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# SAFE AT HOME: THE SUPREME COURT'S PERSONAL JURISDICTION GIFT TO BUSINESS

*Alan B. Morrison**

CONTENTS



* The author is the Lerner Family Associate Dean for Public Interest and Public Service Law at the George Washington University Law School, where he teaches civil procedure and constitutional law to first year students. This Article has its genesis in those courses. A prior version was submitted by the author as an amicus brief in support of the plaintiffs in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). He benefited greatly from the comments received at the George Washington Law School workshop where he presented this Article and in particular those from the suggestions of his colleagues Roger Trangsrud and Todd Peterson who have written about this subject. Helen Herhskoff of New York University Law School provided special insights on an earlier version of this Article. Finally, the research and editorial assistance of James Hannaway, George Washington Law, Class of 2019, made completing this work much easier and the product better than it would have been without his help.

## Overview

Over the past seven terms, the Supreme Court has issued six personal jurisdiction decisions in which it concluded that the United States Constitution protected the defendant from being sued in the forum chosen by the plaintiff. In all but one of the cases, the defendant was a large corporate defendant, and in the other case, the defendant was a law enforcement official who was sued over the way in which he carried out his official duties.[1] In only one of those six cases, *J. McIntyre Machinery, Ltd. v. Nicastro*,[2] do I believe that the outcome was erroneous under the current understanding of the application of the Due Process Clause of the Fourteenth Amendment.[3] But in all of them, the difficulty is both with the premise that the Due Process Clause is the proper constitutional approach and that the Court's division of personal jurisdiction into general and specific has any basis in the Constitution or is a useful means of resolving these cases. Instead, if the issue is whether hailing a defendant into a particular forum is constitutional, the proper tool is the Dormant Commerce Clause, which at one time was the principal defense against plaintiffs' forum shopping, and today is a well-tailored means of resolving similar kinds of constitutional questions.

In the first part of Section I of this Article, I give a brief overview of the Court's treatment of personal jurisdiction, beginning with *Pennoyer v. Neff*.[4] There, the Court announced that the Due Process Clause of the Fourteenth Amendment placed limits on the ability of states to bring out-of-state defendants into their courts, and I argue that there is no textual or other basis for utilizing that provision for that purpose. I next argue that the current test for personal jurisdiction—focusing on purposeful availment—is dysfunctional and that the recent effort to place all personal jurisdiction cases into either the Court-created narrow categories of general or specific jurisdiction has no basis in the Constitution and has destroyed what was a reasonable balance between the rights of plaintiffs and defendants. Increasingly, these decisions result in plaintiffs being unable to sue business defendants except in the relative safety of the defendants' home jurisdictions.

In Section II, I advocate for the replacement of the Due Process analysis under the Fourteenth Amendment with an analysis under the Dormant Commerce Clause. There is, of course, no express textual justification for either approach, but the Supreme Court has reached a

1. Walden v. Fiore, 571 U.S. 277, 280–81 (2014).
2. 564 U.S. 873 (2011).
3. U.S. Const. amend. XIV, § 1.
4. 95 U.S. 714 (1877).

general consensus on how to analyze Dormant Commerce Clause cases to determine whether a particular state law places an undue burden on a business challenging it, which is essentially the question that personal jurisdiction cases are asked to answer. I then revisit recent Supreme Court personal jurisdiction decisions and apply the Dormant Commerce Clause to them and, most significantly, to a sample of the cases that will almost certainly arise as businesses try to reduce further the jurisdictions in which they can be sued. If the Court continues to apply the Due Process Clause as it has recently, business defendants (mainly but not exclusively corporations) will further undermine what was once the established understanding of where plaintiffs could bring suit. By contrast, employing the Dormant Commerce Clause will restore that balance, while providing ample protection to corporate defendants. And, to the extent that the Dormant Commerce Clause does not offer reasonable protection for defendants, other doctrines, such as venue, transfer of forum, and forum non conveniens, are available. Nevertheless, the Court has declined to use them in several of these cases, instead insisting on ruling on constitutional grounds.[5] In Section III, I briefly discuss a renewal of an old technique to obtaining personal jurisdiction: using a business's registration with the state as a form of consent to be sued there. Finally, in Section IV, I preliminarily explore two related issues: What is the constitutional basis for protecting out-of-state individuals against whom non-business claims are made, and whether there is a basis for different personal jurisdiction rules in federal court than those that apply in state court.

## Introduction

Debates about personal jurisdiction, whether in the classroom or in court, often have a legalistic atmosphere about them, masking what is at stake in these cases: the ability of both plaintiffs and defendants to forum shop. Whatever may have been true in the days of *Pennoyer* or even *International Shoe Co. v. Washington*,[6] the burdens imposed on a party in having to sue or defend in a distant forum are quite modest in these days where travel is convenient and lawyers litigate nationwide. The costs of travel are, for the kinds of cases in which personal jurisdiction battles are worth having, only a small fraction of the other costs, including attorneys' fees, that each party will have to bear. Moreover, if one forum is more convenient for plaintiff, then another will be more convenient for defendant, and there is no judicially-man-

5. *See* discussion *infra* note 67.
6. 326 U.S. 310 (1945).

ageable way to compare the relative inconveniences or burdens of the parties or to decide the question on that basis.

There can be no doubt that the battles over personal jurisdiction are battles about forum shopping as evidenced by two cases decided by the Supreme Court in 2017. In *BNSF Railway Co. v. Tyrell*,[7] two plaintiffs sued their railroad employer in Montana state court over work-related injuries under the Federal Employer's Liability Act.[8] One plaintiff, a resident of North Dakota, was injured while working for BNSF as a fuel truck driver in Washington State, and the other was the surviving spouse of a South Dakota resident, who alleged he had contracted cancer while working at various locations outside of Montana for BNSF over a period of years.[9] In recent years, a large number of injured workers had sued BNSF in the Montana state courts, not because it was convenient to where their injury occurred or because they resided in the forum state. Instead, it was because the plaintiffs (or more precisely their lawyers) believed that they would achieve a more favorable result there than if they sued elsewhere.

In the Supreme Court case, the railroad argued only lack of relevant contacts for these claims, not inconvenience, because it had a very significant presence in Montana.[10] According to BNSF, because the injuries to the plaintiffs did not occur in Montana, the cases could only be brought in Texas, where the railroad was headquartered, or in Delaware, its state of incorporation.[11] BNSF did not appear to object to having one of the cases brought in Washington where the injury to one plaintiff happened, but it did not suggest where the widow of the cancer victim could properly sue other than in Texas or Delaware.

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7. 137 S. Ct. 1549 (2017).

8. 45 U.S.C. § 51 (2012).

9. Brief for Respondents at 7, BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017) (No. 16-405), 2017 WL 1192088, at *7.

10. The unrebutted Brief for Respondents described BNSF's Montana presence this way:

> It owns and operates more than 2,100 miles of rail lines there, and in 2013, BNSF's freight trains logged more than 40 million locomotive miles traversing the state. Since 2010, it has opened approximately 40 new facilities in the state, . . . and its facilities include an economic development office . . . . BNSF employs more than 2,200 people in Montana. BNSF earned more than $1.7 billion in 2013 from its Montana operations.
>
> BNSF has developed a de facto monopoly over rail shipping in Montana. Its in-state activities dwarf those of Union Pacific, the only other Class I carrier operating in the state, which owns a mere 125 miles of track. Montana Rail Link (MRL), a domestic carrier in the state, also operates on several hundred miles of tracks but leases those tracks from BNSF. Since 1987, MRL has maintained an agreement with BNSF that gives BNSF significant control over MRL's pricing when MRL moves freight off its lines to other carriers.

*Id.* at 5–6 (citations and footnotes omitted).

11. Brief for Petitioner at 4, *BNSF*, 137 S. Ct. 1549 (No. 16-405).

Similarly, in *Bristol-Myers Squibb Co. v. Superior Court*, the defendant, based in New York and New Jersey, was already being sued in California by 86 California residents. Yet the defendant objected to having 592 residents from 33 other states join in those lawsuits because none of them alleged that they had sustained injuries in California and consequently lacked what Bristol-Myers said were the relevant contacts.[12] The claims in these cases were that the defendant's drug, Plavix, was defective and injured the plaintiffs, and the main difference among the cases was the location where the plaintiffs took the drug. In joining the non-resident plaintiffs, the California plaintiffs pointed out that, although Plavix was not designed or manufactured in California, Bristol-Myers has very substantial business operations there.[13]

It is almost always to the advantage of plaintiffs to bring many claims together. This is what the plaintiffs did in these Plavix cases, and their lawyers also chose California because they believed that its state courts would produce a better outcome for their clients. Bristol-Myers agreed that the non-California plaintiffs could aggregate their claim, but only in the jurisdiction where they took the drug or in the defendant's home states.[14] It is clear that *Bristol-Myers*, like *BNSF*, is a forum-shopping case on both sides, with plaintiffs having the initial choice because they have to decide where to file, and defendants then trying to have the case heard in some other forum in which they believe that they will obtain a better outcome. In the end, cases against U.S. defendants can always be brought somewhere in this country, but the important question is where.[15]

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

13. "Five of the company's research and laboratory facilities, which employ a total of around 160 employees, are located there. BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento." *Id.* at 1778. In addition, "[b]etween 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales." *Id.*

14. *Id.* at 1783.

15. As discussed in the paragraphs containing *infra* notes 74–78, some of the Court's recent decisions may make it impossible to sue foreign defendants in the United States, not simply in the cases in which the Court has ruled to date, but in other more common situations that may affect a large number of U.S. residents.

## I. The Court Should No Longer Use the Due Process Clause to Determine the Constitutionality of State Court Assertions of Personal Jurisdiction

### *A. The Lack of Textual Basis*

The Due Process Clause of the Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty or property, without due process of law."[16] For 140 years, beginning with *Pennoyer v. Neff*,[17] the Court has relied on that clause in deciding whether to strike down the efforts of states to expand the reach of their courts. But the ruling in *Pennoyer* that the Due Process Clause forbade the state from reaching beyond its borders was an almost offhand ruling, not justified by the text of the Clause, the opinion, or any of the Court's prior precedents.[18]

This is the totality of what the Court said in finding that the Due Process Clause is the basis of the limitation:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.[19]

According to the Court, the words Due Process "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."[20] But the Court did not further elaborate—based on text or even history—why the substantive authority of a state court to exercise jurisdiction over a non-resident defendant is found in the "rules and principles" governing legal proceedings under the Fourteenth Amendment.

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16. U.S. Const. amend. XIV, § 1.

17. 95 U.S. 714 (1877).

18. The literature on the constitutional limits of state court personal jurisdiction is extensive. The most significant articles, as of November 2010, are listed in Todd David Peterson, *The Timing of Minimum Contacts*, 79 Geo. Wash. L. Rev. 101, 101–02 nn.2–4 (2010).

19. *Pennoyer*, 95 U.S. at 733. The Court also observed:

> To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

*Id.* However, that sensible conclusion does not answer the question of the constitutional basis, if any, for it.

20. *Id.*

The *Pennoyer* decision lacked an explanation of why the Due Process Clause limited the power of Oregon. A likely reason for this is that neither of the briefs submitted to the Court, nor the opinion of the court below made any mention of the Due Process Clause, let alone argued why it did or did not apply.[21] Instead, the focus of those briefs was on the common law rules limiting the reach of state courts and the applicable Oregon statutes. The defendant, Neff, was a citizen of California, and the plaintiff, Pennoyer, was a citizen of Oregon, which enabled the case to be heard in federal court under its diversity of citizenship jurisdiction.[22] In diversity cases, the federal courts decide questions of state law, even in cases like *Pennoyer* in which the claim was, as both parties agreed, a collateral attack on a prior state court judgment.[23]

In 1877, there were no intermediate federal courts, so appeals went directly to the U.S. Supreme Court, which was not limited to deciding questions of federal law, as it essentially is now.[24] This explains why the focus of the courts and the parties in *Pennoyer* was on the Oregon statutes governing jurisdiction and the common law decisions of other states as well as the Supreme Court on that issue. Even before *Pennoyer*, no one disputed that there were some limits on the reach of state courts although the legal basis for them appears to have been a common law understanding, something akin to natural law, or as my colleague Roger Trangsrud called it in his article by that title: "The Federal Common Law of Personal Jurisdiction."[25]

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21. *See* Brief of James K. Kelly for Defendant in Error, *Pennoyer*, 95 U.S. 714 (No. 669); Brief and Argument for Plaintiff in Error, *Pennoyer*, 95 U.S. 714 (No. 669). James K. Kelly is the attorney for Neff.

22. *Pennoyer*, 95 U.S. at 717; Brief and Argument for Plaintiff in Error, *Pennoyer*, 95 U.S. 714 (No. 669).

23. A collateral attack is a lawsuit which challenges a judgment in a case which has already become final and not subject to further review (whether by appeal or certiorari) in that case. Collateral attacks are the exception to the rule of finality, but they are allowed in cases like *Pennoyer*, in which the plaintiff in the second case claims that it was never properly made a party in the first case.

24. SUP. CT. R. 10.

25. Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849 (1989). Another case, *Galpin v. Page*, was cited in the briefs of both parties in *Pennoyer*, and it illustrated the non-constitutional way in which the courts derived these limits on state courts:

> The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. "The authority of every judicial tribunal, and the obligation to obey it," says Burge, in his Commentaries, "are circumscribed by the limits of the territory in which it is established." "No sovereignty," says Story, in his Conflict of Laws, "can extend its process beyond its own territorial limits, to subject either

The lengthy dissent of Justice Hunt in *Pennoyer*[26] is instructive on how Due Process became the basis of the majority opinion. The dissent quoted a number of decisions, including the ruling by Justice Field, sitting as a Circuit Judge in *Galpin v. Page*,[27] in which the phrase "due process of law" appears in connection with similar issues relating to notice and attachment, as well as personal jurisdiction generally. In none of those references is there a connection made to the Fourteenth Amendment, which is understandable because a number of these decisions were issued well before 1868 when that Amendment was adopted. Rather, the phrase seems to be used in the sense that it represents basic notions of fairness regarding when and how, among other things, notice should be provided to defendants of proceedings against them. The main difference between the majority and dissent in *Pennoyer* was whether the time of attachment was a question left up to each state, as the dissent concluded, or whether the right to have the defendant's property attached before judgment was mandatory, as the majority concluded.[28] The decision in *Pennoyer* could have been based on the common law as it was then understood, without having to decide the constitutional issue of the territorial

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> persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." And in Picquet v. Swan, the same learned justice says: "The courts of a State, however general may be their jurisdiction, are necessarily confined to the territorial limits of the State. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the Court of King's Bench, in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit, short of his general authority."

Galpin v. Page, 85 U.S. 350, 367–68 (1873) (footnotes omitted). The basis of these limits, pre-Fourteenth Amendment, were subsequently described "as a result of applying fundamental principles of justice and the rules of international law as they existed among the states at the inception of the government." Baker v. Baker Eccles & Co., 242 U.S. 394, 401 (1917).

26. 95 U.S. at 736–48 (Hunt, J., dissenting).

27. 9 F. Cas. 1126, 1134 (C.C.D. Cal. 1874).

28. *Compare Pennoyer*, 95 U.S. at 737–38 (Hunt, J., dissenting), *with id.* at 728 (plurality opinion) respectively.

reach of state courts, on which the Court's subsequent personal jurisdiction jurisprudence was founded.[29]

The question of whether a state court may enter a valid judgment against an out-of-state defendant is not procedural in the ordinary meaning of that term, nor does it fit easily within the phrase "due process" in the Fourteenth Amendment. Those terms include at least the right to meaningful notice, to an opportunity to be heard, and to know the evidence on which the decision will be based.[30] But the right not to be forced to litigate in a distant state is a different kind of right: No matter what procedural rights are available to a defendant, the defendant may still object that the state court is attempting to exercise power over that defendant that it does not have. In that situation, the objection is not procedural, but is substantive, because no amount of process can cure it.[31] Put another way, procedural due process must be provided only when there is some recognized substantive right to be protected.[32] For that reason, when personal jurisdiction is the issue, the proper source of that substantive right is not found in the procedural protections of the Fourteenth Amendment itself, but somewhere else, which I argue below is the Dormant Commerce Clause.[33]

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29. If the majority in *Pennoyer* had wanted to rule in favor of Neff, without using the Fourteenth Amendment, it could also have relied on two provisions of the Oregon Code that appear to limit attachments to situations in which the absent defendant currently has property in the state. Section 506 provided the circumstances in which Oregon courts would have jurisdiction, one of which is where the defendants "have property [in the state]; and in [that] case only to the extent of such property at the time that the jurisdiction attached." Brief of James K. Kelly for Defendant in Error at 9, *Pennoyer*, 95 U.S. 714 (No. 669) (quoting Or. Code § 506); *see also id.* at 8 (citing Or. Code § 55, ¶ 3 to the same effect). Had the Court followed that route, it then would have had to confront Section 57 of the Oregon Code which provides rules on the sale of property pursuant to a judgment obtained through notice by publication, the last of which states that "title to property sold upon such judgment to a purchaser in good faith, shall not thereby be affected." Brief and Argument for Plaintiff in Error at 21–22, *Pennoyer*, 95 U.S. 714 (No. 669) (quoting Or. Code § 57). Presumably, the invocation of the Constitution overrode that statute and thereby awarded title to Neff, not Pennoyer, which the sub-constitutional approach illustrated in note 19 *supra* would not have been able to do.

30. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

31. *See, e.g.*, Kerry v. Din, 135 S. Ct. 2128 (2015).

32. *See also* Trangsrud, *supra* note 25, at 898–903 (establishing that the protections in personal jurisdiction cases are substantive and not procedural limitations).

33. Over vigorous dissents, the Court has also relied on the Due Process Clause to attempt to control the substantive law of punitive damages, with line drawing difficulties not dissimilar to those for personal jurisdiction. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429–39 (2003) (Scalia, J., Thomas, J., & Ginsburg, J., dissenting). The one aspect of *State Farm* which did permit sensible law drawing—excluding harms that occurred outside the state from the calculation, *id.* at 421–22—could readily be achieved through a Dormant Commerce Clause analysis of the kind proposed in Section II *infra*.

This is not to suggest that *Pennoyer* reached the wrong conclusion on whether Neff's Due Process rights had been violated. The default judgment against Neff was almost certainly void for lack of procedural due process, at least under today's standards, because the plaintiff Mitchell made no effort to assure that Neff had notice of the lawsuit or of the sale of Neff's property following the default judgment against him.[34] As a result, as the Court later ruled in *Mullane v. Central Hanover Bank & Trust Co.*, the attempt at notice was invalid as no more than "a mere gesture," because "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[35]

*Pennoyer* was just the beginning, and it dealt with what could fairly be described as procedures, albeit with a significant substantive impact. The seminal personal jurisdiction case on the territorial reach of state courts is *International Shoe Co. v. Washington*.[36] There, the Court expanded the situations in which a state could exercise personal jurisdiction over an out-of-state party, but it provided no further justification for the conclusion that Due Process was the source of that protection. The company argued "that its activities within the state were not sufficient to manifest its 'presence' there and that, in its absence, the state courts were without jurisdiction, [and] that consequently it was a denial of Due Process for the state to subject appellant to suit."[37] The Court accepted the Due Process premise, but found that it was satisfied because the defendant had "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[38] Again, as in *Pennoyer*, there is no discussion of why the Due

34. Pennoyer v. Neff, 95 U.S. 714, 719–20 (1877). Mitchell's pleading recited that Neff was a California resident, whose whereabouts were not known to Mitchell. Given all that is known about Mitchell, the truth of that averment is subject to considerable doubt. Moreover, since the original case involved a routine default judgment for failure to appear, it is quite unlikely that the judge actually inquired into the factual basis for this claim of Mitchell or even whether Neff had property in Oregon or when he acquired it.

35. 339 U.S. 306, 315 (1950). Before discussing notice in *Mullane*, Justice Jackson first had to establish that the New York courts could adjudicate the rights of the beneficiaries of the trust at issue there insofar as they were non-residents of the forum state. He does this mainly by asserting that New York must have jurisdiction, without explaining on what basis. *Id.* at 313. A more direct way to reach that result would be to treat an intangible trust created under New York law, with assets held in a New York bank, as if the trust were a piece of real property over which the New York courts would plainly have in rem jurisdiction. Because New York would surely have the power to regulate such a trust, that same result would also follow if the Dormant Commerce Clause analysis proposed below were followed.

36. 326 U.S. 310 (1945).

37. *Id.* at 315.

38. *Id.* at 316.

Process Clause created these limits on state power. Moreover, no subsequent case has questioned the applicability of the Due Process Clause to state court personal jurisdiction nor elaborated on the basis for it.[39]

One additional and often overlooked point about *International Shoe* is that the State's merits claim was that the company had wrongly failed to pay the unemployment taxes due for the employees who sold its shoes in Washington. Because the company used the same system for selling shoes in states other than Missouri, where it had its headquarters, and because the amount of the Washington tax at issue was only $3,159.24, it is almost certain that the company was principally concerned with its total tax liability outside of Missouri if the Washington tax were upheld.[40] Because the Supreme Court had little difficulty with the tax issue, the only reason it would need to discuss the personal jurisdiction defense was to expand the ability of states to hail non-resident defendants to answer claims in their courts. Indeed, Justice Black's concurring opinion expressed concern that the Court had unduly limited plaintiffs in their choice of forum, but gave no examples of how the majority's test would have that effect.[41]

### *B. The Current Test Is Dysfunctional*

In addition to its questionable pedigree, the Due Process minimum contacts test has been reformulated into the unhelpful question of whether the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State."[42] *McIntyre* is emblematic of how few questions the current test sensibly answers. In *McIntyre*, a British manufacturer sold a three-ton shearing machine to a

39. Ironically, under the Court's present personal jurisdiction jurisprudence, the Oregon state court would almost certainly have had jurisdiction over Neff if he had received actual notice of the lawsuit without regard to Neff's property in Oregon or whether it had been validly attached. The complaint alleged that Mitchell performed $253.14 worth of legal services for Neff in Oregon relating to the acquisition of land in Oregon, which would have satisfied the minimum contacts requirement of *International Shoe*. *See* Brief and Argument for Plaintiff in Error at 2, *Pennoyer*, 95 U.S. 714 (No. 669).

40. Appellant's Brief at 3, 5, *Int'l Shoe*, 326 U.S. 310 (No. 107), 1945 WL 27431, at *3, 5.

41. *Int'l Shoe*, 326 U.S. at 322–26 (Black, J., concurring). Justice Black also argued that the authority of the state to impose the tax at issue was so clear that "the question seems so patently frivolous as to make the case a fit candidate for dismissal." *Id.* at 322.

42. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 877 (2011) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). Although the Hanson opinion did use that term, it was in the very different context in which a Florida court sought to obtain personal jurisdiction over a corporate trustee with offices only in Delaware, over a trust formed in Delaware, with all its assets located there, and no connection with Florida, other than the fact the settlor of the trust, who was by then deceased, moved there after the trust had been created. *Hanson*, 357 U.S. at 253–54.

scrap metal dealer in New Jersey whose employee was injured by the machine and sued McIntyre in New Jersey state court.[43] McIntyre UK had sold its products in the United States through an exclusive distributor in Ohio.[44] The machine in question was one of no more than four such products that McIntyre ever sold in New Jersey. Furthermore, there was no evidence that McIntyre "targeted" the state for business by seeking to sell other machines there, although it admitted to attempting to sell throughout the United States, or by otherwise seeking to take advantage of the laws of New Jersey.[45] On those facts, the Court set aside the ruling that the state court had personal jurisdiction over the manufacturer because of a lack of "purposeful availment" to New Jersey regarding this machine.[46] There are three major problems with the purposeful availment formula and the holding in *McIntyre*.

First, the result is very difficult to reconcile with one aspect of another international products liability case, *World-Wide Volkswagen Corp. v. Woodson*.[47] The holding in *World-Wide Volkswagen*—that the dealer in New York who sold the allegedly defective car and the regional distributor for the New York area could not be sued in Oklahoma where the injuries occurred—is not problematic.[48] But, like the dog that did not bark for Sherlock Holmes,[49] there were two other defendants in *World-Wide Volkswagen*, the German manufacturer and the U.S. importer, that did not contest jurisdiction in Oklahoma even though there was no claim that they had any direct connection with the plaintiffs' injuries in that state. Those defendants had every incentive to avoid suit in an inconvenient and perhaps plaintiff-friendly state court, but they never claimed that the state court did not have personal jurisdiction over them. That was almost certainly because they concluded that a company that sells its products without geographic restrictions throughout the United States can be sued in any state where their products cause injuries, based on a claim that they were defectively designed or manufactured. The problem is in reconciling that sensible result with a finding of a lack of personal jurisdiction in *McIntyre*. Indeed, applying the rationale of *International Shoe*, most students would find the assertion of personal jurisdiction over the manufacturer of an immobile shearing machine

43. *McIntyre*, 564 U.S. at 894 (Ginsburg, J., dissenting).
44. *Id*. at 896.
45. *See id*. at 877–79 (plurality opinion).
46. *Id.* at 886–87.
47. 444 U.S. 286 (1980).
48. *Id.* at 295.
49. Arthur Conan Doyle, *The Adventure of Silver Blaze*, *in* THE COMPLETE ADVENTURES AND MEMOIRS OF SHERLOCK HOLMES 1, 26 (Harper Bros. ed. 1894).

for causing an injury in New Jersey, at least as appropriate and fair as one seeking damages in Oklahoma from a defective automobile that was driven a thousand miles from where it was purchased, and across the Atlantic Ocean from where it was designed and manufactured.

Students are even more perplexed when the Due Process comparison is made with the outcome in *Burnham v. Superior Court*.[50] Mr. Burnham, who was recently separated from his wife in New Jersey, went to California for three days, mainly to visit their children who lived there with his wife. While there, he was personally served with process in his wife's suit for divorce, spousal support, and custody of their children.[51] Students accept the Court's unanimous conclusion (albeit with no opinion supported by five Justices) that the California courts had jurisdiction in the case, mainly because of the common law tradition validating in-state service, coupled with the fact that every state would reach the same result as a matter of state law. What students cannot accept is that the Court dismissed the suit against McIntyre UK for lack of personal jurisdiction over the injuries allegedly caused by its dangerous machine, but it allowed the divorce and financial support claims against Mr. Burnham to move forward, based solely on his having been served while visiting his children in California.

The second major problem with the purposeful availment formula and the holding in *McIntyre* is that the stated purpose of these Due Process protections is to assure that state court assertions of personal jurisdiction do not offend "traditional notions of fair play and substantial justice."[52] Perhaps because of the highly subjective nature of those goals, coupled with similar problems with the purposeful availment test, it is very difficult to explain to students why assertions of jurisdiction in cases like *McIntyre* are unfair to the defendant. Although the Court never said where in the United States the defendant in *McIntyre* could be sued over its defective machine, it should at least be in Ohio where its distributor for the entire country was located and to which the Court presumed McIntyre UK had sent the machine that injured Mr. Nicastro.[53] But if this British company could be sued in Ohio, or in other states where it sold more than one machine, or in Nevada where it successfully solicited business from the owner of the plant where Nicastro worked, it is almost impossible to explain why it is "unfair" and contrary to principles of "substantial justice" for it to

50. 495 U.S. 604 (1990).
51. *Id.* at 607–08, 623.
52. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
53. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 878 (2011).

be sued in New Jersey for damages caused there, even if the machine arrived there via its Ohio distributor.[54] And if it could not be sued anywhere in the United States, students cannot understand how that comports with *International Shoe* and the expansion of personal jurisdiction to fit the modern commercial world.

The third major problem is that the purposeful availment approach is not very helpful to litigants and lower court judges because of the nebulous nature of the inquiry as applied to many transactions in modern interstate and foreign commerce. In its effort to supply meaning to "purposeful availment," the Supreme Court has required that the parties provide courts with all of the possible relevant facts concerning the defendant's connection with the forum state. As a result, it has transformed what should be a simple threshold inquiry into a major additional round of litigation, almost wholly unrelated to the merits.[55] Consider the facts in *McIntyre* and what a plaintiff must prove in a case in which the defendant moves to dismiss for lack of personal jurisdiction. A plaintiff's lawyer will now have no choice but to embark on extensive discovery with the defendant (who was hoping to avoid the suit, at least in part to avoid any discovery) to learn about all its connections with the forum state, as well as with the distributor and plaintiff's employer. Given the Court's focus on the lack of facts to support jurisdiction in *McIntyre*, especially in the concurring opinion of Justices Breyer and Alito, plaintiff's counsel would be wise to leave no stone unturned. In future cases like *McIntyre*, the plaintiff would need to gather at least the following information: all sales in the United States and especially in New Jersey; information on all of defendant's personnel in the United States; all advertising and promotional activities in the United States; the company's service and warranty program for the machine at issue; and by whom and by what route the machine was delivered. By contrast, as explained in Section II, if the personal jurisdiction analysis were under the Dormant Commerce Clause, that would raise very few factual issues and create very little need for discovery because the question would be a much simpler one: Does the exercise of jurisdiction over the manufacturer of a dangerous machine brought into the state impose an undue burden on interstate or, as in *McIntyre*, foreign commerce?[56]

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54. *Id.* at 895 (Ginsburg, J., dissenting).

55. Courts now engage in a wide-ranging and time intensive "jurisdictional discovery." *See, e.g.*, Gourdine v. Karl Storz Endoscopy-Am., Inc., 223 F. Supp. 3d 475, 481 (D.S.C. 2016) (outlining procedural history involving three separate periods for jurisdictional discovery over eight months).

56. The record in *McIntyre* reflects the following facts that should have produced a different result, even under the plurality's view of the meaning of "purposeful availment." The machine

### C. The Rigid Divide Between General & Specific Jurisdiction Is Without Textual Basis and Is Unworkable

In an effort to clarify and perhaps simplify the doctrine, the Court has recently divided the world of personal jurisdiction into two rigid categories—general and specific[57]—which has created far more problems than it has solved. General jurisdiction has always been understood to allow the defendant to be sued on any claim, no matter where the allegedly wrongful conduct occurred. Until recently, there were no specific parameters attached to general jurisdiction beyond requiring substantial operations in the state. Then, for the first time in *Goodyear Dunlap Tires Operations, S.A. v. Brown* in 2011 and in *Daimler AG v. Bauman* three years later, a corporation became subject to general jurisdiction only where it is "at home," which includes its place of incorporation and principal place of business—and probably nothing more.[58] While this assures that there is at least one state where every U.S. corporation can be sued, that will not be true for most foreign corporations. By contrast, specific jurisdiction requires less, and is established by showing that the claim arose in, or was related to, the jurisdiction in which the case was brought. On the basis of those rulings, the Court concluded that the plaintiffs in both *BNSF* and *Bristol-Myers* could not establish either general or specific jurisdiction.[59]

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that was sold to plaintiff's employer was not assembled in the UK until there was a firm order for it. Joint Appendix at 135a, *McIntyre*, 564 U.S. 873 (No. 09-1343). The supposedly-independent Ohio distributor never obtained title to the machine and was only paid after the manufacturer was paid. *Id.* at 131a. The warranty was from the manufacturer. *Id.* at 126a. A sign on the machine stated that requests for repair parts should be directed to the manufacturer. *Id.* at 78a. While the record does not include the actual route by which the machine arrived in New Jersey, it is inconceivable that this three-ton product was sent from Great Britain to the distributor in Ohio and then transported to New Jersey, especially because the distributor was located in the small town of Stow, which is over 30 miles from Lake Erie, through which such a large machine is likely to have been sent. *Id.* at 43a, 52a–53a. For those reasons, it was plainly distinguishable from stream-of-commerce cases like *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

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

58. *Goodyear*, 564 U.S. at 919; *Daimler*, 571 U.S. at 136–38.

59. *Burnham v. Superior Court* was a case in which there was no claim that the defendant had minimum contacts with the forum state, but personal jurisdiction over him was sustained because he had been personally served in the state. Although the decision pre-dates the rigid demarcation in *Goodyear* between general and specific jurisdiction, the lack of contacts between defendant and the forum state means that *Burnham* must be a general jurisdiction case, and therefore that Mr. Burnham could have been sued in the forum state for any claim that his wife had, not simply those related to their marital status. The disconnect between the expansive personal jurisdiction countenanced in *Burnham* and the denial of even specific jurisdiction in cases like *McIntyre* is even harder to explain to students who are concerned with the reasons for a given result, and not simply a formalistic justification for it.

Under this approach to personal jurisdiction, defendants may not be sued anywhere besides their home, unless there is a specific connection between the claim and the jurisdiction in which the suit was filed. Many cases, such as the auto accident in *Hess v. Pawloski*,[60] are easy to decide because the suit against the non-resident was brought in the jurisdiction where the plaintiff's injury and the alleged negligence occurred. Others, such as *World-Wide Volkswagen* (as applied to the manufacturer and importer), *McIntyre* (as applied to a dangerous machine that was manufactured abroad), and *BNSF* (as applied to the plaintiff who contracted cancer while working at many different job sites), have no clear answers. For *World-Wide* and *McIntyre*, it is clear where the injury to the plaintiff occurred. But if the focus is on where the wrongful conduct of the defendant took place, that might be where the product was designed or manufactured, which would not be in the United States. And for the cancer plaintiff in *BNSF*, the place of injury might be where the disease first manifested or was diagnosed, or where the worker was exposed to the cancer-causing substance. Beyond the effects on plaintiffs' choices of a forum, it is also troubling that these questions relate to the preliminary and collateral issue of where the case may be litigated, with every incentive for defendants to drag out the inquiry as long as possible to wear down the plaintiff. This uncertainty, which has been going on for more than thirty years, has increased significantly in recent years. It is almost certain to continue given the complexity of our economy, the multiple ways in which businesses are organized, and the increased receptivity of the Court to limit plaintiffs' choice of a convenient forum. Furthermore, the impact of the Internet will vastly magnify the difficulties of connecting plaintiffs' claims and the forum under the current Due Process approach.[61]

The Court's dichotomy between general and specific jurisdiction is also inconsistent with what was the apparently once-settled expectations of large corporate defendants and their sophisticated counsel. In three personal jurisdiction cases before the Court—*World-Wide Volkswagen*, *Goodyear*, and *Daimler*—one or more of the defendants did not contest personal jurisdiction under the "at home" approach, on which they would now have a substantial chance of prevailing. In

60. 274 U.S. 352 (1927); *see also* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957) (holding that the sale of a single life insurance policy gave personal jurisdiction for policy-related claim in state of residence of purchaser).

61. *See McIntyre*, 564 U.S. at 890–92 (Breyer, J., concurring). *See generally* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 CORNELL L. REV. 1129 (2015).

*World-Wide Volkswagen*, the German manufacturer was plainly not "at home" in Oklahoma, and it is likely that the flaws in design and manufacturing defects that caused the injuries to plaintiffs did not "arise" in Oklahoma. Today, the automobile maker could argue that there is an insufficient relation to Oklahoma for suit to be brought there, even though the accident occurred in Oklahoma. At the very least, defendant manufacturers in similar cases will now have a major litigable issue unrelated to the merits on which considerable discovery is likely to be required.

Similarly, in *Goodyear*, suit was brought in North Carolina state court against the parent company, an Ohio corporation, as well as three foreign subsidiaries.[62] The claim was based on an accident in France involving allegedly defective tires made by the subsidiaries outside the United States. The tires exploded, causing the deaths of the plaintiffs' children, who were North Carolina residents. I agree with the Court's holding that North Carolina seriously erred in asserting personal jurisdiction over the foreign subsidiaries under any of the various approaches.[63] Indeed, the case highlights why defendants need a constitutional basis to prevent states' expansive efforts to provide redress for their own citizens.

What is most significant about *Goodyear* in assessing the Court's current personal jurisdiction jurisprudence is that the defendant parent company made no objection to the North Carolina court's assertion of personal jurisdiction. This is noteworthy because the defendant was not at home in North Carolina and did nothing in that state that was in any way connected to the claims of the plaintiffs. Unsurprisingly, the record in *Goodyear* does not reflect why the parent company made no such objection to the North Carolina courts or the Supreme Court. The most likely explanation is that the parent company simply assumed that, because it was a major supplier of tires in North Carolina, it could be sued on any claim against it relating to its tires, no matter where the claim arose. But today, under the Court's current general and specific jurisdiction tests, Goodyear USA, the parent corporation, would surely contest personal jurisdiction in North Carolina. And it would object to personal jurisdiction not just in cases where the tires at issue were made by a subsidiary, but even where the defective tires were designed or manufactured by the parent company, unless they were actually made or sold in the state where the accident took place.

62. *Goodyear*, 564 U.S. at 918.
63. *Id.* at 920–21.

*Daimler* is the third case illustrating how the new rigid rules on personal jurisdiction have unsettled prior assumptions of litigants, scholars, and lower courts. At issue there were claims that an Argentine subsidiary, allegedly acting in collaboration with Argentine officials in Argentina, intentionally inflicted serious physical injuries on plaintiffs, all of whom were Argentine citizens.[64] The plaintiffs sued only the German parent and argued that California could assert general jurisdiction over it by treating its wholly-owned U.S. subsidiary as its agent in California.[65] The parent contested personal jurisdiction throughout the case, but conceded that the U.S. subsidiary, which was incorporated and had its headquarters in New Jersey, was subject to general jurisdiction in California, presumably because it did substantial business in the state. The Court found that there was no general jurisdiction over the parent,[66] a holding that I agree is correct and does not create any problems for most plaintiffs in most cases in U.S. courts. But in the next case, the subsidiary will reflect the new understanding and object to being sued in the forum state, except for claims against it that arose there.[67]

In all three of these cases, a sophisticated corporate defendant assumed that it was subject to personal jurisdiction in a state where it was engaging in substantial business and where it was registered to do business. The same is likely true for *BNSF* which, until *Daimler*, has no basis to object to regularly being sued in Montana over non-Montana injuries because it was doing extensive business there. Similarly, defendants in lawsuits like the one at issue in *Bristol-Myers* routinely failed in the past to object to aggregations, even in plaintiff-friendly jurisdictions because they had no basis to do so. The cause of these new objections arises from the Court's unprecedented division of per-

64. Daimler AG v. Bauman, 571 U.S. 117, 120–21 (2014).

65. *Id.* at 123.

66. *Id.* at 134–36.

67. The Court probably should not have decided the constitutional personal jurisdiction issue in *Daimler* because there were two clear non-constitutional grounds for dismissal: lack of statutory subject matter jurisdiction and forum non conveniens. Before the Supreme Court decided that case, all of the federal claims had been eliminated because of the recent substantive rulings in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012). *Daimler*, 571 U.S. at 140–41. Furthermore, because the remaining claims were only among aliens, the diversity statute, 28 U.S.C. § 1332 (2012), was inapplicable. In the alternative, because of a complete lack of connection between the claims and the California forum, the case should have been dismissed on forum non-conveniens grounds. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). Similarly, in *Walden v. Fiore,* 571 U.S. 277 (2014), none of the courts needed to reach the personal jurisdiction-constitutional question, because the case plainly should have been transferred to the Northern District of Georgia under 28 U.S.C. § 1404(a) (2012), where all witnesses except the plaintiffs were located and where all the events at issue took place.

sonal jurisdiction into two quite constricted departments and the substantial narrowing of general jurisdiction. Thus, *Daimler* rules out general jurisdiction except in the defendant's home states, and as *BNSF* and *Bristol-Myers* show, that applies no matter how much of its business the defendant did in the forum state.[68] Given all of these successes, there is no reason to think that the business community will not continue to press its advantage and seek additional limits on the choice of forums for plaintiffs.

Here are some ways in which plaintiffs' choices may be further reduced. Under the approach adopted by the Court in *Bristol-Myers*, there must be a direct relationship between the allegedly wrongful conduct of the defendant and the injury to each plaintiff in the forum in which the case is brought.[69] Taken to its next step, as defendants have been doing with each successive personal jurisdiction victory, the company may argue that there would not be specific jurisdiction if, for example, a plaintiff suing in State B had purchased Plavix from the defendant in State A and later moved to State B, where plaintiff's symptoms first appeared and where the plaintiff now resides.[70] In particular, if the plaintiff ingested most of the drug in State A, the defendant would likely argue that suit must be brought there (or in defendant's home state). In that situation, the court might have to determine how much Plavix was ingested in each state, over what period of time, and what kind of symptoms first appeared in which jurisdiction—all to resolve the preliminary question of where the case should be litigated.[71]

Or suppose that the facts show that Plavix was sold throughout the United States, but was designed and manufactured only in New Jersey. Assume that plaintiffs base their claims on negligent design and manufacture, which took place, if at all, in New Jersey. Would that be the only state with specific jurisdiction over these claims because that is where the tortious conduct took place, even if none of the plaintiffs had ever lived or ingested Plavix in New Jersey? Perhaps defendants will not press their advantage to that extent, at least not

68. *See supra* notes 10–13 and accompanying text.

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

70. Defendants have already successfully made this argument in *Waite v. All Acquisition Corp.*, 901 F.3d 1307 (11th Cir. 2018), *cert. denied*, 2019 WL 400831 (U.S. Mar. 25, 2019) (No. 18-998). In that case a Florida resident, who moved there after exposure to asbestos in Massachusetts, sued the asbestos manufacturer in Florida. *Id.* at 1311–12. Even though the manufacturer had a plant and substantial operations in the state, the Eleventh Circuit found a lack of general or specific personal jurisdiction over it. *Id.* at 1315, 1318.

71. *See id.* at 1315 (holding there was a lack of specific jurisdiction after a fact-intensive review of plaintiff's exposure, defendant's operations in the forum, and their relation to one another).

yet, but the defendant-protective rulings in *BNSF* and *Bristol-Myers* would surely provide support for the conclusion that a company can be sued only where its wrongful acts occurred.

Of perhaps more concern is the fact that many foreign manufacturers, for legitimate reasons having nothing to do with personal jurisdiction, establish wholly-owned U.S. subsidiaries through which all of their sales are made in this country for products manufactured abroad. Under the Court's current approach, with the parent company not "at home" anywhere in the United States, and with the claim based on defective designs or manufacturing done abroad by the parent, the parent may not be able to be sued *anywhere* in this country even for injuries sustained here.[72] Moreover, even if the plaintiff has a valid legal claim against a non-manufacturing subsidiary located in the United States, over which it *can* obtain personal jurisdiction someplace in the United States, discovery on the merits will be needed against the foreign parent company, which will be very complicated, if it can be done at all.

There is yet another complication that may make personal jurisdiction even more problematic in many of these cases. As the records in *World-Wide Volkswagen* and *Daimler* show, even the U.S. subsidiary does not sell automobiles to consumers: They are sold through truly independent dealers. Following *McIntyre*, the manufacturer and its subsidiary may be able to avoid being sued where the plaintiff was injured, even if it is in the state where she bought the automobile that injured her, because her only contact was with the local independent dealer. This possibility was also supported by the arguments made by Bristol-Myers and its amici, as well as some of the amici in *Daimler*.[73] Moreover, although the defendants that allegedly injured the plaintiffs in *McIntyre*, *Goodyear*, and *Daimler* were foreign corporations, the principles that the Court enunciated appear to apply equally to companies incorporated in the United States.[74] If the Court follows through on this approach to general and specific jurisdiction, it will have created a mechanism for major U.S. manufacturers of potentially dangerous products to insulate themselves from suits in state courts if their products are sold through independent third parties, except perhaps if the sales are made in their home states.

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72. *See* Wilson v. Nouvag GmbH, No. 15-CV-11700, 2018 WL 1565602, at *6 (N.D. Ill. Mar. 30, 2018) (holding that a foreign manufacturer cannot be sued in Illinois, where its distributor is based, for injuries to a Virginia plaintiff).

73. *Bristol-Myers*, 137 U.S. 1773, 1788 n.3 (2017) (Sotomayor, J., dissenting); *Daimler*, 571 U.S. 117, 136 n.16 (2014).

74. *See* J. McIntyre Machinery, Ltd., v. Nicastro, 564 U.S. 873, 885 (2011).

Even before the Court decided *Bristol-Myers*, the invitations from *McIntyre*, *Goodyear*, and *Daimler* to constrict personal jurisdiction had been accepted by the Supreme Court of Alabama in what may well be a preview of future decisions. In what can hardly be called a unique set of circumstances, a wholly-owned Canadian subsidiary of General Motors manufactured and sold a car to GM US, which then sold it through an independent dealer to a buyer in Pennsylvania who eventually drove the car to Alabama. The car was in an accident in Alabama, and a passenger was seriously injured, allegedly due to a defect in the car's design, manufacture, or both.[75] Suit was brought against the Pennsylvania dealer who, like the dealer in *World-Wide Volkswagen*, was dismissed from the case and, eventually, so was GM Canada on the ground that there was no connection between GM Canada, this car, and Alabama.[76]

Again, the holding itself—that a foreign company cannot be sued in a state in which it did no business directly, nor sold the product in question—is not so troubling. The issues of future significance are where, if at all in the United States, the plaintiff could sue companies in the position of GM Canada, and where GM US could be sued on this claim, if at all.[77] Or would the only possible defendant over whom there would be personal jurisdiction anywhere be the Pennsylvania dealer and then only in that state? If that were the situation, it is unclear whether the car dealer would have any substantive liability for a claim of a design or manufacturing defect. In any event, the dealer would attempt to implead GM US, from which it bought the car (unless there was a further intermediary), but that would still leave the Alabama plaintiff with no right to sue anyone close to where he was injured. Until *Goodyear* and *Daimler*, major multi-national companies like GM US, GM Canada, and Volkswagen would never have contested personal jurisdiction over a claim that one of its products was defectively made and injured someone in the forum state, and surely would not have argued that they could only be sued where they were safe at home.[78]

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75. Hinrichs v. Gen. Motors of Canada, Ltd., 222 So.3d 1114, 1116–17 (Ala. 2016), *cert. denied*, 137 S. Ct. 2291 (2017).

76. *Id.* at 1141.

77. The liability of GM US was not litigated because, after plaintiff filed suit, GM had been reorganized so that any liability it had to plaintiff was arguably discharged. Nonetheless, the new reorganized GM settled with plaintiff. *Id*. at 1117.

78. GM Canada involved a claim against the manufacturer of a finished product, not a maker of a component, as in *Asahi*, where precluding suit against a component maker would still enable suit to be brought against the final product maker, which would then have to sue the component maker where there would be jurisdiction between those two companies.

If the Due Process Clause or some other part of the Constitution contained the words "general" and "specific" to modify personal jurisdiction, or if the Court had used that method of adjudicating constitutional defenses to assertions of personal jurisdiction from the outset, the Court might be justified in retaining them. But neither is true, and in fact, the terms first appeared in a Supreme Court opinion as two footnotes in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[79] which cited only law review articles as their authority. Moreover, the stringent limits on general jurisdiction embodied in the "at home" approach only date back to 2011 in *Goodyear*. If the current rigid dichotomy between special and general jurisdiction used in determining whether personal jurisdiction over a business defendant is retained, the implications for the specific jurisdiction cases that will flow from those rulings further demonstrate why the Due Process Clause is the wrong basis on which to decide these questions.

### *D. The Final Straw*

The event that finally pushed me to write this Article was grading the final exams in my civil procedure class for the fall semester of 2016. As I always do, I had a personal jurisdiction question, which is appended to this Article. These are the essential facts: A university in one state solicited money from a famous scientist from a distant state, who had no prior connection with the university. He was asked to donate to a new science center, a part of which would bear his name. Without actually visiting the university, he agreed to make contributions over several years. Shortly after making the initial payment, he learned facts which, he alleges, would have caused him not to make the pledge and, he alleges, that the university knowingly withheld this information from him, thereby defrauding him. Both the donor and the university sued in their home states. My students were asked to assess the personal jurisdiction defenses raised by each party to the other's complaint.

My practice is to sketch out the answer to my questions before the exams are given, but there are always surprises. This time, I anticipated how the class would react to the question, but what I did not fully appreciate until I was in the middle of grading was that the "purposeful availment" concept, as applied to these specific jurisdiction questions, was virtually meaningless. Yes, there were facts to which each side could point, but they were trivial at best and did not come close to providing an answer, let alone a coherent one that could be

79. 466 U.S. 408, 414 nn.8–9 (1984).

justified to my students. I also realized that this problem did not involve Internet-based transactions, which would only put further stress on "purposeful availment." It was time for me to say that "the Emperor has no clothes," which is this part of this Article, and then to find a new tailor, which is the next.

## II. The Constitutionality of State Court Assertions of Personal Jurisdiction over Commercial Transactions Should Be Decided under the Dormant Commerce Clause

In light of cases like *Goodyear* and *Daimler*, where the lower courts found personal jurisdiction, but the facts underlying the claim had no connection with the forum, there is still a need to provide some judicial protection for defendants against expansive forum shopping. Despite all its flaws, abandoning the Due Process Clause in personal jurisdiction cases would be unacceptable if there were no alternative that would provide some limits on state court assertions of the right to entertain a suit against a non-resident. In my view, the approach developed under the Dormant Commerce Clause, which prevents states from imposing unreasonable burdens on interstate and foreign commerce, is the best option. But before turning to it, I address the possible use of the Full Faith and Credit Clause as an alternative.

The Full Faith and Credit Clause in Article IV requires, *inter alia*, that states give effect to the judgments of their sister states and also empowers Congress to make laws prescribing how they shall be proven "and the effects thereof."[80] As my colleague Roger Trangsrud demonstrated nearly three decades ago, the clause requires recognition of only those out-of-state judgments that are legally binding outside the rendering state, which assumes that the original court must have had personal jurisdiction over the person against whom the judgment was entered.[81] He also concludes, and I agree, that Congress has the authority to write rules by which the enforceability of state court judgments must be determined.[82] And Congress has enacted a general, but limited, provision on recognizing judgments[83] as well as laws specifically applicable to child custody determinations[84] and child sup-

80. U.S. Const., art. IV, § 1.
81. Trangsrud, *supra* note 25, at 864–65.
82. *Id.* at 903–05.
83. 28 U.S.C. § 1738 (2012).
84. 28 U.S.C. § 1738A (2012 & Supp. V 2018).

port orders.[85] Thus, if Congress acted to issue general rules for personal jurisdiction in state courts, it would solve the problem. It is quite doubtful that Congress will be any more successful than the Court has been in trying to prescribe detailed rules in this area. But the larger point is that Congress has not done so, and therefore another backstop is needed.

Professor Trangsrud proposed that a standard of "political consent" by the defendant be used until Congress steps in and that the standard should replace the substantive due process approach now used by the Court.[86] As I understand that concept, which is drawn from the notion that the authority of the state generally is based on the consent of the governed, it is that personal jurisdiction should arise only by consent of the defendant, including implied consent. My difficulty with that alternative is that it is almost as open-ended as the current due process approach embodied in what appears to have become the magic words "purposeful availment." To be fair to Professor Trangsrud, his 1989 article was written before both the line of cases that have led to the current understanding of the due process approach and the advent of the Internet. Nonetheless, at least as it is currently proposed, the concept of political consent does not provide any meaningful and sensible guidelines, which is the main problem with the Court's Due Process approach and which is why I suggest the Dormant Commerce Clause as a preferable alternative.[87]

Turning to the Dormant Commerce Clause, although subjecting a business to suit in the courts of a state in which it is not regularly doing business is not generally described as the state attempting to "regulate" the conduct of that business, that is the impact of a judg-

85. 28 U.S.C. § 1738B (2012 & Supp. V 2018). It also enacted a provision that permitted states *not* to recognize same sex marriages performed out-of-state, 28 U.S.C. § 1738C (2012), but which no longer has any effect after the Supreme Court held that laws banning same sex marriages were unconstitutional. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

86. Trangsrud, *supra* note 25, at 884. For other commentators who agree that the rule is substantive, not procedural, see Peterson, *supra* note 18, at 114 n.66.

87. Another area in which the Court has restricted the powers of state courts is choice of law, again through the substantive limits in the Due Process Clause. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). The Court there concluded that a Kansas state court could not automatically apply the law of Kansas to determine the proper interest rate payable on royalties for oil leases where "over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit." *Id.* at 815. The principal problem there was that the Kansas courts made no effort to determine whether there were actual conflicts with the laws of other states that had connections with these transactions. *Id.* at 816. The Supreme Court also made clear that states had wide latitude in this area of law, *id.* at 823, and since that decision, the Court has not rejected a state court's choice of law ruling. For these reasons, relying on choice of law decisions would not solve the personal jurisdiction problem.

ment against an out-of-state defendant in a lawsuit: The state is effectively ordering the defendant to conduct its business in a certain manner or, as in most tort cases, to pay damages for failing to have done so.[88] Thus, because California could have constitutionally regulated Bristol-Myers's sale of Plavix in California, there should have been no Commerce Clause barrier to a California court entering a tort judgment against Bristol-Myers. As I show below, under the Dormant Commerce Clause, a California court could enter a judgment having that regulatory effect, regardless of whether a particular plaintiff bought or used Plavix in California (as was the case for 86 plaintiffs) or elsewhere (as was the case for the remaining 592 plaintiffs).

The idea that the Dormant Commerce Clause is relevant to the issue of personal jurisdiction is hardly a new concept. Indeed, prior to *International Shoe*, defendants that objected to state courts entertaining suits against them relied principally on claims of undue burden under the Dormant Commerce Clause.[89] For example, in *Denver & Rio Grande Western Railway Co. v. Terte*, one defendant railroad, which had operations in the forum state, was permitted to be sued there, but the other railroad, which had no such forum state operations, was dismissed.[90] Although the Due Process Clause was mentioned in *Terte*, the Court resolved the issue of personal jurisdiction under the Dormant Commerce Clause by assessing the burdens on each defendant.

Similarly, in *International Shoe* itself, the Dormant Commerce Clause was part of the basis of the company's objection, to which the Court responded as follows:

> Appellant's argument, renewed here, that the [taxing] statute imposes an unconstitutional burden on interstate commerce need not detain us. . . . 26 U.S.C. § 1606(a) . . . provides that "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of

88. *See* Brief of United States as Amicus Curiae Supporting Petitioner at 22, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) (No. 16-466), 2017 WL 1046237 (recognizing the regulatory impact of state court adjudications).

89. *See* Denver & Rio Grande W. Ry. Co. v. Terte, 284 U.S. 284, 285, 287 (1932) (collecting cases).

90. *Id*. at 287.

> the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it.[91]

The statute in the quoted passage refers to the state law imposing substantive liability for unemployment taxes on International Shoe. Having found that the state had the power to assess unemployment taxes against International Shoe under the Dormant Commerce Clause,[92] it is almost inconceivable that the Constitution would not permit Washington to collect that tax in its own courts, rather than having to sue the taxpayer in its home state courts. Therefore, by that reasoning, if there is no Dormant Commerce Clause objection to a state statute imposing substantive liability on an out-of-state defendant, there can be no Dormant Commerce Clause objection to suing the defendant in that state. Indeed, International Shoe argued that the State had a heavier burden to support the tax than it did to commence the proceeding to collect the tax.[93]

The proper relation between the Due Process Clause and the Dormant Commerce Clause can be seen in two cases involving collection of use taxes. In those cases, states sought to impose on out-of-state mail-order businesses the obligation to collect the state use tax that is payable by the in-state purchaser for goods sent from out-of-state. In both cases, *National Bellas Hess, Inc. v. Department of Revenue*[94] and *Quill Corp. v. North Dakota*,[95] it was agreed that neither the state from which the products were shipped, nor the state into which they were sent, could constitutionally collect a *sales* tax on the product. It was also agreed that the state into which the product was sent may collect a *use* tax from the purchaser in an amount equal to the sales tax that the state would have collected if the sale had been made by an in-state merchant. The question presented in both cases was whether the state seeking to collect the use tax could require the out-of-state seller to collect that tax for it, consistent with both the Due Process and the Dormant Commerce Clauses.

In *National Bellas Hess*, the Court discussed the relationship between the two Clauses as follows:

> National argues that the liabilities which Illinois has thus imposed violate the Due Process Clause of the Fourteenth Amendment and

91. Int'l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945). The current version of section 1606(a) is in 26 U.S.C. § 3305(a) (2012).

92. *Int'l Shoe*, 326 U.S. at 321.

93. Appellant's Reply Brief at 6, *Int'l Shoe*, 326 U.S. 310 (1945) (No. 107), 1945 WL 48613, at *6.

94. 386 U.S. 753 (1967).

95. 504 U.S. 298 (1992), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). For a further discussion, see *infra* note 106.

> create an unconstitutional burden upon interstate commerce. These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar.[96]

The Court then agreed that the state could not constitutionally impose such a requirement, but it did so without differentiating between the two grounds.[97] Although the Court did not use the words "procedural" or "substantive" to characterize the Due Process defense, the context makes it quite clear that the constitutional flaw was not procedural because the company made no complaint about a lack of notice or opportunity to contest the tax.[98] It simply argued that the state had no power to coerce it into collecting the tax, the precise kind of claim made in the Due Process personal jurisdiction cases discussed in Section I. The three dissenting Justices disagreed with the majority on whether the state tax collection law imposed a substantial burden on interstate commerce. Although the dissent did not separately address the Due Process claim, the language that it used to determine the lawfulness of the burden is reminiscent of language from personal jurisdiction decisions.[99] Yet nothing in the majority opinion suggests that a purchaser who was unhappy with the quality of National's products, or was injured by them, could not sue the company in the courts of Illinois to recover the sales price or the damages for any resulting harm.

The same two objections to collecting a use tax were made twenty-five years later in *Quill*, with the same result, but this time only on Dormant Commerce Clause grounds.[100] In describing its prior decision on this issue, the majority observed that it ruled against the state in that case because the out-of-state seller "lacked the requisite minimum contacts with the State,"[101] which were the very terms used in *International Shoe*[102] but not satisfied in *National Bellas Hess.* The majority then disagreed with the conclusion in *National Bellas Hess* that

96. *Nat'l Bellas Hess*, 386 U.S. at 756.

97. *Id.* at 758.

98. *Id.* at 756.

99. *Id.* at 765 (Fortas, J., dissenting) ("As the [majority] says, the test whether an out-of-state business must comply with a state levy is variously formulated: 'whether the state has given anything for which it can ask return'; whether the out-of-state business enjoys the protection or benefits of the State; whether there is a sufficient nexus: 'Some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" (footnotes omitted)).

100. Quill Corp. v. North Dakota, 504 U.S. at 318.

101. *Id.* at 301.

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

the two Clauses completely overlapped, in part because it noted that Congress can cure a Dormant Commerce Clause violation but cannot fix the problem if there is a Due Process objection—at least when the issue is the power of the state to require an out-of-state person to comply with its laws.[103] It then went on to overrule the Due Process basis for striking down the law at issue in *National Bellas Hess*.[104] It nonetheless declined to overrule *National Bellas Hess* on Dormant Commerce Clause grounds, in part for reasons of stare decisis and in part because Congress was now able to deal with any problems that the decision had created once the Due Process barrier was removed.[105] Thus, *Quill* establishes that a state law can be consistent with Due Process but at the same time can violate the Dormant Commerce Clause.[106] That is because the inquiries are related but separate.

The validity of a state law like that in *Quill* requiring the collection of taxes owed by others is, to be sure, different from the question of whether a state may require an out-of-state defendant to respond to a claim filed in its courts. Nonetheless, there are several sets of reasons why the answers to both questions can and should be determined by application of Dormant Commerce Clause jurisprudence and not under the substantive aspect of the Due Process Clause on which the Supreme Court has traditionally relied. First, as demonstrated in Section I, the Due Process personal jurisdiction doctrine is without basis in the Constitution, and it has produced (1) decisions that are difficult to apply, (2) results that are difficult to justify in light of the stated purposes of the limits on personal jurisdiction, and (3) the need for extensive discovery on the threshold issue of whether there is specific jurisdiction, which will be required in all but the most routine cases. Second, as I now demonstrate, the Dormant Commerce Clause is a proper constitutional fit, it is relatively easy to apply, it produces sensible results in personal jurisdiction cases, and it generally will require little or no discovery to resolve.[107]

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103. *Quill Corp.*, 504 U.S. at 305.

104. *Id.* at 308 (relying in part on *Int'l Shoe*, 326 U.S. 310, and *Burger King v. Rudzewicz*, 471 U.S. 462 (1985)).

105. *Id.* at 318; *see also id.* at 320 (Scalia, J., concurring).

106. As discussed *supra* note 95, the holding in *Quill* was overruled by the Court in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018). That overruling does not undermine the arguments made in this Article, and, as explained below, the Court's rationale provides further support for the application of the Dormant Commerce Clause to issues of personal jurisdiction.

107. For a recent case in which there was limited initial personal jurisdiction discovery, followed by an interlocutory appeal, and a denial of certiorari, with more discovery to follow, see Align Corp. v. Boustred, 421 P.3d 163, 166 (Colo. 2017), *cert. denied*, 138 S. Ct. 2623 (2018).

It is also significant that application of the Dormant Commerce Clause is consistent with the stated principles underlying the Court's Due Process rulings. Although the decisions in cases such as *Goodyear*, *Daimler*, *World-Wide Volkswagen*, and *McIntyre* focus on the extent of the defendant's contacts with the forum state, each of the opinions makes clear that the Court's underlying concerns are with the potential adverse impact of upholding personal jurisdiction on the ability of the defendant to engage in foreign or interstate commerce. That concern is at the heart of this Court's Dormant Commerce Clause jurisprudence, which, unlike the Due Process approach to personal jurisdiction, is derived from the principles underlying the Commerce Clause itself. Within the strands of Dormant Commerce Clause jurisprudence, the proper test to determine whether a forum state can exercise jurisdiction over a particular defendant is that in *Pike v. Bruce Church, Inc.*:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[108]

Accordingly, to demonstrate that this approach is doctrinally sound, produces fair results, and can be utilized with a minimal amount of discovery, I will apply it to the Supreme Court's most recent significant personal jurisdiction cases, whether falling under general or specific jurisdiction.[109]

In *World-Wide Volkswagen*, there were four defendants, but for simplicity, focusing on the manufacturer and the dealer will illustrate how the Dormant Commerce Clause can properly and fairly resolve the personal jurisdiction question for both of them and for the plaintiffs. The question to be asked upfront is whether Oklahoma (where the accident occurred) could constitutionally regulate the conduct that was the basis of the claim in that case, for example, by passing a law applicable to automobiles operating in the state with certain design or

108. 397 U.S. 137, 142 (1970) (internal citation omitted).

109. States may also violate the Dormant Commerce Clause by discriminating against out-of-state businesses, often by enacting laws that literally or practically apply only to out-of-state businesses. City of Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978). Because personal jurisdiction statutes and rules are written in neutral terms, the anti-discrimination cases do not apply here.

manufacturing defects, regardless of where the car was manufactured or purchased. Under that law, and assuming no federal preemption, the state could seek monetary penalties or a court order directing the recall or repair of non-conforming vehicles. Based on *Pike*, that law would not create an excessive burden on foreign commerce, as long as the covered defects were similar to those imposed on the manufacturer in other jurisdictions in which its products were sold. In that situation, a suit to collect those penalties, or to obtain an injunction, could be brought against the manufacturer in the Oklahoma courts without violating the Dormant Commerce Clause.[110]

However, if Oklahoma sought to apply that law to the New York auto dealer who sold the car to the person driving it in Oklahoma, that would impose very significant burdens on the dealer, who did not design or manufacture the car. Thus, in order to comply with that law, the dealer would have to, in effect, re-make and re-design every vehicle that it sold to satisfy every state no matter where the vehicle might be driven. Under a Dormant Commerce Clause analysis, that burden would be clearly excessive, and the law could not be enforced against an out-of-state dealer. Returning to the personal jurisdiction issue, and applying the *Pike* Dormant Commerce Clause analysis, the state court would not have personal jurisdiction over tort or other claims against the dealer, but it would against the car's manufacturer because the manufacturer intended to have its vehicles sold and driven anywhere in the United States. And, unlike under the *McIntyre* approach, there would appear to be little or no need for discovery as to the extent of their activities in Oklahoma in order to decide the motions to dismiss for want of personal jurisdiction by either the dealer or the manufacturer.

In *Burger King v. Rudzewicz*,[111] the out-of-state defendant was required to litigate a claim involving a contract that it signed with a Florida franchisor. To test the Dormant Commerce Clause approach, suppose that Florida passed a law imposing modest monetary penalties on all parties to a franchise agreement if they failed to comply

110. The brief of the United States in *Bristol-Myers* correctly observed that Plavix as well as many other consumer products, are subject to federal rules that preempt different state laws. Brief for the United States as Amicus Curiae Supporting Petitioner at 24–25 n.3, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) (No. 16-466), 2017 WL 1046237. That observation was not a reason to deny California's assertion of personal jurisdiction there, but one to permit it, because, if there is an existing federal standard, there is no possibility that California could apply a different substantive standard than would apply elsewhere. And the fact that an existing federal standard preempts state law does not establish that, absent the federal law, state law would run afoul of the Dormant Commerce Clause.

111. 471 U.S. 462 (1985).

with its material terms without good cause. Under *Pike*, that law would not create any special burdens on out-of-state businesses that it did not impose on local businesses, and so it would not be subject to a Dormant Commerce Clause objection. In such a case, the out-of-state party would have to defend the claim in the Florida courts, just as the defendant did in the actual *Burger King* case. And the same would be true if Burger King had been sued in Michigan, and it objected to personal jurisdiction there.

*Asahi Metal Industry Co. v. Superior Court*[112] is another personal jurisdiction case that could have been readily resolved in a sensible and fair manner under *Pike* with much less difficulty than in the actual case, in which there was no majority opinion. The objecting party there was the maker of valves used in tubes for motorcycle tires. It was located in Taiwan and had sold its valves to a Japanese tube making company which in turn had sold them to the tire maker, which in turn had sold the tires that were the alleged cause of the plaintiff's injuries.[113] The Due Process question in *Asahi* was whether the tube maker could continue with its cross-claims against the valve maker in the California state courts after all other claims and cross claims had settled.[114] Under *Pike*, the question would be whether, under a hypothetical California law, the state could dictate the standards which the Taiwanese valve maker had to follow for valves for motorcycle tires used in California and could the State subject the valve maker to monetary penalties or an injunction for failing to do so. The answer would surely be that the burden on that Taiwanese company to follow California law would be clearly excessive, although perhaps a different answer might be given if the valve maker was a U.S. company whose products were sold to tube and tire makers throughout this country. Under the *Pike* approach, if that substantive burden could not be imposed under the Dormant Commerce Clause (regardless of whether the defendant is a domestic or foreign business), then the valve maker could not be sued on the basis of that obligation, even if the claim arose in tort instead of in a penalty enforcement case.

On the other hand, if *McIntyre* were viewed through a *Pike* lens, the result would almost certainly have been different. Thus, if New Jersey established substantive safety standards for shearing machines that were not preempted by federal law, McIntyre could not have objected to complying with them for its machines that ended up in New Jersey. That would be true whether it sold the machine directly or through a

112. 480 U.S. 102 (1987).
113. *Id.* at 105–06.
114. *Id.*

subsidiary or an independent distributor. Either way, any burdens would not be excessive in light of New Jersey's interests in protecting its citizens against all dangerous machines no matter where they were manufactured or how they arrived in the state. And if McIntyre UK had no Dormant Commerce Clause objection to the substantive standard, it could be sued in New Jersey state courts if it failed to comply with New Jersey's substantive standards and that failure caused the injury to the plaintiff.

*Goodyear* and *Daimler* would have reached the same result under *Pike* as under the Due Process Clause, albeit by a different and much more direct route. Surely, North Carolina could not dictate the safety standards for foreign manufacturers for their tires that were not manufactured, sold, or even used in North Carolina.[115] Nor could California dictate to the employees of an Argentine subsidiary of Daimler what they may and may not do in Argentina in the conduct of the company's business there no matter how offensive California may find their conduct. Neither case would require discovery, and a motion to dismiss might not even have to be made because the excessiveness of the burdens that the state would have imposed on foreign companies would be obvious to all. And there would be no need to undergo extensive discovery as would be the case if general and specific jurisdiction and Due Process were at issue.

Of course, invoking the Dormant Commerce Clause will not automatically answer all personal jurisdiction cases involving a commercial defendant because there are still disputes about how to apply the Clause even if it is clear that it supplies the applicable rule of law. But, compared to the difficulties that the Supreme Court, many other courts, law professors, and law students have with the current Due Process jurisprudence, using the Dormant Commerce Clause would be a vast improvement.[116]

The superiority of a Dormant Commerce Clause approach to that of a Due Process focus on contacts and purposeful availment can be seen from the facts of a recent state tax case, which could easily be present in a personal jurisdiction context. In *Florida Department of Revenue v. American Business USA Corp.*, an online flower business

115. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 921 (2011).

116. *Walden v. Fiore*, 571 U.S. 277 (2014), did not involve a commercial defendant, but a government agent sued in federal court for refusal to return property to the plaintiff in the forum state when the property had been seized in another State. Had the case been in state court, such that transfer under 28 U.S.C. § 1404(a) (2012) was not available, the Court could have used the *Pike* analysis to properly conclude that the forum state had no authority to regulate what happened in the state where the seizure took place, which would include the failure to minimize the harm to the plaintiff by promptly returning the seized property.

fulfilled its orders through independent flower shops, which were located in various states, as were the persons who purchased the flowers and the individuals to whom they were sent.[117] In many cases, the purchaser and the recipient will not know which flower shop actually did the delivery, nor will they know the location of the online company (or its website operators). Similarly, the online company may know the name of the purchaser, but have no idea where that person lives or where the person was when the order was placed, especially if the transaction was made via credit card. The issue in the actual case was whether the Dormant Commerce Clause precluded Florida from imposing a sales tax on flowers delivered out of state, and the Florida court upheld the tax.[118]

Now suppose that instead of a tax dispute, the disputes were over any of the following: (1) the quality of the flowers, (2) whether the flowers contained insects that infected the house of the recipient, and (3) the non-payment by the purchaser of the amount due. In those situations, asking whether any of the potential defendants "purposefully availed" themselves of any of the fora where they might be sued is a quest bound to fail because that question is meaningless and ill-suited for the inquiry. On the other hand, using the Dormant Commerce Clause would lead to the conclusion that there would be no barrier, i.e., no excessive burden, if the online seller were sued in the state court of the purchaser or recipient or if the non-paying purchaser were sued where the online seller is located. And in answering those questions, the existing lines between general and specific jurisdiction would become irrelevant, and the issue of personal jurisdiction could be resolved without the kind of extensive factual discovery that *McIntyre* seems to compel plaintiffs to undertake.

Examining the facts of *Bristol-Myers* through *Pike*'s Dormant Commerce Clause lens produces a clear but different picture. The company did not dispute that it could be sued in California for Plavix purchased and used there, even though it did not make the sale directly to those consumers and the drug was not manufactured there. It presumably made that concession because it directed a significant portion of its efforts to sell Plavix to California residents—purposefully availing itself of the laws of California—and thus could be sued there by them, even after *McIntyre*. In addition, the parties agreed, at least for personal jurisdiction purposes, that the substantive standard that California will apply to determine whether defendant's drugs are de-

117. 191 So. 3d 906, 908 (Fla. 2016), *cert. denied*, 137 S. Ct. 1067 (2017).
118. *Id.* at 911.

fective is the same for both the resident and non-resident plaintiffs. Therefore, defendant's obligations to design, label, and manufacture Plavix did not vary depending on where the drug was sold or consumed. Moreover, the company did not argue that the existence of intermediaries who actually sold Plavix to consumers altered its legal obligations because it had exclusive control over the alleged causes of the drug being defective. The company nonetheless objected to being sued in California by persons who consumed the drug elsewhere.

Bristol-Myers admitted, indeed embraced, the fact that it can be sued in other states where the non-California plaintiffs ingested Plavix. Thus, the question under *Pike* would be whether forcing the company to defend against the 592 non-California plaintiffs in California, instead of in the many other states where it would be sued, is an unconstitutional burden on commerce. Because Bristol-Myers would have to defend against 86 claims in California and therefore be subject to significant discovery and probably several trials there, it is hard to understand how the burden of responding to the remaining claims there, rather than in other fora, can be considered excessive, let alone "clearly excessive" as *Pike* requires.

But if the determination of excessive burden depended in part on the state's reasons for supporting the consolidation of these claims in its courts, two are apparent. First, and most prominent, is the desire to help California residents in their cases by enabling them to join forces with plaintiffs from other states who will also be benefitted by the consolidation of these claims, which would create greater efficiency in discovery and in the briefing of the legal and factual issues that must be decided. The majority in *Bristol-Myers* recognized the value of consolidation but noted that there could still be meaningful consolidation in states like Texas and Ohio, where many of the non-residents in the California case resided, as well as in the home jurisdictions of the defendant, where some cases had already been filed.[119] In other words, the case was all about forum shopping, and the Court relied on the Due Process Clause to rule for the defendant, instead of the more appropriate Dormant Commerce Clause which would have supported the plaintiffs.

Second, allowing consolidation of cases in a single state, as California attempted there, may eliminate the need for satellite litigation elsewhere over where injured consumers may sue. For example, given the *Bristol-Myers* Court's narrow view of where injured plaintiffs can sue, a consumer who lived in one state when Plavix was first pre-

119. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783 (2017).

scribed, and moved to another during the course of the treatment, may be met with personal jurisdiction objections that only serve to delay the case and impose burdens on the plaintiff and on the courts unrelated to the merits of the controversy. To the extent that the state's reasons for allowing consolidation are relevant in a *Pike* approach, these would more than suffice, and hence the outcome would have been the opposite of what the Court held.

Moreover, the Court's ruling in favor of Bristol-Myers could make it impossible to bring nationwide class action suits for economic damages, even those that meet the requirements of Federal Rule of Civil Procedure 23.[120] Bristol-Myers did not acknowledge this potential impact of its position, and the Court declined to decide the question.[121] But the victory for Bristol-Myers is likely to re-open the jurisdictional dispute in *Phillips Petroleum Co. v. Shutts*.[122] The merits issue there was whether the class was owed interest on royalty payments that had been improperly delayed by the defendant, and if so, at what rate. The Court upheld a nationwide state court class action against a personal jurisdiction argument made by the defendant, although it overturned, on Due Process grounds, the decision to apply the law of the forum state to the merits of the dispute.[123]

On the personal jurisdiction issue, *Shutts* involved claims by 28,000 owners of royalty leases from Phillips Petroleum Company, a Delaware corporation with its principal place of business in Oklahoma, on properties located in eleven states.[124] The case was brought by a single Kansas resident in Kansas state court, which applied Kansas substantive law, despite the fact that "over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit."[125] The company objected to the nationwide class not on the ground that the state court lacked jurisdiction over it, as in *Bristol-Meyers*, but on the ground that the Due Process rights of absent class members were violated by causing their claims (worth about $100 each) to be adjudicated in a state court with which they had no connection, unless they affirmatively consented to

120. Courts grappling with this question have come to opposite conclusions. *See* Alison Frankel, *Courts Are Starting to Decide If BMS Jurisdiction Precedent Applies in Class Actions*, REUTERS (Oct. 26. 2017), https://1.next.westlaw.com/Document/I5d8fd020ba9c11e794b1e51a4cb22ae7/ View/FullText.html.

121. *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting).

122. 472 U.S. 797 (1985).

123. *Id.* at 799.

124. *Id.*

125. *Id*. at 815.

jurisdiction there.[126] The Court unanimously rejected that argument, finding that other protections, including notice, the right to opt out, and court supervision of the class action, provided all the process that was due to the class.[127]

After *Bristol-Myers*, because a defendant like the one in *Shutts* would have had little or no connection with the forum for the claims of most of the class, it would surely argue that an otherwise proper nationwide class action could not be maintained against it, even if the Due Process rights of all class members were protected. To be sure, like in *Bristol-Myers*, the case could have been brought in Oklahoma, the company's headquarters. But suppose a class action had been brought in states such as Texas, Louisiana, Wyoming, or New Mexico where there were significant numbers of leaseholders, properties, or royalties due on those properties.[128] Indeed, unlike *Bristol-Myers* where the company admitted that the substantive law would be the same for all plaintiffs, no matter where they resided, in *Shutts* there was at least a genuine dispute about the applicable interest rate, assuming that the defendant was liable for the unpaid interest at whatever rate was proper.[129]

As a matter of class action law under Federal Rule of Civil Procedure 23 or its state court equivalents, the fact that only some leases might require interest to be paid, or that interest rates might vary among the leases could be dealt with by sub-classes, assuming the other Rule 23 requirements were met. But after *Bristol-Myers*, Phillips Petroleum's objection would be that it could not be sued on behalf of the class in any state besides Oklahoma or Delaware. In Oklahoma, there were many, but at most a significant minority, of the leases, or the royalty owners, or both. In Delaware, Phillip Petroleum's state of incorporation, there were no leases and no member of the plaintiff class resided there.[130] Perhaps a few states would have enough of a connection with the plaintiffs, their leases, or both to have viable class actions, but the only one where all the claims could be brought was the jurisdiction in which the defendant would most like to be—its home sweet home in Oklahoma.

By contrast, under a *Pike* approach, the *Shutts* plaintiffs could sue in their preferred forum if the state had the power, consistent with the Dormant Commerce Clause, to enact the substantive law at issue

126. *Id.* at 806.
127. *Id.* at 811–14.
128. *Shutts*, 472 U.S. at 815 n.6.
129. *Id.* at 816–18.
130. *See* discussion *supra* note 87.

there, which protected the owners of the lease payments from the company's refusal to pay them interest on money admittedly owed. A state could properly exercise that authority where there were a significant number of leases in the state, where the dollar amounts owed on the leases were large, or where the company had solicited a large number of local residents to invest in the lease. Given these three reasonable ways for a state to exercise jurisdiction, there would be a far greater likelihood that one or perhaps two states other than Oklahoma could hear these class actions.[131]

The same analysis would produce a more evenly balanced result for the plaintiff in *BNSF* who was injured while working on the defendant's railroad in Washington and who sued in Montana. So far as the record reveals, the accident was the kind that railroad employees often sustain, regardless of where they are working on a given day. Thus, it was as likely that a worker could have suffered that injury in Montana, where BNSF had substantial regular operations, as where it actually happened. Assuming no federal preemption as to the specific conduct at issue, Montana could properly have sought to regulate the kind of activity that caused the plaintiff's injuries without offending the Dormant Commerce Clause. Therefore, using the Dormant Commerce Clause approach, there would be no basis for objecting to the suit being brought in Montana or, for that matter, in the plaintiff's home state of South Dakota even though the decision in *BNSF* precluded suit in those jurisdictions because the injury did not take place in the state where the plaintiff sued.

But suppose that the injury to the railroad employee in *BNSF* resulted from a condition in the railroad yards that was unique to BNSF's operations in Washington. If suit was brought in a state other than where the accident occurred or the defendant's home state, the Dormant Commerce Clause would not allow that suit because the forum state would not be entitled to impose burdens as to a condition not found in the forum jurisdiction. Similarly, if a California resident slipped on a wet floor in a Bristol-Myers's property in New York, a California court should not be able to adjudicate that matter because California has no legitimate regulatory interest in preventing slip and fall accidents outside its territory.

131. *Shutts* is an example of the kind of multi-state case which ought to be within the ambit of the Class Action Fairness Act, 28 U.S.C. § 1332(d) (2012), and be decided in federal court, except that the defendant is now likely to move to dismiss on personal jurisdiction grounds, either in state court or after removal to federal court. At least with respect to cases like *Shutts*, in which the claims involved interstate commerce, Congress almost certainly could authorize class actions like that to be heard in federal court.

This past June, in *South Dakota v. Wayfair, Inc.*,[132] the Supreme Court overruled the Dormant Commerce Clause holding in *Quill*, rejecting what the Court called "the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow."[133] Further, in language that also supports application of the Dormant Commerce Clause to business-related personal jurisdiction questions, the Court noted that:

> The reasons given in Quill for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Physical presence is not necessary to create a substantial nexus.[134]

As the Court further observed in language that applies with similar effect to the ability of interstate businesses to defend lawsuits where they do business, "the administrative costs of compliance, especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State."[135] Instead of the physical presence rule, the Court recognized that the balancing approach in *Pike* would remain available in the event that states imposed unreasonable burdens on out-of-state sellers.[136]

*Wayfair* is not, of course, a personal jurisdiction case, and neither it nor any other Dormant Commerce Clause case post-*International Shoe* holds that the Due Process Clause is not the proper basis to decide personal jurisdiction cases and that it should be replaced by a Dormant Commerce Clause analysis. But, as the Court noted in *Wayfair*, examining personal jurisdiction under the jurisprudence of the latter clause would avoid "the sort of arbitrary, formalistic distinction[s]" found in the Court's most recent personal jurisdiction rulings.[137]

There is one final reason why a Dormant Commerce Clause approach is preferable to one relying on Due Process. As the *Quill* Court observed, a ruling that Due Process permits or precludes a state from acting leaves no role for Congress because Due Process limits can only be altered by constitutional amendment. By contrast, as both *Quill* and *Wayfair* recognized under the Commerce Clause, Congress has very significant powers to prevent states from imposing undue

132. 138 S. Ct. 2080, 2099 (2017).
133. *Id*. at 2092.
134. *Id*. at 2093.
135. *Id*.
136. *Id*. at 2099.
137. *Id.* at 2092.

burdens on interstate and foreign commerce, or it can impose conditions on a state's exercise of powers that might have an adverse impact on commerce. That fact is quite significant because defendants and their supporting amici in these cases have expressed concerns not simply over the state's exercise of personal jurisdiction over non-resident plaintiffs but over how the state applies some of its rules and practices to the alleged unfair disadvantage of out-of-state defendants. Unlike a Due Process approach, which is all or nothing, a Commerce Clause approach would enable Congress to condition state court jurisdiction over out-of-state defendants on compliance with reasonable rules and practices, including rules on forum non-conveniens, if it concluded that these objections had merit.

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The proof of the pudding is in the eating. How would the question on my final exam be decided under a Dormant Commerce Clause analysis? From the perspective of the state of the donor, it could surely enact a law that would forbid fraud in the solicitation of charitable contributions from citizens of that state, without any barrier from the Dormant Commerce Clause. On the university side, the issue would be: Could the state enact laws that affect charitable gifts made to institutions in that state consistent with the Dormant Commerce Clause? Looking only at the question of authority (and not likelihood of enactment), such laws might require certain disclosure by the recipient to the prospective donor of gifts over some large amount, might impose a modest tax on such gifts, or might require that all disputes between a charity and a donor be resolved by binding arbitration, filling a gap in the Federal Arbitration Act, which applies only to commercial transactions.[138] From a Dormant Commerce Clause perspective, both states would be permitted to exercise personal jurisdiction over the claims of its residents, which is a fair reading of the decision in *Burger King* which would have allowed each party to sue in its home state. Moreover, the issue would be able to be resolved very quickly with no need for discovery especially of the kind that would be common after *McIntyre*.[139]

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138. 9 U.S.C. § 1 *et seq.* (2012).

139. Relying on *Bristol-Myers*, the Court summarily reversed, vacated, and remanded for further consideration a decision from the Supreme Court of Arkansas, permitting suit against a Louisiana sporting goods store for personal injuries sustained while the Arkansas plaintiff was shopping there, based on extensive efforts of the store to attract business from Arkansas residents. Simmons Sporting Goods, Inc. v. Lawson, 138 S. Ct. 237 (2017) (mem.), *vacating* 511 S.W.3d 883 (Ark. Ct. App. 2017). Under a Dormant Commerce Clause analysis, jurisdiction would plainly be lacking because Arkansas has no legitimate interest in attempting to regulate

## III. A Renewal of an Old Approach

The plaintiffs in *BNSF* urged the Supreme Court to uphold jurisdiction in Montana on the ground that the defendant consented to be sued in the Montana state courts when it registered to do business there, but the Court declined to resolve that issue in the first instance.[140] Those plaintiffs did not pursue that issue on remand, but other plaintiffs did in a later suit and were rejected by the Supreme Court of Montana in *DeLeon v. BNSF Railway Co.*[141] That result was surely correct as a matter of Montana law because "Montana's registration statutes specifically provide that the appointment of a registered agent 'does not by itself create the basis for personal jurisdiction over the represented entity in this state.'"[142]

The notion that a corporation that registers to do business in a state thereby consents to be sued in that state is hardly a new concept.[143] Although that approach failed in Montana, it has been successful to date in Pennsylvania. The applicable Pennsylvania statute provides that qualification to do business by a foreign association (which includes corporations and other similar entities[144]) "shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person."[145] Recent decisions from Pennsylvania courts, including both a federal district court[146] and a state Superior Court,[147] have upheld the use of general jurisdiction, despite claims that such an approach was no longer viable post-*Daimler*, even though that avenue was expressly left open in *BNSF*.

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the safety of a business property in another state, no matter how hard the defendant tries to attract business from non-residents. Therefore, there would be no need for discovery of a remand of the kind the Court ordered in *Simmons* or any debate on the issue of personal jurisdiction.

140. BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1559 (2017).

141. 426 P.3d 1 (Mont. 2018).

142. *Id.* at 7 (quoting Mont. Code Ann. § 35-7-115 (2015)).

143. *See* Note, Pennoyer*'s Ghost: Consent, Registration Statutes and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. Rev. 1609, 1611 (2015). This Note, which was written before the Court specifically left open the issue in *BNSF*, surveys a wide range of cases and concludes that Due Process renders all registration-jurisdiction statutes unconstitutional. A more complete discussion of the question and an analysis of the cases that the Note discussed are beyond the scope of this Article, which will highlight only a few more recent decisions and suggest some questions that these statutes raise, including under the Dormant Commerce Clause, which is not mentioned in the Note.

144. 15 Pa. Stat. and Cons. Stat. Ann. § 102 (West 2017).

145. 42 Pa. Stat. and Cons. Stat. Ann. §§ 5301(a)(2)–(3) (West 2018).

146. Bors v. Johnson & Johnson, 208 F. Supp. 3d 648, 655 (E.D. Pa. 2016).

147. Webb-Benjamin, LLC v. Int'l Rug Grp., LLC, 192 A.3d 1133, 1139 (Pa. Super. Ct. 2018).

In states where there are statutes like the one in Pennsylvania, plaintiffs will seek to rely on them to argue that consent to personal jurisdiction is just as valid today as it was when *Pennoyer* was decided. Defendants will surely disagree, arguing that *Daimler* established the limits of general jurisdiction and that state statutes cannot alter them. A likely response would be that *Daimler* set the rules for general jurisdiction based on domicile, but it said nothing about consent. Surely, despite all the recent personal jurisdiction decisions, a defendant can still consent to personal jurisdiction in any forum where it has been sued, and the consent under these statutes differs only because the consent is in advance and applicable to all future claims.

Assuming that statutory consent in general is a valid concept for personal jurisdiction, at least two questions are raised. First, is it reasonable to treat what happens in Pennsylvania as consent when the form that foreign entities file to register to do business does not include any consent language?[148] Moreover, there is nothing in the registration statutes stating that registration constitutes consent to general jurisdiction: that rule is found only in the jurisdiction provision in Title 42, cited in note 145 *supra*. Second, assuming there is meaningful consent, the question would be whether there are any constitutional limits when the consent sweeps very broadly. In a case like *Bristol-Myers*, in which the defendant was already in state court with 86 plaintiffs, a consent provision might have tipped the scales in favor of allowing suit by the other 592 plaintiffs with claims involving the same drug. Or in a case against a railroad in which the employee sued in his home state for an accident arising elsewhere, it would seem entirely reasonable for a law, like the statute in Pennsylvania, to require a railroad doing business in that state to have to defend that claim there. Indeed, the railroad might choose not to contest jurisdiction because the case does not involve obvious forum shopping.

The more difficult case would involve both the statute and the registration form specifically stating that registration constitutes consent to general jurisdiction. And unlike the prior example, the plaintiff does not sue where the injury occurred or in his home state, but in a state that has a consent statute and no other connection to the claim. The defendant would surely argue that the statute, as applied to those facts, is unconstitutional. But relying on the Due Process Clause here would be a very steep uphill battle, and its invocation to question a state statute would establish what my colleague Roger Trangsrud con-

148. *Foreign Registration Statement*, PA. DEP'T. ST., www.dos.pa.gov/BusinessCharities/Business/RegistrationForms/Documents/RegForms/15-412%20Foreign%20Registration%20Statement.pdf (last updated July 1, 2015).

tended many years ago—that Due Process in this context is plainly substantive and not procedural.[149] On the other hand, if, as this Article argues, the proper analysis is under *Pike* and the Dormant Commerce Clause, there would be no threshold problem of applying that provision to that question. Whether the statute creates an "excessive burden" would be a close question, which might depend on how unreasonable the assertion of jurisdiction was in a particular case.

## IV. Two Related Issues

### *A. Non-Business Suits Against Individuals*

Most of the Court's most recent personal jurisdiction cases have involved businesses which, by definition, are engaged in commerce, and there would be no personal jurisdiction issue unless the commerce had an interstate (foreign) aspect to it. Individuals who engage in commercial activities, as in *Burger King*, would also have their personal jurisdiction defenses judged by the same *Pike* standard, with most of the complexity eliminated because individuals generally act without using subsidiaries as businesses often do. As for individuals who actually commit torts that injured the plaintiff in the forum state, surely no one who negligently drives a car in another state has any basis to avoid defending a lawsuit there.

One case that does not fit the Dormant Commerce Clause or traditional tort models is *Burnham*, where a suit for divorce, alimony, and child support was filed in California by a wife who moved there from New Jersey.[150] The Court upheld personal jurisdiction because her husband was personally served when he came to visit the children. But in the next case, both spouses will stay out of the forum where the other spouse lives, and the question will arise as to whether either state can obtain personal jurisdiction to (a) dissolve the marriage, (b) determine child custody, and (c) award alimony, child support, or both. These cases are unlikely to arise with any frequency, but as explained above in *Burnham* itself, the Due Process Clause has not been able to provide an agreed upon rationale, as evidenced by the sharp division in the opinions of the Justices, even though they agreed on the outcome.

Presumably, the Court will conclude, as the Court did in *Pennoyer*,[151] that at least the last state where the couple lived together has jurisdiction over the "marriage" as a kind of res, but that approach

149. Trangsrud, *supra* note 25, at 898–903.
150. Burnham v. Superior Court, 495 U.S. 604, 607–08 (1990).
151. Pennoyer v. Neff, 95 U.S. 714, 735 (1877).

may not extend to alimony and child support payments. And it may not cover cases in which neither spouse continues to reside in the last jurisdiction where they lived together. But whatever the basis for upholding personal jurisdiction over the absent spouse, there is surely no rationale under the Court's current approach for allowing the plaintiff to obtain general, rather than specific jurisdiction over the defendant, as happened in *Burnham*,[152] thus allowing the plaintiff to sue for any claim between the two, regardless of whether it is related to their marriage or has any connection to the forum state.

Of course, one spouse can always sue in the other's home state, and will do so at the point where the lack of a preferable alternative forum is outweighed by the need to have the dispute resolved. But that is true in every personal jurisdiction dispute where the real issue is who will win the forum-shopping battle. However, unlike most personal jurisdiction cases in which the forum states are essentially agnostic on whether the dispute is resolved at all, let alone in which court system, the situation is different in matrimonial matters. In those cases, one state may have a monetary interest in assuring that one spouse, as well as any children, receive necessary financial support so that they do not require state aid for living expenses. In addition, when one spouse wishes to remarry, the state has its own interest in assuring that such spouse was properly divorced so that it is not in the position of potentially sanctioning a bigamous relationship.

Neither the Dormant Commerce Clause nor the Due Process Clause seems to be a proper fit for resolving personal jurisdiction questions in marriage cases and probably not in some cases involving the Internet, such as defamation or invasion of privacy, where the defendant is an individual who is being sued over a non-commercial activity.[153] Full explication of an alternative is beyond the scope of this Article, but one candidate is the immunity portion of the Privileges and Immunities Clause of Article IV, Section 3. Like the Dormant Commerce Clause, with which it has a "mutually reinforcing" relationship,[154] it is designed to protect citizens of one state from being disadvantaged by the laws of another state. An individual defendant sued in a forum to which she or he objected would claim an immunity,

152. *See* discussion *supra* note 59.

153. Claims of copyright or trademark infringement in a non-commercial context would fall into this category, but since those claims are based on federal law, they would be brought in federal court where personal jurisdiction limits may be less significant. 28 U.S.C. § 1338(a) (2012).

154. Hicklin v. Orbeck, 437 U.S. 518, 531 (1978). Although rejecting defendant's personal jurisdiction defense, the Court noted in *Hess v. Pawloski* the possibility of a defendant invoking the Privileges & Immunities Clause in that connection. 274 U.S. 352, 355–56 (1927).

and the court would resolve the question by asking whether a citizen of the forum would be entitled to a similar immunity if that citizen were sued in another jurisdiction. Thus, if State A were prepared to subject its citizens to suit outside its borders in the circumstances of the case before it, then the equality of treatment in interstate matters that the Clause commands would be met, and there would be no constitutional barrier to suit brought there.[155]

### *B. Are Federal Courts Different?*

The Court has indicated, but not yet held, that personal jurisdiction questions would be decided differently if the case were in federal court. As it has in the past, the Court in *Bristol-Myers* declined to decide that question because it was not directly presented there.[156] In his plurality opinion in *McIntyre*, Justice Kennedy suggested that the territorial limits on state courts might not apply in federal court.[157] In that same paragraph, he also noted that Congress must first authorize the federal courts to exercise wider personal jurisdiction beyond the limits of Federal Rule of Civil Procedure 4(k)(1), which restricts even federal courts to the reach of the state court in which it sits unless there is an express statute or federal rule creating broader jurisdiction.

Students learn from *International Shoe* that personal jurisdiction rules are there to assure fairness to the defendant by not having to defend a case in an inconvenient forum. With that goal in mind, they are puzzled, as was Justice Ginsburg in *McIntyre*,[158] by the notion that the defendant in *McIntyre* could not be sued in the New Jersey state court but might be able to be sued in the New Jersey federal court, which is often across the street from its state counterpart. Similarly confusing to students is the idea that convenience and fairness can explain a decision like *Bristol-Myers* in which a large business was relieved of defending 592 claims in California state court while continuing to have to defend against 86 other, virtually identical claims, save for the state of residence of the claimant.[159] And to the extent that the Due Process Clause of the Fifth Amendment is the basis of limits on

155. States can (and should) also reduce these problems by sensible venue provisions that would limit overly broad grants of personal jurisdiction.

156. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017) (citing Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987)). The Advisory Committee's Notes with respect to the 1993 amendments to Rule 4(k) stated that federal courts are not subject to the same territorial limits under the Constitution as are state courts. FED. R. CIV. P. 4(k) advisory committee's note to 1993 amendment.

157. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 885–86 (2011).

158. *Id.* at 904 n.12.

159. 137 S. Ct. at 1779.

federal court jurisdiction, they wonder why those words should receive a different construction than the identical words in the Fourteenth Amendment. Justice Kennedy's suggestion in *McIntyre* that personal jurisdiction may be based on the limited power of the sovereign, which is different for a state than a federal court, may provide an acceptable rationale. That approach, which seems unmoored from notions of Due Process, would nonetheless side-step the anomaly of reading the same words in the Constitution differently in the Fifth and Fourteenth Amendments.

A number of federal statutes, such as those involving antitrust claims, have provisions for nationwide service of process.[160] Because the conduct at issue in those cases would almost certainly include activities in the forum jurisdiction that formed the basis of the plaintiff's claim, there would not likely be a problem even under the current purposeful availment test. Other federal statutes, such as the Interpleader Act,[161] provide a number of proper forums, in which at least some of the claimants may have no connection in the typical case. Assuming that the Court continues to rely on the Due Process Clause in order to assess federal court personal jurisdiction in those cases, the Court could employ something like a national sovereignty theory under which personal jurisdiction would be proper anywhere in the United States. If Congress were to make that approach the law of federal court personal jurisdiction generally, the existing provisions on venue and transfer would take on much greater significance as a means of protecting defendants from being sued in very inconvenient locations.

The current political climate makes it unlikely that Congress will enact a broad provision allowing substantial numbers of cases now filed in state court to be filed in federal court to enable plaintiffs a greater ability to forum shop. On the rules side, it is unclear how much the Supreme Court would be willing to do through that process, in addition to the current 100-mile expansion outside of the state's borders when a party is sought to be joined under Federal Rule of Civil Procedure 14 or 19.[162]

There are, however, two options under the current rules that may provide an avenue for plaintiffs whose claims are in federal court and

160. For antitrust claims, 15 U.S.C. § 22 (2012) provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

161. 28 U.S.C. §§ 1335 & 2361 (2012); 28 U.S.C. § 1393 (repealed 1988).

162. FED. R. CIV. P. 4(k)(1)(B).

are met with a motion to dismiss for lack of personal jurisdiction. First, for plaintiffs whose cases have been removed to federal court, they can argue that the constitutional reach of the state court is no longer relevant, and the only question should be: Is the Constitution violated by a federal court entertaining the action? In that situation, a plaintiff would argue that a defendant that had removed the case to federal court had in effect consented to have the case heard in federal court, and therefore the personal jurisdiction question should be the same as if the case were properly filed in the federal court in the first instance, i.e., that there is a federal statute or rule specifically providing for personal jurisdiction in that situation. This approach would be most appropriate in cases removed to federal court under the Class Action Fairness Act where Congress has concluded that federal court removal and adjudication of those claims protects important federal interests of defendants.[163] If consent were found under this rationale, the federal courts would still be required to answer the question that the Court again declined to decide in *Bristol-Myers*, but at least the lack of a federal statute or rule allowing the case to be filed in federal court in the first instance would no longer be a problem. Congress could also achieve the same result by making removal expressly conditioned on limiting personal jurisdiction questions in federal court to whether the Constitution bars the court from hearing the case before it.

Second, the current common understanding of Rule 4(k)(1)(A) is that use of a state long-arm statute in federal court also requires bringing with it the state court's limits under the Fourteenth Amendment. However, that reading is largely assumed, and it is by no means compelled by the language of the Rule, any state statutes or rules relied on, or the Constitution. The most recent example of the assumption that the Fourteenth Amendment's limits apply under Federal Rule of Civil Procedure 4(k)(1) to cases filed in federal court can be seen from the opinion of the district court in what became *Walden v. Fiore* in the Supreme Court.[164] In dismissing the case for lack of personal jurisdiction over the defendant, the trial judge stated the applicable law this way:

> An analysis of personal jurisdiction has two components. First, there must be a statute that gives the court authority to exercise jurisdiction. Second, the exercise of jurisdiction must meet Constitutional due process standards. Id. Because there is no applicable fed-

163. 28 U.S.C. § 1453(b) (2012) (providing for removal of diversity class actions and making several ordinary limits on removal inapplicable).

164. Fiore v. Walden, No. 2:07-CV-01674-ECR, 2008 WL 9833854 (D. Nev. 2008).

> eral statute governing personal jurisdiction, our starting point is Nevada's long-arm statute. See Fed.R.Civ.P. 4(k)(1)(A) . . . . Nevada's long-arm statute permits the exercise of jurisdiction to the limits of due process. N.R.S. § 14.065 . . . . Thus, our analysis of personal jurisdiction under Nevada's long-arm statute and the Constitution collapse into one, and we consider only whether the exercise of jurisdiction comports with the Fourteenth Amendment's due process requirements.[165]

But that outcome is far from compelled by the text of Rule 4(k)(1)(A) which provides:

> (1) *In General.* Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
> (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .[166]

One thing is clear: There must be a state long-arm statute that authorizes this kind of suit, and if there are limits under state law, Federal Rule of Civil Procedure 4(k)(1)(A) brings them along to federal court.

But there is also no language importing the Fourteenth Amendment's limits into the case once it is in federal court other than the word "jurisdiction," which by no means requires that interpretation. Surely, if the intent and language of the state long-arm statute were considered, it would compel the opposite conclusion. Thus, Nevada's statute at issue in *Walden* permitted the Nevada courts to entertain cases as follows: "A court of this state may exercise jurisdiction over a party to a civil action on any basis not inconsistent with the Constitution of this state or the Constitution of the United States."[167] There is no specific reference to the Fourteenth Amendment but simply to the limits imposed by the United States Constitution. Assuming that federal courts are not subject to the same constitutional limit as are state courts, reading Federal Rule of Civil Procedure 4(k)(1)(A) to be restricted only by limits on federal courts—not state courts—would raise no constitutional barriers to a broader interpretation of that rule.

Finally, to the extent that fairness to the defendant and avoiding inconvenience are relevant considerations, the general federal venue statute[168] and the federal transfer statute[169] would address any such

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165. *Id*. at *2 (internal citations omitted).

166. FED. R. CIV. P. 4(k)(1)(A)

167. NEV. REV. STAT. ANN. § 14.065 (West 2000). The comparable provision of California law at issue in *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014), contains virtually identical expansive language: California state courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 2004).

168. 28 U.S.C. § 1391 (2012).

169. 28 U.S.C. § 1404(a) (2012).

issues in virtually every imaginable case. And if they do not, Congress can fix the problem or delegate the task to the Supreme Court's rulemaking process. To be sure, further consideration may suggest flaws in this approach, but for now, plaintiffs who are concerned with the current state court limits on jurisdiction imposed by the Supreme Court should consider making these arguments to keep a case in a federal court in a district in which the state court would lack personal jurisdiction.

## Conclusion

The proposal advanced in this Article would make a major change in the Supreme Court's personal jurisdiction jurisprudence, although not necessarily in the outcome of many recent cases. However, for the reasons explained above, a shift from a Due Process to a Dormant Commerce Clause analysis would produce fairer, simpler, and more coherent results as defendants seek to confine the forum in more and more lawsuits to places where they are safely at home.

## Appendix

This appendix contains an exact replication of the final exam problem I wrote and administered to my civil procedure class for the fall semester of 2016.

**FINAL EXAM**
**CIVIL PROCEDURE – SECTION 6212-21**
**DEAN ALAN MORRISON**
**DECEMBER 13, 2016**
**QUESTION I**

Old Blue University in Connecticut embarked on a massive fundraising campaign to build a new science center on its main campus there. In addition to tapping alums and foundations across the country, it reached out to leading entrepreneurs who had made their fortunes based on significant advances in science, including some who had never studied or taught at Old Blue.

In the course of their research, the development office at Old Blue came across the name Irving Innovator, who lives in California. Innovator created the operating system that is the centerpiece of all military and civilian drones in the US, for which he obtained a patent that has made him a billionaire. The development office sent him a letter explaining the plans for a new science center and suggested a follow-up telephone call. A few weeks later, a mid-level staff person in that office visited Innovator at his California office. By that time, the plans for the new science center had been posted on Old Blue's website, and Innovator was directed there for further details.

At this point, the development office decided that it would try to arrange a meeting between the university's president and Innovator. Innovator rarely travels, but was scheduled to come to New York City, and the president agreed to meet him there. At that meeting, the president proposed that Innovator donate $10 million dollars and that the university name the wing to be devoted to physics in Innovator's honor. The proposal, which was subsequently reduced to writing in the form of a binding pledge, provided that Innovator would donate $1 million within 30 days, that an announcement would be made as to the naming within an additional 60 days, and that Innovator would donate an additional $2 million within six months and the remaining $5 million with two years. The pledge agreement stated that it will be governed by the laws of Connecticut. It also contained directions for sending the payments under it to the Next to Last National Bank's branch in Old Haven, Connecticut.

Innovator made the first donation, and the university made the announcement as promised. It also scheduled the opening of the Center for May 2018, and Innovator promised he would attend. Shortly thereafter, the university made another announcement: The science center as a whole will be named The Troll Center for the Advancement of Science, after Ted Troll who gave $50 million from his fortune made by suing patent infringers. Troll obtained his patents from individuals and universities who could not figure out how to get them to market. But instead of using those patents to make useful products, Troll found major companies that were infringing them, which he sued, often recovering very large sums.

Innovator was outraged because his company was the main defendant in one of Troll's suits, which it grudgingly settled for $35 million. He immediately contacted Old Blue and demanded that the Center not be named for Troll. When that idea was rebuffed (Troll had already donated $30 million), Innovator sent the university an email demanding his $1 million back. He also stated that he considered his pledge to be voided and hence would not donate the remaining $ 9 million. He further asserted that the university knew of the plan to name the Center for Troll before Innovator agreed to his pledge and deliberately withheld that information from him because it knew of his antagonism for Troll.

Both parties then sued in their own state courts, and in each case the defendant properly and timely removed the case to federal court. Before motions to dismiss for lack of personal jurisdiction were filed, the parties agreed to submit the issue of personal jurisdiction to none other than your civil procedure professor with an unusual request: pick the forum for which the plaintiff has the stronger case for personal jurisdiction, even if the conclusion is that there may not be personal jurisdiction in either forum.

You are a research assistant for the professor. He asks you to write a memo assessing the strengths and weakness of each side's assertion of jurisdiction in their home state, and then a brief conclusion as to which one has the better claim and why. He also tells you that the applicable jurisdictional statutes in both Connecticut and California provide for personal jurisdiction "to the maximum extent permitted by the Constitution."