Mallory's counsel's efforts to reframe personal jurisdiction analysis in terms of "original public meaning" created considerable buzz.[158] Some

activity. *See, e.g.*, Freer, 73 ALA. L. REV., *supra* note 146, at 599. But *Ford* articulates no such theory; Not only that, at least some commentators suggest that it is inconsistent with *BMS.* Borchers et al., *supra* note 31, at 6, 13; Freer, 73 ALA. L. REV., *supra* note 146, at 600. *Ford* seems to reintroduce the sliding scale theory of minimum contacts, a theory rejected in *BMS. See* Borchers et al., *supra* note 31, at 13 (referring to *Ford* as a "de facto adoption of the sliding scale approach"); Freer, 73 ALA. L. REV., *supra* note 146, at 600 ("[T]he [*Ford*] Court appears to recognize a sliding scale"); *see also* Zois Manaris, Note, Ford *v. Where Are We?: The Revival of The Sliding Scale to Govern The Supreme Court's New "Relating to" Personal Jurisdiction*, 64 WM. & MARY L. REV. 265 (2022).

[149] 600 U.S. 122 (2023) (plurality opinion).

[150] *Id.* at 126.

[151] *See* Daimler AG v. Bauman, 571 U.S. 117, 136–37 (2014) ("[T]he place of incorporation and principal place of business are paradigm bases for general jurisdiction") (internal quotes and citations omitted); *Mallory*, 600 U.S. at 126 ("[Norfolk Southern] was incorporated in Virginia and had its headquarters there too").

[152] See *Mallory*, 600 U.S. at 126 ("[Mallory's] complaint alleged that he was exposed to carcinogens in Ohio and Virginia.").

[153] *Id.* at 127; 42 PA. CONS. STAT. § 5301(a)(2)(i), (b).

[154] Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 565 (Pa. 2021).

[155] *Mallory*, 600 U.S. at 136.

[156] *See* discussion *infra* Part III.

[157] Brief for Petitioner at 11–28, Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023) (No. 21-1168).

[158] Amy Howe, *Originalist Arguments and Business Interests Clash in a Dispute Over Where Companies Can Be Sued*, SCOTUS BLOG (Nov. 7, 2022, 3:09 PM),

commentators focused on Mallory's arguments about original meaning and wondered whether, in light of the Court's increasing commitment to original meaning, the Court would find for Mallory on that basis.[159] Some observers wondered why the Justices' questions did not delve more deeply into the original meaning of the Fourteenth Amendment.[160] As we develop below, a ruling that personal jurisdiction should be governed by original meaning would have made bad law.[161] Perhaps someone hoping for a coherent theory to explain the Court's personal jurisdiction case law could argue at least that originalism would have done so. Perhaps. But not in our view.

III. *MALLORY V. NORFOLK SOUTHERN RAILWAY CO.*, DUE PROCESS AND STRANGE BEDFELLOWS

The facts of *Mallory* are more straightforward than one might expect for such a fractured decision. Robert Mallory worked for Norfolk Southern as a freight car mechanic for over twenty years in both Ohio and then later in Virginia.[162] After ending his employment with Norfolk Southern, Mallory moved to Pennsylvania and then later moved back to Virginia.[163] Before moving back to Virginia, Mallory was diagnosed with cancer and asserted that his employment with Norfolk Southern exposed him to chemicals that caused his cancer.[164] Mallory sued Norfolk Southern in Pennsylvania state court and alleged a violation of the Federal

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https://www.scotusblog.com/2022/11/originalist-arguments-and-business-interests-clash-in-a-dispute-over-where-companies-can-be-sued/ [https://perma.cc/6ZBX-E2G7]; Gardner, *supra* note 14; Monestier, *supra* note 13; John Masslon, Mallory v. Norfolk Southern: *Oral Argument Preview*, THE FEDERALIST SOC'Y (Nov. 8, 2022), https://fedsoc.org/commentary/fedsoc-blog/mallory-v-norfolk-southern-oral-argument-preview [https://perma.cc/N77M-EY4T]; Rocky Rhodes & Andra Robertson, *The* Mallory *Argument on Personal Jurisdiction via Corporate Registration*, PRAWFSBLAWG (Nov. 9, 2022), https://prawfsblawg.blogs.com/prawfsblawg/2022/11/guest-post-the-mallory-argument-on-personal-jurisdiction-via-corporate-registration.html [https://perma.cc/US7Z-6YMV]; Richard Wiese, Norfolk Southern Railway Co., *United States Government Urge Supreme Court of the United States to Shorten the Reach of Pennsylvania Long-Arm Statute*, JDSUPRA (Sept. 19, 2022), https://www.jdsupra.com/legalnews/norfolk-southern-railway-co-united-7206761/ [https://perma.cc/N3YX-HNLP].

[159] Rhodes & Robertson, *supra* note 158.

[160] Monestier, *supra* note 13.

[161] *See infra* Part III(a); *see also* Gardner, *supra* note 14 (opining that resolving personal jurisdiction cases based on an original and historical understanding of the Constitution is unworkable).

[162] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 126 (2023) (plurality opinion).

[163] *Id.*

[164] *Id.*

Employers' Liability Act.[165] At the time, Mallory was a citizen of Virginia, and Norfolk Southern was incorporated in Virginia and had its principal place of business in Virginia.[166] Notably, Mallory did not allege that he was exposed to carcinogens in Pennsylvania.[167]

Norfolk Southern objected to the complaint on the ground that Due Process under the Fourteenth Amendment prohibited Pennsylvania state courts from exercising jurisdiction over it.[168] Norfolk Southern argued that since neither party was a citizen of Pennsylvania and that Mallory did not allege that the harm stemmed from Norfolk Southern's conduct in Pennsylvania, Pennsylvania state court did not have jurisdiction.[169] In response, Mallory emphasized that Norfolk Southern registered to do business in Pennsylvania and argued that registration equated to consent to general jurisdiction in the state.[170]

Pennsylvania's registration statute is sweeping in scope and mandatory for a company to do business in that jurisdiction. More specifically, 15 Pa. Cons. Stat. § 411(a) states that an out-of-state corporation cannot "do business in this Commonwealth until it registers to do business" with the Department of State.[171] Further, 42 Pa. Cons. Stat. § 5301(a)(ii)(i) specifically provides that an out-of-state corporation's successful registration permits Pennsylvania state courts to "exercise general personal jurisdiction" over the foreign corporation on "any cause of action" asserted against it.[172] Thus, Mallory argued that Norfolk Southern's compliance with Pennsylvania registration requirements showed that the corporation explicitly consented to general personal jurisdiction.[173]

The trial court dismissed the case and held that the statutory scheme purporting to vest Pennsylvania courts with general personal jurisdiction based on registration without continuous and systematic contacts does not comport with Due Process under the Fourteenth Amendment.[174] The trial court reasoned that "it would violate due process to construe a foreign corporation's compliance with our mandatory registration statute as voluntary consent to Pennsylvania courts' exercise of general personal jurisdiction."[175]

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[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id*.
[170] *Id*. at 127.
[171] *Id.* at 134.
[172] *Id.*
[173] *Id.* at 127.
[174] Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 547 (Pa. 2021).
[175] *Id.*

The Pennsylvania Supreme Court affirmed.[176] Relying on the United States Supreme Court's opinions in *Daim*ler and *Goodyear*,[177] the court held the registration scheme could not confer general personal jurisdiction "absent affiliations within the state that are so continuous and systematic as to render the foreign corporation essentially at home in Pennsylvania" without violating due process.[178] Further, the court held that compliance with the registration scheme did not equate to voluntary consent to all-purpose general jurisdiction.[179]

After the United States Supreme Court granted certiorari on the registration issue, many commentators expected at least a slightly new approach to the Court's due process analysis.[180] But after a long wait between argument and opinion, the decision reached back and relied on precedent over 100 years old.[181] But how did it sidestep a new approach?

In the briefing, Mallory argued that the Pennsylvania Supreme Court erroneously concluded that the registration scheme violated due process because the "original public meaning" of the Fourteenth Amendment required the opposite conclusion.[182] More specifically, Mallory argued that in the years before and immediately after the Fourteenth Amendment was ratified, every state required out-of-state corporations to register to do business within the state and consent to jurisdiction.[183] Moreover, Mallory pointed out that Congress enacted an analogous federal statute in 1867, only months after Congress proposed the Fourteenth Amendment to the States for ratification.[184] Mallory continued that state courts routinely applied similar consent-by-registration statutes, and the Supreme Court did so in dozens of cases.[185] Accordingly, Mallory argued that, based on tradition and history, consent-by-registration statutes survive Due Process Clause scrutiny.[186] At oral argument, it appeared that the Court was heading towards an originalist analysis, frequently asking questions about historical understanding and tradition.[187] Indeed, counsel for Mallory

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[176] *Id.* at 542.

[177] Daimler AG v. Bauman, 571 U.S. 117 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

[178] *Mallory*, 266 A.3d at 547.

[179] *Id.* at 566.

[180] *Id.* at 566–68.

[181] *See infra* note 193 and accompanying text.

[182] Brief for Petitioner at 11–25, Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023) (No. 21-1168).

[183] *Id.* at 12.

[184] *Id.* at 14.

[185] *Id.* at 17.

[186] *Id.* at 23–24.

[187] *See* Transcript of Oral Argument at 5, *Mallory*, 600 U.S. 122 (2023) (No. 21-1168).

relied heavily on originalist notions during the oral argument, likely expecting originalism to be front and center.[188]

Despite emphases on originalism and due process in the briefing and in oral argument, the Supreme Court took a different path. In a highly fractured decision, Justice Gorsuch delivered the Court's judgment in Parts I and III-B, but he could not secure a majority for Parts II, III-A, and IV.[189] In Parts I and III-B, Justice Gorsuch turned to a similar 1917 case, *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,[190] to find that the Pennsylvania registration scheme did not violate due process.[191] Calling it a "very old question," Justice Gorsuch explicitly found that the Court had previously decided this very issue in 1917.[192]

In *Pennsylvania Fire*, an Arizona mining company sued a Pennsylvania insurance firm in Missouri.[193] Missouri law in 1917 required any out-of-state insurance company that wanted to do business within the state to file paperwork with the state that (1) appointed a state official to serve as the insurance company's agent for service of process, and (2) to accept service on that state official as valid in any suit.[194] Pennsylvania Fire complied with Missouri's registration requirement for more than ten years prior to the lawsuit.[195] Justice Holmes wrote for a unanimous Court and found no due process violation, primarily because the insurance firm appointed the agent for service of process in Missouri.[196] This act alone, Justice Holmes held, left "no doubt" that Pennsylvania Fire could be sued in Missouri by an out-of-state plaintiff on an out-of-state contract.[197] While recognizing that the outcome might have been different if the insurance firm had never appointed an agent in Missouri, the Court unanimously held that due process allows a corporation to be sued on any claim in a State where it has appointed an agent to receive whatever suits may come.[198]

Without reference to many of the originalism or due process arguments raised in the briefing and at oral argument, Justice Gorsuch simply proclaimed that "*Pennsylvania Fire* controls this case."[199] He noted that, like in *Pennsylvania Fire*, the defendant had complied with the

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[188] *Id.* at 12 ("Historically, some of the statutes used words like 'consent' or 'assent,' but admittedly, most of them didn't.").

[189] *Mallory*, 600 U.S. at 124.

[190] 243 U.S. 93 (1917).

[191] *Mallory*, 600 U.S. at 127–28.

[192] *Id.*

[193] *Pa. Fire*, 243 U.S. at 94.

[194] *Id.*

[195] *Id.* at 96.

[196] *Id.* at 94–96.

[197] *Id.* at 95.

[198] *Id.* at 95–96.

[199] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 134 (2023) (plurality opinion).

registration requirements here since 1998.[200] "All told, then, Norfolk Southern has agreed to be found in Pennsylvania and answer any suit there for more than 20 years."[201] Further, Justice Gorsuch emphasized that Norfolk Southern conceded that it not only registered to do business in Pennsylvania, but that it established an office there to receive process.[202] Accordingly, Justice Gorsuch found that these facts show that Norfolk Southern "understood it would be amendable to suit [in Pennsylvania] on any claim."[203] Justice Gorsuch could not get the majority to stretch any further.

Justice Gorsuch delivered parts II, III-A, and IV with Justices Thomas, Sotomayor, and Jackson joining.[204] These sections reflect two primary components. The first (part II) involved a detailed discussion of in-state registration statutes and found that registration statutes like the Pennsylvania scheme at issue were primarily a mechanism to bring transitory actions against corporations in the nineteenth century.[205] The plurality recognized that transitory actions, commonly known as "tag jurisdiction," is still used today.[206] Tag jurisdiction allows a plaintiff to establish *in personam* jurisdiction over a defendant in any place where the defendant can be served with process inside the jurisdiction.[207] Justice Gorsuch further explained that, over time, corporations sought to hide behind their foreign status to defeat suits in out-of-state courts.[208] As a result, states adopted statutes, like Pennsylvania's, to essentially establish tag jurisdiction over foreign corporations.[209]

Part IV of Gorsuch's opinion involved an examination of *International Shoe Co. v. Washington* and its potential impact on the dispute in *Mallory*.[210] According to Justice Gorsuch, *International Shoe* and its contacts-based theory of personal jurisdiction did not foreclose other ways of haling an out-of-state defendant into a foreign court.[211] While *Shaffer v. Heitner* offers some indication or argument that *International Shoe* discarded traditional methods of establishing *in personam* jurisdiction over a defendant, the plurality in *Shaffer* rejected

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[200] *Id.* at 134–35.
[201] *Id.* at 135.
[202] *Id.*
[203] *Id.*
[204] *Id.* at 122.
[205] *Id.* at 128–31.
[206] *Id.* at 129.
[207] *See* Burnham v. Superior Ct., 495 U.S. 604, 637 (1990).
[208] *Mallory*, 600 U.S. at 129–30.
[209] *Id.* at 130.
[210] *Id.* at 126–46.
[211] *Id.* at 139–40 (noting *International Shoe* did not do away with tag jurisdiction).

this notion.[212] Instead, the four Justices agreed that dicta in both *Burnham* and *Daimler AG* provided that *International Shoe* did not displace traditional personal jurisdiction analysis; it just established a novel way for plaintiffs to secure jurisdiction over a defendant.[213]

To underscore the previous point, consider the way that Justice Gorsuch framed many of his arguments. Rather than directly discussing Mallory's claim that original public meaning should control, Justice Gorsuch spent most of his time addressing and rejecting Norfolk Southern's arguments for why the Court should affirm the Pennsylvania court's ruling.[214] Thus, as indicated above, insofar as the original understanding of the Fourteenth Amendment or historical practice was relevant to Justice Gorsuch, one might summarize it as follows: compliance with historical practice is almost always sufficient to comport with Due Process but is not necessary. Echoing Justice Scalia's plurality opinion in *Burnham*, Justice Gorsuch indicated that compliance with traditional bases of jurisdiction is sufficient but does not prevent states from adopting "novel" ways to secure personal jurisdiction.[215]

As such, Justice Gorsuch's plurality opinion did not even suggest that the original meaning of the Fourteenth Amendment is always controlling.[216] History matters. Despite Justice Gorsuch's suggestion in his concurring opinion in *Ford Motor Company* that the Court might reexamine *International Shoe*'s formulation of due process, in *Mallory*, he reaffirmed *International Shoe* as good law.[217]

Justice Jackson concurred that *International Shoe* did not do away with traditional bases of personal jurisdiction when she cited *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee* as a case establishing the validity of consent-based jurisdiction post-*International Shoe*.[218] Indeed, Justice Jackson would have wholly relied on the reasoning in *Insurance Corporation* rather than that of *Pennsylvania Fire*.[219]

Justices Barret, Kagan, and Kavanaugh dissented.[220] They took issue with the plurality on two main points.[221] First, as a policy matter, the dissenting Justices took a time and place approach and argued that the

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[212] *Id.* at 140–41.

[213] *Id.* at 141.

[214] *Id.* at 140–44.

[215] *Id.* at 140.

[216] *Id.* at 144.

[217] *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring) ("Maybe, too, *International Shoe* just doesn't work quite as well as it once did"); *Mallory*, 600 U.S. at 146.

[218] *Mallory*, 600 U.S. at 148 (Jackson, J., concurring).

[219] *Id.*

[220] *Id*. at 163 (Barrett, J., dissenting).

[221] *Id*. at 166–70.

plurality opinion was not "in the spirit of our age."[222] Ultimately, they felt it unreasonable for Pennsylvania to place conditions on foreign corporations in exchange for access to its markets because it would allow states to relabel their long-arm statutes to manufacture consent.[223]

The second point the dissent raised looked to caselaw post-*International Shoe*.[224] The dissenting Justices felt that *International Shoe* and its progeny foreclosed all other methods of establishing personal jurisdiction over an out-of-state defendant with the exception of tag jurisdiction, which the Court unanimously upheld in *Burnham*.[225] Given that Mallory did not seriously dispute *International Shoe*'s contacts-based approach, the dissenting Justices focused more on refuting Mallory's claim under *Burnham*'s two-prong test which held that tag jurisdiction was "both firmly approved by tradition and still favored."[226] According to the dissent, Pennsylvania's general-jurisdiction-by-registration failed *Burnham*'s test because it was not used prior to the Fourteenth Amendment's ratification in 1868, nor was it used in other states.[227] Based on *Burnham*, then, the dissent would have invalidated Pennsylvania's registration scheme as a violation of the Due Process Clause because it was neither tradition nor favored by anyone other than Pennsylvania.[228]

Perhaps most surprising and interesting to commentators, Justice Alito took an unexpected approach in his concurrence. Justice Alito immediately agreed with the plurality that assuming the Constitution allows a registration requirement upon submission to general personal jurisdiction, Pennsylvania's registration scheme must stand under *Pennsylvania Fire*.[229] The key word is "assuming."[230] Justice Alito was simply not convinced that the Constitution permits such a requirement.[231]

Pointing to the "development of our constitutional case law," Justice Alito would have held that the Dormant Commerce Clause is the most appropriate doctrine through which to analyze personal jurisdiction in this case had it been before the Court.[232] "We have long recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection to the State's legitimate interests."[233]

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[222] *Id.* at 173.
[223] *Id.* at 180.
[224] *Id.* at 168–70.
[225] *Id.* at 171–72.
[226] *Id.*
[227] *Id.*
[228] *Id.* at 152 (Alito, J., concurring).
[229] *Id.* at 150.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.* at 154.

Hearkening back to notions of federalism and territorial limitations, Justice Alito relied on *Pennoyer v. Neff*, *Hanson v. Denckla*, and *World-Wide Volkswagen* to assert that the Court's decisional law supports restricting state power in a jurisdictional sense such that states cannot encroach on their coequal sovereign states' territorial authority.[234] Justice Alito appears to have been primarily concerned with issues of territory and federalism. Because a Dormant Commerce Clause challenge was not properly before the Court, however, Justice Alito went so far as to encourage Norfolk Southern to raise the argument on remand.[235]

IV. UNANSWERED QUESTIONS

A. Originalism

This section focuses on three important questions: What was the original meaning of due process as it might relate to personal jurisdiction?[236] What would be wrong with the Court adopting an originalist approach to due process personal jurisdiction questions?[237] Given the commitment that some of the Justices have to originalism, why would those Justices not have taken Mallory's argument to heart?[238]

Above, we argued that the Court has failed to articulate a coherent theory in its many due process cases involving personal jurisdiction.[239] Perhaps, adherence to originalism would at least provide a consistent theory. Many proceduralists believe that adherence to originalism would be a mistake for many reasons.[240]

The difficulty in determining the framers' original understanding of various terms is frequently cited as a problem with originalism.[241]

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[234] *Id.* at 153–56.

[235] *Id.* at 163.

[236] *See* discussion *infra*.

[237] *See* discussion *infra*.

[238] *See* discussion *infra.*

[239] *See supra* Part I.

[240] Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 2 (2007) (noting that adherence to an originalist understanding of procedural due process would prevent procedural innovation); Allan Erbsen, *Personal Jurisdiction's Moment of Opportunity: A Reform Blueprint for Originalists and Nonoriginalists*, 75 FLA. L. REV. 415, 456–58 (2023) (noting the difficulties that would come with an originalist approach to procedural due process).

[241] *See* Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 377 n.30 (listing several seminal articles critiquing originalism on the ground that it is difficult, if not impossible, to discern the intent of the framers). Moreover, even if were easy to discern the intent of the Framers, scholars doubt whether the Framers themselves were originalists; that is, whether the Framers intended for the Constitution to be interpreted through an

Rephrased, how would the framers have dealt with situations that might have arisen in the nineteenth century when the United States ratified the Fourteenth Amendment?[242] And how would the framers deal with situations that they could never have anticipated?[243] To distinguish the two situations, consider the facts in *Mallory*: as a condition of doing business in-state, a corporation had to appoint an agent for receipt of process.[244] The framers would have familiarity with such regulations.[245] Consider, by contrast, cases involving corporations or other potential defendants whose contact with the forum state came about through internet contacts. Obviously, the drafters and adopters of the Fourteenth Amendment could not be thinking about the internet.

Consider the first type of situation, where judges and lawyers can search the historical record to determine practices that were common in the nineteenth century. How good are the sources?[246] Enter *Pennoyer v. Neff*.[247] Given the timing of that decision—shortly after adoption of the Fourteenth Amendment and decided by Justices who would presumably

originalist lens. *See* Erwin Chemerisnky, *Even the Founders Didn't Believe in Originalism*, ATLANTIC (Sept. 6, 2022), https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334/ [https://perma.cc/7KPQ-FWVW]; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 (1985) (arguing that the Framers did not wish for their intent to be the north star of Constitutional interpretation).

[242] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2138 (2022) (observing that there may be a difference in understanding of the Bill of Rights between when it was adopted and when it was applied to the states through the Fourteenth Amendment). The Court neglected to address the issue fully in *Bruen* because, as the majority saw it, the outcome would have been the same either way. *Id.*

[243] Surely, no one knows what Thomas Jefferson would have thought about buying a color television set or where he would have placed it in Monticello.

[244] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 132 (2023).

[245] Pennoyer v. Neff, 95 U.S. 714, 735 (1877) ("Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State."), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977). Justice Field then cites several cases standing for the same proposition. *Id.*

[246] Michael L. Smith & Alexander Hiland, *Originalism's Implementation Problem*, 30 WM. & MARY BILL RTS. J. 1063, 1087–88 (2022) (discussing the limited and semi-untrustworthy nature of historical records).

[247] 95 U.S. 714.

be aware of the original meaning of due process—one might be inclined to defer to its discussion of due process.[248]

But *Pennoyer*'s discussion of due process raises serious doubts about whether it should be treated as authoritative on the meaning of due process. There, Justice Field stated that due process served to protect states' interests.[249] That is, due process prevented an Oregon court from legally serving process on a non-consenting, non-resident unless he was served in-hand, in-state.[250] To allow Oregon to do so, according to Justice Field, would violate California's interest in protecting its sovereignty.[251] Can the Fourteenth Amendment, explicitly and implicitly adopted to limit states' powers, be read to protect states' interests? Either Justice Field did not care about the amendment's original meaning, or he got it wrong. And yet, *Pennoyer* ranks as one of the closest cases to a contemporary source of the meaning of due process as it relates to personal jurisdiction.[252]

One should not be too quick to assume that Justice Field was right about whether the drafters and adopters of the Fourteenth Amendment intended to say anything about personal jurisdiction. Yes, *Pennoyer* seems to have been consistent with contemporary notions about a sovereign's power to reach beyond its borders.[253] But as Justice Field stated, that was

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[248] See *id.* at 733. Note, however, that the portion of Justice Field's opinion expounding Due Process is largely dicta. *See id.*

[249] *Id.* There is good reason to doubt Justice Field's claim. *See* Elizabeth B. Wydra, *The Fourteenth Amendment's Due Process Clause and Caperton: Placing the Federalism Debate in Historical Context*, 60 SYRACUSE L. REV. 239, 241–44 (2010) (arguing that the point of the Fourteenth Amendment was to take away the primary responsibility of protecting fundamental rights from the states and give it to the federal government); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U L. REV. 1801 (2010) (arguing that an originalist interpretation of the reconstruction amendments—including the Fourteenth Amendment—supports a broad view of congressional power instead of a narrow view based on states' rights); A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 601 (2010) ("the principal responsibility for carrying out the[] [reconstruction amendments] promises to fruition was committed to Congress").

[250] *Pennoyer*, 95 U.S. at 724.

[251] *Id.* at 720.

[252] *See* Stephen E. Sachs, Pennoyer *was Right*, 95 TEX. L. REV. 1249, 1252 (2017) (stating that Pennoyer's reasoning should not seem archaic and provides "attractive way to think about personal jurisdiction").

[253] D'Arcy v. Ketchum, 52 U.S. 165, 167–68 (1850). In *D'Arcy*, a New York statute allowed for service of process on all joint debtors—most of which were in Louisiana—by service to only one of them. *Id.* at 166–67. The case was decided in New York and the victors sought enforcement of the judgment in Louisiana. *Id.* The Supreme Court ruled that the New York Court's judgment was void because it did not comply with the standards of international law vis-a-vis service of process. *Id.* at 176. *D'Arcy*, however, was not controlling in *Pennoyer* because it was decided under the Full Faith and Credit clause before the enactment of the Fourteenth Amendment. *Pennoyer*, 95 U.S. at 729, 733.

a matter of international public law, not part of the Constitution.[254] Further, the intended purpose of including the Due Process Clause in the Fourteenth Amendment is a bit of a mystery.[255]

Obviously, the Fourteenth Amendment was a limitation on states' powers, making clear that the Southern states' efforts to secede from the union were invalid.[256] Further, much of the amendment was written to extend protection for Black citizens.[257] That is obvious both from history and from the inclusion of "equal protection" in the Fourteenth Amendment.[258] The addition of the Due Process Clause was a bit more mysterious.[259] It was not in the original draft of the amendment, but rather it was added in a closed session.[260] When asked about the meaning of due process, Mr. Bingham stated "the courts have settled that long ago and the gentleman can go and read their decisions."[261]

Also, there are additional reasons to doubt whether due process was originally relevant to personal jurisdiction or at least as the Court read the clause in *Pennoyer*. Due processes' origins in the Magna Carta and its general historical meaning focused on whether the government followed fair procedures before stripping a person of that person's property.[262] That kind of procedural guarantee seems different from *Pennoyer*'s holding

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[254] *Pennoyer*, 95 U.S. at 730.

[255] WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 49, 57 (1998) (noting that the earlier drafts of the amendment did not include the Due Process Clause and that the clause was added in a closed session, of which minimal records survived).

[256] *See* U.S. CONST. amend. XIV, §§ 3, 4.

[257] Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with governmentally imposed discrimination based on race") (internal footnote omitted); CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (The Fourteenth Amendment "protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.").

[258] *See History of Law: The Fourteenth Amendment*, TUL. U. L. SCH. (July 9, 2017), https://online.law.tulane.edu/blog [https://perma.cc/98DG-Z33P] (overview of period leading up to the passage of the Fourteenth Amendment); U.S. CONST. amend. XIV, § 1.

[259] NELSON, *supra* note 255, at 49, 57.

[260] *Id.*

[261] CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

[262] *See* MAGNA CARTA, § 39 ("No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land."); 28 Edw. 3, § 3 (English law passed in 1354 stating "[t]hat no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law").

limiting the reach of one state into another state.[263] That historical understanding seems more consonant with the idea that due process guarantees adequate notice and an opportunity to be heard.[264]

Where does this all leave us? As many critics of originalism argue, the historical record is often inadequate to resolve questions that courts may face, and that is so even with cases that might have arisen in the nineteenth century.[265] Consider further how little guidance the original meaning of due process provides when the facts include transactions conducted via the internet. Imagine, as in *Pennoyer*, Marcus Neff, residing in California, finding John H. Mitchell's name online.[266] Imagine further that Neff contracted with Mitchell, an Oregon resident, to do legal work for Neff. Upon completion of the work, imagine further that Neff used Mitchell's legal services to his advantage and refused to pay Mitchell. Surely, nineteenth century fiction writers imagined time travel and the like,[267] but one doubts that anyone conceived of the internet. Saddling themselves with the original meaning of due process would force courts to engage in analogous reasoning, surely an exercise in subjectivity.

Apart from the uncertainty about the original meaning of due process, would a holding that personal jurisdiction cases should be decided consistent with that original meaning be good policy? For those of us who believe that the Court got it wrong in cases like *Daimler*, effectively gutting general jurisdiction,[268] the result in *Mallory*, even if based on the original meaning of due process would be helpful.[269] But overall, would originalism help?

As to individual defendants, the answer is almost certainly, "no." Think back to *Hess v. Pawloski*.[270] There, Hess drove his vehicle on roads

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[263] *See* Pennoyer v. Neff, 95 U.S. 714, 722–23 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

[264] *See, e.g.*, Buchanan v. Rucker, 103 E.R. 546 (1808) (noting in dicta that even if the law of Jamaica allowed for the type of service proffered (namely, nailing notice to the courthouse against a person who never stepped foot on the island), courts in other nations would be very unlikely to enforce that judgment on the basis that the defendant never had notice).

[265] *See* Smith & Hiland, *supra* note 246.

[266] They, of course, were the individuals who gave rise to the dispute that led to the Court's decision in *Pennoyer*. *See* Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 479–80 (1987) (discussing the characters involved in the case).

[267] *See, e.g.*, MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR'S COURT (1983).

[268] VITIELLO, *supra* note 4, at 53–57. As critics of Daimler have argued, the Court has never offered a coherent explanation for why general jurisdiction should be available or limited. *Id.* at 40–44, 53–57.

[269] Indeed, as long as state legislatures want to open their courthouse doors to injured plaintiffs, *Mallory* goes a long way towards gutting *Daimler*.

[270] Hess v. Pawlowski, 274 U.S. 352 (1927).

in Massachusetts where he injured Pawloski. Pawloski could not serve Hess with process before Hess returned to Pennsylvania.[271] Had the Court not relied on the fanciful "implied consent" theory,[272] Pawloski would have had to pursue Hess in his home state rather than in the much more convenient forum where the accident occurred.[273] Modern observers certainly accept the idea that Hess, who created the connection with the forum state, should not be able to avoid answering the suit in Massachusetts.[274] Yes, the Court upheld jurisdiction based on the implied consent fiction.[275] Despite that, the result turned on the existence of a state statute creating the consent theory.[276] Pro-business, pro-defendant organizations with political clout can undo such laws, leaving the Pawloski's of the world without a convenient forum in which to sue.[277] Further, it is uncertain whether a court applying the original understanding of the Fourteenth Amendment would uphold an implied consent theory.[278]

The situation with corporations is also iffy as a matter of the Court's original understanding of due process because the Court did not address core issues that have arisen in the modern setting. *Pennoyer* included dicta concerning business organizations.[279] Notably, it stated that a state would be able to require a business "to appoint an agent or representative in the State to receive service of process . . . ."[280] But what if a corporation does

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[271] *Id.* at 353.

[272] Olberding v. Ill. C. R. Co., 346 U.S. 338, 340–41 (1953) ("[T]here has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has 'impliedly' consented to be sued there.").

[273] *Hess*, 274 U.S. at 355. The *Hess* Court is all but explicit that, but for the deus ex machina of implied consent, Pawloski's only option would be a suit in PA. *Id.*

[274] Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

[275] *Hess*, 274 U.S. at 357.

[276] *Id.* at 355; Pennoyer v. Neff, 95 U.S. 714, 719 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977). Given *Pennoyer's* rule, but for the implied consent statute, Pawloski would have been out of luck. *Hess*, 274 U.S. at 355.

[277] Vitiello, *Limiting Access*, *supra* note 48, at 219–20 (noting that *Pennoyer*'s holding created "unfair situations" and its underlying theory is "analytically jarring"); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 104 (6th ed. 2016) (explaining how "foreign corporations" could evade suit under *Pennoyer* because "a state court could not obtain in-personam jurisdiction over a foreign corporation even by personally serving the corporation's chief executive officer within its territory"). *See also* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880–81 (2011) (plurality opinion) (advancing an approach that requires one to "submit to a State's authority").

[278] Respondent's Brief in Opposition at 20, Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023) (No. 21-1168) ("Even under these old cases, the implied 'statutory consent of a foreign corporation to be sued d[id] not extend to causes of action arising in other states,' so . . . 'suits for torts, wherever committed,' could *not* be filed in 'any state in which the foreign corporation might at any time be carrying on business.'").

[279] *Pennoyer*, 95 U.S. at 735.

[280] *Id.*

not appoint such an agent? Consistent with the original meaning of the amendment, would the Fourteenth Amendment allow the assertion of jurisdiction over a non-consenting, out-of-state defendant that had never entered the state? As with the discussion above, the answer is uncertain. Consider Justice Holmes' terse opinion in *Flexner v. Farson*,[281] for example. There, a unanimous Court found that reliance on a theory that a business entity consented to the state's jurisdiction by doing business in the state could not be squared with the Commerce Clause:

> But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in . . . . The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void.[282]

Justice Holmes did not state whether such a view was required by the original meaning of the Constitution.[283] Were it found to be part of the original meaning of the Constitution, it is not clear if a court would have jurisdiction over a business entity shipping a harmful product to a plaintiff in-state even though the product caused injuries to a plaintiff. From the perspective of many observers, such a result would be undesirable.[284]

One area that might expand a plaintiff's access to a state court would be in cases involving in rem jurisdiction. Historically, the mere presence of property in state allowed a plaintiff to begin suit by a proper seizure of that property.[285] That changed in 1977 when the Court decided *Shaffer v. Heitner*.[286] There, the Court held that all assertions of jurisdiction had to satisfy the Court's more modern due process test articulated in *International Shoe Co. v. Washington*.[287] Returning to the pre-*Shaffer* approach would provide plaintiffs the chance to begin suits against large

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[281] 248 U.S. 289 (1919).

[282] *Id.* at 293.

[283] The terse opinion was silent on the Justices' view of the original intent of the Constitution. *Id.*

[284] Linda S. Mullenix, *Is the Arc of Procedure Bending Towards Injustice?*, 50 U. PAC. L. REV. 611, 611–12 (2019) (discussing the decline of the "golden age of procedural law" and the "closing of the courthouse doors"); Freer, *supra* note 140, at 588 *Justice*(analyzing Justice Black's warning that the Court's doctrine in *International Shoe* would "limit plaintiff's access to courts"); Vitiello, *Due Process*, *supra* note 11, at 514.

[285] *Pennoyer*, 95 U.S. at 733.

[286] 433 U.S. 186 (1977).

[287] *Id.* at 212.

corporate defendants with substantial assets in a given state even on a claim that arose out of activity in a state other than the forum state.[288] That would undo some of the courthouse-door-closing-effect of *Daimler*.[289]

Apart from in rem cases, the net effect of rethinking the personal jurisdiction-due process analysis in originalist terms might be the further limitations on access to a convenient forum for injured plaintiffs. As mentioned above, that seems especially unwise in an era in which the instances of interstate and international transactions have proliferated.[290] Modern transportation and communication greatly reduce a defendant's burden.[291]

That leaves the third question posed above.[292] *Mallory* extended the Court the opportunity to rule broadly that the original public meaning of the Fourteenth Amendment should control in personal jurisdiction cases. Justices like Justice Gorsuch, who invited such arguments in his concurring opinion in *Ford*,[293] did not take up *Mallory*'s offer.[294] Nor did Justice Thomas, the Court's most uncompromising originalist.[295] One can only speculate why they did not do so.

One possibility is that they believed adherence to the original understanding of the Due Process Clause would produce negative results. Justice Scalia's plurality opinion in *Burnham* hints at such an approach.[296] There, the Court had to determine whether *Pennoyer*'s rule was that a non-

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[288] Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 108 (2015) (noting that before *Shaffer*, "[a] corporation with a sufficiently large level of activity in the state would in practice be subject to general jurisdiction for all claims in all amounts.").

[289] Often, as in cases like *BMS* and *Daimler*, large corporations have substantial physical and intangible assets in a state where they have "continuous and systematic contacts" with the forum state.

[290] *See supra* Part I.

[291] *See* Bristol-Myers Squibb Co. v. Superior Ct. 582 U.S. 255, 268 (2017) (noting BMS' concession that "suits could be brought in either New York or Delaware," and that the Texas and Ohio plaintiffs "could probably sue together in their home States").

[292] *See supra* Part III(a) (Given the commitment that some of the Justices have to originalism, why would those Justices not have taken Mallory's argument to heart?).

[293] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1036 (2021) (Gorsuch, J., concurring).

[294] *See supra* Part II.

[295] Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 649 (2007) (arguing Justice Thomas is more committed to originalism than Justice Scalia).

[296] Burnham v. Superior Ct., 495 U.S. 604, 615 (1990) ("We do not know of a single state or federal statute, or a single judicial decision resting upon state law, that has abandoned in-state service as a basis of jurisdiction.").

consenting, non-resident defendant was subject to a court's jurisdiction if served in-hand, in-state.[297] Rephrased, must a court assess whether such an assertion of jurisdiction meets the modern rules developed in *International Shoe* and its progeny? Justice Scalia relied on history to determine the answer to this question.[298] Indeed, his opinion for four Justices used the terms "tradition" or "traditional" thirty-two times.[299] But while his *Burnham* decision demonstrates his commitment to the traditional interpretation of the Due Process Clause, he also recognized that, "[a]s *International Shoe* suggests, the defendant's litigation-related 'minimum contacts' may take the place of physical presence as the basis for jurisdiction . . . ."[300] He cited the changes in transportation and communication as justifications for the expansion of jurisdiction seen in the modern case law.[301]

Justice Scalia, thus, seemed willing to interpret the Constitution in a manner consistent with changes in circumstances. Or perhaps he did *sometimes*. While Justice Scalia is associated with originalism,[302] he did not always follow the original meaning of the Constitution.[303] Not long after his appointment to the Court, he described himself as a "faint-hearted" originalist.[304] While he may have become a more devoted originalist over time, he abandoned his commitment to originalism in some notable instances.[305] In a lecture early in his tenure as a Supreme Court Justice, Justice Scalia discussed what he saw as limitations with the methodology but argued that he opted for originalism as the lesser of two

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[297] *Id.* at 607.

[298] *See id.* at 609.

[299] *See generally id.*

[300] *Id.* at 618.

[301] *Id.* at 617.

[302] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989); Interview by Calvin Massey, *The Originalist: Justice Antonin Scalia*, CAL. LAW. (Jan. 2011), http://ww2.callawyer.com/story.cfm?eid=913358&evid=1 [https://perma.cc/ZZS9-X4A4]; Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24 (2016).

[303] Scalia, *supra* note 302, at 864 (calling himself a "faint-hearted" originalist); Michael Lewyn, *When Scalia Wasn't Such an Originalist*, 32 TOURO L. REV. 747, 749 (2016).

[304] Scalia, *supra* note 302, at 864.

[305] *Id.* at 861; Michael Vitiello, *Justice Scalia's Eighth Amendment Jurisprudence: An Unabashed Foe of Criminal Defendants*, 50 AKRON L. REV. 175, 197 (2017) (discussing notable instances in which Scalia "abandoned original understanding" and analyzing suggestions that "he was open to abandoning a narrow historical reading of the Eighth Amendment"); Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 OHIO ST. L.J. 925, 961–68 (2007) (calling the Court's Equal Protection reading "the most unbounded, leaving the most room for variability in judicial reasoning").

evils.[306] Opting for the original understanding of the Constitution led to fewer instances when Justices can substitute their personal value for those of the people.[307]

While Justice Scalia's commitment to avoiding imposing his values for the American people was often open to question,[308] he also explained when he believed that originalism did not work well and when he would, therefore, abandon originalism.[309] Notably, in some instances, constitutional language does not provide sufficient guidance on how to resolve a conflict.[310] In other instances, according to Justice Scalia, in cases like *Marbury v. Madison*,[311] stare decisis makes the ruling so well established that adhering to the ruling simply makes sense.[312] Finally, he suggested that he would abandon the original meaning of the Constitution if following the Constitution would produce a sufficiently objectionable result.[313] (As an aside, one can see in each of these instances, Justice Scalia had plenty of opportunities to substitute his personal views for those of the framers. As a simple example, when would the result under the Constitution be sufficiently objectionable? Objectionable to whom? Was his willingness to adopt a novel theory of equal protection in *Bush v. Gore* such a case? How would he explain his willingness to use the Equal Protection Clause to protect *white* people from racial discrimination?)

We suspect that Justice Scalia might justify adherence to *International Shoe* by stating that a contrary holding would produce objectionable results. That is at least plausible.

But what about the originalists on the Court today? Justice Thomas, for example, shares none of Justice Scalia's skepticism about originalism

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[306] Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, THE TANNER LECTURE SERIES, 118–23 (March 8–9, 1995), https://tannerlectures.utah.edu/_resources/documents/a-to-z/s/scalia97.pdf [https://perma.cc/8TK2-T635].

[307] Scalia, *supra* note 302, at 862.

[308] *See* Bush v. Gore, 531 U.S. 98, 103 (2000). In some notable examples, like *Bush v. Gore*, Justice Scalia was quite willing to substitute his views for the American people, effectively guaranteeing that his views prevailed without a full count of the votes in Florida. *Id.*; *see also* Richmond v. J.A. Croson, 488 U.S. 469, 526–28 (1989) (Scalia, J., concurring) (rejecting restorative Justice and affirmative action because they reinforce "a manner of thinking by race that was the source of the injustice that will, if it endures within our society, be the source of more injustice still").

[309] Scalia, *supra* note 302, at 861.

[310] *Id.* at 863.

[311] 5 U.S. 137 (1803).

[312] Scalia, *supra* note 302, at 861.

[313] *Id.*

as a general rule.[314] Notably, one can observe Justice Thomas' commitment to originalism in his concurring opinion in *McDonald v. Chicago*.[315] There, counsel for McDonald began his argument urging the overruling of the Slaughterhouse Cases, which rejected the idea that the Privileges and Immunities Clause incorporated the entire Bill of Rights.[316] In questioning McDonald's counsel, several Justices were incredulous, Justice Scalia was in his element, managing to put a dig in at law professors, but explaining to counsel that the selective incorporation process was the safer route to take.[317] Justice Thomas concurred in the lead opinion,[318] which engaged in the selective incorporation process established during the Warren Court.[319] Justice Thomas would have reversed the Slaughterhouse Cases and held that the Privileges and Immunities Clause incorporated the Bill of Rights.[320] Apparently, Justice Thomas was not bothered by the impractical possibility that state courts would have to provide civil juries in cases involving an amount in excess of twenty dollars.[321]

Other Justices who subscribe to originalism may not be quite right to Justice Thomas' level of commitment.[322] But Justices like Justice Gorsuch have not waffled on his commitment to originalism as did Justice Scalia.[323] Indeed, many of the Justices on the right-wing of the Court were full-

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[314] William H. Pryor Jr., *Justice Thomas, Criminal Justice, and Originalism's Legitimacy*, 127 YALE L.J. F. 173, 181 (2017) (arguing Justice Thomas has strengthened the originalist methodology, accomplishing "what no originalist by himself could").

[315] 561 U.S. 742, 812 (2010) (Thomas, J., concurring) ("[A]ny serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does. I cannot accept a theory of constitutional interpretation that rests on such tenuous footing.").

[316] Transcript of Oral Argument at 1–2, McDonald v. Chicago, 561 U.S. 742 (2010) (No. 08–1521).

[317] *Id.* at 4–5.

[318] *McDonald*, 561 U.S. at 805.

[319] *Id.* at 763.

[320] *Id.* at 813.

[321] U.S. CONST. amend. VII.

[322] Pryor Jr., *supra* note 314, at 181; Jacob, *supra* note 295, at 649; William Baude, *Is Originalism our Law?*, 115 COLUM. L. REV. 2349, 2406 (2015) (regarding Justice Thomas as "even more well known [than Scalia] for his elevation of the original meaning of the Constitution").

[323] Christopher Fitzpatrick Cannataro, *The New Scalia? An Aristotelian Analysis of Judge Gorsuch's Fourth Amendment Jurisprudence*, 17 GEO. J.L. & PUB. POL'Y 317, 319 (2019) (arguing Justice Gorsuch "will have the opportunity to become more than just the next Justice Scalia"); Max Alderman & Duncan Pickard, *Justice Scalia's Heir Apparent?: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. 185 (2017).

throated originalists during the 2021-22 term of the Court. *Dobbs* and *Bruen* seemed to herald a new age of originalism.[324] Abortion supporters lost because the Constitution as originally understood did not include a right to have an abortion to terminate a pregnancy.[325] *Bruen* expanded gun rights, putting at risk limitations on claimed Second Amendment rights to own and carry weapons.[326] The Court made reasonable regulations of weapons more difficult at a time of increasing gun violence, potentially overriding the will of the people in many states around the nation.[327] Despite the unpopularity of both decisions,[328] no doubt, Justices like Justice Thomas shield themselves in their belief that their job to interpret the Constitution consistent with its original meaning.

If that is the case, then we are at a loss to explain why Justices like Thomas and Gorsuch would not have sided with Mallory and reinterpreted personal jurisdiction consistent with the original understanding of due process. But we are agnostic about Justice Thomas's commitment to originalism despite his attempt to portray himself as such. We find

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[324] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111 (2022); *see also* Lawrence B. Solum & Randy E. Barnett, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023); Chad Flanders, *Flag* Bruen*ing:* Texas v. Johnson *in Light of The Supreme Court's 2021–22 Term*, 2022 U. ILL. L REV. ONLINE 94 (2022) (contextualizing the "decisive turn towards originalism" after cases like *Bruen* and *Dobbs*).

[325] *Dobbs*, 142 S. Ct. at 2248.

[326] *Bruen*, 142 S. Ct. at 2126. For a discussion on the aftermath of *Bruen*, *see* Jacob Charles, *By the Numbers: How Disruptive Has* Bruen *Been?*, DUKE CTR. FOR FIREARMS L. (Mar. 27, 2023), https://firearmslaw.duke.edu/2023/03/by-the-numbers-how-disruptive-has-bruen-been/ [https://perma.cc/HH4E-RUUV] (noting courts have declared "more laws invalid under the Second Amendment in the eight months after *Bruen* than they did in the first few years after *Heller*").

[327] In 2021, "53% [of American adults] favored stricter gun laws." Katherine Schaeffer, *Key Facts about Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2021), https://www.pewresearch.org/short-reads/2021/09/13/key-facts-about-americans-and-guns/ [https://perma.cc/T7MQ-TTJY]; John Bowden, *2 in 3 Support Stricter Gun Control Laws: Poll*, THE HILL (Apr. 14, 2021, 9:03 AM), https://thehill.com/homenews/news/548127-2-in-3-support-stricter-gun-control-laws-poll/ [https://perma.cc/6LT2-QPTE]. A 2023 poll, found that up to "[s]ixty-four percent said they were in favor of stricter laws." Julia Shapero, *Most Americans Say They Would Support Stricter Gun Control Laws: Poll*, THE HILL (May 27, 2023, 7:10 PM), https://thehill.com/blogs/blog-briefing-room/4023902-most-americans-say-they-would-support-stricter-gun-control-laws-poll/ [https://perma.cc/UT58-STPS].

[328] Charles Franklin, *New Marquette Law School Poll National Survey Finds Approval of the Supreme Court at New Lows, With Strong Partisan Differences Over Abortion and Gun Rights*, MARQ. U. L. SCH. POLL (July 20, 2022), https://law.marquette.edu/poll/2022/07/20/mlspsc09-court-press-release/ [https://perma.cc/3HEZ-AUNA].

evidence of a result-oriented commitment to originalism in other cases decided during the 2022-23 term.

Notably, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* provides a counterexample to claims that Justices like Thomas and Gorsuch follow originalism wherever it goes.[329] Justice Gorsuch, for example, joined Chief Justice Roberts' majority opinion in *Students for Fair Admissions, Inc.*[330] That opinion made little effort to tie the Court's holding that Harvard and the University of North Carolina's affirmative action programs violated the equal protection rights of white prospective students to the original meaning of equal protection.[331] His focus was on modern case law, including a discussion of earlier Supreme Court precedent suggesting that affirmative action programs would become unjustified in time.[332] In effect, the Chief Justice said that the time had come to end these programs.[333]

Justice Thomas's concurring opinion in *Students for Fair Admissions, Inc.* is also worth close scrutiny.[334] He attempts to argue that the original understanding of Fourteenth Amendment equal protection is really about assuring a race-blind standard.[335] One wonders whether he has convinced himself that the framers of the Equal Protection Clause believed that they were writing an amendment to protect white people from discrimination. He avoided phrasing his argument in such a stark manner.[336] To do so would be to rebut any claim that the Equal Protection Clause as originally understood is offended by affirmative action, a practice which was followed at least in part at the time of the adoption of the Fourteenth Amendment.[337]

Perhaps the answer to our question is obvious: although Justices like Justices Thomas and Gorsuch do not want to admit a faint-hearted commitment to originalism, we should watch what they do, not what they say. At least for now, in the context of personal jurisdiction, we are breathing a sigh of relief. For now, at least, the Court's modern approach remains in place without potentially unraveling about seventy-five years of analysis.

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[329] 600 U.S. 181 (2023).

[330] *Id.*

[331] *See id.* (failing to mention original meaning at all throughout the majority opinion).

[332] *Id.* at 203–213.

[333] *Id.* at 213.

[334] *See id.* at 231–87 (Thomas, J. concurring).

[335] *Id.*

[336] *See id.*

[337] *Id.* at 318 (Sotomayor, J., dissenting) ("The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind.").

We also are breathing a bit more easily because for the second time in two years, the Court has upheld the assertion of jurisdiction over defendants in what from our perspective were reasonably chosen venues. But that is not the end of the story told by the *Mallory* Court. We turn now to another potential courthouse-door-closing-pro-corporate defendant argument unresolved by the Court: what about Justice Alito's suggestion that defendants advance a Dormant Commerce Clause argument?

B. The Dormant Commerce Clause and the Future

After reluctantly concurring that *Pennsylvania Fire* required remand in *Mallory*, Justice Alito spent significant time asserting that the Dormant Commerce Clause should control the outcome of the case and registration cases generally.[338] Given that the Dormant Commerce Clause was not before the Court,[339] Justice Alito took the somewhat rare path of suggesting that Norfolk Southern bring it front and center on remand and even offered arguments for why he thinks the Dormant Commerce Clause should become part of the general jurisdiction analysis in the registration context.[340]

More specifically, Justice Alito heavily emphasized the strictures of federalism as a basis to invoke the Dormant Commerce Clause in the personal jurisdiction context: "We have long recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests."[341] While the dissent suggested this principle is a proper consideration under the Due Process Clause, Justice Alito argued that the federalism concerns "fall more naturally within the scope of the Commerce Clause."[342]

Of course, the Dormant Commerce Clause invalidates state law when it discriminates against interstate commerce or when it imposes undue burdens on interstate commerce.[343] If a challenger can show that a law discriminates against interstate commerce, either facially or as applied, the state must "demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served as well by available

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[338] *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 150–63 (2023) (Alito, J., concurring in part).

[339] The majority opinion only considered whether the Pennsylvania law violated the Due Process Clause of the Constitution. *See id.* at 125–46. The Dormant Commerce Clause was raised in the court below, but the Pennsylvania Supreme Court did not address it. *See id.* at 180 n.3.

[340] *Id.* at 157.

[341] *Id.* at 154.

[342] *Id.* at 157, 164. It is perhaps telling that an originalist like Justice Alito would rely on language that does not appear in the Constitution to arrive at conclusion that fits a pro-business outcome. *Id.* at 158–59.

[343] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

nondiscriminatory means."[344] A law that does not discriminate but burdens interstate commerce to advance a "legitimate local public interest," however, must satisfy a lower threshold to survive.[345] Such non-discriminatory laws will survive scrutiny "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[346]

According to Justice Alito, Pennsylvania's registration-based jurisdiction likely discriminates against out-of-state-companies.[347] Justice Alito does not, however, engage in the discrimination analysis. Instead, he focuses on the undue burden analysis: "But at the very least, the law imposes a 'significant burden' on interstate commerce by '[r]equiring a foreign corporation . . . to defend itself with reference to all transactions,' including those with no forum connection."[348] Justice Alito then points to typical concerns present in most personal jurisdiction opinions to locate a burden in this context, including operational burdens, different liability regimes among states, damages caps, and local rules.[349] And who the Pennsylvania law would really hurt, according to Justice Alito, is small corporations, because apparently large corporations are the only ones who could successfully navigate and understand registration and consent laws.[350]

Paternalism for smaller companies aside, Justice Alito continues his analysis by explaining that he is "hard-pressed" to identify any "*legitimate local* interest" advanced by registration laws.[351] In short, Justice Alito argues that states do "not have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the state."[352]

Notably, Justice Alito relies on century-old cases for the proposition that the Dormant Commerce Clause invalidates Pennsylvania's personal jurisdiction registration scheme because of the "undue" burden on the

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[344] Maine v. Taylor, 477 U.S. 131, 138 (1986); *see* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278–79 (1988) (describing this standard as a high bar to overcome a presumption of invalidity).

[345] *Wayfair*, 138 S. Ct. at 2091 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[346] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 160–61 (2023) (Alito, J., concurring in part) (quoting *Wayfair*, 138 S. Ct. at 2091).

[347] *Id.* at 161.

[348] *Id.*

[349] *Id.* at 161–62.

[350] *Id.* at 162.

[351] *Id.*

[352] *Id.*

foreign corporation.[353] With personal jurisdiction doctrine at its relative infancy at the time, courts looked to traditional notions of territoriality as a primary consideration.[354] The Court obviously decided these cases long before the development of modern jurisdictional analysis stemming from *International Shoe* (1945),[355] and even longer before the Court's most recent decision concerning general jurisdiction in *Daimler A.G. v. Bauman* (2014).[356] He also relies on a 1988 opinion, *Bendix Autolite Corporation v. Midwesco Enterprises, Inc.*, for the same proposition.[357] While *Bendix* is fairly factually analogous and the Court did engage in a Dormant Commerce Clause analysis, it did so in a statute of limitations and summary judgment context, not a personal jurisdiction analysis, because the plaintiff must have waived a personal jurisdiction challenge to get to a Rule 56 motion.[358] Of course, the evidentiary analysis in a Rule 56 motion, based on undisputed facts learned throughout discovery, is quite different than the personal jurisdiction analysis under Rule 12(b)(2) based on the allegations in a complaint.[359]

The question thus becomes: Why resurrect centuries-old case law from a different epoch to apply it to an infinitely more complex society today? In addition, why bring the Dormant Commerce Clause into the personal jurisdiction analysis at all when it stands on its own and is available to defendants when appropriate?

Justice Alito is not quite alone in his opinion. A small number of commentators have either advocated for the Dormant Commerce Clause to be incorporated into the personal jurisdiction framework or have recognized that it could be.[360] Justice Alito mirrors these commentators with the baseline assertion that registration statutes unjustifiably burden corporations that choose to do business within a state, register to do

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[353] *Id.* at 161; Michigan Cent. R. Co. v. Mix, 278 U.S. 492 (1929); Denver & Rio Grande W. R. Co. v. Terte, 284 U.S. 284 (1932); Atchison, T. & S. F. R. Co. v. Wells, 265 U.S. 101 (1924).

[354] Pennoyer v. Neff, 95 U.S. 714, 728 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).

[355] 326 U.S. 310 (1945).

[356] 571 U.S. 117 (2014).

[357] *Mallory*, 600 U.S. at 161 (Alito, J., concurring in part); Bendix Autolite Corp. v. Midwesco Enterp., Inc, 486 U.S. 888 (1988).

[358] *Bendix Autolite Corp.*, 486 U.S. 888.

[359] *See* Bhrens v. Pelletier, 516 U.S. 299, 300 (1996) (distinguishing between evidentiary basis of a Rule 56 motion from the allegations-based analysis of a motion to dismiss).

[360] *See* John F. Pries, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 138, 140 (2016); Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to do Business: A Limited Role for General Jurisdiction*, 58 SAN DIEGO L. REV. 309, 367–68 (2021); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343 (2015).

business in that state, and appoint an agent in that state for service of process.[361] Given the sophistication of modern companies and the complexities of modern commerce, however, this view amounts to a thinly veiled, results-driven outcome.

Instead, if there are inequities to be had, those burdens should be imposed on the party most able to shoulder them, not the injured plaintiff.

As a threshold point, almost all commentators would agree that *Daimler* spelled the end for general jurisdiction based on continuous and systematic contacts, also known as "doing business" jurisdiction.[362] Prior to *Daimler* in 2014, a plaintiff could secure general jurisdiction against a corporate defendant if the facts showed that the defendant was essentially "at home" in the jurisdiction due to a presence that was continuous and systematic.[363] Courts would look to specific corporate conduct to determine if a corporation was at home in a jurisdiction other than the one of its incorporation or its principal place of business.[364] These analyses would oftentimes be fact intensive and focused on balancing burdens on the defendant.[365] The defense bar, however, felt quite relieved when *Daimler* effectively removed this jurisdictional option absent truly exceptional circumstances such as those seen in *Perkins*.[366]

Justice Alito's proposed adoption of the Dormant Commerce Clause in modern general jurisdiction analysis significantly resurrects core parts of the "continuous and systematic" analysis of the past despite the Court's relatively recent repudiation of doing business jurisdiction.[367] Whether the challenge considers discrimination or undue burden on interstate commerce, a court will be forced to analyze facts and context that *Daimler* held were inappropriate for general jurisdiction over a corporation.

More specifically, the general jurisdiction test arising out of *International Shoe* required that out-of-state corporations have significant contacts or connections such that asserting jurisdiction over the

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[361] *Mallory*, 600 U.S. at 161 (Alito, J., concurring in part); *see* Pries, *supra* note 360, at 140 (arguing that jurisdiction based on a company's registration to do business violates the Dormant Commerce Clause in cases where the lawsuit has no connection to the forum); Rensberger, *supra* note 360 (arguing that a state may assert general jurisdiction on a registration-as-consent basis when it has a local plaintiff for whom it wishes to provide a forum); Monestier, *supra* note 360 (arguing that registration does not amount to consent to general jurisdiction).

[362] Monestier, *supra* note 360, at 1349.

[363] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011); Daimler AG v. Bauman, 571 U.S. 117, 119 (2014).

[364] *Brown*, 564 U.S. at 929.

[365] *Id.* at 930; *see also Daimler AG*, 571 U.S. at 145.

[366] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952) (observing that Ohio served as the company's primary corporate presence after its mining operations closed in the Philippines); *Daimler AG,* 571 U.S. at 138–39 n.19.

[367] *Daimler AG*, 571 U.S. at 138.

corporation regarding its out-of-state conduct did not violate Due Process.[368] Later cases like *Perkins* and *Helicopteros Nacionales de Columbia, S.A., v. Hall* provided some guidance that a corporation was subject to general jurisdiction where it had "continuous and systematic general business contacts."[369] Factors that courts considered in the general jurisdiction analysis included, among others, whether the corporation had a physical presence or office in the forum, whether the corporation had employees in the forum, whether the corporation advertised in the forum, and the volume of sales in the forum state.[370] Such analyses resulted in inconsistent results.[371] Again, however, *Daimler* effectively removed such fact-intensive considerations from the general jurisdiction analysis and rendered general jurisdiction applicable only in the events of incorporation or maintaining a principal place of business in the forum.[372]

Engaging in the Dormant Commerce Clause analysis regarding registration would likely require courts to return to fact-intensive considerations that existed pre-*Daimler*. Recall that such an evaluation requires courts to consider whether the jurisdiction has a "legitimate local interest" that outweighs the alleged infringement on commerce.[373] Of course, particularly in "as-applied" analyses, courts would then have to examine whether a corporate defendant's conduct in the forum arose to such a level that the state's interest in asserting general jurisdiction over that corporation was indeed legitimate. These analyses would include similar considerations that existed pre-*Daimler*, and they would include questions like does the corporation have an office in the forum, how many sales does the corporation make there, how many employees exist there, etc.? In other words, has the corporate defendant made itself nearly impossible to locate and serve in the forum? In *Mallory*, Justice Alito himself recognized that states have a legitimate interest in regulating such corporate conduct.[374] It is thus unclear why retreating from *Daimler*'s predictable standard in favor of a muddled, case-by-case analysis under the Dormant Commerce Clause makes sense in the jurisdictional context if one is truly concerned with predictability.

Further, if the concern is that consent by registration statutes violate the Dormant Commerce Clause by discriminating against foreign corporations, that is not the case. Instead, registration statutes like

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[368] *See* Monestier, *supra* note 360, at 1351–52.

[369] *Id.* at 1352; *see generally Perkins*, 342 U.S. 437; Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984).

[370] Monestier, *supra* note 360, at 1352.

[371] *See* Rhodes, *supra* note 114, at 810.

[372] *Daimler AG*, 571 U.S. at 139.

[373] Mallory, 600 U.S. 122, 163 (Alito, J., concurring in part).

[374] *Id.* at 162 (recognizing "legitimate interest in regulating activities conducted within its borders . . . and in providing a forum to redress harms that occurred within the state") (internal quotations and citations omitted).

Pennsylvania's place foreign corporations on the same footing as in-state corporations due to consent.[375] Personal jurisdiction is a waivable right,[376] and therefore if a corporation wants to do business in a state, it should be able to waive the right not to be haled into court there in exchange for answering lawsuits in the state. As Justice Jackson noted during oral argument, "to the extent that the corporation . . . is agreeing voluntarily, knowingly, to do business in the state, I would think the state would have a very significant interest in making sure that its residents have a forum to bring their lawsuits."[377] The Supreme Court has found several times that when out-of-state companies are subjected to the same requirements of in-state corporations, there is no burden on interstate commerce.[378]

In addition, if the concern is that plaintiffs will engage in unfettered forum shopping into an inconvenient forum, corporate defendants already have several protections in place to lessen the concern without grafting the Dormant Commerce Clause onto the specific personal jurisdiction analysis. These protections include choice of law rules, transfer, and forum non-conveniens.

First, choice of law rules provide corporate defendants with an avenue to defeat inappropriate forum shopping. If a conflict exists between the forum law and another, the adversely impacted party (typically defendants) can move the court to apply the more favorable law.[379] As courts modernly move away from lex loci delicti towards a more contacts-based, "most significant relationship" test,[380] the likelihood of a state with very little interest in the suit having its laws applied are greatly lessened.[381] Under the modern approach, a court applies the law of the state where the injury occurred, unless another state has a more significant relationship to the occurrence and the parties.[382] If no significant relationship exists, the law of the situs of the injury will apply. Another conflicts of laws theory, known as the governmental interest test, would produce similar results. Under that test, a court examines, among

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[375] *Id.* at 127.

[376] *Id*. at 147 (Jackson, J., concurring).

[377] Oral Argument Transcript at 52, Mallory v. Norfolk S. Ry. Co., 600 U.S. 122 (2023) (No. 21-1168).

[378] *See* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 368 (2023).

[379] Such a conflict might arise, for example, in the differences between a comparative fault state and a contributory negligence state. *See* Hataway v. McKinley, 830 S.W.2d 53 (Tenn. 1992).

[380] Lex loci delicti is loosely translated to mean "law of the place." *See, e.g.*, Williams v. State Farm Mut. Auto. Ins. Co., 641 A.2d 783, 789 (Conn. 1994); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (discussing the "most significant relationship" test).

[381] *See* Hataway v. McKinley, 830 S.W.2d 53, 58 (Tenn. 1992); Bernhard v. Harrah's Club, 546 P.2d 719, 720–21 (Cal. 1976).

[382] *See Hataway*, 830 S.W.2d at 57; *Bernhard*, 546 P.2d at 725–26.

other things, "each jurisdiction's relationship with the litigation and determines whether or not the application of a particular state's law would be consistent with the purposes identified as supporting that law."[383] If no significant purpose exists other than a plaintiff seeking favorable law, the defendant has solid grounds to move the court to apply a different forum's law. Thus, the corporate defendant is protected from inappropriate forum shopping, even if the corporation registered to do business in a particular state, without resort to the Dormant Commerce Clause.

If choice of law is not enough, corporate defendants enjoy further protections from inconvenient forum shopping through uncontroversial transfer rules, including Rule 1404(a) and forum non conveniens.[384] Rule 1404(a) unambiguously gives defendants the ability to transfer to another district court "For the convenience of parties and witnesses, in the interest of justice" if the original complaint could have been brought there.[385] Such considerations have become known as a "center of gravity" test.[386] Further, if a plaintiff files suit in a forum that is constitutionally inconvenient, one need only look to Justice Marshall's opinion in *Piper Aircraft v. Reyno* where the Court held that a plaintiff cannot defeat a motion to dismiss based on forum non conveniens by showing that the substantive law that would be applied in the alternate forum is less favorable to the plaintiff than the chosen forum.[387] A corporate defendant has ample opportunity to present the alleged unfairness through several public and private interest factors such as the governmental interest in the controversy, witness and document availability, and subpoena power—precisely the type of Due Process Clause protections that exist today without reference to the Dormant Commerce Clause at all.[388]

Turning back to *Mallory* specifically, one can puzzle over why Pennsylvania's registration requirement discriminated against Norfolk Southern or created an "undue" burden on interstate commerce. Justice Gorsuch's plurality recounts Norfolk's conduct in Pennsylvania as follows: "Norfolk Southern manages over 2,000 miles of track, operates 11 railyards, and runs 3 locomotive repair shops in Pennsylvania."[389] Further, the plurality states that "Norfolk Southern has registered to do business in Pennsylvania in light of its 'regular, systematic, [and]

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[383] *See Hataway*, 830 S.W.2d at 58; *Bernhard*, 546 P.2d at 724–25.

[384] 28 U.S.C. § 1404(a).

[385] *Id.*

[386] *Center-of-Gravity Doctrine Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/c/center-of-gravity-doctrine/ [https://perma.cc/V3N5-XJKL] (last visited Dec. 27, 2023).

[387] 454 U.S. 235, 247 (1981).

[388] *Id.* at 242–43.

[389] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 127 (2023).

extensive' operations there."[390] In fact, Norfolk Southern registered to do business in Pennsylvania in 1998 and complied with the law for over two decades:

> Acting through its Corporate Secretary as a "duly authorized officer," the company completed an "Application for Certificate of Authority" from the Commonwealth "in compliance with" state law. As part of that process, the company named a "Commercial Registered Office Provider" in Philadelphia County, agreeing that this was where it "shall be deemed . . . located." The Secretary of the Commonwealth approved the application, *conferring on Norfolk Southern both the benefits and burdens shared by domestic corporations*—including amenability to suit in state court on any claim.[391]

Against these facts, one must strain to see the inequitable treatment between Pennsylvania companies and Norfolk Southern.[392] A common refrain from commentators is that such obvious consent could not have been voluntary and effective because the state would have "unfettered jurisdictional power over all of these businesses based simply on the fact that these businesses have filled out and filed paperwork" with the state.[393] The overstatement belies the facts in *Mallory* and the realities of modern commerce. Moreover, if filling out and filing paperwork with a governmental agency is mere formality, one must ask whether corporations are even "born" at all, since that too is a formalistic filing of paperwork. Formalism for formalism's sake starts to sound much more like politics than sound legal analysis.

Further, under an as applied Dormant Commerce Clause analysis and assuming Pennsylvania's registration scheme is an undue burden on interstate commerce, the Court would then balance the burden on interstate commerce against the state's interest underlying the statute.[394] Laws will be upheld "unless the burden imposed on [interstate] commerce is clearly

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[390] *Id.* (quoting Mallory v. Norfolk S. Ry. Co., 266 A.3d 542 (Pa. 2021) *vacated and remanded*, 600 U.S. 122 (2023).

[391] *Id*. at 2037 (emphasis added) (internal citations omitted).

[392] Pries, *supra* note 360, at 138 (arguing that the dormant Commerce Clause invalidates registration statutes, recognizes that "jurisdiction-via-registration statutes do not facially discriminate against out-of-staters" because they "generally apply to all companies that desire to do business in the state, regardless of whether the companies also claim that state as their home").

[393] *See* Monestier, *supra* note 360, at 1352; Pries, *supra* note 360, at 140.

[394] Pries, *supra* note 360, at 137.

excessive in relation to the putative local benefits."[395] Admittedly, it is difficult to balance the burden against the local interest.[396] Given the lack of an obvious burden on interstate commerce in *Mallory*, Pennsylvania could simply point to a legitimate interests such as preserving claims "against defendants who have placed themselves beyond the personal jurisdiction of [Pennsylvania] courts, and (by encouraging appointment of an agent) to facilitate service upon out-of-state defendants who might otherwise be difficult to locate."[397] Such interests are legitimate interests of a state,[398] and thus would likely overcome a Dormant Commerce Clause as applied analysis.

Perhaps sensing that the tide was turning among his co-Justices on the Court concerning the validity of registration statutes as they relate to due process, Justice Alito reaches back in time to reintroduce territoriality as a primary analytical factor through the Dormant Commerce Clause. Modern commerce is vastly different now than the early 1920s when the Dormant Commerce Clause last found traction in jurisdictional analysis. Justice Alito ignores this reality. Thus, it becomes clear that his concurring opinion in *Mallory* is consistent with prior attempts to further close the courthouse doors on plaintiffs while protecting corporate defendants who rightfully should bear the brunt of inconvenience if any is to be had.

V. CONCLUSION

On June 27, 2023, one could hear a metaphoric "whoosh" caused by Civil Procedure professors and scholars exhaling when they read the Court's *Mallory* decisions. No doubt, authors of Civil Procedure casebooks were pleased that they did not have to do a complete revision of the material on personal jurisdiction.[399] More seriously, despite some

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[395] *Mallory*, 600 U.S. at 160–61 (Alito, J., concurring in part) (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2091 (2018)).

[396] *See* Bendix Autolite Corp. v. Midwesco Enterp., Inc., 488 U.S. 888, 897 (1988) (Scalia, J., concurring) ("[I]t is more like judging whether a particular line is longer than a particular rock is heavy.").

[397] *Id.* at 897.

[398] *See* G.D. Searle & Co. v. Cohn, 455 U.S. 404, 410 (1982) (It is "a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve").

[399] The editors of one leading Civil Procedure casebook include the case as an extended note in their 2023 Supplement. That note appears in the discussion of consent. *See* FREER ET AL., CIVIL PROCEDURE: CASES, QUESTIONS, AND MATERIALS (8th ed. 2020) (found in the Update Memorandum 2023), https://cap-press.com/pdf/FreerCivPro8e2023SuppWM.pdf [https://perma.cc/5ZHL-B649].

of the Justices' earlier flirtation with replacing modern due process analysis with an originalist approach, the Court veered from that course.[400]

Many Civil Procedure scholars and commentators wonder about the appeal of revisiting the original understanding of due process. As developed above, we question whether the *Pennoyer* Court's discussion reflects the original understanding of the Fourteenth Amendment.[401] Further, as we argued above, a return to the original meaning of due process-personal jurisdiction analysis has the potential to create unfair and unintended results.[402] The framers of the Fourteenth Amendment could not have conceptualized internet transactions that connect markets from all corners of the globe in micro-seconds. Nor did they understand the modern transportation that has united the nation and the world, reducing the burdens of responding to suits in far-flung venues. At best, one might believe that an originalist approach would bring coherence to the Court's due process analysis. Even on that point, we are skeptical that the Court would follow through in doing so.[403]

Given that the Court did not take up Mallory's counsel's argument to adopt an original public meaning analysis, one might believe that *Mallory* is good news. But then there is Justice Alito's concurring opinion, urging that corporate defendants especially begin raising Dormant Commerce Clause arguments.[404] As we argued above, several Justices have tried to make sovereignty a part of the Court's due process analysis, despite compelling arguments to the contrary.[405] Were the Court to adopt Justice Alito's position, it would no longer need to try to explain the unexplainable. The Dormant Commerce Clause would put state sovereignty into the mix.[406] We expect that the Court will address this issue in a 2024 or 2025 term when *Mallory* undoubtedly returns to the Court after remand.

As we argued above, our hope is that the Court will not adopt a Dormant Commerce Clause analysis in personal jurisdiction cases. Justices who are originalists ought to be embarrassed about following Justice Alito's lead: they can garner little support that the Constitution as originally understood included a Dormant Commerce Clause.[407] Beyond

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[400] *See supra* Part III.

[401] *See supra* Part III.

[402] *See supra* Part III.

[403] *See supra* Part III.

[404] Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 150–63 (2023) (Alito, J., concurring in part).

[405] *See supra* Part III.

[406] *See supra* Part III.

[407] *See* Energy and Env't Legal Inst. v. Epel, 793 F.3d 1169, 1171 (10th Cir. 2015) (writing for the majority, Gorsuch cited to dissents by Scalia and Thomas for the proposition that the dormant Commerce Clause is not supported by the text or history of the constitution); *but see* Barry A. Friedman & Daniel T. Deacon, *A Course*

that, the arguments garnered in support of limiting a state's power over an out-of-state corporation are unconvincing. The burden on interstate commerce when a plaintiff sues a megacorporation seems frivolous.[408] Smaller corporations entering a state like Pennsylvania, which has a consent-to-be-sued akin to general jurisdiction, may be in a more sympathetic position. But the need to rely on the Dormant Commerce Clause ignores the substantial procedural protections already in place if a plaintiff sues a corporate defendant in a particularly inconvenient forum.[409] Sued in state court, the defendant may be able to dismiss by invoking the doctrine of forum non conveniens.[410] Or the defendant can remove the action to the appropriate federal district court and then file a §1404(a) transfer of venue motion.[411]

At times, as in the Court's recent general jurisdiction cases that severely narrowed the doctrine, the Court has seemed to be bothered by overly aggressive forum shopping by the plaintiffs.[412] Of course, the Court has not explained when a party's forum shopping goes too far.[413] But in some instances, a lawyer can engage in forum shopping that seems extreme. The plaintiff may do so to capture favorable law under the forum state's conflict of law rules.[414] Even that concern is overstated. For example, most states have adopted some modern forum or choice of law rules that minimize a plaintiff's ability to engage in naked forum shopping.[415] Few states adhere to lex fori or lex loci rules today. Instead, most modern conflict of law rules require a balance of states' interests

Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause, 97 VA. L. REV. 1877 (2011) (arguing originalism and textualism support the existence of the dormant Commerce Clause).

[408] *See supra* Part III.

[409] *See supra* Part III.

[410] *Forum Non Conveniens*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/forum_non_conveniens [https://perma.cc/5XE3-KQWA] (last visited Oct. 11, 2023).

[411] 28 U.S.C. § 1441 (allowing for removal to federal district court for any case in which the federal district court would have original jurisdiction); *id.* § 1404(a).

[412] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1031 (2021) (stating that "[the] plaintiffs in [*BMS*] were engaged in forum shopping" and contrasting the facts of *Ford* for the purpose of bolstering the plaintiffs' argument for jurisdiction in the case).

[413] Vitiello, *Due Process*, *supra* note 11, at 533–36.

[414] *See* Ferens v. John Deere Co., 494 U.S. 516, 532 (1990) (holding the law of the transferring court rather than the law of the transferee court decides a case).

[415] *See A Primer on Choice of Law*, TRANSNATIONAL LITIG. BLOG (Feb. 28, 2023), https://tlblog.org/primer-on-choice-of-law/ [https://perma.cc/BEZ7-KMVK] (giving a broad overview of the various choice-of-law rules employed across the states).

when more than one state has an interest in the litigation.[416] If an out-of-state plaintiff sues a defendant in a state where the harm did not occur, the forum state will have little interest in having its substantive rules of law apply to the dispute. Thus, in our view, most, if not all, of the concerns voiced by Justice Alito in urging the expansion of the Dormant Commerce Clause to states' ability to assert jurisdiction over an out-of-state defendant are unavailing.

Notably, the Court has used procedural rulings to narrow plaintiffs' access to a forum of their choice.[417] Such rulings get little pushback from the public in most instances.[418] If the Court takes up Justice Alito to insert the Dormant Commerce Clause into personal jurisdiction analysis, we suspect that the Court's pro-business bias will be in evidence once more.

[416] *Id.* (stating most states follow the *Restatement (Second) of Conflict of Laws*, which centers around which state has the most significant relationship to the controversy).

[417] VITIELLO, *supra* note 4, 64–67.

[418] *Id.*