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# FORD MOTOR COMPANY V. MONTANA EIGHTH JUDICIAL DISTRICT COURT: LOTS OF QUESTIONS, SOME ANSWERS

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## ABSTRACT

*In Ford Motor Company v. Montana Eighth Judicial District Court, the Supreme Court handed down its seventh personal jurisdiction decision in the last ten years. Ford—involving two consolidated state-court products liability suits alleging defects in the defendants’ cars that injured forum-state residents in their home states—is the only case in the Supreme Court’s decade-long spate of jurisdictional decisions to find the minimum contacts test satisfied. In this Article, we examine all three opinions of the case. Ford is a welcome return to serious consideration of the fairness of the assertion of jurisdiction. Unlike its six immediate predecessors, Ford considers not only the burden on the defendant in asserting jurisdiction, but also the unfairness to the plaintiff if the Court were to not allow jurisdiction. That said, Ford leaves open many important questions, which we explore. The consequences of the majority’s splitting the “arise out of or relate to” test for specific jurisdiction are not entirely clear. It remains an open question as to under what circumstances a non-causal relationship will suffice and when the presumably more demanding “arise out of” test must be met. We explore several hypothetical factual scenarios in which jurisdiction would depend on which formulation of relatedness is employed.*

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## INTRODUCTION

After ignoring the topic for twenty-one years, the Supreme Court rediscovered personal jurisdiction in 2011.<sup>1</sup> Since then, it has decided seven personal jurisdiction cases.<sup>2</sup> The biggest development in this “new generation” of cases concerns general (or “all-purpose”)<sup>3</sup> jurisdiction, which permits a court to entertain claims against the defendant no matter where they arise. In three cases, the Court, without explanation, profoundly restricted the availability of general jurisdiction based upon minimum contacts.<sup>4</sup> This restriction did more than change the law of general jurisdiction. It drove a significant change in the nature of the inquiry required in many specific jurisdiction cases.

Specific (or “case-linked”)<sup>5</sup> jurisdiction permits a court to hear claims that are connected in some appropriate way to the defendant’s contacts with the forum.<sup>6</sup> For over half a century, the Court’s near-singular focus in specific jurisdiction cases was whether a defendant had forged relevant *contacts* with the forum in which it was sued. In several decisions from *Hanson v. Denckla*<sup>7</sup> in 1957 through *Walden v. Fiore*<sup>8</sup> in 2014, the Court found that defendants lacked contacts sufficient to satisfy what had emerged as the prime requirement for personal jurisdiction in its iconic *International Shoe Co. v. Washington*<sup>9</sup> decision.<sup>10</sup>

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<sup>1</sup> Before this recent spate, the Court’s last personal jurisdiction decision was *Burnham v. Superior Court of California*, 495 U.S. 604, 628 (1990) (upholding “tag” jurisdiction, i.e., jurisdiction based on personal service in the forum state).

<sup>2</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021); *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

<sup>3</sup> This term was introduced by Justice Ginsburg in *Goodyear*, 564 U.S. at 919.

<sup>4</sup> *BNSF*, 137 S. Ct. at 1558–60; *Daimler*, 571 U.S. at 136; *Goodyear*, 564 U.S. at 929. Jurisdiction based upon the traditional grounds of in-state service, domicile, or consent is also all-purpose jurisdiction and was not affected by these cases.

<sup>5</sup> This term was introduced in *Goodyear*, 564 U.S. at 919.

<sup>6</sup> *Id.*

<sup>7</sup> 357 U.S. 235 (1958).

<sup>8</sup> 571 U.S. 277 (2014).

<sup>9</sup> 326 U.S. 310 (1945).

<sup>10</sup> The Court found specific jurisdiction lacking because of insufficient purposeful contacts several times in this period. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886–87 (2011); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980); *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84, 94 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977). In *Asahi Metal Industry Co. v. Superior Court of California*, the Justices split four-to-four on whether the defendant’s contacts with the forum were sufficient to support specific jurisdiction. 480 U.S. 102, 105 (1987). Justice Stevens, in his concurrence, said that he would be “inclined” to find that the sale of 100,000 units (motorcycle tire valves) in the forum state would constitute purposeful availment but refused to commit because it was unnecessary to the result. *Id.* at 121–22 (Stevens, J., concurring).

Now, however, the Court encounters a new generation of specific jurisdiction cases. Here, the defendant has forged significant purposeful contacts with the forum<sup>11</sup>—enough to support general jurisdiction under the old law. But because general jurisdiction no longer applies, plaintiffs must rely on specific jurisdiction. And here we see the shift in focus: from whether the defendant has sufficient contacts with the forum to whether the plaintiff’s claim is appropriately connected to those contacts.<sup>12</sup> In common parlance, the shift is from “contacts” to “relatedness.”

The Court has attempted to define and apply the relatedness requirement only twice; both times in its most recent specific jurisdiction cases: *Bristol-Myers Squibb Co. v. Superior Court of California (BMS)*<sup>13</sup> in 2017 and, on March 25, 2021, *Ford Motor Co. v. Montana Eighth Judicial District Court (Ford)*.<sup>14</sup> Interestingly, *Ford* is in tension with *BMS* in significant ways.<sup>15</sup> Moreover, although the Court upheld state-court jurisdiction unanimously in *Ford*,<sup>16</sup> the fissures that have divided Justices in past personal jurisdiction cases are evident. Unlike some important jurisdictional cases,<sup>17</sup> *Ford* produced a majority opinion, albeit with only five Justices signing it.<sup>18</sup> Justice Kagan authored the majority opinion; Justice Alito wrote a solo concurrence in the judgment; and Justice Gorsuch, joined by Justice Thomas, authored another concurrence in the judgment.<sup>19</sup>

In this Article, after briefly recounting the development of personal jurisdiction law, we consider the importance of the separate opinions in *Ford*: the majority’s, Justice Alito’s, and Justice Gorsuch’s. We then offer some observations on questions left open, the consequences of the decision, and the current state of the methodology to be applied in specific jurisdiction cases.

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in part and concurring in the judgment).

<sup>11</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1022 (2021).

<sup>12</sup> *Id.* at 1023.

<sup>13</sup> 137 S. Ct. 1773, 1773 (2017).

<sup>14</sup> 141 S. Ct. at 1031–32.

<sup>15</sup> *See infra* Part II.

<sup>16</sup> *Ford*, 141 S. Ct. at 1021, 1032. The decision was 8-0, with Justice Barrett not participating.

<sup>17</sup> *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990); *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102 (1987).

<sup>18</sup> *Ford*, 141 S. Ct. at 1022.

<sup>19</sup> *Id.*; *id.* at 1032 (Alito, J., concurring in the judgment); *id.* at 1034 (Gorsuch, J., concurring in the judgment).

## I. THE ROAD TO *FORD*

*International Shoe* instructed courts to consider several factors in assessing personal jurisdiction. Principal among them were two: (1) the defendant's contacts with the forum and (2) whether the exercise of personal jurisdiction would be fair or reasonable under the circumstances.<sup>20</sup> In the 1950s, the Court melded these two factors in a *mélange* approach.<sup>21</sup> That practice ended in 1980 when the Court established a rigid two-step approach in *World-Wide Volkswagen Corp. v. Woodson*.<sup>22</sup>

First, there must be relevant contacts between the defendant and the forum.<sup>23</sup> The contacts must result from “purposeful availment”—that is, from the defendant's own efforts at affiliation (and not the “unilateral activity of [a third party]”).<sup>24</sup> Without at least one such contact, there can be no jurisdiction. Second, only *after* such a contact is found does a court assess whether jurisdiction is fair or reasonable.<sup>25</sup> In this regard, the Court established five “fairness factors,” which it has never retracted.<sup>26</sup> After *World-Wide Volkswagen* and *Burger King Corp. v. Rudzewicz*,<sup>27</sup> the fairness assessment can *defeat* jurisdiction but cannot create jurisdiction in the absence of a relevant contact, although perhaps the factors can nudge a court toward finding jurisdiction in a close case.

Because of the two-step approach, for decades many defendants have put all their eggs in the contacts basket, arguing that their affiliation with the forum was not purposeful. In case after case the Court agreed,<sup>28</sup> reaching its low ebb for considering the reasonableness of jurisdiction in *J. McIntyre Machinery, Ltd. v.*

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<sup>20</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945).

<sup>21</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222–24 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 645–48 (1950).

<sup>22</sup> 444 U.S. 286, 291–92 (1984). The Court suggested this rigid approach in *Hanson v. Denckla*, 357 U.S. 235, 251, 253 (1958), but state and lower federal courts did not embrace it. See MICHAEL VITIELLO, *ANIMATING CIVIL PROCEDURE* 28–32 (2017).

<sup>23</sup> *World-Wide Volkswagen*, 444 U.S. at 291.

<sup>24</sup> *Id.* at 297–98.

<sup>25</sup> *Id.* at 292.

<sup>26</sup> *Id.* (listing (1) burden on the defendant, (2) forum state's interest in adjudicating the dispute, (3) plaintiff's interest in convenient relief, (4) efficiency of resolution, and (5) shared state interests).

<sup>27</sup> 471 U.S. 462, 477–78 (1985).

<sup>28</sup> See *supra* notes 7–9 and accompanying text.

*Nicastro*.<sup>29</sup> There, although the fairness factors cried out for litigation in New Jersey,<sup>30</sup> the plurality found no relevant contact and, therefore, no jurisdiction.<sup>31</sup>

Now enters the Court's restriction of general jurisdiction. Prior to 2011, courts exercised general jurisdiction if the defendant had "continuous and systematic" contacts with the forum.<sup>32</sup> In cases decided in 2011, 2014, and 2017, the Court abruptly limited general jurisdiction to where a defendant could be considered "at home."<sup>33</sup> For a corporate defendant, this concept evidently is restricted to at most two states: its state of incorporation and the state of its principal place of business.<sup>34</sup> The Court has failed to explain why this restriction, which is significant, was necessary.

And now we see the new generation of specific jurisdiction cases. In *BMS* and *Ford*, the defendant had continuous, ongoing, and substantial purposeful contacts with the forum. The question became whether the plaintiff's claim was sufficiently related to the contacts to justify specific jurisdiction. In other words, the two-step inquiry of *World-Wide Volkswagen* became a three-step assessment: (1) purposeful contacts, (2) relatedness of the claim to the contacts, and, presumably, (3) whether jurisdiction was fair or reasonable.<sup>35</sup>

In *BMS*, 678 plaintiffs filed suit in a California state court against pharmaceutical giant Bristol-Myers Squibb (BMS),<sup>36</sup> seeking damages for personal injuries allegedly caused by BMS's drug Plavix (a blood thinner). BMS's contacts with California were extensive but could no longer support general jurisdiction.<sup>37</sup> The jurisdictional difficulty was that 592 of the plaintiffs

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<sup>29</sup> 564 U.S. 873, 882–84 (2011).

<sup>30</sup> See *id.* at 886–87. The plaintiff resided in the forum, the plaintiff was injured in the forum by a machine purchased by his employer, the forum had an interest in providing a remedy and regulating workplace safety, the witnesses to the injury and the machine were in the forum, and forum law governed the plaintiff's tort claim. *Id.*

<sup>31</sup> *Id.* at 886.

<sup>32</sup> *International Shoe Co. v. Washington* did not employ that phrase, but clearly embraced the notion of general jurisdiction. 326 U.S. 310, 318 (1945) ("[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.")

<sup>33</sup> The three cases working this transformation were *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1555 (2017), *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014), and *Goodyear, Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Many have criticized the Court's still-unexplained restriction of general jurisdiction. See, e.g., Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 551–52 (2012); see also *infra* note 160.

<sup>34</sup> See *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1784, 1789 (2017) (Sotomayor, J., dissenting).

<sup>35</sup> *Id.* at 1781–83 (2017) (majority opinion).

<sup>36</sup> *Id.* at 1778.

<sup>37</sup> *Id.* at 1778, 1780.

were not residents of California. The Plavix they ingested was not manufactured, packaged, labeled, or sold in California.<sup>38</sup> Those 592 plaintiffs could not connect their *claims* to BMS's California *contacts*.<sup>39</sup> They did not get Plavix through California doctors; they did not ingest Plavix in California; and they were neither injured nor treated in California.<sup>40</sup> On the other hand, the California court had specific jurisdiction over BMS for the claims by the eighty-six plaintiffs who were residents of California.<sup>41</sup> The jurisdictional "relatedness" issue was a difficulty only for the non-California plaintiffs.

The relatedness requirement, now front and center, required the Court to wrestle with a standard phrase in specific jurisdiction cases: the plaintiff's claim must "arise out of or relate to" the defendant's forum activities.<sup>42</sup> Long ago, in his dissent in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>43</sup> Justice Brennan argued that the phrase should be split, with "arise out of" meaning something different from "relate to."<sup>44</sup> Specifically, he argued, "relate to" is broader than "arise out of."<sup>45</sup> In the Brennan view, if a defendant has massive contacts with the forum, specific jurisdiction could be upheld based upon a lesser showing of relatedness than if the defendant had limited contacts with the forum.<sup>46</sup> In *BMS*, however, the Court rejected both the effort to parse the phrase ("arise out of or related to") and the effort to engage a sliding scale, which the California Supreme Court used to assert jurisdiction over all the claims.<sup>47</sup> Bluntly, said the majority, there is no sliding scale and the plaintiffs' claims neither "arose from or related to" the defendant's contacts.<sup>48</sup> On the facts, the non-Californians' claims simply did not relate sufficiently to BMS's California contacts to justify jurisdiction.<sup>49</sup>

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<sup>38</sup> *Id.* at 1778.

<sup>39</sup> *Id.* at 1781.

<sup>40</sup> *Id.* at 1778.

<sup>41</sup> *Id.*

<sup>42</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The actual phrase used in *International Shoe* is "arise out of or are connected with," but over the years the Court's "most common formulation of the rule" uses the phrase "arise out of or relate to" the suit. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021).

<sup>43</sup> 466 U.S. 408 (1984).

<sup>44</sup> *Id.* at 425 (Brennan, J., dissenting).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 426. Justice Brennan made this argument in asserting that Texas had specific jurisdiction in *Helicopteros*. *Id.* The majority of the Court in that case did not address the issue, however, because it interpreted the plaintiffs' inartful brief to concede that there was no specific jurisdiction. *Id.* at 415 (majority opinion).

<sup>47</sup> *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

*BMS* provided little guidance. The Court did nothing to resolve a split of approaches to relatedness that had evolved in state and lower federal courts.<sup>50</sup> For instance, must the defendant’s contact with the forum include the very product (such as the particular pill) that harmed the plaintiff? Must there be a causal relationship between contact and claim? If so, must it be one of proximate cause, but-for cause, or some other form of causation? These and other open questions required the Court to return to the field, which it did in *Ford*.

Our focus is *Ford*, which involved two consolidated cases.<sup>51</sup>

## II. *FORD*: THE MAJORITY OPINION AND THE POTENTIAL SLIDING SCALE APPROACH

The consolidated cases in *Ford* involved similar facts.<sup>52</sup> For convenience, the Court principally discussed the Minnesota case. There, a Crown Victoria manufactured by Ford Motor Company outside Minnesota and marketed into North Dakota was involved in a rear-end collision with a snowplow.<sup>53</sup> The passenger-side airbag did not deploy, which resulted in serious injury to the passenger, who sued Ford in Minnesota.<sup>54</sup> Ford conceded its purposeful contact with Minnesota.<sup>55</sup> Indeed, its contact was massive and included dealerships, advertising, vehicle sales, and the provision of parts and service.<sup>56</sup> Likewise, Ford did not argue that jurisdiction in Minnesota would be unfair. Rather, Ford’s entire argument was that its contacts with the forum were not sufficiently related to the suit—specifically, that it neither manufactured nor marketed the specific Crown Victoria in Minnesota.<sup>57</sup>

*Ford* took a markedly different approach to relatedness than *BMS*. Following Justice Brennan’s suggestion in *Helicopteros*, the majority bifurcated the “arise out of or relate to” phrase and, in so doing, inevitably rekindled discussion of a sliding-scale analysis,<sup>58</sup> although it probably will not be called that after the term

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<sup>50</sup> See *infra* note 130.

<sup>51</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1022 (2021).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1023.

<sup>54</sup> *Id.* The companion case was from Montana and involved a wreck in that state of a Ford Explorer originally sold by Ford in Washington. *Id.* The Montana wreck resulted in the death of the plaintiff’s decedent who, like plaintiff, was a resident of Montana. *Id.*

<sup>55</sup> *Id.* at 1026.

<sup>56</sup> *Id.* at 1028.

<sup>57</sup> See Brief for Petitioner at 2, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369), 2020 U.S. S. Ct. Briefs Lexis 5332, at \*4.

<sup>58</sup> *Ford*, 141 S. Ct. at 1026.

was pilloried in *BMS*.<sup>59</sup> In the Minnesota case involved in *Ford*, the Court noted the defendant's considerable contacts with the forum: it maintained eighty-four independent dealerships in the state, which sold new Fords and offered service and parts for new and used vehicles; it advertised through multiple media in the state; it sold thousands of new vehicles there, including the same year and model that was involved in the plaintiff's wreck; and it provided parts to stores throughout the state.<sup>60</sup>

Ford's contacts with Minnesota were so "continuous and systematic" that pre-2011 it surely would not have contested jurisdiction. In fact, from 1945 (when *International Shoe* was decided) until 2011, Ford did not make a single constitutional challenge to personal jurisdiction in a single American case with similar facts.<sup>61</sup> But now, after the Court's contraction of general jurisdiction, the case had to sink or swim on specific jurisdiction.

And here, although the plaintiff was a Minnesota resident injured on a Minnesota road,<sup>62</sup> the car in question did not get into Minnesota through Ford's actions. Ford did not design or manufacture the car in Minnesota.<sup>63</sup> It did not sell the car in Minnesota (Ford sold the car to a dealership in North Dakota, where it was purchased by its first owner).<sup>64</sup> The car made its way to Minnesota through a series of private second- and third-hand sales, eventually being owned by the Minnesota resident who drove it when the crash occurred.<sup>65</sup>

Ford did not (and could not) argue it lacked purposeful contacts with Minnesota in light of the dealerships and sales.<sup>66</sup> Similarly, Ford did not (and

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<sup>59</sup> *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1782 (2017).

<sup>60</sup> *Ford*, 141 S. Ct. at 1028.

<sup>61</sup> Charles W. "Rocky" Rhodes, *The Roberts Court's Jurisdictional Revolution within Ford's Frame*, 51 STETSON L. REV. (forthcoming 2021) (manuscript at 2) (on file with authors) (noting a Westlaw search shows that Ford made no such challenge in any domestic case during those years).

<sup>62</sup> *Ford*, 141 S. Ct. at 1023.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See Brief for Petitioner at 9, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369), 2020 U.S. S. Ct. Briefs Lexis 5332, at \*12. The basic facts, as noted, were the same in the companion Montana case. There, a Montana resident was killed in the crash of a 1996 Ford Explorer. *Ford*, 141 S. Ct. at 1023. Ford engaged in the same activities in Montana as in Minnesota, with the exception that it maintained thirty-six dealerships. *Id.* at 1028. The wreck occurred on a Montana highway and, although Ford sold the same model in Montana, the car involved was manufactured in Canada and initially sold in Washington. *Id.* at 1023. It got to Montana through a series of private transactions. *Id.* at 1028.

<sup>66</sup> *Id.* One interesting argument might have been whether the automobile involved in the case constituted the requisite contact between Ford and Minnesota. The argument would have had to contend with the holding in *World-Wide Volkswagen* that the car's getting into the forum through the unilateral act of the plaintiff does not constitute a contact.

could not) argue that the exercise of jurisdiction in Minnesota would be unfair. Its entire argument was based upon relatedness: the plaintiff’s claim did not—according to Ford—“arise out of or relate to” Ford’s contacts with the forum.<sup>67</sup> It argued that the relatedness requirement can be satisfied only by a “causal” relationship—specifically, that the *very car* in which the plaintiff was injured was (1) designed, (2) manufactured, or (3) sold directly by Ford in the forum.<sup>68</sup>

The Court unanimously rejected this argument and upheld specific jurisdiction.<sup>69</sup> The majority opinion by Justice Kagan did exactly what the majority in *BMS* refused to do: it adopted Justice Brennan’s approach that the phrase “arise out of” be separated from the phrase “relate to.”<sup>70</sup> The former, the majority concluded, requires causation: that the defendant’s contact with the forum *caused* the harm suffered by the plaintiff.<sup>71</sup> But—and this is a crucial point—a causal relationship is not required for all cases.<sup>72</sup> In some cases, all that is required is that the defendant’s contact with the forum “relate to”—i.e., have some factual connection with—the plaintiff’s claim.<sup>73</sup>

How does a court decide which test (“arise out of” or “related to”) to use? Here, the Court also appeared to do what it refused to do in *BMS*: recognize (although not in so many words) a sliding scale. If the defendant has a great deal of contact with the forum, such as Ford’s contacts with Minnesota, the plaintiff need only satisfy the “relate to” test to support specific jurisdiction. On the other hand, if the defendant has relatively less contact with the forum, the plaintiff perhaps must show a causal relationship between the defendant’s contact and her claim. But the Court failed to explain how much of a causal relationship is required for a claim to “arise out of” forum contacts: but-for causation? Proximate causation? Some other type of causation? Maybe as one slides up the

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<sup>67</sup> See Brief for Petitioner at 1, *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369), 2020 U.S. S. Ct. Briefs Lexis 5332, at \*4.

<sup>68</sup> *Ford*, 141 S. Ct. at 1023.

<sup>69</sup> *Id.* at 1022. The majority emphasized that its holding was presaged by its discussion, in dictum, about jurisdiction over the manufacturer of the vehicle involved in *World-Wide Volkswagen*. *Id.* at 1027 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 297 (1980)). There, in rejecting jurisdiction over two New York defendants for lack of contact with Oklahoma, the Court said that the forum certainly had personal jurisdiction over the German manufacturer. *Id.* (citing *World-Wide Volkswagen*, 444 U.S. at 295, 297). The Court failed to notice one distinction between the cases: in *World-Wide Volkswagen*, the plaintiff was not a resident of the forum. *World-Wide Volkswagen*, 444 U.S. at 288. The Court’s statement in *Ford* makes clear that this difference will not affect jurisdiction. *Ford*, 141 S. Ct. at 1027–28. Moreover, in *Daimler*, the Court said, “[W]e used the Audi/Volkswagen scenario as a paradigm case of specific jurisdiction.” *Id.* (citing *Daimler AG v. Bauman*, 571 U.S. 117, 124 (2014)).

<sup>70</sup> *Ford*, 141 S. Ct. at 1026; see *supra* notes 58–59 and accompanying text.

<sup>71</sup> *Ford*, 141 S. Ct. at 1026.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

scale to more substantial contacts, a weaker form of causation is needed—such as pure “but-for” causation—but on more isolated contacts, a stronger form of causation, such as proximate causation (with the requirements of foreseeability and directness it entails<sup>74</sup>), is required. Once one reaches the volume of contacts that once supported general jurisdiction, a non-causal relationship suffices. But only the latter proposition is free from doubt; the Court dropped only hints as to how to resolve cases with fewer contacts.

An early Supreme Court case that stands at the opposite end of the relatedness scale is *McGee v. International Life Insurance Co.*<sup>75</sup> As far as the *McGee* record showed, the defendant Texas life insurance company had only one insured in the forum state of California.<sup>76</sup> The insured died, but the Texas company refused to pay the insured’s mother (the beneficiary), claiming that the death was a suicide and thus not covered.<sup>77</sup> The mother sued in California.<sup>78</sup> The Supreme Court held that the Texas company had minimum contacts with California.<sup>79</sup> As scant as the defendant’s contacts were with California, it is hard to imagine a tighter relationship between the contacts and the claim. The Texas company accepted the benefits (premiums) of having an insured in California, and the claim was on that policy.<sup>80</sup> It is an entirely foreseeable consequence of doing business with a Californian that a dispute with that Californian will arise from those dealings. So, while the *quantity* of the contacts could hardly have been smaller in *McGee*, the *quality* of them could hardly have been greater. In *Ford*, the quantity of the contacts meant that a looser relationship sufficed; in *McGee*, the direct causal relationship between the contacts and the claim meant that a tiny volume of contacts sufficed.

One should not assume that *Ford* overruled *BMS sub silentio*. The defendant’s contacts with California in *BMS* were vastly greater than the Texas company’s contacts in *McGee*. But—as to the non-California plaintiffs—the relationship between the defendant’s California contacts and their claims was attenuated. They probably saw identical television ads, took the same drug, and suffered similar injuries, but not in California.<sup>81</sup> Unlike *Ford*, in which the market for used Ford vehicles surely depended on the availability of service,

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<sup>74</sup> See Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. U. L. REV. 77, 102 n.147 (2012).

<sup>75</sup> 355 U.S. 220 (1957).

<sup>76</sup> *Id.* at 222.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 221.

<sup>79</sup> *Id.* at 223.

<sup>80</sup> *Id.*

<sup>81</sup> *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017).

replacement parts, and so on in the forum state,<sup>82</sup> nothing about BMS's presence in California could have induced a New Jersey plaintiff to take Plavix.

Perhaps, from the standpoint of efficiency, state courts could develop something akin to the federal statute consolidating large numbers of related cases for pretrial matters as federal courts do in multi-district litigation.<sup>83</sup> Indeed, Justice Sotomayor's dissent urged that the efficiencies of a single nationwide class action for the Plavix claims justified jurisdiction in California because the defendant conceded that the California and non-California claims were identical.<sup>84</sup> This relationship between the cases should be sufficient, she argued.<sup>85</sup> But the rest of the Court disagreed,<sup>86</sup> and nothing in *Ford* suggests they have changed their mind.

More broadly, distinguishing between contacts that "arise out of" and "relate to" the cause of action seems to engage an assessment like the old "continuous and systematic" test for general jurisdiction. The *Ford* majority opinion reads like the "old era" (pre-2011) general jurisdiction cases: the Court noted Ford's "substantial business in the State,"<sup>87</sup> that Ford "systematically served" the state market,<sup>88</sup> that it "regularly conduct[ed]" business in the state,<sup>89</sup> and, in discussing *World-Wide Volkswagen*, the defendant's "systematic contacts" with the forum.<sup>90</sup> Of course, here such extensive ties with the forum no longer support *general* jurisdiction. But they do permit *specific* jurisdiction over the defendant for a claim that merely "relates to" those ties. The Court cautions that the "relates to" test does not mean "anything goes" but, instead, imposes "real limits" to protect the defendant from litigation in an inappropriate place.<sup>91</sup> But what are those limits?

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<sup>82</sup> See *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1028 (2021).

<sup>83</sup> 28 U.S.C. § 1407.

<sup>84</sup> *BMS*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting).

<sup>85</sup> *Id.* at 1786–87, 1789. In view of the "interstate judicial system's shared interest in obtaining the most efficient resolution of controversies," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1984), Justice Sotomayor had a good point. Cf. Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. L. F. 119, 138 (2001) (arguing that the personal jurisdiction doctrine might facilitate litigation in a single forum of all claims arising from a single transaction or occurrence).

<sup>86</sup> *BMS*, 137 S. Ct. at 1783–84.

<sup>87</sup> *Ford*, 141 S. Ct. at 1022.

<sup>88</sup> *Id.* at 1028.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1029. Similarly, Justice Alito's concurring opinion referred to Ford's "heavy presence" in Minnesota. *Id.* at 1032 (Alito, J., concurring in the judgment). The majority contrasted such continuous ties with "isolated or sporadic" contacts. *Id.* at 1028 n.4 (majority opinion).

<sup>91</sup> *Id.* at 1026.

On the facts of the case, *Ford* was easy. Ford's extensive activities in Minnesota were aimed at creating a market for Ford vehicles in that state. By advertising, providing parts, and maintaining dealerships that repair used vehicles, the company encouraged Minnesotans to become Ford owners, even if they bought their car out of state in a second-hand transaction.<sup>92</sup> Ford cultivated relationships with Minnesota residents. The Court was willing to assume that the plaintiffs "might never have bought" the used car "except for Ford's contacts with their home States."<sup>93</sup> The plaintiff's claim "relate[d] to" these contacts even though the very car in which the plaintiff was injured got into the forum through the acts of third parties. But that tells us little about the needed relationship if the contacts are less voluminous.

### III. THE ALITO CONCURRENCE

Justice Alito concurred in the judgment in *Ford*.<sup>94</sup> Although he "agree[d] with the main thrust of the Court's opinion,"<sup>95</sup> and emphasized the same "heavy presence" of Ford in Montana and Minnesota,<sup>96</sup> he wrote separately to criticize this "new gloss . . . on our case law."<sup>97</sup> He complained that by splitting "arise out of" from "relate to," the majority had recognized "a new category" of specific jurisdiction cases, in which plaintiffs' claims "are not caused by" the defendant's forum contacts "but nevertheless sufficiently 'relate to' those contacts in some undefined way . . . ."<sup>98</sup> Such a broad concept, he asserted, on the one hand, risks "needless complications," since the majority had given no indication of what the limits on "relate to" would be.<sup>99</sup> On the other hand, the entire phrase appropriately limits the scope of specific jurisdiction by requiring some sort of "causal link" between the forum contacts and the claim, just not the strict "but for" causation test that Ford had urged.<sup>100</sup>

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<sup>92</sup> See *id.* at 1022–23.

<sup>93</sup> *Id.* at 1029.

<sup>94</sup> *Id.* at 1032 (Alito, J., concurring in the judgment).

<sup>95</sup> *Id.* at 1033.

<sup>96</sup> *Id.* at 1032.

<sup>97</sup> *Id.* at 1033.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1033–34.

<sup>100</sup> *Id.* at 1033. In this case, the causal link was present. It was reasonable to infer that without Ford's activities in the forum state, "the vehicles in question here would never have been on the roads in Minnesota and Montana . . . [because] [t]he whole point of those activities was to put more Fords (including those in question here) on Minnesota and Montana roads." *Id.* This "common-sense relationship between Ford's activities and these suits . . . is causal in the broad sense of the concept" and was sufficient "without strict proof of the type Ford would require." *Id.*

Justice Alito correctly foresaw that the majority’s approach, and especially its de facto adoption of the sliding scale approach, which had been rejected in his opinion for the Court in *BMS*,<sup>101</sup> could enable the Court to expand the scope of specific jurisdiction far beyond that currently permitted by *World-Wide Volkswagen* and its progeny.<sup>102</sup> At the same time, however, he noted that the current law of personal jurisdiction may not be “well suited for the way in which business is now conducted.”<sup>103</sup> This observation perhaps explains why he concurred rather than dissented. For, as he asked, how could “anyone seriously argue that requiring Ford to litigate these cases in Minnesota and Montana would be fundamentally unfair?”<sup>104</sup>

Indeed, how could they?<sup>105</sup> But despite Justice Alito’s contention that the case could be decided correctly “without any alteration or refinement of our case law,”<sup>106</sup> this is simply not so. Ford’s strict causation argument was not foreclosed by the Court’s prior cases.<sup>107</sup> Justice Alito’s causation requirement is just as much a “refinement” of the case law as the majority’s splitting of the “arise out of or relate to” phrase and its use of a de facto sliding scale. Apparently, Justice Alito would prefer to expand the scope of specific jurisdiction to cover cases like *Ford* in a less expansive way than would the majority, or at least in a way that does not reject so much of his handiwork in *BMS*.<sup>108</sup>

#### IV. THE GORSUCH CONCURRENCE

Justice Gorsuch, joined by Justice Thomas, also concurred in the

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<sup>101</sup> *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017).

<sup>102</sup> *See Ford*, 141 U.S. at 1033–34 (Alito, J., concurring in the judgment).

<sup>103</sup> *Id.* at 1332.

<sup>104</sup> *Id.*

<sup>105</sup> As Arthur’s wife (who is not a lawyer) said when he stated the case to her, any other result would be “stupid.” Justice Alito apparently agrees. Borchers gave a mid-term exam to his first-year students in the Fall of 2020 using the facts of the Minnesota *Ford* case and almost all his students concluded that Ford was subject to jurisdiction. However, the fact that some of them concluded otherwise, and that there were two dissenting justices in the Minnesota Supreme Court (although none in the Montana case) perhaps shows that reading too many minimum-contacts cases can rob you of your common sense. *See Bandemer v. Ford Motor Co.*, 931 N.W.2d 744, 755 (Minn. 2019) (Anderson, J., dissenting); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 443 P.3d 407 (Mont. 2019).

<sup>106</sup> *Ford*, 141 S. Ct. at 1032 (Alito, J., concurring in the judgment).

<sup>107</sup> *See supra* notes 67–68 and accompanying text.

<sup>108</sup> He may be particularly solicitous of *BMS*’s strong rejection of a sliding scale: “Our cases provide no support for this approach, which resembles a *loose and spurious form* of general jurisdiction.” *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1781 (2017) (emphasis added). As we have explained, *Ford* now provides support for this approach. *See supra* Part II.

judgment.<sup>109</sup> The opinion is divided into two parts. The first is a critique of the majority's minimum-contacts analysis.<sup>110</sup> The second—and more radical—is an invitation to reconsider *International Shoe* and the link between the Due Process Clause and personal jurisdiction based on the original understanding of the Fourteenth Amendment.<sup>111</sup>

### A. *The Critique of the Majority Opinion*

Like Justice Alito, Justice Gorsuch criticized the majority's parsing of the "arise out of or relate to" phrase.<sup>112</sup> As he noted, construing a causal linkage between the defendant's forum-state activities and the operative events of the suit in purely "but for" terms is a trivial check on the meaning of "relate to."<sup>113</sup> He thought the phrase best read as a "unit,"<sup>114</sup> although he did not explicitly offer an alternative reading. The majority variously described Ford's activities as having a "relationship," "affiliation," or "connection" with the forum state.<sup>115</sup> However, Justice Gorsuch complained that this leaves the second step of specific jurisdiction—the needed relationship of the defendant's forum-state contacts to the cause of action—"far from clear."<sup>116</sup>

The majority opinion and Justice Gorsuch's concurrence both bucked against the radical limitation of general jurisdiction in *Goodyear* and *Daimler* to corporate defendants' "homes."<sup>117</sup> Justice Gorsuch's concurrence asked a reasonable question: what sense does it make to limit a multinational corporation with multiple headquarters to two homes—its principal place of business (defined apparently by the "nerve center" test that applies to the federal venue statute)<sup>118</sup> and its state of incorporation?<sup>119</sup>

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<sup>109</sup> *Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring in the judgment).

<sup>110</sup> *Id.* at 1034–36.

<sup>111</sup> *See id.* at 1036–39.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; *see also* *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) (holding that receipt by plaintiffs in forum state of advertisement for cruise was a related contact because injury would not have occurred but for the forum-state act), *rev'd on other grounds*, 498 U.S. 485 (1991).

<sup>114</sup> *Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring in the judgment).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1034.

<sup>117</sup> *Id.* at 1024–25 (majority opinion); *id.* at 1034 (Gorsuch, J., concurring in the judgment).

<sup>118</sup> *See Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

<sup>119</sup> *Ford*, 141 S. Ct. at 1036–38 (Gorsuch, J., concurring in the judgment). Justice Gorsuch attempted to lean on footnote dictum that corporations might have another home besides these two. *See id.* at 1034 (citing *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017)). But if these extra homes exist, they are extremely hard to find. *See BNSF*, 137 S. Ct. at 1560–61 (Sotomayor, J., dissenting in part). Perhaps a more apt analogy would be the multiple "abodes" an individual can have for abode service of process. *See, e.g., Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 257 (2d Cir. 1991).

Justice Gorsuch’s concurrence discussed extensively the majority’s “duck decoy” hypothetical.<sup>120</sup> The majority argued, and Justice Gorsuch agreed, that a sole proprietor in Maine selling an occasional home-made duck decoy over the internet to an out-of-state buyer is much differently positioned from Ford with its dealerships, advertising, and the resources to hire lawyers in any state.<sup>121</sup> But Justice Gorsuch’s concurrence professed confusion as to how, under the majority’s test, the duck decoy creator could be distinguished in a principled fashion from Ford.<sup>122</sup>

However, one cannot always neatly separate the quantity and quality of the defendant’s contacts. A large volume of commercial activity connotes a purposeful effort to connect with, and a deeper relationship to, the forum state. Ford sold many Crown Victoria and Explorer models in the forum states because it is a vastly larger enterprise and invests infinitely more marketing resources than a hobbyist with an Etsy store. Ford advertises, has dealerships, services cars, holds promotions, and sells repair parts in every state.<sup>123</sup> Moreover, the resale market exists in part due to the availability of service and repair parts for Ford vehicles.<sup>124</sup> If the duck decoy crafter sold one to a Nebraskan, who then resold it to a Coloradan friend who dropped it and the decoy splintered and injured the eye of the Coloradan end-purchaser, it is easy to distinguish that case from *Ford*. The duck decoy seller does not have related contacts because his connection to Colorado is trivial, even if he also sold a few other decoys directly to Coloradans. The decoy maker is not promising to provide services or do anything else that serves the Colorado resale market; there is no meaningful relationship between his Etsy store and the Coloradan’s eye injury.

Both the majority and Justice Gorsuch seemingly would like to ditch (quietly) the “essentially at home” test for general jurisdiction.<sup>125</sup> The difference between their two approaches is which exit door each would choose. The majority—as discussed above<sup>126</sup>—appeared to adopt a sliding scale; the greater the volume of contacts, the more likely they are related to the claim. But the majority could not use that term after it was pilloried in the last Supreme Court

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<sup>120</sup> *Ford*, 141 S. Ct. at 1035, 1038 (Gorsuch, J., concurring in the judgment). Duck decoys are man-made models of ducks, floated in the water by duck hunters to fool live ducks into thinking that it is a safe water. See *Duck Decoy (Model)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Duck\\_decoy\\_\(model\)](https://en.wikipedia.org/wiki/Duck_decoy_(model)) (Dec. 28, 2020, 6:37 PM).

<sup>121</sup> *Ford*, 141 S. Ct. at 1028 n.4 (majority opinion); *id.* at 1035 (Gorsuch, J., concurring in the judgment).

<sup>122</sup> *Id.* at 1035 (“[B]etween the poles of ‘continuous’ and ‘isolated’ contacts lie a virtually infinite number of ‘affiliations’ waiting to be explored.”).

<sup>123</sup> *Id.* at 1022–23 (majority opinion).

<sup>124</sup> *Id.* at 1028.

<sup>125</sup> See *id.* at 1026; *id.* at 1034 (Gorsuch, J., concurring in the judgment).

<sup>126</sup> See *supra* notes 87–93 and accompanying text.

minimum-contacts case.<sup>127</sup> Justice Gorsuch would like to slip out by finding more “homes” for large corporations.<sup>128</sup> Justice Gorsuch complained that the majority’s relationship test lacks clarity,<sup>129</sup> but the pre-*Goodyear* tests for “continuous and systematic” contacts, which a search for additional corporate homes would likely resemble, were also unclear.<sup>130</sup>

Few would describe the Supreme Court’s personal jurisdiction jurisprudence as Justice Holmes’s “seamless web.”<sup>131</sup> But one can give all three *Ford* opinions credit for this much: they recognized the issue as mostly one of fairness.<sup>132</sup> *Ford* could not plausibly claim that it would have been fairer to litigate the cases in the states where *Ford* initially sold the vehicles. The witnesses, the physical evidence, a view of the accident scene, the residence of the injured parties and co-defendants, and everything else necessary for a fair trial pointed to the injury states.<sup>133</sup> *Ford*’s obvious motive was to impede the plaintiffs’ prosecution of the case and perhaps avoid liability if the limitations period had run in other forums and if no savings statute applied.<sup>134</sup>

## B. *International Shoe’s Vitality*

The second portion of Justice Gorsuch’s concurrence questioned the utility of the general/specific jurisdiction dichotomy implicit in *International Shoe*<sup>135</sup>—and the core of *International Shoe* itself—and remarked that “it’s hard not to ask how we got here and where we might be headed.”<sup>136</sup> This might prompt eye-rolling as if Justice Gorsuch would take us back to the horse-and-buggy era, but in fact he was arguing for broader corporate jurisdiction. His

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<sup>127</sup> See *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017).

<sup>128</sup> *Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring in the judgment) (“[I]t seems almost quaint [to assign only two homes] in 2021 when corporations with global reach often have massive operations spread across multiple States.”).

<sup>129</sup> *Id.* at 1034–35.

<sup>130</sup> See PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRIS A. WHYTOCK, *CONFLICT OF LAWS* 382–84 (6th ed. 2018).

<sup>131</sup> See James L. Huffman, *From Legal History to Legal Theory: Or Is It the Other Way Around?*, 40 *TULSA L. REV.* 579, 579–80 n.3 (2005) (noting that the quotation is usually attributed to Justice Holmes, but that English lawyer and legal historian Frederic Maitland may have been the first to use it in a legal context).

<sup>132</sup> *Ford*, 141 S. Ct. at 1029–30; *id.* at 1039 (Gorsuch, J., concurring in the judgment).

<sup>133</sup> *Cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (noting private factors in forum non conveniens dismissals).

<sup>134</sup> *E.g.*, IOWA CODE § 614.10 (2021) (giving plaintiff six months to refile an action dismissed on non-merits grounds).

<sup>135</sup> See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317–18 (1945); see also Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 *HARV. L. REV.* 1121, 1136, 1144, 1147 (1966), cited in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8–9 (1984).

<sup>136</sup> *Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring in the judgment).

opinion, for a few paragraphs, reviewed the Court’s jurisprudence leading to *International Shoe*.<sup>137</sup> As he noted, state courts in the *Pennoyer-to-International-Shoe* era treated corporations doing business in the forum state as “present” and thus amenable to service.<sup>138</sup> Justice Gorsuch cited,<sup>139</sup> with seeming approval, the Court’s decision in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,<sup>140</sup> which held that states could require out-of-state corporations to appoint an agent for service of process, and thus render the corporation amenable to general jurisdiction.<sup>141</sup> But, as Justice Gorsuch noted, in a series of Supreme Court “muscular interventions,”<sup>142</sup> corporations found “a more receptive audience” in a Court that shielded them from jurisdiction in states where they conducted significant commerce.<sup>143</sup>

Although he did not get one, Justice Black—who wrote separately in *International Shoe*<sup>144</sup>—deserved a hat tip from Justice Gorsuch. Justice Black saw as frivolous the International Shoe Company’s due-process argument for avoiding suit where it sold a significant quantity of shoes.<sup>145</sup> Justice Black, ever the constitutional literalist, argued that “it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere.”<sup>146</sup> His opinion concluded, “I believe that the Federal Constitution leaves to each State, without any ‘ifs’ or ‘buts,’ a power to . . . open the doors of its courts for its citizens to sue corporations whose agents do business in those States.”<sup>147</sup>

Essentially, this was Justice Gorsuch’s argument. Unmoored from constitutional language, jurisdictional law has given corporations doing business on an interstate<sup>148</sup> or international<sup>149</sup> scale solicitous treatment as defendants. Justice Gorsuch mused: “Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the

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<sup>137</sup> *Id.* at 1036–37.

<sup>138</sup> *Id.* at 1037 (citing *Pullman Palace Car Co. v. Lawrence*, 22 So. 53, 55–56 (Miss. 1897)).

<sup>139</sup> *Id.*

<sup>140</sup> 243 U.S. 93, 95 (1917).

<sup>141</sup> *Id.* at 96.

<sup>142</sup> *Ford*, 141 S. Ct. at 1039 (Gorsuch, J., concurring in the judgment).

<sup>143</sup> *Id.* at 1036–37 (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517–18 (1923)).

<sup>144</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 322 (opinion of Black, J.).

<sup>145</sup> *Id.* at 323.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 324–25.

<sup>148</sup> *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980).

<sup>149</sup> *See, e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 894 (2011); *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 105–06 (1987).

name of the Constitution. Less clear is why.”<sup>150</sup> Justice Black called it. Left floating free of the rest of due process jurisprudence, the minimum-contacts test became a doctrinal orphan, allowing considerations alien to the Due Process Clause—such as “state sovereignty”<sup>151</sup> and “interstate federalism”<sup>152</sup>—to significantly determine the state-court forums available to private litigants.<sup>153</sup>

And then there is the possibility that the conventional notion that *Pennoyer v. Neff*<sup>154</sup> constitutionalized the limits of state-court territorial reach is a “giant misunderstanding.”<sup>155</sup> The Supreme Court routinely asserted, without judicial question until *Ford*, that *Pennoyer* established direct due-process limits on personal jurisdiction; if a state reaches too far it violates due process.<sup>156</sup> However, extensive historical analyses (one of which Justice Gorsuch’s opinion cited) show that the question of whether *Pennoyer* established the Due Process Clause as the source of jurisdictional limitations is debatable.<sup>157</sup> As Justice Gorsuch’s opinion put it, these analyses “at least seek to answer the right question”<sup>158</sup>—that is, what do the Constitution’s text, structure, and history require?

<sup>150</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring in the judgment).

<sup>151</sup> *J. McIntyre*, 564 U.S. at 884.

<sup>152</sup> *World-Wide Volkswagen*, 444 U.S. at 293.

<sup>153</sup> See Patrick J. Borchers, *The Muddy-Booted, Disingenuous Revolution in Personal Jurisdiction*, 70 FLA. L. REV. F. 21, 24 (2018); Harold Lewis, *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in Personal Jurisdiction Jurisprudence*, 58 NOTRE DAME L. REV. 699, 699 (1983).

<sup>154</sup> 95 U.S. 714 (1878).

<sup>155</sup> See Borchers, *supra* note 153, at 22.

<sup>156</sup> See, e.g., *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1779 (2017) (“It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts.”); *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (“In [*Pennoyer*], decided shortly after the enactment of the Fourteenth Amendment, the Court held that a tribunal’s jurisdiction over persons reaches no farther than the geographic bounds of the forum.”).

<sup>157</sup> See Steven Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1255 (2017), *cited in Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1036 n.7 (2021) (Gorsuch, J., concurring in the judgment) (arguing that *Pennoyer* invoked the Due Process Clause only as a mechanism to enforce the general common law of jurisdiction, not to set rules of jurisdiction); see also Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 24, 40 (1990) (arguing that *Pennoyer* may have invoked the Due Process Clause only to ensure that defendants were able to challenge jurisdiction under state law and that the Supreme Court should largely abandon its efforts to regulate state-court jurisdiction); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 499–500 (1987) (referring to *Pennoyer*’s reliance on the Due Process clause as “startling”); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 501 (1981) (providing an exhaustive review of due-process and full-faith-and-credit law and arguing that *Pennoyer* was erroneously decided).

<sup>158</sup> *Ford*, 141 S. Ct. at 1036 n.7 (Gorsuch, J., concurring in the judgment).

Clearly this is an invitation for scholarly inquiry into the relationship between the Fourteenth Amendment's Due Process Clause and limits on personal jurisdiction. We will not attempt in this brief article to engage this project in depth. Some state courts, in the immediate aftermath of *Pennoyer*, did not view the Due Process Clause as a restraint on their jurisdiction.<sup>159</sup> If the Supreme Court engages in a fundamental reconsideration of the constitutional bases for limiting state-court jurisdiction, matters could change considerably. Congress and state legislatures might gain considerably more latitude in defining the boundaries of personal jurisdiction. But for now, the minimum-contacts test retains its status as the fundamental test of personal jurisdiction.

## V. WHAT NOW?

Before engaging in a catalogue of questions left unanswered by the *Ford* opinion, we note that the Supreme Court got it right in *Ford*. We and other commentators have had plenty to say about cases in which we think the Supreme Court reached a dubious result,<sup>160</sup> and other cases in which the Supreme Court got the result right but took away forum choices that we think should be available to plaintiffs.<sup>161</sup> So, reaching an inarguably fair and just result for essentially the right reasons deserves a round of applause.

### A. Ford *Frustration*

That said, *Ford* is frustrating on several levels. First, the bifurcation of “arise out of” and “relate to” is significant, but the Court fails to tell us how the assessment is made.<sup>162</sup> At what point are contacts sufficient to invoke the “relates to” test? Second, if the “arise out of” test is applied, and causation between the defendant's activity and the plaintiff's claim is assessed, how is it to be judged? Is it but-for causation? Proximate causation? Some other type of causation?

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<sup>159</sup> See, e.g., *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137 (1881) (holding that jurisdiction over a corporation was allowed based on in-state service of its president, but with no other connection to the forum state).

<sup>160</sup> See, e.g., Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish for: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2002 (2014); Patrick J. Borchers, J. McIntyre, *Goodyear and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245–46 (2011); Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1164 (2015).

<sup>161</sup> See, e.g., Freer, *supra* note 160; Hoffheimer, *supra* note 33, at 551–52.

<sup>162</sup> *Ford*, 141 S. Ct. at 1026.

Most frustrating, perhaps, is the majority's lack of attention to methodology. *BMS* strongly implied that specific jurisdiction consists of three steps: (1) purposeful contact, (2) relatedness, and (3) an assessment of the fairness factors.<sup>163</sup> It is clear from *Ford* that the starting point is a concession of purposeful contact (which is obvious on the facts).<sup>164</sup> The majority opinion defines relevant contacts as requiring "purposeful availment"<sup>165</sup> but does not mention foreseeability, which had been established as relevant in *World-Wide Volkswagen*.<sup>166</sup> Still, the concept seems implicit in the *Ford* conclusion that Ford's level of contact in the forum gave it "fair warning" that it might be subjected to jurisdiction there.<sup>167</sup>

Less clear is how one assesses the fairness of specific jurisdiction. The Court long ago (in *World-Wide Volkswagen*) laid out five fairness factors,<sup>168</sup> and even Justice Ginsburg came to embrace the consideration of fairness as a separate check on jurisdiction, in specific jurisdiction cases, from that of minimum contacts.<sup>169</sup> In *Asahi Metal Industry Co. v. Superior Court of California*,<sup>170</sup> those fairness factors were enough to defeat jurisdiction even though four (maybe five) Justices thought that the defendant had minimum contacts with the forum state.<sup>171</sup> In *Ford*, the majority never addressed the reasonableness of jurisdiction (the fairness factors) expressly.<sup>172</sup> Still, the fairness considerations are present, but in *Ford* they were mixed in with relatedness.<sup>173</sup> For instance, concern with burden on the defendant is addressed by the Court's conclusion that there is nothing unfair in making Ford defend where it does such substantial business (and reaps such substantial rewards).<sup>174</sup> And the forum state's interest is present in the Court's embrace of "interstate federalism."<sup>175</sup> Minnesota has an interest, the Court insists, that other states not intrude on its ability to provide a remedy

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<sup>163</sup> *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1781–83 (2017).

<sup>164</sup> *Ford*, 141 S. Ct. at 1024–25.

<sup>165</sup> *Id.*

<sup>166</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>167</sup> *Ford*, 141 S. Ct. at 1025. This conclusion is consistent with the *World-Wide Volkswagen* requirement of foreseeability that the defendant might be sued in the particular forum.

<sup>168</sup> *World-Wide Volkswagen*, 444 U.S. at 292.

<sup>169</sup> Justice Ginsburg did so in dictum in *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014).

<sup>170</sup> 480 U.S. 102 (1987).

<sup>171</sup> *Id.* at 113–16 (plurality opinion); *id.* at 116 (Brennan, J., concurring in part and concurring in the judgment); *id.* at 122 (Stevens, J., concurring in part and concurring in the judgment) (arguing that, although it was unnecessary to the result, he would be "inclined" to find purposeful availment based on volume of sales in the forum state).

<sup>172</sup> *See Ford*, 141 S. Ct. at 1022–32.

<sup>173</sup> *See id.* at 1026–30.

<sup>174</sup> *See id.* at 1026, 1030.

<sup>175</sup> *See id.* at 1030.

for its residents.<sup>176</sup> It also has an interest in enforcing its motor vehicle safety laws.<sup>177</sup> The plaintiff's interest in suing at home is clearly facilitated by upholding jurisdiction. Finally, the interest in efficient litigation is fostered by suit in Minnesota because the witnesses and relevant evidence will likely be there and (although the Court does not mention this) the forum state's law will govern on the merits.<sup>178</sup>

If the fairness factors are still a separate element of specific jurisdiction, the Court should say so. In *Asahi*, they defeated jurisdiction.<sup>179</sup> In *Burger King*, the Court suggested they might bolster the argument for jurisdiction in a case of marginal contacts.<sup>180</sup> If the fairness factors are subsumed under the relatedness inquiry, the Court should be explicit so that lower courts and lawyers can appropriately analyze and brief the issues.

### B. "Vacation Cases"

Perhaps the most common sort of cases presenting close questions of relatedness are what we call "vacation cases." Frequently, a plaintiff decides to vacation out of state (at a hotel, at a resort, or on a cruise ship), gets injured there, and returns and wishes to sue in her home state.<sup>181</sup> Can she get jurisdiction back home? Pre-2011, if it were a national enterprise, the answer was yes—on general jurisdiction grounds. But not now.

We could choose from scores of cases in this basic fact pattern, but a well-known Texas Supreme Court decision suits our purposes. *Moki Mac River Expeditions v. Drugg*<sup>182</sup> is a sad story. The plaintiffs' decedent (a thirteen-year-old boy) died in Utah on a river-rafting excursion.<sup>183</sup> The Texas-domiciled plaintiffs learned of the outdoor adventure through a friend.<sup>184</sup> There was no room for the boy on rafting adventures that year, but he was put on a waiting

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Not only that, but the plaintiff's suit against the driver of the vehicle (who was a Minnesota resident) would proceed in that state. Forcing the plaintiff to sue Ford in a different state would be wildly inefficient because it would require two suits, one against Ford in North Dakota and one against the driver in Minnesota.

<sup>179</sup> *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 113–16 (1987) (plurality opinion); *id.* at 116 (Brennan, J., concurring in part and concurring in the judgment).

<sup>180</sup> *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

<sup>181</sup> *See, e.g., Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 498 U.S. 485 (1991).

<sup>182</sup> 221 S.W.3d 569 (Tex. 2007).

<sup>183</sup> *Id.* at 573.

<sup>184</sup> *Id.*

list.<sup>185</sup> A place opened up the next year, and the plaintiffs paid for the boy to enroll in a fourteen-day trip.<sup>186</sup>

The decedent's mother corresponded by e-mail with the Utah-based defendant-outfitter from her home in Texas.<sup>187</sup> She decided to send her son on the trip based on its representation that “[y]ou don’t need ‘mountain man’ camping skills to participate in one of our trips, children age twelve or above are suited to participate, and [the defendant] has taken reasonable steps to provide you with appropriate equipment and/or skilled guides.”<sup>188</sup> She alleged that but for those representations, she would not have sent her son on the excursion.<sup>189</sup> Tragically, her son was killed on the second day of the excursion; a boulder blocked the group’s hiking path, the defendant’s guides failed to provide adequate guidance on how to get around the boulder safely, and her son fell to his death.<sup>190</sup>

The plaintiffs sued in Texas on a variety of theories, including negligent misrepresentation in the defendant’s materials, along with negligence of their employees in supervising the excursion.<sup>191</sup> The Texas Supreme Court, flummoxed by the array of tests used by other courts, invented one of its own. Courts on one side take the position that a bare causal relationship between the defendant’s forum state contacts suffices;<sup>192</sup> others take the position that all the liability-creating events need to take place in the forum state.<sup>193</sup> The Texas court attempted to hit a middle ground with a test that it called “substantial connection to operative facts.”<sup>194</sup> Applying this test, the Texas Supreme Court held that specific jurisdiction was lacking.<sup>195</sup>

But what would be the result with *Ford* on the books? Events of significance occurred in the forum state of Texas. The mother alleged that she was induced to send her young son on the trip because it was represented to be safe for children twelve or older. The defendant obviously knew it was dealing with a

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 585 (internal quotations omitted).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 573.

<sup>191</sup> *Id.*

<sup>192</sup> *See, e.g.,* *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 498 U.S. 485 (1991).

<sup>193</sup> *See* *Tecre Co. v. Buttonpro, Inc.*, 387 F. Supp. 2d 927, 933 (E.D. Wis. 2005) (citing *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986)) (applying the substantive relevance test).

<sup>194</sup> *Moki Mac*, 221 S.W.2d at 584.

<sup>195</sup> *Id.* at 588.

Texas customer. True, the guides who allegedly failed to take reasonable safety precautions are likely in Utah—although if it were a summer job, they may have headed back to their home states. Physical evidence of the condition of the trail would be in Utah, assuming (maybe but not assuredly) that it is in the same condition as it was at the time of the fatal fall.

One can argue as to whether Texas or Utah is a better forum. But to us, this seems like an “angels on the head of a pin” debate. Evidence and witnesses are spread across at least two states. Under *Ford*, a defendant—in a specific jurisdiction case—does not have an absolute constitutional right to draw the plaintiff to the defendant’s home state.<sup>196</sup> Perhaps sub-constitutional devices such as forum non conveniens could reroute the case to where the most physical evidence is located.<sup>197</sup> One of *Ford*’s major virtues is to end the exclusive focus on the inconvenience to the defendant and bring both parties into the calculus.

But even if there is (as we think there should be) jurisdiction on the *Moki Mac* facts, slight variations in the facts make it a stronger or weaker case for jurisdiction. For example, suppose that the defendant also had guided tours in Texas. Although this case is not as strong as *Ford*, the relationship between its Texas and Utah activities becomes more obvious. On the other hand, suppose the mother in *Moki Mac* had simply heard about the tour from a friend, never read any of the allegedly misleading literature, and simply filled out a form with preferred dates and mailed a check to Utah. Now all we have is pure but-for causation, which Justice Gorsuch pointed out is not much of a limitation.<sup>198</sup> In these very common fact patterns, we still do not have clear guidance.

### C. *Plaintiffs Injured Away from Home but Not on Vacation*

Vacation cases like *Moki Mac*, of course, are just a subset of a much larger set of cases in which plaintiffs are injured or otherwise harmed away from home. For example, suppose a resident of Georgia, traveling on business in Maine, slips and falls in a Walmart store there. Can she sue Walmart in Georgia, where Walmart has, if not a “veritable truckload of contacts” like *Ford*,<sup>199</sup> a veritable warehouse full of them? Will specific jurisdiction be available under *Ford*’s new sliding scale?<sup>200</sup> As in *Ford*, a forum resident sues a defendant with massive

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<sup>196</sup> See *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1032 (2021).

<sup>197</sup> See, e.g., *Fennell v. Ill. Cent. R.R. Co.*, 987 N.E.2d 355, 359–60 (Ill. 2012); *Stangvik v. Shiley Inc.*, 819 P.2d 14, 17 (Cal. 1991); *Chambers v. Merrell-Dow Pharms.*, 519 N.E.2d 370, 373 (Ohio 1988).

<sup>198</sup> *Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring in the judgment).

<sup>199</sup> *Id.* at 1031 (majority opinion).

<sup>200</sup> This would have been an easy case for contacts-based general jurisdiction prior to *Goodyear* and its progeny. See HAY, *supra* note 130, at 382–84.

forum state contacts. Unlike in *Ford*, she suffered her injury out of state. Should that distinction make a difference? Unlike the out-of-state plaintiffs in *BMS*, however, she is a resident of the forum. Would that, coupled with Walmart's massive *physical* presence in Georgia, be enough?

For yet another example, suppose one of the *Ford* plaintiffs had been injured in a neighboring state while commuting to work there. May he still sue at home? The only distinction from the actual case is that the injury took place outside the forum state. Again, would Ford's "truckload of contacts" plus plaintiff's residence provide the requisite "affiliation between the forum and the underlying controversy"?<sup>201</sup> *Ford* describes this as "*principally*[]" [an] activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation."<sup>202</sup> Does "principally" leave enough wiggle room for jurisdiction over this case, where the activity took place outside the forum state and not subject to its regulation?

Speaking of warehouses, suppose our Georgia traveler leaves her hair dryer at home and her budget motel does not provide one. She gets Amazon to ship her one overnight. Needless to say, it malfunctions, shocking her severely. May she sue Amazon at home in Georgia?<sup>203</sup> If not, suppose the hair dryer does not malfunction until she is back in Atlanta. Now may she sue at home? The Court expressly did not "consider internet transactions, which may raise doctrinal questions of their own."<sup>204</sup> So, we lack guidance on this massive set of cases, too.

#### D. *The Buckeye Boiler Scenario*

Over fifty years ago, the California Supreme Court upheld jurisdiction in *Buckeye Boiler Co. v. Superior Court of Los Angeles County*.<sup>205</sup> The facts of the case suggest a hypothetical that is timely after the decision in *Ford*. Suppose Pressure Tank Corporation (PTC) manufactures tanks in which liquid is placed and put under pressure so it can be sprayed. PTC makes two kinds of tanks, PTC-

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<sup>201</sup> *Ford*, 141 S. Ct. at 1025 (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017)).

<sup>202</sup> *Id.* at 1025 (quoting *BMS*, 137 S. Ct. at 1780) (emphasis added).

<sup>203</sup> Here we note that in July 2021, Amazon changed its conditions of use for Prime customers. The conditions provide that customers waive any right to sue Amazon other than in the state or federal courts of King County, Washington. An earlier iteration required submission to arbitration rather than to court litigation. Obviously, the enforceability of these terms of use adds a wrinkle to our hypothetical case here, one that is beyond the scope of this article.

<sup>204</sup> *Ford*, 141 S. Ct. at 1028 n.4 (citing *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014)).

<sup>205</sup> 458 P.2d 57, 67 (Cal. 1969).

1 and PTC-2, which are different sizes and accommodate different amounts of pressure. Plaintiff is injured when a PTC-2 tank explodes while he is using it to spray paint his house in State A. PTC routinely sells thousands of PTC-1 tanks to State A businesses and ships them directly to State A. But PTC has never marketed the PTC-2 tank in State A. It is unclear how the PTC-2 tank used by Plaintiff got into State A (except that PTC had no role in its being there). PTC is not incorporated in State A, nor does it maintain its principal place of business there. Would State A have personal jurisdiction over PTC for Plaintiff's claim?

*Ford* does not answer this question directly. The Court expressly refused to address a case “in which Ford marketed the models [involved in the wrecks] in only a different State or region.”<sup>206</sup> It seems to us, however, that the outcome will depend in part upon how much business PTC does in State A. If the level of activity would satisfy the “continuous and systematic” test for general jurisdiction in an earlier era, we know that a lesser showing of relatedness will suffice to uphold specific jurisdiction. Beyond that, however, notice the fact-specific nature of the relatedness analysis. Presumably we would need to know whether PTC's activities in the forum include providing service or parts for the PTC-2 tank. If so, the argument for relatedness is stronger. But is it strong enough?

#### *E. Redressing the Balance Between Plaintiffs and Defendants?*

As we noted at the beginning of this article, *Ford* is the first personal jurisdiction case in the last ten years in which the defendants lost. The other six cases<sup>207</sup> radically cut back the available fora where plaintiffs could obtain redress for their injuries and, as Justice Gorsuch observed,<sup>208</sup> favor large corporate defendants, who can easily litigate in any state, over injured individuals who cannot. The most significant question about *Ford* is whether it will be the first of a new set of cases redressing this obvious imbalance between plaintiffs and defendants.

All three opinions in *Ford* suggest that the Court is aware that something must be done to repair this imbalance.<sup>209</sup> But there the agreement stops. If the

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<sup>206</sup> *Ford*, 141 S. Ct. at 1028.

<sup>207</sup> *See supra* note 2.

<sup>208</sup> *Ford*, 141 S. Ct. at 1038 (Gorsuch, J., concurring in the judgment). As Justice Gorsuch also noted, the Court's three general jurisdiction decisions only benefited corporations. *Id.* Individuals can still be sued for any claim where they can be served. *Id.* General jurisdiction outside the defendant's home still lives—but just for individual defendants. *Id.*

<sup>209</sup> *Id.* at 1022–32 (majority opinion); *id.* at 1032–34 (Alito, J., concurring in the judgment); *id.* at 1034–39 (Gorsuch, J., concurring in the judgment); *see supra* notes 132–133 and accompanying text.

Court can be persuaded to abandon the *International Shoe* framework, as the concurring opinions tease, it could give states far more leeway to provide convenient fora for their residents. But as Justice Kagan responded to the concurring Justices, the Court has been proceeding under the *International Shoe* framework for over seventy-five years.<sup>210</sup> That is a long time and a lot of precedents. Precedent matters. At least for now and the foreseeable future, a majority of the Justices seem unready for a such a radically new approach, the details of which were not even suggested by the three concurring Justices.

Moreover, the fault lies less with *International Shoe* than with the cases misapplying it. *International Shoe*'s goal was to provide a coherent and functional basis for expanding personal jurisdiction beyond the limits imposed by the traditional bases of presence, consent, and domicile, without the confusing use of legal fictions. *International Shoe*'s endorsement<sup>211</sup> of *Hess v. Pawloski*<sup>212</sup> led directly to the original long-arm statutes, all of which asserted specific jurisdiction over cases "arising from" defendants' in-state contacts. Jurisdiction under these statutes remains routinely available in most cases.<sup>213</sup> Additionally, the Court in *International Shoe* did not restrict general jurisdiction to where a corporation is "at home." *International Shoe* expressly stated that the minimum-contacts analysis included "an estimate of the inconveniences which would result to the corporation from a trial *away from* its home or principal place of business."<sup>214</sup> For over sixty-five years, general jurisdiction was an integral part of the contacts-based system created by *International Shoe*, and state courts routinely used it where specific jurisdiction was unavailable.<sup>215</sup>

In short, the Court can easily redress the balance between plaintiffs and defendants within the *International Shoe* framework, if it has the will to do so. *Goodyear* and its progeny are neither faithful to *International Shoe* nor well-established precedents. The Court could candidly confess error and overrule them or, failing that, use *Ford*'s sliding scale approach to de facto reinstate general jurisdiction based on continuous and systematic contacts. It could also recognize that large corporations, like wealthy individuals, have many states where they are "at home" and can easily litigate, and require them to litigate

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<sup>210</sup> *Ford*, 141 S. Ct. at 1025 n.2.

<sup>211</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318–19 (1945).

<sup>212</sup> 274 U.S. 352, 356–57 (1927) (upholding Massachusetts nonresident motorist statute on implied consent theory).

<sup>213</sup> RICHARD D. FREER, *CIVIL PROCEDURE* 140 (4th ed. 2017) (explaining that most long-arm statutes provide that—or are interpreted to—extend personal jurisdiction to the constitutional limit).

<sup>214</sup> *Int'l Shoe*, 326 U.S. at 317 (emphasis added) (internal quotation marks omitted); see also Arthur & Freer, *supra* note 160.

<sup>215</sup> HAY, *supra* note 130, at 382–84.

there in all cases. Future decisions could find specific jurisdiction in the fact patterns that we discuss above, especially if the Court gives adequate weight to plaintiffs' legitimate interest in suing at home—and their home states' legitimate interest in providing them an adequate forum.

The most significant barrier to the reformulation of specific jurisdiction doctrine is an irrational solicitude for defendants, either because of abstract concerns that they should not be governed by states other than their own<sup>216</sup> or the risk that a host of “little guys”<sup>217</sup> will be summoned to far-away fora. But individuals injured by defective products are little guys, too, and in most cases smaller than defendants.<sup>218</sup> The burden of distant litigation in most cases will be greater for them—and not covered by liability insurance. A sensible system of jurisdiction would at least put the parties on an equal footing. The fairness factors already provide “little guy” defendants all the legitimate protection they deserve. As Justice Brennan explained in *Burger King*, the fairness factors would deny jurisdiction where the burden of distant litigation would in fact put the defendant “at a ‘severe disadvantage’ in comparison to his opponent”<sup>219</sup> or would “for all practical purposes . . . deprive[] [him] of his day in court.”<sup>220</sup>

## CONCLUSION

Hopefully, *Ford* signals that the Court is finally beginning to recognize the constitutional equality of the parties. Inconvenience to one party is usually convenience (or a strategic advantage) to the other. As Justice Brennan observed long ago, the minimum-contacts test has long been focused on the relationship between the defendant and the forum.<sup>221</sup> But *Ford*, to its great credit, recognizes that it takes two to tango. We hope that *Ford* signals an equal appreciation of the need for plaintiffs to have access to a reasonable forum and the right of a

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<sup>216</sup> See, e.g., *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017) (noting that, in addition to the “practical problems” arising from litigation in the forum, courts must consider “the more abstract matter of submitting to the coercive power of a State [with] little legitimate interest” in the case).

<sup>217</sup> See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980) (discussing hypotheticals involving a local tire retailer, seller of a defective jack, and soft drink concessionaire); see also *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 891–92 (2011) (mentioning an “Appalachian potter,” “a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer”).

<sup>218</sup> For example, compare the family injured in *World-Wide Volkswagen* with the Audi dealer that sold them the allegedly defective car. Most car dealers are surely wealthier than most of their customers.

<sup>219</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

<sup>220</sup> *Id.* at 486 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

<sup>221</sup> *World-Wide Volkswagen*, 444 U.S. at 303 (Brennan, J., dissenting).

defendant to avoid litigation in a forum with which it has little contact. For now, we must wait and see.