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Stepping Back to Move Forward: Expanding Personal Jurisdiction by Reviving Old Practices

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STEPPING BACK TO MOVE FORWARD: EXPANDING PERSONAL JURISDICTION BY REVIVING OLD PRACTICES

ABSTRACT

This Comment analyzes personal jurisdiction through the lens of Bristol-Myers Squibb v. Superior Court. *Courts have, for years, been split on the degree of relatedness required between the claim and the defendant's contacts with a forum when analyzing specific jurisdiction. While the Supreme Court recently intervened in an attempt to clarify the issue and articulate a single test for relatedness, this Comment argues that the Court's entire personal jurisdiction framework is flawed. The main problem is an overemphasis on the defendant's contact with the forum. The result of this emphasis is that courts rarely, if ever, consider fairness as a dispositive factor in the analysis. And when courts try to expand the scope of jurisdiction under this contact-focused approach, the resulting opinions can be confusing or otherwise flawed.*

This Comment argues that the best way to expand the scope of state personal jurisdiction is to return to a mélange approach, under which each factor weighing on the overall fairness of exercising personal jurisdiction is considered alongside the others. This approach has several advantages over the Court's current framework. Expanding personal jurisdiction through the mélange would reduce the resources currently being spent on pre-discovery litigation, and would allow more cases to move forward past the pleading stage and closer to being resolved on their merits. Reducing litigation costs would in turn encourage access to courts. Furthermore, because the mélange considers the forum state's interest in adjudicating a case as a coequal factor, it encourages courts to consider the role of states as separate sovereigns. Finally, the mélange would promote a fairness-based view of due process by making fairness the central question to be asked and answered in every personal jurisdiction case.

INTRODUCTION

In March 2012, eight complaints were filed in a San Francisco Superior Court, each alleging the same thirteen causes of action against the same defendant.[1] The plaintiffs were 678 individuals, each of whom had been prescribed and had taken the drug Plavix.[2] Their complaints alleged injuries resulting from having taken the drug.[3] The defendant was Bristol-Myers Squibb Company (BMS), the manufacturer of Plavix.[4] BMS is not a small company; it employs a workforce of over 12,000, maintains research facilities in California, and in California alone sold $918 million worth of Plavix over a six-year period.[5] BMS moved to quash service of process on the grounds that California lacked personal jurisdiction with respect to the nonresident plaintiffs' claims.[6] The Superior Court denied the motion, and BMS appealed.[7]

The issue was whether the nonresident plaintiffs' claims arose from BMS's contacts with California.[8] Only eighty-six of the plaintiffs reside in California; the rest were spread across thirty-three other states.[9] The 592 plaintiffs who did not reside in California (the nonresident plaintiffs) were all injured by drugs they took outside California.[10] Furthermore, BMS did not manufacture those drugs in California, and the drugs did not even pass through California while being distributed to the nonresident plaintiffs.[11] For these 592 plaintiffs, the connection between their claims and BMS's activities in California would appear nonexistent. The California Supreme Court disagreed, and in August 2016 held that jurisdiction was proper in California.[12]

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1 Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 877 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

2 *Id.* at 877–78. Plavix is prescribed "to inhibit blood clotting." *Id.* at 878.

3 *Id.* The injuries included, *inter alia*, bleeding, heart attack, stroke, hematoma, and death. *Id.*

4 *Id.* at 877–78. The plaintiffs named a second defendant, McKesson Corporation. *Id.* at 878. McKesson did not allege that California lacked personal jurisdiction over it because it is headquartered in the state. *See id.* at 893.

5 *Id.* at 879.

6 *Id.* at 878.

7 *Id.* at 879.

8 *Id.*

9 *Id.* at 878.

10 *Id.* at 878–79.

11 *Id.* at 879.

12 *Id.* at 878.

Why was *Bristol-Myers Squibb* notable? Because it was one of the first cases to address specific jurisdiction since *Daimler AG v. Bauman.*[13] There, the Court confirmed a shift in general jurisdiction jurisprudence that it had begun in 2011.[14] Prior to 2011, courts analyzed general jurisdiction as a question of whether a defendant had "continuous and systematic" contacts with a forum state.[15] In 2011, the Court qualified this test to establish the current standard; now the defendant's contacts must be "so 'continuous and systematic' as to render [it] essentially at home in the forum."[16] *Daimler* clarified this standard. Generally a corporation will be "at home" only in the states where the corporation is incorporated and where it has its principal place of business.[17]

While *Daimler* severely limited general jurisdiction, it also hinted at an expanding role for specific jurisdiction.[18] Commenters and attorneys noticed this hint, and now seek ways to expand specific jurisdiction.[19] Because the nonresident plaintiffs could not directly trace their injuries to BMS's California activities,[20] *Bristol-Myers Squibb* presented an opportunity to try such an expansion. Unfortunately, this opportunity would be short-lived.[21]

Why focus on expanding the scope of specific jurisdiction when courts are already swarming with litigants?[22] Because litigating jurisdiction wastes both judicial and party resources at the pleading stage, before a dispute can be

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[13] 134 S. Ct. 746 (2014). For more on the *Daimler* opinion, see generally Bernadette B. Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107 (2015) (discussing the Court's narrowing of the scope of general jurisdiction).

[14] *Daimler*, 134 S. Ct. at 760; Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

[15] *See* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 123–24 (2001) (discussing the "continuous and systematic" standard).

[16] *Goodyear*, 564 U.S. at 919.

[17] *Daimler*, 134 S. Ct. at 760 (quoting Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)). The Court referred to these locations as the "paradigm forums" for general jurisdiction; hence for a corporation to be "at home" elsewhere will be the exception. *See* Genetin, *supra* note 13, at 140.

[18] *See Daimler*, 134 S. Ct. at 758 n.10 (claiming that specific jurisdiction has "flourished" in recent decades); *see also* Genetin, *supra* note 13, at 136–37.

[19] *See, e.g.*, Genetin, *supra* note 13, at 112 (arguing for an approach that assesses first whether the defendant has any contacts with the forum and second whether jurisdiction would be reasonable); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 230–35 (2014) (discussing relatedness as a means to refine specific jurisdiction analysis).

[20] *See supra* notes 9–11 and accompanying text.

[21] *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) (rejecting an expansive view of specific jurisdiction).

[22] One major trend over the last several decades has been the tremendous growth in the number of civil filings. *See* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1859–61 (2014) (discussing this growth).

resolved on its merits.[23] Making jurisdiction easier to establish would streamline litigation by avoiding lengthy disputes at the pleading stage.[24] It would also expand access to the courts and ensure that the injured have an opportunity to be made whole,[25] respect state sovereignty,[26] and promote the fundamental goals of due process fairness.[27] These are significant values in the field of civil procedure beyond just personal jurisdiction; they underpin much of the Federal Rules of Civil Procedure,[28] as well as our American democracy.[29]

This Comment proceeds in three parts. Part I traces the development of the Court's approach to personal jurisdiction since 1945, explaining how over time it moved from an approach that focused on the reasonableness of jurisdiction to an approach that focused primarily on whether the defendant has any contact with the forum.[30] Part II then discusses how the California Supreme Court articulated a broad view of the scope of specific jurisdiction and arrived at a fair result in *Bristol-Myers Squibb*.[31] However, the California Supreme Court's reasoning was convoluted, and the Supreme Court eventually reversed it in an opinion that doubled down on a contacts-centric approach.[32] Finally, Part III concludes that the best way to expand the scope of specific jurisdiction while avoiding the confusion apparent in the *Bristol-Myers Squibb* decision is to return to "the mélange"—an approach to personal jurisdiction that the Supreme Court last utilized in 1957.[33]

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[23] *Cf.* Arthur R. Miller, Keynote Address, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 477 (2012) (complaining that "important litigation values have been impaired by the erection of procedural stop signs").

[24] *Id.*

[25] *See generally* John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (discussing the gap that occurs when an individual who has been wronged does not have access to a remedy in the context of constitutional law).

[26] *See* Allan R. Stein, Symposium, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. L. REV. 411, 415–16, 419–20 (2004) (discussing the relationship between personal jurisdiction and state sovereignty). *But see* Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 737 (2012) (questioning the analytical value of basing personal jurisdiction in terms of state sovereignty).

[27] The Supreme Court has framed personal jurisdiction as an extension of due process since 1877. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

[28] *See* Miller, *supra* note 23, at 465–66 (discussing the normative values underlying the Federal Rules); *see also* Subrin & Main, *supra* note 22, at 1856 (discussing the same).

[29] *See* Subrin & Main, *supra* note 22, at 1889 ("The civil litigation system is a key part of a larger American political structure.").

[30] *See infra* Part I.

[31] *See infra* Section II.A.

[32] *See infra* Sections II.B–C.

[33] *See infra* Part III.

I. BACKGROUND: THE RISE AND FALL OF THE MÉLANGE

The modern distinction between specific and general personal jurisdiction can be traced back to the Court's decision in *International Shoe Co. v. Washington*.[34] In that case, the Court departed from nearly seventy years of personal jurisdiction jurisprudence—which had focused on the territorial boundaries of the states as the guideposts for constitutional exercises of jurisdiction[35]—in favor of a more liberal interpretation.[36] After *International Shoe*, the constitutionality of personal jurisdiction no longer depended on the defendant's consent to jurisdiction or presence in the forum. Personal jurisdiction in a forum would satisfy due process so long as the defendant had "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[37] This language has vexed courts, commentators, and first-year law students for decades, as the court has moved from an analytical framework that considered fairness alongside contacts to one that now considers solely contacts.[38]

A. The Rise of the Mélange

As other commentators have noted, the Court's earliest applications of the *International Shoe* test followed what can best be called a reasonableness—or mélange—approach.[39] This approach focused on answering one short question: Would personal jurisdiction be reasonable, or fair, in this case? Following this approach, the Court would weigh each factor relevant to personal

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[34] 326 U.S. 310 (1945).

[35] *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1878) (noting that with few exceptions "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established"). *Pennoyer* also marked the innovation of the Fourteenth Amendment as a limit on a state's authority to exercise jurisdiction over nonresidents. *See id.* at 733–34 (discussing the Due Process Clause's applicability to personal jurisdiction); *see also* Perdue, *supra* note 25, at 730 (noting that *Pennoyer* "introduced the Due Process Clause into personal jurisdiction doctrine").

[36] *See Int'l Shoe*, 326 U.S. at 316–17 (recognizing that the marker of constitutional exercises of personal jurisdiction is no longer the defendant's presence within the forum, but rather whether the defendant's overall contacts with the forum make the exercise of jurisdiction fair and reasonable).

[37] *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[38] They even vexed one of the sitting justices at the time. Justice Black, in a separate opinion, expressed concerns that the minimum contacts language would be used in future decisions to restrict the scope of state court jurisdiction. *Id.* at 322–26 (Black, J., concurring).

[39] This Comment borrows the term "mélange" from Professor Richard Freer, who uses it to describe the approach taken by the Court in early post-*International Shoe* jurisdiction cases, and advocated by Justice Brennan in dissenting opinions until the early 1980s. Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 558 (2012) (detailing the rise and fall of the reasonableness/mélange approach); *see also* Genetin, *supra* note 13 (describing the Court's early applications of *International Shoe* as following a "reasonableness" approach).

jurisdiction—the forum state's interest in adjudicating the case, the nature of the defendant's contacts, and the burden on the parties and overall convenience of litigating in the forum—together to determine whether jurisdiction in the forum was reasonable in a given case.[40] The mélange approach reached its zenith in the mid-1950s with the cases of *Travelers Health Ass'n v. Virginia*,[41] *Mullane v. Central Hanover Bank & Trust Co.*,[42] and finally with *McGee v. International Life Insurance*.[43]

In *Travelers*, the Court upheld Virginia's exercise of personal jurisdiction over a Nebraska nonprofit association that sold health insurance.[44] Travelers' members paid initiation and periodic fees to an office in Omaha, and recommended the association to prospective new members; the Omaha office would then mail solicitations to these prospective members.[45] This behavior violated a Virginia blue sky law[46] requiring that companies selling certificates of insurance first obtain a permit from the state.[47] After the state initiated a cease-and-desist proceeding against Travelers, the association moved to quash service of process for lack of jurisdiction.[48] The Virginia courts affirmed and Travelers appealed to the Supreme Court.[49]

The Court relied on four factors to uphold personal jurisdiction. First, Travelers' contacts with Virginia were not "isolated or short-lived," but rather were sufficient to "create continuing obligations between the Association and each of the many certificate holders in the state."[50] Second, Virginia had a strong interest in both regulating insurance policies affecting its residents and ensuring that its blue sky laws were enforced.[51] Third, any suits against Travelers based on Virginia policies would "be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses

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[40] *See* McGee v. Int'l Life Ins., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950).

[41] *Travelers*, 339 U.S. 643.

[42] *Mullane*, 339 U.S. 306.

[43] *McGee*, 355 U.S. 220.

[44] *Travelers*, 339 U.S. at 645, 649.

[45] *Id.* at 645–46.

[46] Blue sky laws regulate securities alongside federal regulations. Each state has its own set of these laws in place to protect investors from, among other things, "fraudulent sales practices and activities" in securities markets. *Fast Answers: Blue Sky Laws*, SEC. & EXCHANGE COMMISSION, https://www.sec.gov/answers/bluesky.htm (last updated Oct. 14, 2014).

[47] *Travelers*, 339 U.S. at 644.

[48] *Id.* at 645.

[49] *Id.* at 646.

[50] *Id.* at 648. In fact, Travelers had approximately 800 members in Virginia in 1950. *Id.* at 646.

[51] *Id.* at 647–48.

would presumably be investigated."[52] Finally, the Court noted, it would be unfair to require policyholders to litigate in Nebraska because the value of individual claims could not justify the travel costs.[53]

The same year that it issued its opinion in *Travelers*, the Court briefly addressed a similar personal jurisdiction challenge in *Mullane*.[54] The question in *Mullane* was whether New York could exercise jurisdiction over nonresident beneficiaries of a trust established under New York law in a proceeding to settle the trust's accounts.[55] The Court answered this question in the affirmative through a discussion of the state's interests:

> It is sufficient to observe that . . . the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident . . . .[56]

In other words, the state's interest in regulating its trusts justified exercising jurisdiction over nonresident beneficiaries.

Seven years after making its debut in *Travelers* and *Mullane*, the mélange approach reached its high point in the Court's unanimous opinion in *McGee v. International Life Insurance*, in which the Court held that due process allowed California to exercise jurisdiction over an insurance company that had a single contact with the state.[57] International Life had mailed a reinsurance certificate to a California resident and afterward had received payments from that resident for two years.[58] When the resident passed away, his mother obtained a judgment against International Life in California.[59] When she later tried to enforce the judgment in Texas, International Life challenged California's authority to enter the judgment as a violation of the Fourteenth Amendment.[60] Texas courts refused to enforce the judgment and the Court granted certiorari.[61]

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[52] *Id.* at 649.

[53] *Id.* at 648–49.

[54] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950).

[55] *Id.* at 309–11.

[56] *Id.* at 313.

[57] McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957).

[58] *Id.* at 221–22. The insured had originally purchased insurance from another provider in 1944, but International Life assumed that provider's insurance obligations in 1948. *Id.* at 221.

[59] *Id.* The insured's mother was the beneficiary of his policy under its terms. *Id.* at 222.

[60] *Id.* at 221.

[61] *Id.*

The opinion in *McGee* is brief, with only two paragraphs devoted to analyzing whether due process allowed International Life to be sued in California.[62] However, in those two paragraphs, the Court touched upon a host of factors it had previously relied upon in *Travelers* and *Mullane* to describe a broad view of the scope of permissible jurisdiction.[63] First and foremost for the Court was the fact that "the suit was based on a contract which had a substantial connection with" California; the contract was delivered to California, the insured was a resident of California, and the insured mailed his premiums to International Life from California.[64] On top of that, the Court recognized that California had a strong interest in providing a forum for its residents to hold their insurers accountable,[65] and that those residents "would be at a severe disadvantage if they were forced" to litigate outside California due to costs.[66] The Court observed that its holding was inconvenient for International Life, but did not give the inconvenience much weight in its analysis.[67]

These cases paint a picture of the Court's early approach to post-*International Shoe* personal jurisdiction as focused on answering one question: Would personal jurisdiction be reasonable, or fair, in this case? In response, the Court's opinions had straightforward answers. A state can fairly dispose of a trust organized under its laws even if beneficiaries resided outside the state.[68] A state may conduct proceedings against an insurance association for its alleged violations of state law.[69] It is fair to allow a grieving mother to sue her son's insurer in the state where she resides.[70] The advantages of this approach are not limited to the fact that it allowed the Court to seek outcomes that were

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[62] *Id.* at 223–24. The two other paragraphs in the opinion's discussion traced the history of personal jurisdiction since *Pennoyer*. *Id.* at 222–23.

[63] *Id.* at 223–24. What is notable about the *McGee* opinion, aside from its broad view of the scope of permissible jurisdiction, is the fact that the Court acknowledged a trend since *Pennoyer* of expanding personal jurisdiction. *Id.* at 222 ("[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years.").

[64] *Id.* at 223. The Court took a remarkably broad view of jurisdiction, focusing on the relationship between the lawsuit and the forum rather than the relationship between the defendant and the forum, as later cases would require. *See* Freer, *supra* note 39, at 558.

[65] *McGee*, 355 U.S. at 223.

[66] *Id.*

[67] *See id.* at 224 (citing Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950)) ("Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process.").

[68] *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

[69] *See Travelers*, 339 U.S. at 649.

[70] *See McGee*, 355 U.S. 220.

case-specific. By looking at whether, considering everything, jurisdiction was fair and reasonable, the Court in its early post-*International Shoe* cases actively furthered the values of providing individuals with access to courts—making it more likely that their injuries would be remedied on the merits—while also respecting the notion of the states as separate sovereigns.[71] However, while the Court's early application of this approach resulted in a broad expansion of a state's jurisdictional reach,[72] this expansion was not to last for very long.[73]

B. The Mélange Takes a Back Seat: Hanson *Through* Burger King

One year after the mélange approach took center stage in *McGee*, the Court pulled the rug out from beneath the mélange's feet with the opinion in *Hanson v. Denckla*. The facts of *Hanson* recall a connection to the forum state similar to the one in *McGee*.[74] Mrs. Donner, a Pennsylvania resident, executed a trust in Delaware in 1935, naming a Delaware company as trustee.[75] Mrs. Donner moved to Florida in 1944; she continued to administer the trust from Florida and the trustee delivered trust income to her in Florida.[76] In 1949, Mrs. Donner executed a power of appointment over the trust that became the subject of dispute after Mrs. Donner passed away.[77] The dispute over the trust wound up before the Supreme Court, which was faced with the question of whether Florida could assert personal jurisdiction over the Delaware trustee.[78] The

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[71] *See infra* Section III.A.2; *cf.* Harold S. Lewis Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 708 (1983) (arguing that cases since *International Shoe* evidence a trend away from using state sovereignty to justify limits on personal jurisdiction). For an example of the Court's shift away from using state sovereignty to justify limits on personal jurisdiction, compare World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980) (explaining that due process "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"), with Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 (1982) (noting that due process "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty"). In another about-face, the Court recently returned to a sovereignty argument. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017) ("As we have put it, restrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'" (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958))).

[72] *See* Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 U.N.H. L. REV. 65, 72–74 (2015) (describing the Court's early application of *International Shoe* as "a presumption of jurisdiction so long as the chosen forum did not appear arbitrary or absurd considering all the factors involved in the litigation, and the chosen forum did not so burden the defendant that it amounted to a denial of due process").

[73] *See Hanson*, 357 U.S. at 253 (introducing the "purposeful availment" requirement).

[74] *Compare id.*, *with McGee*, 355 U.S. 220.

[75] *Hanson*, 357 U.S. at 238.

[76] *Id.* at 252.

[77] *Id.* at 239–40.

[78] *Id.* at 243.

Court held that it could not, and in doing so expressly rejected the idea that *McGee* suggested a trend towards "the eventual demise of all restrictions on the personal jurisdiction of state courts."[79] To establish the minimum contacts sufficient to satisfy *International Shoe*, the Court held, the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum."[80] Furthermore, while the Delaware trustee interacted with Mrs. Donner in Florida, it only did so because of her "unilateral activity" of moving to the state, which the Court concluded was not an example of purposeful availment.[81] Thus, jurisdiction was improper in Florida because the Delaware trustee lacked minimum contacts with the state.[82]

Hanson signaled a major shift away from *McGee*, *Mullane*, and *Travelers*. Rather than considering Florida's interest in the dispute[83] or giving weight to the litigants' relative abilities to travel, the Court based its decision solely on the Delaware trustee's contact with the forum.[84] This fact was not lost on the dissenters in *Hanson*,[85] who argued that the case should have been decided on a similar basis as *Mullane*.[86] The dissenters focused their attention on the nature of the contact between the dispute and Florida.[87] Mrs. Donner had not only executed the power of appointment in Florida, but the beneficiaries most affected by the dispute resided in Florida as well.[88] What appears to have driven the dissenters' opinion above all else was the fact that it would not be "fundamentally unfair" to allow Florida to assert jurisdiction over the Delaware trustee because the trustee "chose to maintain business relations with Mrs. Donner in [Florida] for eight years" and maintained regular communications with her about the trust throughout that relationship.[89]

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[79] *Id.* at 250–51. The majority limited *McGee* to its facts. *See id.* at 252.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 251.

[83] The Court distinguished *Hanson* from *McGee* on this point by noting that California had expressed its interest by "enact[ing] special legislation" subjecting insurers to jurisdiction, whereas Florida lacked a similar statute for trustees. *Id.* at 252; *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, 62 n.254 (1990) (describing the Court's focus on the statutory differences between *Hanson* and *McGee*).

[84] Hanson v. Denckla, 357 U.S. 235, 253 (1958); *see also* Freer, *supra* note 39, at 558 (explaining the defendant-focused nature of the *Hanson* opinion).

[85] *Hanson* was the first personal jurisdiction case in which Justice Brennan would find himself dissenting; he would continue to dissent until the 1980s. *See generally* Freer, *supra* note 39, at 559–69 (detailing Justice Brennan's string of dissents).

[86] *Hanson*, 357 U.S. at 260–61 (Black, J., dissenting) (citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950)).

[87] *See id.* at 258.

[88] *Id.*

[89] *Id.*

However, a majority of the Court disagreed with this approach, a fact that would only continue to become clearer over the next decades.

After *Hanson*, the Court took a break from personal jurisdiction issues until the late 1970s when it decided a flurry of jurisdiction cases in quick succession.[90] One of those cases, *World-Wide Volkswagen Corp. v. Woodson*,[91] stands out for two reasons: (1) it signaled another move by the Court further away from the mélange approach to specific jurisdiction and (2) its facts presented the Court with an exceptional opportunity to decide questions of jurisdiction on grounds of overall fairness.

The facts of *World-Wide Volkswagen* are familiar to even first-year law students. A family from New York traveling to settle in Arizona was struck by another driver while driving through Oklahoma; several family members were severely burned when their car caught fire.[92] They filed suit in Oklahoma—alleging defects in the car's design that led to a propensity to catch fire—against, *inter alia*, the dealership that sold them their car and the distributor that supplied the dealership.[93] Both businesses were incorporated in New York and conducted all their business in the tristate area.[94] The defendants challenged Oklahoma's authority to assert personal jurisdiction over them, and the Court agreed.[95]

The majority opinion is notable for two reasons. First, the Court provided a normative explanation for the minimum contacts test: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum[]" and preserves the status of the states as "coequal sovereigns in a federal system" by imposing limits on their jurisdictional reach.[96] Second, the majority opinion built upon the test from *Hanson* by adding an element of foreseeability

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[90] For an overview of these cases, see Borchers, *supra* note 83, at 64–72; Freer, *supra* note 39, at 559–69; Pfeffer, *supra* note 72, at 76–93.

[91] 444 U.S. 286 (1980).

[92] *Id.* at 288. Their injuries were so severe that, at the time of the lawsuit, they were hospitalized in Oklahoma. *Id.* at 305 (Brennan, J., dissenting).

[93] *Id.* at 288 (majority opinion).

[94] *Id.* at 288–89. "Tristate area" refers to areas in New York, New Jersey, and Connecticut.

[95] *Id.* at 287–91.

[96] *Id.* at 292. While the Court has maintained its defendant-focused justification for limits on personal jurisdiction, the continuing validity of its state sovereignty justification has long been in flux. *See* Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."). *But see* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017) (returning to a sovereignty justification). *See generally* Perdue, *supra* note 26, at 730 (discussing sovereignty concerns in personal jurisdiction analysis).

to its minimum contacts analysis.[97] For a defendant to have purposefully availed itself of the forum, the Court reasoned that its contact must be such that it would lead the defendant to "reasonably anticipate being haled into court" in the forum.[98]

While the Court in *World-Wide* moved further away from a mélange approach to personal jurisdiction toward one that focused primarily on the defendant's contact with the forum, it also gave hope to the idea that courts may also consider factors related to the overall reasonableness of litigating in the chosen forum, but only in an "appropriate case."[99] However, as the outcome in *World-Wide* demonstrates, it might be easier to find a unicorn than the "appropriate case."[100] This was not lost on Justice Brennan, whose dissent focused on the reasonableness of allowing Oklahoma to assert jurisdiction.[101]

Brennan accused the majority's analysis of "focus[ing] tightly on the existence of contacts between the forum and the defendant"[102] such that it ignored the forum state's interest in adjudicating the case and did not adequately balance the extent of the inconveniences on the parties.[103] He criticized what he saw as *International Shoe*'s "defendant focus," and suggested that advances in transportation technology and the increasingly national scope of business had made that focus obsolete.[104] Oklahoma had a

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[97] *See* Pfeffer, *supra* note 72, at 77–84 (discussing the *World-Wide* case and opinion).

[98] *World-Wide Volkswagen*, 444 U.S. at 297. Although one could foresee that a car distributed and sold by the defendants in New York might make its way to Oklahoma, it was not foreseeable that the defendants could be haled into court in Oklahoma. *Id.* at 295–96. The Court reached this result to preserve "a degree of predictability to the legal system that allow[ed] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct [would] and [would] not render them liable to suit." *Id.* at 297.

[99] *Id.* These factors are: "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies." *Id.* (citations omitted).

[100] *See id.* at 294 (emphasizing the importance of contacts by stating, "Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; [and] even if the forum State is the most convenient location for litigation.").

[101] *See id.* at 299 (Brennan, J., dissenting).

[102] *Id.* Responding to the majority's conclusion that the defendants lacked contacts with Oklahoma, Brennan noted that, because they sold a highly mobile product, the defendants "derive[d] substantial benefits from States other than [their] own," and therefore did have contacts with Oklahoma. *Id.* at 307.

[103] Brennan argued that the Court should give these factors as much weight as the extent and nature of the defendant's contacts. *Id.* at 299–300.

[104] *Id.* at 308–09.

strong interest in adjudicating this dispute,[105] and the burdens on the defendants were not excessive enough to trigger due process concerns.[106]

Despite Justice Brennan's protest, the Court in *World-Wide* again made it clear that it no longer believed that personal jurisdiction should be decided on the basis of the overall fairness or reasonableness of jurisdiction. Rather, the Court made it clear that its focal point for personal jurisdiction was now, and would continue to be, the defendant's contacts with the forum.

C. Specific Jurisdiction Today: Disorder "Arising out of or Relating to" a Muddled Theory

Four years after *World-Wide*, the Court settled on a three-part test for specific jurisdiction.[107] First, the defendant must have purposefully availed itself of the forum to an extent where it is foreseeable that it might be "haled into court there."[108] Second, the plaintiff's claims must "arise out of or relate to" the defendant's contacts with the forum.[109] Third, the exercise of jurisdiction must "comport with 'fair play and substantial justice'" when considered in light of the factors mentioned by the Court in *World-Wide*.[110]

Much has been written criticizing the Court's current approach,[111] and some commentators have gone so far as to suggest abandoning it, and even the entire *International Shoe* framework, altogether.[112] But what the California

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[105] *Id.* at 305 ("The State has a legitimate interest in enforcing its laws designed to keep its highway system safe . . . .").

[106] *See id.* at 309.

[107] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474–78 (1985) (setting out the test).

[108] *Id.* at 474 (quoting *World-Wide*, 444 U.S. at 297). A typical justification offered for this prong is that it allows potential defendants to structure their conduct to make litigation more predictable in certain jurisdictions. *See* Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 885–86 (Cal. 2016) (quoting *Burger King*, 471 U.S. at 471–72), *rev'd*, 137 S. Ct. 1773 (2017).

[109] Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

[110] *Burger King*, 471 U.S. at 476 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)). For a list of the factors, s*ee supra* note 99.

[111] *See, e.g.*, Borchers, *supra* note 15, at 130–32 (criticizing the Court's specific jurisdiction framework as restrictive on tort claimants, discouraging of consolidating litigation, and indifferent to the "relative economic strength of the parties"); *see also* Freer, *supra* note 39 (criticizing the Court's test for being too focused on the defendant's contacts with the forum).

[112] *See, e.g.*, Borchers, *supra* note 83, at 24–25 (arguing that the Court should stop analyzing jurisdiction as a constitutional issue and should leave regulation of jurisdiction to Congress or to state legislatures); Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1073 (1994) (suggesting that the Court "stop supervising jurisdiction under the Due Process Clause"); Douglas D. McFarland, *Drop the* Shoe*: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 754 (2003) (arguing that the Court should abandon the minimum contacts test entirely); Pfeffer, *supra* note 72, at 162 (arguing that matters of personal jurisdiction should be left to the states to decide).

Supreme Court's opinion in *Bristol-Myers Squibb* focused on was the second part of the test—the Court's requirement that the plaintiff's claims somehow "arise out of or relate to" the defendant's contacts with the forum.

The primary criticism commentators have levied against the relatedness requirement is that it is incomplete.[113] The Court has yet to define its contours.[114] And because of the Court's prolonged radio silence, lower courts across the country developed conflicting tests for determining the relatedness required to assert specific jurisdiction.[115] The two most common tests sit at opposite ends of the spectrum in terms of restrictiveness. On the permissive end of the spectrum, a number of courts have adopted a but-for test, under which the defendant's actions inside the forum state are related to the plaintiff's claim if they are in "the chain of events leading up to the cause of action."[116] In contrast, the "substantive relevance" test focuses on whether the defendant's contacts give rise to the plaintiff's cause of action.[117] If the contacts establish one of the elements of the underlying claim, then the relatedness requirement is met.[118] The absence of a uniform test of relatedness created confusion among courts.[119] Although the Court recently addressed this requirement in *Bristol-Myers Squibb*,[120] confusion will likely continue.

Regardless of whether the relatedness requirement is clarified, when considered alongside the purposeful availment requirement, it raises further problems because the Court has used both to refocus personal jurisdiction

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[113] *See, e.g.*, *Helicopteros*, 466 U.S. at 420 (Brennan, J., dissenting) (noting that "arising out of" and "relating to" are different standards, and that the majority opinion failed to distinguish between the two); *see also* Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867 (2012); Lawrence W. Moore, S.J., *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583 (2001); Ryne H. Ballou, Note, *Be More Specific: Vague Precedents and the Differing Standards by Which to Apply "Arises out of or Relates to" in the Test for Specific Personal Jurisdiction*, 35 U. ARK. LITTLE ROCK L. REV. 663 (2013).

[114] Although the Court first used the "arise out of or relate to" language in *Helicopteros*, it decided that case on general jurisdiction grounds because all parties conceded that specific jurisdiction was not available. 466 U.S. at 415–16. Justice Brennan disagreed. *Id.* at 425 n.3 (Brennan, J., dissenting). By deciding the case as a matter of general jurisdiction, Brennan argued, the Court missed an opportunity to clarify the distinction between contacts that '"give rise' to" and contacts that "are 'related to'" a cause of action. *Id.* at 425. For more on Justice Brennan's dissent, *see* Freer, *supra* note 39, at 569.

[115] *See infra* notes 116–18 and accompanying text.

[116] Ballou, *supra* note 113, at 668–69 (internal quotations omitted) (quoting Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise from or Relate To" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1277 (1993)).

[117] *See* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1455 (1988).

[118] *Id.*

[119] *See supra* note 113 and accompanying text.

[120] *See infra* Section II.C.

analysis away from considerations of fairness and toward an approach focused almost solely on whether the defendant's contacts with the forum constitute legal "contacts."[121] A useful illustration of how focusing on contacts muddies the waters of personal jurisdiction is the Court's handling of this issue in *J. McIntyre Machinery, Ltd. v. Nicastro*.[122]

The facts of *McIntyre* present the quintessential stream of commerce scenario.[123] Nicastro injured his hand with a metal-shearing machine while employed at a scrap metal company in New Jersey.[124] J. McIntyre Machinery, an English corporation, manufactured the machine in England and sold it in the United States through a distributor.[125] Although McIntyre representatives attended annual trade shows across the United States to promote its machines, none took place in New Jersey.[126] At most, four of McIntyre's machines made their way into New Jersey.[127] Nicastro filed suit in New Jersey; on appeal, the New Jersey Supreme Court held that the state could exercise jurisdiction over McIntyre.[128] Although the U.S. Supreme Court could not come to a consensus as to its rationale,[129] the Justices all agreed that the case turned on whether McIntyre established any contacts whatsoever with New Jersey.[130]

Writing for a plurality, Justice Kennedy focused entirely on whether McIntyre had established any contacts with New Jersey, even though (1) it intended to sell its machines throughout the United States, and (2) at least one

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[121] *See* Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014) (holding that Nevada lacked authority to exercise personal jurisdiction over a federal agent who interacted with Nevada residents outside the forum because "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." (citation omitted)); *see also* Freer, *supra* note 39, at 584 (noting that under the Court's current approach, "[f]inding no contact [with the forum] is the only realistic way to defeat jurisdiction").

[122] 564 U.S. 873 (2011).

[123] The stream of commerce will be familiar to anyone who has taken a first-year Civil Procedure course. It arises when a manufacturer's goods make their way from one forum to another through transactions to which the manufacturer is not a party. *See* Alan G. Schwartz & Kevin M. Smith, *Wading Through the Stream of Commerce: When Can Foreign Manufacturers Expect to Be Subject to Specific Jurisdiction in United States Courts?*, 80 DEF. COUNS. J. 349 (2013). Fitting stream of commerce cases into the purposeful availment framework has vexed the Court for decades. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

[124] *McIntyre*, 564 U.S. at 878.

[125] *Id.* The distributor was based in Ohio. *Id.* at 896 (Ginsburg, J., dissenting).

[126] *Id.* at 878 (plurality opinion).

[127] *Id.*

[128] *Id.* at 877–78.

[129] Kennedy announced the judgment in an opinion joined by Roberts, Scalia, and Thomas; Breyer and Alito filed a separate opinion concurring in the judgment; Ginsburg, Sotomayor, and Kagan dissented. *Id.* at 877, 887, 893 (2014).

[130] *Id.* at 880, 888 (plurality opinion), 905 (Ginsburg, J., dissenting)*; see also* Freer, *supra* note 39.

of its machines made its way into New Jersey.[131] Kennedy focused his inquiry on whether McIntyre's conduct evidenced an intent to "target[] the forum."[132] This analysis hardly considered whether jurisdiction would be fair. In fact, Kennedy made it clear that fairness plays second fiddle to contacts in the Court's analysis.[133] Kennedy concluded that although McIntyre targeted the entire U.S. market through the distributor, it had not specifically targeted New Jersey, and, therefore, jurisdiction was inappropriate.[134]

Justice Ginsburg disagreed.[135] She argued that because McIntyre sought to distribute its machines throughout the United States, it had established contacts with the country as a whole, and, therefore, with every state where its machines were sold, including New Jersey.[136] Although Ginsburg based her opinion in part on the notion that jurisdiction would be fair in New Jersey,[137] she still focused her analysis around the question of whether McIntyre had established contacts with New Jersey.[138] So although Ginsburg dissented, she did so within the same framework as the other Justices, signaling that the Court's message on contacts, not fairness, was proper.

The unfortunate thing about *McIntyre* is that the Court would have engaged in a much fuller analysis through the mélange approach. First, New Jersey had a strong interest in adjudicating this case apart from the fact that the plaintiff was injured there. New Jersey is home to more scrap metal processing than any other state;[139] surely it would want to ensure that machines used to process scrap metal are safe. Second, the injury occurred in New Jersey, where witnesses and relevant evidence would be located, making litigation more

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131 *McIntyre*, 564 U.S. at 878.

132 *Id.* at 882.

133 *Id.* at 883 ("[J]urisdiction is in the first instance a question of authority rather than fairness . . . .").

134 *Id.* at 886–67.

135 *Id.* at 893 (Ginsburg, J., dissenting).

136 *Id.* at 905. For more discussion of Justice Ginsburg's dissent, see Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 481, 504–08 (2012).

137 *See McIntyre*, 564 U.S. at 910 (Ginsburg, J., dissenting) (arguing that Justice Kennedy's opinion "would take a giant step away from the 'notions of fair play and substantial justice' underlying *International Shoe*" (citation omitted)); *see also* Steinman, *supra* note 136, at 504–06 (arguing that Justice Ginsburg's dissent combined an inquiry into contacts and reasonableness that was unlike the Court's previous analyses).

138 *See McIntyre*, 564 U.S. at 910 (Ginsburg, J., dissenting) (arguing that Nicastro's situation presents an exception to the general rule that when a plaintiff is injured by a manufacturer's product, "jurisdiction is appropriately exercised by courts of the place where the product was sold and caused injury").

139 *See id.* at 895 (citing ROB VAN HAAREN ET AL., THE STATE OF GARBAGE IN AMERICA tbl.3, BIOCYCLE (2010)).

efficient.[140] Third, McIntyre derived a significant amount of revenue from the sale of its machines in New Jersey, suggesting that McIntyre's contact with New Jersey was more substantial than the Court credited.[141] Finally, when the conveniences of the parties are weighed, the balance tipped in favor of litigating in New Jersey. Nicastro was an individual plaintiff who lost several fingers in an industrial accident,[142] making travel for litigation a difficult task. In contrast, McIntyre representatives travel across the Atlantic each year to attend trade shows,[143] indicating that travel was less of a burden on the defendant.

Unfortunately, because the Court has adopted an approach to personal jurisdiction that is focused primarily on the nature of the defendant's contacts rather than asserting whether jurisdiction is fair, the Court's analysis could not be so thorough. Five years after *McIntyre*, the California Supreme Court issued a reminder that current personal jurisdiction jurisprudence is flawed.

II. *BRISTOL-MYERS SQUIBB CO. V. SUPERIOR COURT*: MAKING SENSE OF THE OPINIONS

Bristol-Myers Squibb presented an interesting fact pattern.[144] To summarize, a group of California residents and nonresidents filed suit against BMS alleging injuries caused by one of the company's drugs.[145] However, the nonresident plaintiffs suffered their alleged injuries outside California, BMS developed and manufactured the drugs that allegedly injured the nonresident plaintiffs outside California, and BMS coordinated advertising for the drugs outside California.[146] One would be forgiven for thinking at first glance that this is a simple case of attempted forum shopping.[147] However, forum

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[140] *See* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 649 (1950) (discussing the availability of witnesses and evidence as a relevant factor in balancing personal jurisdiction factors).

[141] *See McIntyre*, 564 U.S. at 894 (Ginsburg, J., dissenting) ("The machine that injured Nicastro . . . sold in the United States for $24,900 in 1995 . . . ."). The Court has also upheld jurisdiction in tort cases in which the defendant has made a single contact with the state. *See* RICHARD D. FREER, CIVIL PROCEDURE 100–01 (3d ed. 2012).

[142] *See McIntyre*, 564 U.S. at 894 (Ginsburg, J., dissenting).

[143] *See id.* at 878 (plurality opinion).

[144] *See supra* notes 1–12 and accompanying text.

[145] Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 878 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

[146] *Id.* at 878–90.

[147] "Forum shopping 'occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.'" Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 268 (1996) (quoting

shopping is typically framed as a question of venue,[148] and BMS moved to dismiss the nonresidents' claims for lack of personal jurisdiction.[149] Regardless, the California Supreme Court held that California could exercise specific jurisdiction over BMS regarding the nonresident plaintiffs.[150] While this result was by itself acceptable, the reasoning the court used to arrive at it was not.[151] And, when the Supreme Court intervened, it doubled down on its contacts-focused approach.[152]

A. The California Supreme Court's Opinion

Moving to the question of jurisdiction, the California Supreme Court first concluded that California could not exercise general jurisdiction over BMS.[153] The court took just three paragraphs to reject the plaintiffs' arguments that California could exercise general jurisdiction.[154] With the question of general jurisdiction settled, the court moved on to determine whether California could exercise specific jurisdiction.[155] Unfortunately, answering this question would not be so simple.

The court's treatment of specific jurisdiction began in an unassuming manner: Did BMS purposefully avail itself of California law by conducting business there?[156] The answer to this question was obviously yes; there was "no question that BMS [had] purposefully availed itself of the privilege of conducting activities in California."[157] The company marketed and sold nearly $1 billion worth of Plavix in California, maintained research facilities in California, and "contracted with a California-based" distributor, to name a just a few of its contacts with the state.[158]

BLACK'S LAW DICTIONARY 655 (6th ed. 1990)). Forum shopping is typically framed as a question of venue rather than one of personal jurisdiction.

148 *See* Mary Garvey Alegro, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 79–80 (1999) (describing forum shopping as "the act of seeking the most advantageous venue in which to try a case.").

149 *Bristol-Myers Squibb*, 377 P.3d at 878.

150 *Id.*

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

152 *See infra* Section II.C.

153 *Bristol-Myers Squibb*, 377 P.3d at 883–84.

154 *Id.* at 884. The plaintiffs made two arguments: (1) BMS registered to do business in California and had an agent for service of process there and (2) BMS contracted with McKesson, which has its principal place of business in California, to distribute Plavix. *Id.* The court rejected both. *Id.*

155 *Id.*

156 *Id.* at 885.

157 *Id.* at 886.

158 *Id.* at 874, 876; *see also Redwood City, California*, BRISTOL-MYERS SQUIBB, http://www.bms.

While it was clear that BMS purposefully availed itself of California law, what was not clear was how the nonresident plaintiffs' injuries arose out of or related to these contacts. By finding that the injuries were related to BMS's contacts,[159] the California Supreme Court took its most audacious step of the opinion. To understand the court's decision, it is important to first understand the relatedness test that it applied.

1. A "Sliding-Scale" Test for Relatedness

The California Supreme Court applied what it called a "substantial connection" test for relatedness in *Bristol-Myers Squibb*.[160] Under this test, a claim arises out of, or relates to, a defendant's contacts if "there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim."[161] Courts applying this test consider both "the nature of the defendant's activities in the forum and the relationship of the claim to those activities . . . ."[162] The next question for the court was where to draw the line separating substantial from insubstantial connections. In a case in which nonresident plaintiffs alleged injuries from a nonresident defendant's out-of-state activities, this question became contentious.[163]

The court took a fluid view of the connection requirement. When determining whether contacts are substantially related to a claim, it noted, "the intensity of forum contacts and the connection of the claim to those contacts are inversely related."[164] Put another way, when a defendant's contacts with the state are great, the connection between those contacts and a claim may be

com/sustainability/worldwide_facilities/north_america/Pages/redwood_city_california.aspx (last visited Nov. 5, 2016).

[159] *Bristol-Myers Squibb*, 377 P.3d at 887–91. The court's analysis was not entirely unprecedented; it mirrors the approach taken by the California Court of Appeal below. *See* Bristol-Myers Squibb Co. v. Superior Court, 175 Cal. Rptr. 3d 412 (Cal. Ct. App. 2014), *aff'd*, 377 P.3d 874 (Cal. 2016); *see also* Linda Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 685–87 (2015) (describing and criticizing the approach taken by the Court of Appeal).

[160] *Bristol-Myers Squibb*, 377 P.3d at 885.

[161] *Id.* (quoting Snowney v. Harrah's Entertainment, Inc., 35 Cal. 4th 1054, 1068 (2005)).

[162] *Id.*

[163] The majority and the dissent in *Bristol-Myers Squibb* split over this question. While the majority found a substantial connection, the dissenters argued that the California plaintiffs' claims were merely "parallel" to the nonresident plaintiffs'. *See id.* at 888 (discussing the difference in opinion between the majority and dissent).

[164] *Id.* at 885 (internal quotations omitted) (quoting Snowney v. Harrah's Entertainment, Inc., 112 P.3d 28, 37 (Cal. 2005)).

more attenuated, and vice versa.[165] Courts and commentators refer to this approach as a "sliding-scale" test for relatedness.[166] After explaining its test, the court proceeded to apply it in two steps: first, it assessed the extent of BMS's contacts with California; and, second, it looked for a connection between those contacts and the nonresidents' injuries.[167]

Unsurprisingly, the court found that BMS had extensive contacts with California. The company marketed, advertised, and sold Plavix in the state.[168] It contracted with a California-based distributor to distribute Plavix in the state.[169] It employed sales representatives in the state.[170] It operated research facilities in the state and even maintained an office in Sacramento to lobby the state on its behalf.[171] All told, BMS employed over 400 people in California, and over the course of six years, it sold roughly $1 billion worth of Plavix in the state.[172] It is no wonder the court concluded that "there [was] no question that BMS [had] purposely availed itself of the privilege of conducting activities in California, invoking the benefits and protection of its laws."[173]

While finding extensive contacts between BMS and California was easy, connecting those contacts to the nonresident plaintiffs would require a greater logical leap. As discussed above, the nonresidents' injuries arose from Plavix that was not manufactured in, purchased from, or distributed through California.[174] Regardless, the "sliding scale" made this leap possible. Because the court found that BMS's contacts with California were extensive, minimum contacts for specific jurisdiction could be found "based on a less direct connection between BMS's forum activities and [the nonresident] plaintiffs'

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165 *Id.* at 887 (quoting Vons Cos., Inc. v. Seabest Foods, Inc., 926 P.2d 1085, 1096 (Cal. 1996) ("A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction." (internal quotations omitted)). The California Supreme Court referred to the test as a "'substantial connection' test." *Id.* at 885.

166 *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1775–76 (2017) ("The California Supreme Court's 'sliding scale approach' . . . ."); Ballou, *supra* note 113, at 676–78 (describing the California test); *see also* William M. Richman, *Part I—Casad's Jurisdiction in Civil Actions; Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 CALIF. L. REV. 1328, 1345–46 (1984) (discussing the academic origins of the test).

167 *Bristol-Myers Squibb*, 377 P.3d at 887–90. By adopting this test, the California Supreme Court again expressly rejected the "substantive relevance" test for relatedness, as it did in *Vons*. *See id.* at 888–89 (citing *Vons*, 926 P.2d at 1112).

168 *Id.* at 886.

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *See supra* notes 9–11 and accompanying text.

claims than might otherwise be required."[175] No one doubted that California could exercise specific jurisdiction over the California plaintiffs' claims—they arose in California.[176] All the court needed to do was find a substantial connection between the claims of the residents and nonresidents. Two facts guided the court's decision; both turned on similarities between the California plaintiffs and nonresident plaintiffs.

First, the court found a substantial connection based on the fact that the California and nonresident plaintiffs' claims were, for all purposes, identical.[177] Each plaintiff alleged the same thirteen causes of action[178] based on BMS's allegedly defective product and the allegedly misleading marketing and promotion campaigns used to sell it.[179] Thus one aspect of the "substantial connection" between BMS's contacts with California and the nonresident plaintiffs' claims was the fact that a group of California plaintiffs also filed suit.[180]

Second, the court found a substantial connection between BMS's California contacts and the nonresidents' injuries because the company developed, manufactured, distributed, and advertised Plavix across the United States.[181] To borrow the court's language, BMS developed and sold Plavix as part of a "single, coordinated, nationwide course of conduct directed out of BMS's New York headquarters and New Jersey operations center and implemented by distributors and salespersons across the country."[182] Therefore the California and nonresident plaintiffs' claims were not based on BMS's similar activities both inside and outside the state.[183] Rather than being isolated incidents in different states, BMS's activities that injured the California plaintiffs and the activities that injured the nonresident plaintiffs were one and the same.[184]

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175 *Bristol-Myers Squibb*, 377 P.3d at 889.

176 *Id.* at 888 ("The California plaintiffs' claims . . . certainly arise from BMS's purposeful contacts with this state . . . .").

177 *Id.*

178 *Id.* at 877.

179 *Id.* at 888.

180 *Id.*

181 *Id.* at 888–89.

182 *Id.* at 888 (citing Cornelison v. Chaney, 545 P.2d 264, 269 (Cal. 1976)) (noting that the interstate nature of a defendant's business typically weighs in favor of finding specific jurisdiction in California).

183 *Id.*

184 *See id.* at 889. Three judges dissented, arguing instead that BMS's California and out-of-state activities were merely "parallel," meaning similar, rather than substantially connected. *See id.* at 899 (Werdegar, J., dissenting) (citing Silberman, *supra* note 159, at 687).

2. The Fundamental Fairness of Litigating in California

Having concluded that the volume of BMS's contacts with California, along with the connections between those contacts and its out-of-state activities, constituted a sufficient nexus to satisfy the second prong of the Supreme Court's specific jurisdiction test, the court moved to the third prong: reasonableness.[185] Because it is easier to find jurisdiction reasonable than it is to find minimum contacts,[186] the court made relatively quick work of this analysis.[187] The court addressed four factors: the burden on BMS imposed by litigating in California, California's interest in providing a forum, the plaintiffs' interest in litigating in the forum, and judicial economy.[188]

First, the court concluded that litigating the nonresident plaintiffs' claims in California would not place an undue burden on BMS because the alternative—rejecting jurisdiction in California—posed a greater burden.[189] If the court denied jurisdiction in California, the practical result would be BMS defending the nonresident plaintiffs' claims "in a scattershot manner . . . in potentially up to 34 different states."[190] The court recognized that litigating in California would not be cheap; most of the company's information relevant to discovery was located in its principal places of business in New York and New Jersey.[191] Still, litigating the claims together in California would not overburden BMS.[192]

Second, the court made three arguments to demonstrate that California also had an interest in providing a forum for the nonresident plaintiffs. First, evidence of the nonresidents' injuries would be helpful at trial in proving defects in Plavix, because under California law, "evidence of other injuries is 'admissible to prove a defective condition.'"[193] Second, the court noted that California expressed its interest in regulating the behavior of pharmaceutical manufacturers through a "substantial body of California law aimed at protecting consumers from the potential dangers posed by prescription

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185 *Id.* at 891 (majority opinion).

186 *See* Freer, *supra* note 39, at 572–73 (discussing the "strikingly onerous burden" on defendants to prove that the jurisdiction is unreasonable in a particular forum).

187 *See Bristol-Myers Squibb*, 377 P.3d at 891–94.

188 *See id.*

189 *Id.* at 891–92.

190 *Id.* at 891.

191 *Id.* at 892. The court mitigated these concerns by noting that California law allows for discovery to take place out of the state. *Id.*

192 *Id.*

193 *Id.* (quoting Ault v. Int'l Harvester Co., 528 P.2d 1148, 1153 (Cal. 1974)).

medication."[194] And finally, California had an additional interest in regulating McKesson Corporation, BMS's codefendant that is headquartered in California.[195]

Third, the court found that jurisdiction in California was reasonable when considering the plaintiffs' interest in litigating in a convenient forum.[196] This determination is not surprising. If the plaintiffs felt that California was not a convenient forum, they would not have filed suit there, a conclusion made clearer by the fact that only eighty-six of the plaintiffs reside in the state.[197]

Finally, the court concluded that allowing the plaintiffs' case to move forward as a single mass tort action in California presented an efficient means to resolve the dispute in light of the "shared interests of the interstate judicial system."[198] The court based its reasoning on protecting the interests of both the defendant and the plaintiffs.[199] Splitting the litigation across several forums would risk "the possible unfairness of punishing a defendant over and over again for the same tortious conduct."[200] Splitting the litigation would also encourage a "race to the courthouse," presenting the possibility that some claims might be shut out by others.[201]

After considering these factors in turn, the court concluded that exercising jurisdiction over BMS in California was not unreasonable.[202] Thus, California could exercise specific jurisdiction over BMS without violating due process.[203]

B. Analysis: Reasonable Result, Unreasonable Opinion

The California Supreme Court's opinion in *Bristol-Myers Squibb* is a prime example of a reasonable result reached by unreasonable means. As previously mentioned, the Court's recent moves to limit general jurisdiction led plaintiffs to push for expanding the scope of specific jurisdiction.[204] In *Bristol-Myers*

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194 *Id.* at 892.

195 *Id.* at 893.

196 *Id.*

197 *See id.* The court also noted that the San Francisco Superior Court's complex litigation department is adept at handling similarly sized cases. *Id.*

198 *Id.*

199 *Id.* at 893–94.

200 *Id.* at 893 (quoting *In re* Exxon Valdez, 229 F.3d 790, 796 (9th Cir. 2000)).

201 *Id.* (quoting *Exxon*, 229 F.3d at 795–96). The court also noted that if litigation were split up, discovery disputes in other forums would cause delays in California, directly affecting the California plaintiffs. *Id.* at 894.

202 *Id.* at 894.

203 *Id.*

204 *See supra* notes 18–21 and accompanying text.

Squibb, the California Supreme Court did just that, finding specific jurisdiction when the facts suggested that it was not unfair to compel BMS to litigate these claims in California.[205] However, the "substantial connection" test for relatedness did not comport with the Supreme Court's recent treatment of personal jurisdiction, and when the Court stepped in, it moved to limit specific jurisdiction.[206]

1. A Reasonable Result

Three arguments support the fairness of allowing California to exercise personal jurisdiction over BMS. First, the California Supreme Court's decision moves a dispute that has been lingering for years closer to a final resolution on the merits. Second, BMS is in a better position to litigate all claims in California than are the nonresident plaintiffs to litigate elsewhere. Finally, allowing the claims to move forward together rather than splitting them up mitigates the dangers of inconsistent outcomes and promotes a more efficient resolution of the dispute.

The California Supreme Court's decision in *Bristol-Myers Squibb* moved the underlying disputes over Plavix closer to being resolved. The plaintiffs filed their complaints in March of 2012.[207] The parties then spent over four years disputing personal jurisdiction.[208] What they did not do during this time was argue the merits of the plaintiffs' claims.[209] Resolving the question of jurisdiction in the plaintiffs' favor, rather than forcing the nonresident plaintiffs to file their claims elsewhere, removes at least one obstacle in the path to settling the dispute.[210]

Asking which party is better equipped to litigate in another forum also points toward the fairness of finding jurisdiction proper in California. Put simply, California's exercise of personal jurisdiction is fair because BMS can afford to litigate in California.[211] BMS is undeniably large; in 2015 alone it

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205 *See supra* Section II.A.

206 *See infra* notes 237–42 and accompanying text.

207 *Bristol-Myers Squibb*, 377 P.3d at 877–78.

208 *See id.* at 878–79 (detailing the procedural background).

209 *Cf. id.*

210 Extensive litigation focusing on issues raised at the pleading stage is nothing new. *See* Subrin & Main, *supra* note 22, at 1877–79 (describing a modern trend toward greater disposition of cases at the pleading stage). For example, in 1962, 89% of civil cases were resolved before trial by dismissal, summary judgment, or settlement; today that number is over 99%. *Id.* at 1878.

211 The Court used to consider the relative wealth of the parties when analyzing personal jurisdiction. *See* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648–49 (1950) (comparing the parties' relative wealth). The Court has not considered it since 1984. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483 n.25

reported total revenues of $16.56 billion and total income before taxes of $2.07 billion.[212] In contrast, the plaintiffs in *Bristol-Myers Squibb* are individuals alleging that Plavix caused, *inter alia*, bleeding, heart attacks, and even death.[213] This description does not paint a portrait of a group that would be able to maintain suits against BMS individually or in smaller groups in separate forums.[214] The comparative positions of the parties in *Bristol-Myers Squibb* should tilt toward accepting the plaintiffs' chosen forum.

Allowing the claims to move forward together, rather than forcing the nonresident plaintiffs to file suit elsewhere, also promotes an efficient resolution to the dispute. As the California Supreme Court noted, the alternative to allowing all the claims to move forward together was to dismiss the nonresidents' claims for lack of personal jurisdiction, leaving them little choice but to file elsewhere.[215] Two dangers are apparent in this outcome. First, spreading this litigation over several forums risks discovery delays, as disputes in one forum spill over into others.[216] And second, splitting these similar claims over multiple forums also raises the possibility of inconsistent outcomes.[217] If the litigation were to be split, plaintiffs who sue in State A may get a more favorable outcome than plaintiffs who sue in State B; likewise, BMS may find itself with greater liability to the State A plaintiffs than to the State B plaintiffs. By allowing all the plaintiffs to sue together, the California Supreme Court mitigated these concerns. However, although the California Supreme Court's exercise of personal jurisdiction over BMS reached a fair result, the reasoning it used to arrive at that decision was far from ideal.

2. An Unreasonable Opinion

Two problems emerge in the California Supreme Court's reasoning in *Bristol-Myers Squibb*. The first is the court's willingness to emphasize contacts

(1985) ("Absent compelling considerations, . . . a defendant . . . may not defeat jurisdiction . . . simply because of his adversary's greater net wealth."); *see also* Borchers, *supra* note 15, at 131–32 (referring to the failure to consider the parties' relative wealth as problematic).

212 Bristol-Myers Squibb Co., Annual Report (Form 10-K/30) (Feb. 12, 2016).

213 *Bristol-Myers Squibb*, 377 P.3d at 878.

214 *Cf. Travelers*, 339 U.S. at 648–49 (discussing the burdens on plaintiffs presented by litigating in alternative forums).

215 *Bristol-Myers Squibb*, 377 P.3d at 894.

216 *Id.*

217 *See* Edward F. Sherman, *Complex Litigation: Plagued by Concerns over Federalism, Jurisdiction, and Fairness*, 37 AKRON L. REV. 589, 591 (2004); *see also* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 566–67 (1996) (noting that many commenters regard inconsistent outcomes as damaging to the public image of the legal system).

while downplaying fairness.[218] The bulk of the opinion's treatment of specific jurisdiction focuses on BMS's contacts with California, while the reasonableness of exercising personal jurisdiction over BMS is only briefly addressed.[219] That the court primarily focused on BMS's contacts with California is understandable; this is the approach that the Supreme Court has followed in recent years.[220] However, while the Court has moved to emphasize contacts, it has never expressly abandoned the language from *International Shoe* compelling consideration of "fair play and substantial justice."[221] Also, Justice Brennan's qualification from *Burger King*—that a lesser showing of contacts may be alleviated by a showing of fundamental fairness—remains the law.[222] *Bristol-Myers Squibb* was an opportunity for the California Supreme Court to place more emphasis on fairness. Instead, it focused on BMS's contacts.[223] The second, and more significant, problem with the opinion is that its logic does not hold water.

Three issues plague the California Supreme Court's reasoning. The first lies in the court's reliance on the similarity between the residents' and nonresidents' claims. The U.S. Supreme Court has rejected arguments based on similarity in the past.[224] In *Taylor v. Sturgell*, the Court vacated the D.C. Circuit's application of claim preclusion to two separate plaintiffs.[225] The D.C. Circuit relied primarily on the fact that the plaintiffs were "close associate[s]" who sought the same remedy from the same defendant.[226] Regardless, the Supreme Court reversed, holding in part that the similarity between the two claims did not establish a privity relationship between them.[227] While jurisdiction is a different issue than privity, what the California Supreme Court did in *Bristol-Myers Squibb* can be likened to what the D.C. Circuit did in

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[218] *See Bristol-Myers Squibb*, 377 P.3d at 887–91 (examining whether the nonresidents' claims "arise out of or relate to" BMS's California contacts); *see also supra* note 121 and accompanying text (discussing the contacts-oriented nature of modern personal jurisdiction analysis).

[219] *See Bristol-Myers Squibb*, 377 P.3d at 891–94.

[220] *See, e.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1121, 1125 n.9 (2014) (examining fairness in connection with the defendant's contacts with the forum rather than fairness for the plaintiffs); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883 (2011) (concluding that jurisdiction is a question of "authority rather than fairness").

[221] *See Walden*, 134 S. Ct. at 1121 (citation omitted); *McIntyre*, 564 U.S. at 880 (citation omitted).

[222] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

[223] *See supra* note 218 and accompanying text.

[224] *See McIntyre*, 564 U.S. 873; Taylor v. Sturgell, 553 U.S. 880 (2008).

[225] *Taylor*, 553 U.S. at 885.

[226] *Id.* at 889–91 (alteration in original).

[227] *Id.* at 904–07. Under the law of preclusion, a nonparty to a case may be bound by the judgment of that case in future litigation if he is found to be in privity with a party in that case. *See* FREER, *supra* note 141, at 608–12 (discussing privity).

Taylor. Like the D.C. Circuit, which found privity between two similar claims, the California Supreme Court held that it could exercise personal jurisdiction over the nonresident claims in part because they were similar—identical, in fact—to the resident claims.[228] And like the D.C. Circuit, the California Supreme Court was reversed.[229]

The second issue with the *Bristol-Myers Squibb* opinion is found in the California Supreme Court's reliance on the fact that BMS sold Plavix in California as part of a nationwide course of conduct. In *McIntyre*, a majority of the Justices rejected the idea that a defendant's contacts with the United States as a whole are relevant in assessing personal jurisdiction for a state.[230] Notwithstanding this precedent, the California Supreme Court explicitly based its decision on BMS's nationwide contacts: the fact that all the plaintiffs were injured by a drug BMS distributed throughout the United States created a substantial connection between BMS's California contacts and the nonresidents' claims.[231]

The third—and most significant—issue with the California Supreme Court's opinion was the "substantial connection" test itself. Under that test, the extent of a defendant's contacts and the degree of relatedness required to justify jurisdiction are "inversely related."[232] Therefore a tenuous connection between a claim and a defendant's contacts with a forum is acceptable where those contacts are more extensive.[233] Permitting extensive contacts to act as a substitute for relatedness recalls the "continuous and systematic" standard the Court applied to general jurisdiction analysis before 2011, and "blurs the distinction between general and specific jurisdiction."[234] The Court abandoned

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228 Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 888 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

229 Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017).

230 *See McIntyre*, 564 U.S. at 886 (noting that although McIntyre targeted the entire United States, its "purposeful contacts with New Jersey, not with the United States . . . alone are relevant"); *id.* at 891 (Breyer, J., concurring) (arguing that considering a defendant's contacts with the United States as a whole contradicts the traditional inquiry into the defendant's contacts with the forum state).

231 *See Bristol-Myers Squibb*, 377 P.3d at 888.

232 Ballou, *supra* note 113, at 676–78 (referring to the test as the "sliding-scale" test and discussing the inverse relationship between contacts and relatedness); *see Bristol-Myers Squibb*, 377 P.3d at 885.

233 Ballou, *supra* note 113, at 677.

234 Moki Mac River Expeditions v. Drugg, 221 S.W.3d. 569, 583 (Tex. 2007) ("[D]eciding jurisdiction based on a sliding continuum blurs the distinction between general and specific jurisdiction that our judicial system has firmly embraced . . . ."); *see* Rhodes & Robertson, *supra* note 19, at 234–35 (criticizing the test as lacking predictive value); Silberman, *supra* note 159, at 686–87 (arguing that the California approach to relatedness "appears to reintroduce general jurisdiction by another name"). *But see* Moore, *supra* note 113, at 595 (citing Vons Cos., Inc. v. Seabest Foods, Inc., 926 P.2d 1085, 1093 (Cal. 1996)) (arguing that the California Supreme Court's relatedness test does not distort the line between general and specific jurisdiction).

this standard in *Goodyear* and *Daimler*; there was little reason to think that it would endorse adapting that approach to specific jurisdiction.[235]

C. Supreme Court Intervention: More of the Same

When the Supreme Court granted certiorari to review the California Supreme Court's decision, the Court signaled that it planned to shed some light on relatedness.[236] The Court's opinion, however, suggests implications beyond that. Three things are notable about the Supreme Court's opinion in *Bristol-Myers Squibb*. First, the Court adopted what appears to be a restrictive definition of relatedness, one that undoubtedly continues the contacts-focused trend. Second, the Court justified its approach on federalism grounds, expressly excluding other sources of fairness. And third, eight Justices signed the majority opinion, suggesting that the Court's new approach is here to stay.

Although the Court took steps to clarify the relatedness requirement in *Bristol-Myers Squibb*, it adopted an approach that will ensure the personal jurisdiction analysis remains effectively a contacts—rather than contacts *and* fairness—analysis. The Court explicitly rejected California's "sliding scale" approach; it resembled too much of a hybrid between general and specific jurisdiction.[237] As Professor Freer notes, the Court made it clear that "[t]here is no sliding scale. All cases are either specific or general."[238] And specific jurisdiction requires a narrow form of relatedness: "an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'"[239] Under this "activity or occurrence" view, the controversy, not the defendant, creates jurisdiction.[240] This approach represents a step back from the Court's reasoning in *Walden*, in which the Court recognized that jurisdiction depends on "the relationship

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[235] The Supreme Court made the same argument. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781 (2017) ("Our cases provide no support for [the substantial connection] approach, which resembles a loose and spurious form of general jurisdiction."). For more about the impact of the *Goodyear* and *Daimler* decisions on general jurisdiction, see *supra* notes 13–17.

[236] *See* Brief for Petitioner at i, *Bristol-Myers Squibb*, 137 S. Ct. 1773 (No. 16-466) (framing the question to be addressed by the Court as one of relatedness).

[237] *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

[238] Richard D. Freer, *Analysis:* BNSF Railway Co. v. Tyrrell, Bristol-Myers Squibb v. Superior Court, EMORY L. NEWS CTR. (July 19, 2017), http://law.emory.edu/news-center/releases/2017/07/Freer-BNSF-Railway-Co-v-Tyrrell-Bristol-Myers-Squibb-v-Superior-Court%20.html#.Wa9iTdOGOfV.

[239] *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (alteration in original) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)). This language evokes the substantive relevance test for relatedness proposed by commenters. *See* Brilmayer, *supra* note 117.

[240] *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting *Goodyear*, 564 U.S. at 919).

among the defendant, the forum, and the litigation."[241] That three-part formulation suggested that a defendant's non-controversy-related contact with a forum could factor in the analysis.[242] But by limiting the scope of contacts relevant to the specific jurisdiction analysis, the Court made it clear that it intends jurisdiction to remain a matter of almost exclusively contacts. And as the analysis continues to center on contacts, it will continue to overlook fairness.

While the "activity or occurrence" language of the Court's updated relatedness standard by itself suggests a contacts-focused approach to personal jurisdiction, the Court's return to territorial federalism as the justification for limiting personal jurisdiction makes it clear that fairness continues to play little more than a supporting role. Revisiting a debate that it began in 1982,[243] the Court justified its restrictive vision of personal jurisdiction on a territorial view of state sovereignty. Limits on jurisdiction act not just to shield defendants from bothersome litigation, they also act as "territorial limitations on the power of the respective states."[244] Federalism, the Court noted, could be decisive, as a state's sovereignty "implie[s] a limitation on the sovereignty of all its sister States."[245] But framing personal jurisdiction primarily as a matter of territorial limits obscures other fairness factors, namely "the plaintiff's interest in obtaining convenient and effective relief" and "the interstate judicial system's interest in obtaining the most efficient resolution of controversies."[246] Surely these interests must trump territorial limits in some circumstances and justify subjecting a defendant to suit in a "distant" forum. However, the Court's opinion—and its focus on borders—suggests the opposite.

The broad agreement of the Justices also suggests that the Court plans to hold fast to its contacts-focused approach. Unlike *McIntyre*, which was a 4–2–3 decision,[247] the Justices ruled 8–1 in *Bristol-Myers Squibb*.[248] Justice Sotomayor was the lone dissenter, arguing that the majority opinion did little more than limit the scope of personal jurisdiction. Limits on jurisdiction should

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241 *See* Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) (internal quotations omitted) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984)).

242 *See id.*

243 *See* Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 (1982) (arguing that limits on personal jurisdiction are not matters of state sovereignty).

244 *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

245 *Id.* at 1780 (alteration in original) (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 293 (1980)).

246 *World-Wide Volkswagen*, 444 U.S. at 292; *see also supra* note 99 (listing other fairness factors).

247 J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

248 *Bristol-Myers Squibb*, 137 S. Ct. 1773.

not be defined by federalism or territorial limitations, she argued. When a plaintiff's claim arises from a defendant's nationwide course of conduct, "[w]hat interest could any single State have in adjudicating [the] claims that the other States do not share?"[249] Instead, limits on personal jurisdiction should be measured "by the yardstick set out in *International Shoe*—'fair play and substantial justice.'"[250] And by that standard, Justice Sotomayor argued, "there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike."[251] That Justice Sotomayor dissented alone suggests the majority's aversion to considering fairness.

So how can the Court expand specific jurisdiction after restricting it in *Bristol-Myers Squibb*? Justice Sotomayor was correct. To ensure that specific jurisdiction "flourishes,"[252] the Court must return to *International Shoe*'s yardstick and revisit the mélange.

III. RETURNING TO THE MÉLANGE: STEPPING BACK TO MOVE FORWARD

Roughly sixty years have passed since the Court last applied the mélange approach to decide a personal jurisdiction case.[253] Why—when so much else has changed in the intervening decades—should the Court go back? Two reasons support this move. First, as we have already seen, the Court's current approach to personal jurisdiction, particularly specific jurisdiction, is flawed.[254] And second, returning to the mélange approach offers a path forward that both expands the scope of personal jurisdiction and promotes the normative values mentioned at the beginning of this Comment: furthering fairness as a matter of due process, respecting state sovereignty, and ensuring access to the courts.[255]

A. The Mélange: A Reasonable Way to Expand Personal Jurisdiction

If, as demonstrated by *Bristol-Myers Squibb*, the Court is unwilling to expand specific jurisdiction in response to a narrow general jurisdiction, then it must reconsider its current approach, which has proven over the years to be

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249 *Id.* at 1788 (Sotomayor, J., dissenting).
250 *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
251 *Id.* at 1784.
252 Daimler AG v. Bauman, 134 S. Ct. 746, 758 n.10 (2014).
253 *See* McGee v. Int'l Life Ins., 355 U.S. 220 (1957).
254 *See supra* Section I.C.
255 *See supra* notes 23–29 and accompanying text.

inflexible.[256] The most obvious effect of the Court's current approach is the possibility that a plaintiff will not be able to sue in the state where he or she was injured.[257] Professor Effron argues that confusion in personal jurisdiction analysis arises because the Court continues to focus on analyzing the relationship between the defendant and the forum, when it should be looking at the relationship between the lawsuit and the forum as well.[258] Although the Court has given lip service to this relationship in recent decisions, it continues to analyze specific jurisdiction in a restrictive, contacts-focused manner.[259] To break free from this restrictiveness, the Court should revisit its past.

A return to a mélange approach to personal jurisdiction would bring with it benefits beyond simply moving away from a framework in which contacts are front and center. Returning to the mélange would allow expanding the scope of personal jurisdiction in a way that streamlines litigation and resolves disputes on their merits, promotes access to the courts, respects state sovereignty, and furthers the fundamental goals of due process fairness.

1. Streamlining Litigation and Resolving Disputes on Their Merits

Returning fairness to a position alongside—instead of behind—contacts in the jurisdiction analysis would make jurisdiction harder for defendants to contest.[260] One of the most frequently cited benefits of the current approach is that it promotes predictability for defendants to be able to know where they may be sued.[261] However, this predictability has also led to court dockets becoming filled with procedural challenges to personal jurisdiction and other motions to dismiss.[262] One of the more prominent litigation trends of the past

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[256] *See* Borchers, *supra* note 15, at 130–32, 138 (criticizing the Court's specific jurisdiction test and concluding that it is overly restrictive); *see also* Genetin, *supra* note 13, at 110 (echoing similar concerns).

[257] *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (holding that a family injured in Oklahoma may not sue there); *see also* Borchers, *supra* note 15, at 130 (noting that the Supreme Court's approach often denies plaintiff's access to the forum in the state of injury).

[258] Effron, *supra* note 113, at 891–92.

[259] *See, e.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) (noting that specific jurisdiction depends on "the relationship among the defendant, the forum, and the litigation" (internal quotation marks omitted) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984))); *see also* Genetin, *supra* note 13, at 157 (concluding that the specific jurisdiction analysis remains vague despite the discussion of the relation between the lawsuit and the forum in *Walden*).

[260] *Cf.* McGee v. Int'l Life Ins., 355 U.S. 220 (1957) (finding jurisdiction based on a single contact).

[261] *See, e.g.*, Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 137 (2005) (remarking that the Court's minimum contacts approach provides a degree of predictability, which "insures . . . that nonresidents will be able to structure their transactions to avoid the sovereign jurisdictional prerogative of a foreign state").

[262] *Cf.* Subrin & Main, *supra* note 22, at 1878–79 (discussing the increase in early dismissals).

several decades has been the move toward greater reliance on early dismissal of cases.[263] Professor Miller refers to the procedural methods for early dismissal as "stop signs."[264] The Federal Rules of Civil Procedure codify seven such stop signs to be raised at the pleading stage.[265] The parties in *Bristol-Myers Squibb* spent four years arguing over jurisdiction alone.[266] Arguing over dismissal at such an early stage in litigation consumes resources and prevents disputes from being decided on their merits.[267] Returning to the mélange may make a challenge to a court's personal jurisdiction more difficult to both argue and prevail under,[268] thus acting as an incentive against making such a motion. A court applying the mélange will consider each factor relevant to personal jurisdiction—and will have discretion as to how to weigh each factor—in a given case.[269] This will remove some of the predictability in the jurisdictional analysis.[270] This may also raise the cost of contesting jurisdiction, as each factor, rather than contacts alone, will need to be argued.[271] Without predictability and facing higher costs of making personal jurisdiction arguments, defendants may find themselves discouraged from contesting jurisdiction. Of course, making it harder for a defendant to prevail at contesting jurisdiction would not remove every roadblock in the litigation process; parties could still delay resolving disputes on their merits.[272] Returning to the mélange would be a small step, but one that would allow courts to abandon an analytical process that *Bristol-Myers Squibb* and other cases have demonstrated is both convoluted and resource-consuming.[273] By simplifying the jurisdictional

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[263] *Id.* Professor Miller went so far as to refer to dismissal motions as "procedural playthings for defendants." Miller, *supra* note 23, at 476.

[264] Miller, *supra* note 23, at 470.

[265] FED. R. CIV. P. 12(b)(1)–(7).

[266] The complaints were originally filed in March 2012, and the California Supreme Court issued its opinion in August 2016. Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 877–79 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

[267] As Professor Miller put it, "More motions, more delays, more costs, more appeals, and potentially more early dismissals." Miller, *supra* note 23, at 476.

[268] *Cf.* McGee v. Int'l Life Ins., 355 U.S. 220 (1957) (upholding jurisdiction despite the defendant having only one contact with California).

[269] *See supra* note 40 and accompanying text.

[270] *Cf.* Rhodes, *supra* note 261, at 137 (discussing predictability under the Court's current approach).

[271] *Compare McGee*, 355 U.S. 220 (analyzing the mélange factors), *with* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (focusing on the defendant's contacts with the forum).

[272] *See* Miller, *supra* note 23, at 470–73 (describing other procedural roadblocks, such as summary judgment, class certification requirements, and heightened pleading standards). *See generally* Subrin & Main, *supra* note 22 (describing procedural roadblocks in modern litigation).

[273] To get a sense of the differences between the mélange approach and the Court's current approach, compare McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957) (finding jurisdiction based on a single contact in part because the plaintiff was in a worse condition to travel), with *McIntyre*, 564 U.S. at 886 (denying jurisdiction even though the plaintiff was in a worse condition to travel).

analysis, moving back to the mélange may help alleviate the burdens of modern judicial caseloads.

A return to the mélange approach would also improve access to the judicial system and help to address what commenters refer to as the "right-remedy gap."[274] Commenters trace the origins of this gap back to *Marbury v. Madison* and the promise that "for every violation of a right, there must be a remedy."[275] Right-remedy commentary typically focuses on situations in which remedies are not available for individuals who suffer constitutional injuries.[276] But the central concept, that injuries must have remedies, can be applied to civil procedure—and personal jurisdiction—more broadly.[277] As mentioned above, the trend in modern litigation has been toward disposing cases before trial.[278] While early dismissal may alleviate the burdens of a judge's caseload,[279] this benefit cannot be viewed in isolation. In particular, dismissing cases before discovery denies plaintiffs both the opportunity to develop a factual record that could aid in reaching accurate settlements, and the opportunity to have their cases resolved on the merits.[280] One consequence of a return to the mélange approach would be to broaden the scope of permissible personal jurisdiction.[281] Under this approach, fewer cases might end up dismissed at the pleading stage,[282] thus improving the odds that they are decided on their merits rather than on a procedural technicality.

Although expanding the scope of state personal jurisdiction will also increase the number of venues for plaintiffs to sue in,[283] returning to the mélange does not pose a significant risk of encouraging forum shopping.

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274 *See generally* Jeffries, *supra* note 25 (discussing the "right-remedy gap" and its origins).

275 *Id.* at 87 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

276 *See generally id.*; Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (discussing the gap between injuries of constitutional rights and available remedies).

277 For example, one of the goals of the drafters of the Federal Rules of Civil Procedure was to ensure "the resolution of disputes on their merits." Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 587–88 (2011).

278 *See supra* note 263 and accompanying text.

279 *See* Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1496–98 (2016) (discussing the origins and effects of growing caseloads on federal judges).

280 *See* Miller, *supra* note 23, at 476–77; Subrin & Main, *supra* note 22, at 1878–79.

281 *See* Genetin, *supra* note 13, at 111 (arguing that a reasonableness-focused personal jurisdiction framework would expand specific jurisdiction).

282 *Cf.* Subrin & Main, *supra* note 22, at 1878–79 (discussing the increase in early dismissals).

283 This is true in the context of federal litigation, where venue may be laid in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(b)(1) (2012). An entity such as a corporation is deemed to reside in each district where it is subject to personal jurisdiction with respect to a given civil action. § 1391(c)(2).

Critics of expanding the scope of personal jurisdiction worry that expansion will work to defendants' disadvantage, as plaintiffs will seek to file suit in the jurisdiction with the most plaintiff-friendly law.[284] Although forum shopping presents real problems for the judicial system,[285] these concerns will not be eliminated by restricting personal jurisdiction. Regardless of the scope of available jurisdiction, plaintiffs will seek to sue where they stand the greatest chance of prevailing or securing a favorable settlement.[286] Expanding jurisdiction is not by itself a blank check to forum shop; a defendant in federal court may still move to have the case transferred or dismissed for forum non conveniens.[287]

2. Respecting State Sovereignty

Returning to a mélange approach would encourage courts to consider the interests of the states as separate sovereigns in a way that the Court's current approach does not. Whether the personal jurisdiction analysis should be based on considerations of state sovereignty at all has been the subject of much debate.[288] The prospect of resolving this debate is not aided by the fact that the Court has taken contradictory positions on the issue, most recently in *Bristol-Myers Squibb* itself.[289] The mélange approach occupies a middle ground

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[284] *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 18–19 (1998) (describing common concerns about the effects of forum shopping); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 486 (2011) (explaining that forum shopping requires the availability of more than one court).

[285] *See* Norwood, *supra* note 147, at 304, 333 (arguing that forum shopping harms "public perceptions" of the justice system). *But see* Debra L. Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 370–73 (2006) (arguing that forum shopping is merely a product of a "lawyer's obligation [to] zealously . . . protect and pursue a client's legitimate interests, within the bounds of the law" (citation omitted)).

[286] *See* Basset, *supra* note 285, at 370 ("In light of differences in state law, lawyers not only do, in fact, check for the most favorable applicable law, but diligent and ethical legal practice requires consideration of this factor.").

[287] *See* Norwood, *supra* note 147, at 269–70 (arguing that courts should be more aggressive in employing forum non conveniens to deter attempts at forum shopping).

[288] *Compare* Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 854–55 (1985) (justifying personal jurisdiction limitations on sovereignty grounds), *and* Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. L. REV. 769 (2016) (justifying sovereignty limitations on personal jurisdiction through analogy to limitations on states imposing their regulatory regimes beyond their borders), *with* Perdue, *supra* note 26, at 739 ("[T]he core inquiry in personal jurisdiction is no longer a state-centered inquiry that focuses on the nature of state sovereignty, but rather a defendant-centered inquiry.").

[289] *Compare* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017) (citing Hanson v. Denckla, 357 U.S. 235, 251 (1958)) (noting that limits on jurisdiction "are a consequence of territorial limitations on the power of the respective States"), *and* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (explaining that due process "acts to ensure that the States, through their courts, do not reach

between the positions of those who support state sovereignty as a basis for personal jurisdiction limitations, and those who advocate other bases.[290] A strong argument can be made that a broader conception of personal jurisdiction makes ignoring state borders easier; the nonresident plaintiffs' claims in *Bristol-Myers Squibb* have few—if any—connections to California,[291] while jurisdiction is reasonable under the mélange.[292] However, a court applying the mélange would do something that a court applying the Court's current approach does not: consider the forum state's interest in litigating the dispute as a coequal factor. Under the current approach, the forum state's interest is not considered until the court finds sufficient contacts between the defendant and the forum state.[293] Under an approach in which the typical personal jurisdiction case is often decided on contacts alone, this means that the forum state's interest will not always be considered altogether.[294] In contrast, a court applying the mélange will always consider the forum state's interest.[295]

3. Focusing on Fairness

By framing the personal jurisdiction analysis as a question of whether jurisdiction is reasonable—not whether the defendant has sufficient contacts with the forum—the mélange approach adopts a fairness-based view of due process. Although the Court has consistently cast personal jurisdiction as a matter of due process since *Pennoyer*,[296] due process's true role in personal

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out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"), *with* Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 (1982) (noting that due process "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty").

290 *Compare* McFarland, *supra* note 112, at 790–94 (arguing that the Court should replace its current approach to personal jurisdiction with one that places greater emphasis on state borders), *with Ins. Corp. of Ir.*, 456 U.S. at 702 (explaining that limits on personal jurisdiction are not based on matters of sovereignty, but rather on the need to protect a defendant's "individual liberty interest"), *and* Perdue, *supra* note 26, at 743 (arguing that arguments based on sovereignty do not add to the analysis, and that "[a] more modest alternative would be for the Court to stop invoking sovereignty as if it provided some analytical content").

291 *See supra* notes 9–11 and accompanying text.

292 *See infra* Section III.B.

293 *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–77 (1985) (explaining that the forum state's interest in the dispute may be considered only after "it has been decided that a defendant purposefully established minimum contacts within the forum State").

294 *See* Freer, *supra* note 39, at 572–73 (noting that "once there is a contact, jurisdiction is presumed reasonable unless the defendant" meets the "strikingly onerous" burden of proving otherwise).

295 *See, e.g.*, McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957) (recognizing California's interest in providing Californians a forum to sue nonpaying insurers); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647–48 (1950) (recognizing Virginia's interest in adjudicating disputes involving Virginians' insurance policies); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (recognizing New York's interest in regulating trusts formed under its laws).

296 *See supra* note 27.

jurisdiction remains the subject of debate.[297] A procedural due process inquiry generally revolves around whether a defendant receives two things: notice and an opportunity to be heard.[298] At the heart of this inquiry is ensuring a modicum of fairness; something that the Court's current approach only hints at considering.[299] The Court's current approach to specific jurisdiction falls short of properly considering fairness for two reasons. First, the Court has made it very clear that only a showing of substantial unfairness can defeat jurisdiction.[300] And second, fairness cannot be considered at all until a contact has been found.[301] What this means is that it is possible for a plaintiff to be unable to sue in an otherwise fair forum simply because the defendant's contacts with that forum are tenuous.[302] It also gives the creative defendant an incentive "to structure its distribution system and send products to all fifty states, while avoiding the reach of any, or almost any, individual state's courts."[303] In contrast, the mélange makes fairness front and center in the analytical process.[304] As discussed above, the central question that the mélange answers is not "does the defendant have sufficient contacts?" but rather "would personal jurisdiction be reasonable, or fair, in this case?"[305]

Accordingly, returning personal jurisdiction to the mélange has three significant advantages over the Court's current inflexible approach. First, the mélange's more permissible view of whether jurisdiction is fair and reasonable in a given case may discourage defendants from contesting jurisdiction, saving

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297 *See, e.g.*, Borchers, *supra* note 83 (arguing that the Court should abandon analyzing personal jurisdiction as a matter of constitutional law altogether); Conison, *supra* note 112 (arguing that personal jurisdiction differs from both procedural and substantive due process); Pfeffer, *supra* note 72 (arguing that personal jurisdiction should be a matter of state rather than constitutional law).

298 Conison, *supra* note 112, at 1074; *cf. McGee*, 355 U.S. at 224 (citing *Travelers*, 339 U.S. 643) (noting that although the defendant will be inconvenienced by litigating in California, "[t]here is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear").

299 *See* Conison, *supra* note 112, at 1188 ("Notice, opportunity to be heard, and fairness in decision-making are not [the Court's current approach's] subjects."); *see also* Freer, *supra* note 39, at 572 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)) (noting that the Court only considers fairness once contact has been found).

300 *See Burger King*, 471 U.S. at 477 ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.").

301 *See id.* at 476–77 (explaining that fairness will not be considered until a contact is found).

302 *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 878 (2011); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 291 (1980); *see also* Borchers, *supra* note 15, at 130 ("[T]he Supreme Court's interpretation of its 'purposeful availment' test often denies plaintiffs in tort cases access to the most rational forum—in other words, the state of the injury.").

303 Miller, *supra* note 23, at 475.

304 *See supra* note 40 and accompanying text.

305 *See supra* notes 39–40 and accompanying text.

resources currently being spent disputing jurisdiction.[306] The effect of avoiding lengthy disputes over jurisdiction would help streamline litigation and encourage access to the courts; both of these consequences would in turn assist in making sure that more cases are resolved on their merits.[307] Next, consideration of the forum state's interests in adjudicating a particular case would also ensure that courts consider the states as separate sovereigns when analyzing jurisdiction.[308] Finally, returning personal jurisdiction to the mélange would promote a fairness-based view of due process by making fairness the central question to be asked and answered.[309]

B. Bristol-Myers Squibb *Under the Mélange*

As convoluted as the California Supreme Court's opinion in *Bristol-Myers Squibb* is,[310] the analysis becomes much simpler when analyzed under the mélange. Recall that a court applying the mélange will consider the nature of the defendant's contacts, the forum state's interest in adjudicating the case, and the burden on the parties and overall convenience of litigating in the forum, and will decide from there whether jurisdiction is reasonable.[311] Instead of focusing on the nuances of whether a defendant's interactions with a state are "contacts" for the purposes of personal jurisdiction,[312] courts applying the mélange will consider the broader question of whether jurisdiction is fair.[313] By examining the *Bristol-Myers Squibb* facts through a mélange lens, the analysis becomes much clearer, and, ultimately, much fuller.

1. BMS's Contacts with California

The extent of BMS's contacts with California suggest that allowing the nonresident plaintiffs' claims to move forward would be reasonable. BMS has a large footprint in California.[314] From 2006 through 2012 alone it sold roughly $1 billion worth of Plavix in the state.[315] Because of these contacts, eighty-six

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306 *See supra* notes 260–73 and accompanying text.
307 *See supra* notes 274–82 and accompanying text.
308 *See supra* notes 288–95 and accompanying text.
309 *See supra* notes 296–305 and accompanying text.
310 *See supra* Section II.B.2.
311 *See supra* note 40 and accompanying text.
312 *See supra* note 259 and accompanying text.
313 *See supra* notes 39–40 and accompanying text.
314 *See supra* notes 168–72 and accompanying text.
315 Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 886 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

California residents filed claims against BMS;[316] even if jurisdiction were not proper over the nonresident plaintiffs' claims, BMS must litigate the California residents' claims where they were filed.[317] However, the fact remains that the nonresident plaintiffs' injuries bear little, if any, connection to BMS's California activities.[318] However, under the mélange, contacts—like any other factor—are not alone dispositive.[319] BMS has made such a large footprint in California that it is reasonable for it to have to answer claims there.

2. California's Interest in the Litigation

While the extent of BMS's contacts with California suggest jurisdiction is reasonable, it is less clear that a court applying the mélange would conclude California has an interest in providing a forum for the nonresidents' claims that weighs in favor of litigating there.

On the one hand, California has an interest in providing a forum for the nonresident plaintiffs' claims. As the California Supreme Court noted in its opinion,[320] this interest stems from "California law[s] aimed at protecting consumers from the potential dangers posed by prescription medication" that regulate pharmaceutical manufacturers.[321] The existence of state laws regulating an industry have been influential in previous mélange cases; the Court in *Travelers*, *McGee*, and *Mullane* referred to similar state regulations.[322] California also has an interest in regulating entities that do business—particularly entities that do as much business as BMS does—within its borders. Beyond California's interest in regulating BMS's behavior, California has an interest in providing a forum for its residents.[323] In fact, California's interest goes beyond providing a forum for its own residents; it is also interested in ensuring that its residents recover for their injuries.[324] Two facts illustrate this interest. First, keeping the California and nonresident plaintiffs' claims consolidated in one action would increase the amount of evidence available

316 *Id.* at 877–78.

317 *See supra* note 176 and accompanying text.

318 *See supra* notes 9–11 and accompanying text.

319 *See* McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957) (finding jurisdiction based on a single contact).

320 *Bristol-Myers Squibb*, 377 P.3d at 892–93.

321 *Id.* at 892; *see also* CAL. HEALTH & SAFETY CODE §§ 119400–119402 (West 2007).

322 *See McGee*, 355 U.S. at 224; Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647–48 (1950); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

323 *Cf. McGee*, 355 U.S. at 223 (noting California's interest in providing its residents a forum).

324 *See Bristol-Myers Squibb*, 377 P.3d at 893.

and would help develop an accurate factual record.[325] Second, keeping the claims consolidated protects the California plaintiffs from being shut out of a recovery, as splitting the plaintiffs would encourage a "race to the courthouse."[326]

On the other hand, despite evidence of California's interest in the litigation, a court applying the mélange might conclude that this factor does not weigh in favor of litigating the nonresidents' claims in California. The comparisons between *Bristol-Myers Squibb* and prior mélange cases are not flawless. While the presence of state laws regulating the defendants' activities was relevant in prior mélange cases, the plaintiffs in those cases were at least citizens of the states where they filed suit.[327] Unlike the trusts in *Mullane*, which were established under the law of the state where complaints were eventually filed,[328] BMS is incorporated in Delaware, not California.[329] Although California law regulates the behavior of pharmaceutical manufacturers such as BMS, using these laws as a justification for regulating activities that occur entirely outside California may raise horizontal federalism concerns.[330] Thus it is possible that a court looking at the facts of *Bristol-Myers Squibb* could conclude that California lacks an interest in providing a forum for these claims that makes it a preferable forum as compared to other states.

3. The Nonresidents' Interest in Litigating in California

Similar to analyses of California's interest in the litigation, courts applying the mélange may differ in the weight that they give to the nonresidents' interest in litigating in California.

A court applying the mélange may find that the nonresident plaintiffs obviously have an interest in litigating in California because they chose to file suit there. If they felt otherwise, they would have filed elsewhere.[331] The nonresident plaintiffs also have a strong interest in keeping their claims

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325 *See id.* at 892 (citing Ault v. Int'l Harvester Co., 528 P.2d 1148, 1153 (1974)) (noting the evidentiary value of evidence of similar claims).

326 *Id.* at 893 (quoting *In re* Exxon Valdez, 229 F.3d 790, 795–96 (9th Cir. 2000)).

327 *See supra* note 322 and accompanying text.

328 Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

329 *Bristol-Myers Squibb*, 377 P.3d at 883.

330 Horizontal federalism refers to the interactions between the laws of the various states. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 60–61 (2014). One horizontal federalism concern relates to "spillovers," situations where one state's laws affect citizens in another state. *See id*. at 61–62.

331 *See Bristol-Myers Squibb*, 377 P.3d at 893 (describing the nonresidents' interest in litigating in California).

consolidated, both amongst themselves and with the California residents; doing so allows them to share both the costs and benefits of litigation amongst themselves.[332] As the California Supreme Court noted, splitting the litigation would also incentivize a "race to the courthouse" among the plaintiffs, presenting the possibility that some claims might be shut out by others.[333] Thus for the plaintiffs, both nonresident and resident, litigating in California furthers their interests in seeking recovery from BMS.

Despite the nonresident plaintiffs' interest in being able to litigate where they choose, a court applying the mélange may find that this interest warrants little weight. Two considerations are relevant here. First, a court may recognize that the nonresident plaintiffs were engaging in forum shopping when they filed their claims in California.[334] Second, in contrast to the California Supreme Court's concern that the alternative to litigating all the claims in California is to have them spread out over multiple forums, a court applying the mélange may consider the fact that, under *Daimler* and *Goodyear*, general jurisdiction over BMS with regard to all the Plavix claims could be obtained in New York or Delaware.[335]

4. The Overall Convenience of Litigating All Claims in California

Comparing the relative positions of both sides in *Bristol-Myers Squibb* demonstrates that the burden imposed on BMS by having to litigate in California is slight. BMS is a large company with resources available to defend against products liability claims.[336] In contrast, the plaintiffs are a group of individuals who likely banded together as a means of diffusing their costs.[337] BMS will have to continue litigating the eighty-six California plaintiffs' claims

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[332] *Cf.* McGee v. Int'l Life Ins., 355 U.S. 220, 223 (1957) ("[R]esidents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable."); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648–49 (1950) (noting that "[h]ealth benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit").

[333] *Bristol-Myers Squibb*, 377 P.3d at 893 (quoting *In re* Exxon Valdez, 229 F.3d 790, 795–96 (9th Cir. 2000)). The court also noted that if litigation were split up, discovery disputes in other forums would cause delays in California, directly affecting the California plaintiffs. *Id.*

[334] *See supra* note 147 and accompanying text.

[335] *See Bristol-Myers Squibb*, 377 P.3d at 883 (noting that BMS could not be "at home" in California because it is incorporated in Delaware and has its principal places of business in New York and New Jersey).

[336] *See supra* note 212 and accompanying text. Forbes recently listed BMS at number 234 on its list of the world's 2,000 largest public companies. *The Just 100: America's Best Corporate Citizens: Bristol-Myers Squibb*, FORBES, http://www.forbes.com/companies/bristol-myers-squibb/ (last visited Mar. 23, 2018).

[337] *See supra* note 332 and accompanying text.

regardless of whether the nonresidents join them.[338] Of course defending against the nonresident claims in California burdens BMS.[339] However, this burden is mitigated by the fact that in the alternative—if the nonresidents' claims were split—BMS would find itself litigating the same issues in multiple states.[340] Thus, BMS is in a better position to travel than the nonresident plaintiffs are.

Finally, the overall convenience of allowing all the claims to move forward together in California suggests that jurisdiction is fair and reasonable there. The facts that point to consolidating the claims in California being an efficient means to resolve the dispute have been mentioned before. Consolidating the claims ensures that the factual record will be well-developed, which in turn increases the odds that the dispute will arrive at a fair resolution.[341] One risk of splitting up the claims is the possibility that some plaintiffs will not be able to recover while others will.[342] If jurisdiction is to help address gaps between rights and remedies, then similarly situated plaintiffs should have similar opportunities to recover.[343] Consolidation also avoids the potential discovery delays that would be caused by concurrent litigation across several states.[344] Finally, consolidating the claims in California is an efficient means of resolving the dispute for BMS, as it avoids the costs of cumulative litigation across multiple states.[345]

Considering the above factors, it is not clear whether asserting personal jurisdiction over BMS in California is reasonable. Although BMS has made extensive contacts with California over the years,[346] and the burdens imposed on BMS by having to litigate in California would be mitigated by the efficiency of allowing a case to move forward where it was originally filed,[347] reasonable courts could differ in how they approach California's and the nonresident plaintiffs' interests in having this case litigated in California.[348]

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338 *See supra* note 176 and accompanying text.

339 *Bristol-Myers Squibb*, 377 P.3d at 891.

340 *Id.* at 891–92. The burden is also mitigated by the fact that California law permits out-of-state discovery. *Id.* at 892 (citing CAL. CIV. PROC. CODE § 2026.010 (West Supp. 2018)).

341 *See* Subrin & Main, *supra* note 22, at 1878–79 (expressing concerns about underdeveloped records).

342 *See Bristol-Myers Squibb*, 377 P.3d at 893 (quoting *In re* Exxon Valdez, 229 F.3d 790, 795–96 (9th Cir. 2000)).

343 *See supra* note 275 and accompanying text.

344 *Bristol-Myers Squibb*, 377 P.3d at 894.

345 *See id.* at 891–92 (noting that the alternative to upholding jurisdiction in California is to litigate the same claims over multiple forums).

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

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

348 *See supra* Sections III.B.2–3.

What is clear is that under the mélange, the analysis of *Bristol-Myers Squibb* becomes much more involved. Whereas California's interest in the litigation and the plaintiffs' interest in litigating where they chose to file suit are merely afterthoughts when examining this case through the current personal jurisdiction framework,[349] under the mélange they become the dispositive factors in an analysis.

CONCLUSION

At its core, the California Supreme Court's approach in *Bristol-Myers Squibb* was a response to *Daimler*. With general jurisdiction limited by the Supreme Court's "at home" standard, the California Supreme Court sought to expand specific jurisdiction by applying a "sliding scale" test for relatedness. That backfired when the Supreme Court granted certiorari to adopt a narrower definition. Many academics and practitioners will undoubtedly appreciate that the Court stepped in to clarify its relatedness standard after decades of silence. However, clarifying what it means for a claim to "arise out of or relate to"[350] a defendant's contacts with the forum is a red herring. It solves the wrong problem.

As this Comment argues, the problem with the Court's current approach to analyzing personal jurisdiction reaches deeper than the relatedness question. The problem is a chronic overemphasis on finding a contact between the defendant and the forum state before even considering whether jurisdiction would be fair. Because of this emphasis, fairness has been all but removed from the jurisdictional analysis. Solving relatedness will not solve this problem. To address it, the Court must abandon its focus on contacts alone and return to a mélange analysis.

Returning to the mélange would further several normative values that modern civil procedure seeks to promote. First, the mélange's fuller analysis of whether jurisdiction is fair and reasonable in a case would reduce the number of resources currently spent on pre-discovery litigation. This in turn would both help streamline litigation and encourage access to the courts, making sure that more cases are resolved on their merits. Consideration of the forum state's interests in adjudicating a case would also ensure that courts consider the states as separate sovereigns when analyzing jurisdiction. Finally, returning personal

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349 *See Bristol-Myers Squibb*, 377 P.3d at 891–94.

350 *Id.* at 886.

jurisdiction to the mélange would promote a fairness-based view of due process by making fairness the central question to be asked and answered.

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