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## Extending Federal Rule of Civil Procedure 4 (k) (2): A Way to (Partially) Clean Up The Personal Jurisdiction Mess

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# Extending Federal Rule of Civil Procedure 4 (k) (2): A Way to (Partially) Clean Up The Personal Jurisdiction Mess

## **Keywords**

Specific jurisdiction as to non-intentional torts, Intentional tort jurisdictional law, The Elusive Reasonableness Test, An extended Rule 4(K)(2)

## ARTICLES

### EXTENDING FEDERAL RULE OF CIVIL PROCEDURE 4(K) (2): A WAY TO (PARTIALLY) CLEAN UP THE PERSONAL JURISDICTION MESS

PATRICK J. BORCHERS\*

*The Supreme Court's personal jurisdiction jurisprudence has become increasingly constricted and remains unclear on many crucial questions. However, it appears that the Court will not rethink its basic approach to determining whether the defendant has minimum contacts with the forum state. The Supreme Court has heard five cases concerning personal jurisdiction since 2011, and it has decided all five in favor of defendants. As a result, U.S. plaintiffs can be left without a U.S. forum, even though they are injured in the United States by foreign corporations and the suits arise from the foreign corporations' purposeful efforts to benefit from the U.S. market. Moreover, other important issues, such as the significance of virtual contacts, lie unresolved. This Article proposes a practicable solution to the worst of the problems: the lack of a U.S. forum for domestic plaintiffs injured in the United States by foreign defendants. The proposed solution is to extend Federal Rule of Civil Procedure 4(k)(2)—which in its current form allows for nationwide personal jurisdiction in federal question cases in which the plaintiff would not have another U.S. forum—to include diversity and alienage cases. While this solution would not resolve all difficult issues, it would work to the advantage of U.S. plaintiffs by ensuring a local forum and benefit U.S. defendants by leveling the playing field between them and their foreign counterparts. This Article then considers whether the Rules*

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*Enabling Act would authorize an extension of Federal Rule 4(k)(2) and if it would be constitutional. The Article concludes that an extended Rule 4(k)(2) would survive challenges under both the Rules Enabling Act and the Constitution.*

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#### INTRODUCTION

I am tired of writing articles complaining about the dismal state of the Supreme Court's personal jurisdiction jurisprudence—and complain I have. I have argued that the Constitution does not require significant restraints on jurisdiction.<sup>1</sup> I have argued that the famous case of *Pennoyer v. Neff*<sup>2</sup> quite plausibly invoked the Due Process Clause of the Fourteenth Amendment only to guarantee the defendant a right to challenge jurisdiction, not to regulate the limits of state-court jurisdiction. Thus, the whole notion that the Supreme Court needs to closely supervise assertions of personal jurisdiction might be a giant misunderstanding.<sup>3</sup> I have argued that the Supreme Court's recent

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1. See, e.g., Patrick J. Borchers, *Jones v. Flowers: An Essay on a Unified Theory of Procedural Due Process*, 40 CREIGHTON L. REV. 343, 346–48 (2007).

2. 95 U.S. 714 (1877).

3. See 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, 38–51 (1990).

decisions are wrong, badly reasoned, or both.<sup>4</sup> I have argued that the current restraints on jurisdiction are at least as severe as those imposed by the implied consent and presence fictions that pre-dated the current “minimum contacts” test the Court first announced in *International Shoe Co. v. Washington*.<sup>5</sup> But I, and like-minded commentators, have not made any headway with the Court.<sup>6</sup> So my aim in this Article is to propose a solution other than having the Court completely rethink its approach to personal jurisdiction, which appears unlikely to occur.<sup>7</sup>

Not all commentators are as despondent as am I. Some have applauded the Court’s recent opinions restricting corporate general jurisdiction<sup>8</sup>—that is, jurisdiction based on contacts with the forum

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For a related argument regarding *Pennoyer*, see Steven E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1309–14 (2017), which asserts that the discussion of the Due Process Clause in *Pennoyer* may have been dicta, but the case was correctly decided regardless.

4. See, e.g., Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1245–46 (2011).

5. 326 U.S. 310, 316 (1945); see also Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1, 3–4 (2014).

6. However, of some personal consolation, the Supreme Court cited one of my articles. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 758 n.9 (2014) (citing Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 139 (2001) (“[G]eneral jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.”)). My point was that a relatively expansive notion of general jurisdiction was necessary to fill in the gaps left by overly constricted specific jurisdiction principles. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) and its progeny’s retraction of corporate general jurisdiction to the corporation’s “home” would, in my view, be unproblematic if it did not leave many plaintiffs without any U.S. forum, even when foreign defendants injure plaintiffs in the United States and in so doing reap the benefits of the U.S. market.

7. See Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, NW. U. L. REV., 1301, 1305 (2014) (explaining why the Supreme Court is unlikely to rethink its approach to personal jurisdiction).

8. See, e.g., Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1081 (2012) (contending that the restrictive view offered in *Goodyear* simplified the general personal jurisdiction analysis); Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 572–73 (2012) (discussing Justice Ginsburg’s attempt in *Goodyear* to clarify the level of activity required for general personal jurisdiction); Wm. Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 MARQ. L. REV. 375, 375 (2016) (arguing that the restrictive interpretation of general personal jurisdiction provides a sense of consistency and predictability).

state unrelated to the suit<sup>9</sup>—to states where the defendant is “essentially at home.”<sup>10</sup> I would have little problem with so restricting general jurisdiction if specific jurisdiction—that is, jurisdiction based on contacts with the forum state related to the suit<sup>11</sup>—had not become unreasonably constricted. Many commentators agree that there are at least some problematic aspects to personal jurisdiction law.<sup>12</sup> Moreover, the Supreme Court’s failure to decide important issues that are splitting lower courts—such as the significance of virtual contacts,<sup>13</sup> the degree to which defendants must target a forum state in products liability suits based on local injuries,<sup>14</sup> the line between related and unrelated contacts,<sup>15</sup> and so on—has left lower courts trying to make sense out of the nonsense.<sup>16</sup>

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9. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (introducing the terms “specific” and “general” jurisdiction).

10. See *Daimler AG*, 134 S. Ct. at 751; *Goodyear*, 564 U.S. at 915.

11. See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1785 n.2 (2017) (Sotomayor, J., dissenting) (describing recent limitations on general jurisdiction as “ill advised”).

12. See, e.g., Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 104–07 (2015) (noting that even though Justice Ginsburg’s analysis in *Daimler* was reasoned in protecting corporations from undue burdens, the same consideration was not given to the burdens that individuals will face, and thus corporations are given “unprecedented” power to predetermine what states or countries they can be sued in and what law will apply to them); Donald L. Doernberg, *Resolving International Shoe*, 2 TEX. A&M L. REV. 247, 254–55 (2014) (recognizing the imbalance between corporations and individuals regarding personal jurisdiction); Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1164–65 (2015) (commenting that the Court has had “historic failure [in] explain[ing] the function of general jurisdiction”); Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 NEB. L. REV. 477, 479–80 (2016) (questioning the viability of personal jurisdiction).

13. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 890 (2011) (Breyer, J., concurring in the judgment) (questioning the sufficiency of rules limiting jurisdiction in relation to virtual contacts); see also *infra* notes 179–94 and accompanying text.

14. See, e.g., *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 548 n.26 (5th Cir. 2014) (recognizing that the stream-of-commerce test contradicts the *McIntyre* plurality test because the stream-of-commerce test does not require that the defendant target the forum state).

15. See, e.g., *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 579–85 (Tex. 2007) (examining the various tests courts have developed to address how close a defendant’s forum activities must be to the cause of action).

16. See, e.g., *Lambeth Magnetic Structures, L.L.C. v. Toshiba Corp.*, No. 14-1526, 2017 WL 782892, at \*5 (W.D. Pa. Mar. 1, 2017) (considering the various tests available and finding the O’Connor test to be most suitable).

However, there is a relatively straightforward (albeit partial) solution, which is to amend Federal Rule of Civil Procedure 4(k) (2) to include cases brought in federal court on diversity of citizenship or alienage grounds.<sup>17</sup> This Article is not the first to mention the extension of Rule 4(k) (2) to diversity and alienage cases,<sup>18</sup> but the possibility of so extending Rule 4(k) (2)—and the potential objections to doing so—have received little attention thus far.

Rule 4(k) (2) currently allows federal courts in federal question cases (maybe in admiralty, too<sup>19</sup>) to extend their jurisdictional reach to the constitutional limits if no U.S. forum would otherwise have jurisdiction.<sup>20</sup> Because federal courts are organs of the federal government, the Due Process Clause of the Fifth Amendment governs them, while the Fourteenth Amendment applies to states.<sup>21</sup> Although the Supreme Court has never ruled on the issue,<sup>22</sup> most lower courts and other authorities are of the opinion that some variant of the “national contacts” test applies to cases under the Fifth Amendment.<sup>23</sup> This test asks not whether the defendant has minimum contacts with any particular state but rather with the United States as a whole.<sup>24</sup> The

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17. See 28 U.S.C. § 1332 (2012) (conferring federal subject matter jurisdiction in cases between citizens of different states and citizens of a foreign state and citizens of a U.S. state).

18. I briefly mentioned the possibility after the *J. McIntyre* decision, see Borchers, *supra* note 4, at 1274–75, and at least three other commentators also noted it. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 305 (2012); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 348 (2012). Professor Steven E. Sachs, picking up on my brief post-*J. McIntyre* suggestion, discusses it and argues that an expanded Rule 4(k) (2) would not do enough to solve the problems. See Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1325 (2014). His proposal is for a federal statute, but—as I discuss—I believe that a federal statute is politically infeasible. See *infra* notes 233–38 and accompanying text. One commentator has suggested revising Rule 4(k) (1) (A), but only in federal question cases. See Daniel Klerman, *Walden v. Fiore and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and Stafford v. Briggs*, 19 LEWIS & CLARK L. REV. 713, 716–17 (2015) (advocating for this change to give plaintiffs multiple U.S. forums in federal question cases).

19. See, e.g., *World Tanker Carriers Corp. v. MV Ya Mawlaya*, 99 F.3d 717, 723 (5th Cir. 1996) (“[W]e conclude that federal law includes admiralty cases for the purposes of Rule 4(k) (2).”).

20. FED. R. CIV. P. 4(k) (2).

21. See PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 479–80 (5th ed. 2010) (noting that in federal litigation the Fifth Amendment limits federal authority and in state litigation the Fourteenth Amendment limits state authority).

22. See *infra* notes 265–70 and accompanying text.

23. See *infra* notes 269–87 and accompanying text.

24. See *infra* note 269–70 and accompanying text.

plurality opinion in *J. McIntyre Machinery Co. v. Nicastrò*<sup>25</sup> suggested in dictum that a federal statute conferring national personal jurisdiction in products liability cases would be constitutional.<sup>26</sup> Assuming the Fifth Amendment allows national personal jurisdiction, a federal statute would cure the perverse result that some foreign defendants can benefit commercially from the U.S. market yet avoid suit in any U.S. court, even if the suit is based on those activities.<sup>27</sup>

The chances of enacting such a federal statute are slim at best. Even very limited efforts in this direction have failed to advance in Congress.<sup>28</sup> Professor Steven E. Sachs has made a thoughtful argument for a federal statute to fix the jurisdictional mess.<sup>29</sup> However, any attempt to enact through Congress even slightly plaintiff-friendly jurisdictional reform will run into devastating political opposition, regardless of which major party controls Congress or the White House.<sup>30</sup> Business interests and the law firms that represent them have celebrated the slew of defense-friendly jurisdictional decisions of the last six years.<sup>31</sup> It is vastly easier to stop legislation than to pass

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25. 564 U.S. 873 (2011) (plurality opinion).

26. *Id.* at 885–86; *see also* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480 n.6 (collecting statutes authorizing “nationwide service” of process). Admittedly, I lambasted the *J. McIntyre* plurality opinion as “quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era.” *See* Borchers, *supra* note 4, at 1263.

27. *J. McIntyre Mach., Ltd.*, 564 U.S. at 885 (plurality opinion) (agreeing that the defendant targeted the U.S. market).

28. *See infra* notes 235–38 and accompanying text.

29. *See* Sachs, *supra* note 18, at 1348–49.

30. A very limited effort to expand jurisdiction in products liability cases has failed to advance regardless of which major political party is in power. *See infra* note 235.

31. For instance, consider just a snippet of commentary on the Supreme Court’s utterly unsurprising ruling in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781–84 (2017), in which the Court held that the forum state lacked specific jurisdiction over the non-residents’ products liability claim against the defendant because there was no connection between the forum state and their claim. *See, e.g.*, Sarah Karlin-Smith, *Supreme Court Ruling in Drug Case Could Have Big Implications for Product Liability*, POLITICO (June 19, 2017, 10:34 AM), <http://www.politico.com/story/2017/06/19/supreme-court-bristol-myers-squib-239712> (highlighting the disproportionate disadvantages for plaintiffs seeking to bring a claim against a corporate defendant resulting from the *Bristol-Myers Squibb* decision); Andrew J. Pincus et al., *Supreme Court’s Decision in Bristol-Myers Squibb v. Superior Court Rejects Expansive View of Specific Jurisdiction*, CLASS DEF. BLOG (June 19, 2017), <https://www.classdefenseblog.com/2017/01/supreme-court-will-review-two-important-cases-regarding-scope-personal-jurisdiction> (commenting that the *Bristol-Myers-Squibb* decision served to recognize “important limits imposed by the Fourteenth Amendment’s due process clause on the ability of courts to adjudicate cases that aggregate the claims of plaintiffs from many jurisdictions”).

legislation, and considerable resources will inevitably pour into maintaining the current defense-friendly jurisdictional regime. However, meaningful (and controversial) changes to the Federal Rules of Civil Procedure are possible, as the major 2015 revisions to the rules show.<sup>32</sup> Moreover, expanding Rule 4(k) (2) is unlikely to generate the political opposition that a broad federal jurisdictional statute would because amending Rule 4(k) (2) would—as a practical matter—mostly affect foreign defendants and work to the benefit of both U.S. plaintiffs and defendants.<sup>33</sup>

In Part I, I review what I see as the most problematic aspects of the current state of personal jurisdiction law. In Part II, I propose the extension of Rule 4(k) (2) to diversity and alienage cases. In Part III, I consider possible objections to adding diversity and alienage cases to the scope of Rule 4(k) (2). These include possible practical shortcomings of this solution, whether it would violate the Rules Enabling Act,<sup>34</sup> and whether it would violate the Constitution. Extending Rule 4(k) (2) would solve one of the worst practical problems created by the law of personal jurisdiction and an extension would not violate the Rules Enabling Act or the Constitution.

## I. PROBLEMATIC ASPECTS

The current personal jurisdiction landscape is full of problems, the worst of which would be solved by extending Rule 4(k) (2). What follows is a discussion of some of those problems. While this is not an exhaustive catalog of all the problematic and unresolved issues lurking in jurisdiction jurisprudence, it nonetheless should make my point that jurisdiction law has problems that need fixing.

### A. *Non-Intentional Torts*

Specific jurisdiction as to non-intentional torts is unclear and too constricted. The original sin was *World-Wide Volkswagen Corp. v. Woodson*,<sup>35</sup> which held that Oklahoma could not exercise jurisdiction

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32. See, e.g., Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 1 (2016) (“The recent amendments to the Federal Rules of Civil Procedure were the most controversial in decades.”); see also Brian J. Pollack & Peter Swann, *The Rules Governing Parties, Discovery and Disclosure*, ARIZ. ATT’Y, Dec. 2016 at 18, 18–19 (noting controversy over whether to adopt new federal rules on the scope of discovery as part of the Arizona rules).

33. See *infra* notes 243–47 and accompanying text.

34. 28 U.S.C. § 2072 (2012).

35. 444 U.S. 286 (1980).

over the New York dealer and the regional distributor of an automobile involved in an accident in the forum state.<sup>36</sup> The plaintiffs in the case had brought a products liability action on the theory that the gas tank's placement made the car vulnerable to igniting if struck from behind.<sup>37</sup> In denying jurisdiction, the Court gave short shrift to practical considerations, including the convenience of an Oklahoma forum (the bulk of the evidence was located there) and foreseeability that a mobile product such as a car would be used out of state.<sup>38</sup> It held that considerations of "interstate federalism" could lead courts to deny jurisdiction to even the most convenient forum.<sup>39</sup>

The Court, however, announced the "stream of commerce" test.<sup>40</sup> Its citation to a famous state court decision implied strongly that selling a product in the forum state—through normal commercial channels—would create minimum contacts in a suit regarding the safety of the product.<sup>41</sup>

Alas, matters turned out to be far from so simple. In a 1987 decision, *Asahi Metal Industry Co. v. Superior Court*,<sup>42</sup> the Court divided four-to-

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36. *Id.* at 298–99. The back story of the case is extensively recounted in Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122 (1993). Although the Supreme Court's opinion assumed that the issues involved the convenience to the parties and state sovereignty, the motion to dismiss the dealer and the distributor from the case had nothing to do with either. Instead, the defendants were trying to create full diversity and get the case removed from state to federal court, and they succeeded in doing so. *Id.* at 1139. The plaintiffs still had two deep-pocketed defendants—Audi and Volkswagen—as parties in the case, and in an era of joint-and-several liability, having the distributor and the dealer as parties only served to keep the case in a plaintiff-friendly state court venue. *Id.* at 1127–28. The defense's strategy was to remove the case to federal court because it was a more defense-friendly forum. *Id.* at 1128–29.

37. *World-Wide Volkswagen Corp.*, 444 U.S. at 288.

38. *Id.* at 295.

39. *Id.* at 294. The Supreme Court seemed to back away from the sovereignty rationale just two years later. *See Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (explaining that the Due Process Clause "makes no mention of federalism concerns"). Recently, however, the sovereignty rationale has made a comeback. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879–80 (2011) (plurality opinion) (relying on the "general rule" that the sovereign may exercise its power when the defendant avails himself of the benefits and privileges of the forum state).

40. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297–98 ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.").

41. *Id.* at 297–98 (citing *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961) (holding that the manufacturer of a valve on a water heater was subject to jurisdiction where the manufacturer sold the heater in the forum state)).

42. 480 U.S. 102 (1987).

four-to-one on whether the sale of approximately 100,000 motorcycle tire valves in the forum state sufficed to establish minimum contacts in a case alleging a defect in one of the valves, leading to a tire blowout.<sup>43</sup> Four Justices opined that predictable sales were not enough unless accompanied by other indicia of affirmative efforts to serve the state market,<sup>44</sup> four other Justices said that predictable sales sufficed,<sup>45</sup> and one Justice refused to endorse either test.<sup>46</sup> Lower courts were predictably confused.<sup>47</sup>

Then, in 2011, the Court appeared poised to resolve the split in *J. McIntyre* but managed the remarkable feat of further confusing matters.<sup>48</sup> The case involved a three-ton, \$24,000 scrap metal recycling machine manufactured in and sold from England by an English corporation.<sup>49</sup> A nominally independent (though similarly named) U.S. distributor in Ohio sold the machine to a buyer who had seen one at a trade show in Nevada and who thereafter bought and used it in New Jersey.<sup>50</sup> The plaintiff, an operator who had four fingers of one hand sliced off by the machine while at work in New Jersey, sued the English manufacturer in New Jersey state court alleging that the machine was unreasonably unsafe.<sup>51</sup>

The Court's four-vote plurality opinion, which found that New Jersey violated the Constitution in taking jurisdiction, was laced with overwrought references to the threat to sovereignty caused by courts overstepping their boundaries. The opinion called into question the

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43. *Id.* at 105 (plurality opinion).

44. *Id.* at 112–13.

45. *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

46. *Id.* at 121–22 (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens endorsed neither test, reasoning that Asahi had minimum contacts under either test based on the volume of the sales of its valves in California. *Id.* at 122.

47. See HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 419–21 (discussing the lack of consensus in lower courts on which test from *Asahi* to apply and to which types of cases).

48. See *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873 (2011); see also Kaitlyn Findley, *Paddling Past Nicastro in the Stream of Commerce Doctrine: Interpreting Justice Breyer's Concurrence as Implicitly Inviting Lower Courts to Develop Alternative Jurisdictional Standards*, 63 EMORY L.J. 695, 700 (2014) (“Yet again, the Court issued a split decision, reinforcing the divide between the competing tests in *Asahi* and seemingly cementing the doctrine's analytical instability.”).

49. *J. McIntyre Mach. Ltd.*, 564 U.S. at 894 (Ginsburg, J., dissenting).

50. *Id.* at 894–96.

51. *Id.* at 878 (plurality opinion).

entire stream-of-commerce concept.<sup>52</sup> The likely controlling<sup>53</sup> two-vote concurrence in the judgment refused to take sides in the debate regarding which stream-of-commerce test should prevail but found that because the record showed only one such machine having been sold in the forum state, its courts lacked jurisdiction under either version of the test.<sup>54</sup> The dissent pointed to the defendant-manufacturer's obvious desire to take advantage of the U.S. market and the foreseeability of a New Jersey sale, and stated it would have found jurisdiction.<sup>55</sup> Thus, the question of whether sale of an allegedly defective product in the forum state through ordinary commercial channels suffices for jurisdiction is no closer to resolution than it was three decades ago.

Of course, many non-intentional tort cases do not involve products liability, but the products cases present the most difficult and interesting jurisdictional cases. Moreover, the extent to which the defendant must target his actions at the forum state in non-products cases is not resolved in other contexts.<sup>56</sup>

### B. General Jurisdiction

Although the case law was a morass, many lower courts once took the view that some corporations have such extensive operations throughout the United States (take General Motors as an example) that they were subject to jurisdiction in any of the fifty states regardless of whether the suit bore any relationship to the forum state.<sup>57</sup> This view drew from *International Shoe*, which stated that corporations were

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52. *See id.* at 879–80.

53. *See* Borchers, *supra* note 4, at 1265 (“Because Justice Breyer’s opinion and the dissent commanded five votes combined, and the concurrence involved the narrowest rationale for invalidating the attempted exercise of jurisdiction, lower courts will likely follow Justice Breyer’s opinion.”).

54. *J. McIntyre Mach. Ltd.*, 564 U.S. at 888–89 (Breyer, J., concurring in the judgment). One might argue that *J. McIntyre* at least makes clear that a single sale cannot suffice, but given the narrowness of Justice Breyer’s opinion, even that is not entirely clear. If the single sale had been a multi-million-dollar jet, it is difficult to say whether the concurrence would have found the single sale sufficient to establish jurisdiction.

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

56. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 424–27 (suggesting that the minimum contacts analysis can be instructive in navigating non-product negligence cases and the purposeful availment analysis can be instructive in non-product strict liability cases).

57. *See generally* Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 808–09 (2004) (noting case law employs broader theories than the academic calls to limit general jurisdiction).

subject to suit wherever they had “systematic and continuous” contacts; the Court held that having about a dozen salesmen and selling roughly \$30,000 worth of shoes annually in the forum state sufficed.<sup>58</sup>

Until recently, the Court did not have much to say about general jurisdiction. In *Perkins v. Benguet Consolidated Mining Co.*,<sup>59</sup> the Court held that a corporation was subject to jurisdiction in the state in which it had temporarily located its corporate headquarters.<sup>60</sup> In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>61</sup> the Court held that four million dollars of unrelated purchases in the forum state was not enough to sustain jurisdiction.<sup>62</sup> A huge range of activities lies between these poles, and lower courts were in the wilderness regarding what sufficed for general jurisdiction.<sup>63</sup>

That changed with the Supreme Court’s 2011 opinion in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>64</sup> *Goodyear* was an easy case that the North Carolina state courts got wrong.<sup>65</sup> The suit arose after a European subsidiary of the American tire giant Goodyear

58. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (holding that the activities of defendant were “systematic and continuous throughout the years in question”).

59. 342 U.S. 437 (1952).

60. *Id.* at 447–48. The Court now uncritically cites *Perkins* for the proposition that a corporation is subject to general jurisdiction in the state of its principal place of business. *See, e.g., Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915, 928 (2011) (describing *Perkins* as “[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum” (quoting *Donahue v. Far E. Air Transp. Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981))). However, the case is not quite so clear as the Court now interprets it. The Court’s opinion was very close to an advisory opinion, the suit was probably related to the corporation’s forum-state activities, and it is not clear how extensive the corporation’s forum-state activities were relative to other locations. *See Borchers, supra* note 4, at 1251.

61. 466 U.S. 408 (1984).

62. *Id.* at 411, 416. The majority held that the plaintiffs conceded in their brief that the forum state activities were unrelated. *Id.* at 414. While the brief was not a model of clarity, Justice Brennan argued in his dissent that the plaintiffs had not conceded the issue. *Id.* at 426 (Brennan, J., dissenting). He noted that they could have reasonably argued the contacts were related because one of the allegations was negligent pilot training—the case arose out of the crash of a helicopter the defendant owned—and at least some training had taken place in the forum state of Texas. *Id.* at 425–26.

63. *See HAY, BORCHERS & SYMEONIDES, supra* note 21, at 408–13 (arguing that “the quantum of unrelated contacts” is the most difficult aspect of the general jurisdiction analysis).

64. 564 U.S. 915 (2011).

65. *See Brown v. Meter*, 681 S.E.2d 382 (N.C. Ct. App. 2009) (finding personal jurisdiction where defendant tire manufacturer exported and distributed a substantial number of its tires in the forum state), *rev’d sub nom. Goodyear*, 564 U.S. 915 (holding that the defendant’s connection was too limited to the forum state to serve as the basis for general jurisdiction).

manufactured a tire that allegedly caused a bus accident in France.<sup>66</sup> The only contacts the subsidiaries had with the forum state were unrelated sales of about tens of thousands (out of tens of millions) of tires.<sup>67</sup> To the surprise of virtually no one,<sup>68</sup> the Court unanimously reversed and held that minimum contacts were lacking.<sup>69</sup> The news out of *Goodyear* was that the Court announced a fresh test for corporate general jurisdiction: the corporation must be “at home” or “essentially at home” (the Court used both formulations) in the forum.<sup>70</sup> In subsequent cases, the Court made clear that it is serious about the new test, and corporations are probably subject to general jurisdiction only in the states of their principal place of business and incorporation.<sup>71</sup> Coupled with an earlier suggestion that contacts-based general jurisdiction does not apply to individuals<sup>72</sup>—thus limiting general jurisdiction over individual defendants to traditional bases, such as

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66. *Goodyear*, 564 U.S. at 918. The Court held that *Goodyear* had not timely raised the question of whether the activities of the subsidiaries could be imputed to the parent U.S. corporation. *Id.* at 930–31.

67. *Id.* at 921.

68. *See, e.g.*, Hoffheimer, *supra* note 8, at 550 n.8 (2012) (predicting the Supreme Court’s unanimous reversal of the lower courts’ finding of jurisdiction).

69. *Goodyear*, 564 U.S. at 929–30.

70. *Id.* at 919, 929.

71. *See, e.g.*, *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (applying the *Goodyear* and *Daimler* “at home” test to determine jurisdiction). While the Supreme Court has declined to create a categorical rule that a corporation is only “at home” in either its place of incorporation or principal place of business, cases finding a corporation “at home” anywhere else, if they exist, are rare indeed. *Id.* at 1560 (Sotomayor, J., concurring in part and dissenting in part) (“[I]t is virtually inconceivable that such corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation.”); *see also* *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1778 (2017) (noting the California Supreme Court’s unanimous agreement that general jurisdiction was lacking).

72. *See* *Burnham v. Superior Court*, 495 U.S. 604, 610 n.1 (1990) (plurality opinion). Even prior to *Burnham*, cases finding general jurisdiction over individuals based on “systematic and continuous” contacts were extremely rare. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 408 (explaining that general jurisdiction over individuals is typically based on domicile or residence, but in rare cases the individual may have strong ties to a forum state other than where they are domiciled). It seems likely that with the Court’s limitation of corporate general jurisdiction to the defendant’s home that the same rule applies to individuals. Thus, general jurisdiction would be limited to a person’s domicile or where the defendant is physically served.

in-state service of process<sup>73</sup> and domicile<sup>74</sup>—general jurisdiction has become extremely limited.<sup>75</sup>

There is something to be said for reining in general jurisdiction.<sup>76</sup> If a large corporation like General Motors were subject to jurisdiction in every state, its only defenses against blatant forum shopping would be the doctrine of forum non conveniens<sup>77</sup> and venue transfer.<sup>78</sup> But broader general jurisdiction sometimes acted as a safety valve to provide plaintiffs with a reasonable forum where specific jurisdiction would not.<sup>79</sup> The Court should have fixed specific jurisdiction before it went to work on general jurisdiction.

### C. Intentional Torts

Intentional tort jurisdictional law was once a relatively clear spot in the jurisdictional fog. In two cases decided the same day, *Calder v. Jones*<sup>80</sup> and *Keeton v. Hustler Magazine, Inc.*,<sup>81</sup> the Court held that a plaintiff defamed by a publication could sue wherever the publication had substantial circulation.<sup>82</sup> In so doing, the Court announced the “effects” test, which seemed to mean that if an intentional tort were committed by the defendant in one state and had a predictable effect on the plaintiff in the forum state, the defendant was subject to jurisdiction.<sup>83</sup>

Matters became less clear, however, with the Supreme Court’s unanimous decision in *Walden v. Fiore*.<sup>84</sup> In *Walden*, the plaintiffs were professional gamblers returning from Puerto Rico to their home in

73. See *Burnham*, 495 U.S. at 619 (plurality opinion) (reaffirming in-state service of process as a traditional basis for general jurisdiction).

74. See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (finding that a defendant’s domicile is a fair basis for general jurisdiction).

75. See *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1784–85 (Sotomayor, J., dissenting) (arguing that *Daimler* severely limited general jurisdiction).

76. See *supra* note 8.

77. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (noting that a court may ordinarily dismiss a case when holding the trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or court).

78. 28 U.S.C. § 1404 (2012) (allowing transfer in the interests of justice to a more convenient federal venue).

79. See *Borchers*, *supra* note 6, at 139 (“[G]eneral jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.”).

80. 465 U.S. 783 (1984).

81. 465 U.S. 770 (1984).

82. *Calder*, 465 U.S. at 790–91; *Keeton*, 465 U.S. at 773–74.

83. See *Calder*, 465 U.S. at 789.

84. 134 S. Ct. 1115 (2014).

Nevada.<sup>85</sup> Federal agents detained them at the Atlanta, Georgia, airport and seized \$97,000 in cash.<sup>86</sup> After repeated demands from the plaintiffs' lawyer, the government eventually returned the money to the plaintiffs in Nevada.<sup>87</sup> The plaintiffs brought a *Bivens* action in a Nevada federal court against the agent, alleging essentially a federalized theory of trespass to chattels.<sup>88</sup>

The plaintiffs alleged that the agents knew that they were Nevadans and argued that under the effects test, Nevada had minimum contacts because the plaintiffs lost the right to use the money in Nevada.<sup>89</sup> The Supreme Court disagreed and unanimously reversed the Court of Appeals' grant of jurisdiction.<sup>90</sup> In a sentence sure now to be quoted by every defense brief on personal jurisdiction, the Court wrote: "[O]ur 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."<sup>91</sup>

Although the Court tried mightily,<sup>92</sup> the *Walden* decision is hard to square with *Calder* and *Keeton*. In *Walden*, the Court explained that it had found jurisdiction in *Calder* because the plaintiff resided in the forum state and the defendant's conduct affected her reputation there.<sup>93</sup> The *Walden* Court noted that in its case the government deprived the plaintiffs of the use of the money no matter where they were located.<sup>94</sup> But, in *Keeton*, *Calder*'s companion case, the Court considered it insignificant that the plaintiff had no connection to the forum state and chose it only for its long statute of limitations.<sup>95</sup> Realistically, the *Keeton* plaintiff had almost no reputation to lose in New Hampshire because the record showed she had never been there

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85. *Id.* at 1119.

86. *Id.*

87. *Id.* at 1126.

88. *Id.* at 1120 (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)) (recounting the plaintiffs' allegation that defendant was unlawfully "keeping the money after concluding that it did not come from drug-related activity").

89. *Id.*

90. *Id.* at 1126.

91. *Id.* at 1122. The Supreme Court relied heavily on this concept in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779 (2017).

92. *Walden*, 134 S. Ct. at 1123–25 (distinguishing *Walden* from *Calder* and *Keeton* by noting that the defendant in *Walden* did not direct any activity toward the state, only the plaintiff).

93. *Id.* at 1124 & n.7 (citing *Calder*, 465 U.S. 783, 788–89 (1984)).

94. *Id.* at 1125.

95. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984).

before the case began,<sup>96</sup> and the *Calder* defendant affected the plaintiff's reputation in California regardless of where the plaintiff was located when the magazine published the article.<sup>97</sup>

Georgia may have been a better forum than Nevada for the *Walden* case. But there is no constitutional rule that the plaintiff is allowed only one forum choice. The issue is *minimum* contacts, not the most significant contacts.<sup>98</sup> If the plaintiffs were truly forum shopping and Georgia was a more convenient forum, the federal venue transfer statute stood ready to shift the proceedings there.<sup>99</sup>

#### D. *The Elusive Reasonableness Test*

In *World-Wide Volkswagen*, the Court created—mostly out of whole cloth—a five-factor test for assessing the reasonableness of jurisdictional assertions. The factors were: (1) “the burden on the defendant”; (2) “the forum State’s interest in adjudicating the dispute”; (3) “the plaintiff’s interest in obtaining convenient and effective relief”; (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies”; and (5) “the shared interest of the several States in furthering fundamental substantive social policies.”<sup>100</sup> Ironically, in *World-Wide Volkswagen*, those factors pointed toward the Oklahoma forum—which the Court found could not exercise jurisdiction—because the bulk of the evidence was there and thus certainly the most convenience for the parties and witnesses.<sup>101</sup> Nevertheless, the Court held that considerations of “interstate federalism” trumped convenience and fairness and Oklahoma’s attempted assertion of jurisdiction over the New York dealer and distributor was unconstitutional.<sup>102</sup>

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96. See *id.* at 779–80 (noting that most of the harm to the plaintiff happened outside New Hampshire).

97. See *Calder*, 465 U.S. at 784–86 (making no mention of plaintiff’s physical location at the time of publication of the libelous story).

98. See Susanna Felleman, Note, *Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct*, 95 COLUM. L. REV. 1500, 1525 (1995) (arguing that the minimum contacts test should be replaced by a “most significant contacts” test).

99. See 28 U.S.C. § 1404 (2012) (allowing parties to change venue to a more convenient forum).

100. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

101. See *id.* at 305 (Brennan, J., dissenting) (emphasizing that Oklahoma was the location of the car accident, the plaintiff’s hospitalization, and essential witnesses and evidence).

102. *Id.* at 294 (majority opinion).

The five-factor reasonableness test re-emerged in *Burger King Corp. v. Rudzewicz*,<sup>103</sup> in which the Court allowed the fast-food franchise giant Burger King to sue a Michigan franchisee for breach of contract in the franchisor's home state of Florida.<sup>104</sup> In that case, the test may have tipped the scales in favor of jurisdiction because the Court placed considerable emphasis on the duration and size of the contract.<sup>105</sup>

The reasonableness test then dictated the result in *Asahi*.<sup>106</sup> In *Asahi*, as noted above,<sup>107</sup> the Court split four-to-four-to-one on whether predictable and substantial resale of a product in the forum state satisfied the stream-of-commerce test. But remarkably, eight of the nine Justices agreed jurisdiction was unreasonable, and thus unconstitutional, on the more general grounds embodied in the five-factor test.<sup>108</sup> The Court pointed to the fact that the only remaining part of the suit was a third-party claim between the Japanese manufacturer of the motorcycle tire valve and the Taiwanese manufacturer of the tube-tire assembly.<sup>109</sup> Given the ancillary nature of the third-party action—and that no domestic party remained in the case—the Court found jurisdiction to be unreasonable.<sup>110</sup> This appeared to be big news because it clearly added another step to the constitutional test: even if the defendant had minimum contacts with the forum state, it still might not be subject to jurisdiction.<sup>111</sup>

Then the Court seemed to forget about the reasonableness test. It is true that every case to reach the Supreme Court since *Burger King*—with one exception<sup>112</sup>—found minimum contacts lacking, thus not requiring the majority and plurality opinions to reach the test. But

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103. 471 U.S. 462 (1985).

104. *See id.* at 468, 477.

105. *Id.* at 479–80.

106. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–14 (1987) (plurality opinion) (applying the five-factor test to determine that jurisdiction over *Asahi* would be unreasonable).

107. *See supra* notes 42–47 and accompanying text.

108. Justice Scalia joined the opinion holding that minimum contacts were lacking but did not offer a view one way or the other on the reasonableness test. *See Asahi*, 480 U.S. at 105 (setting forth the votes of each Justice).

109. *Id.* at 114 (plurality opinion).

110. *Id.* at 113–14.

111. The *Asahi* reasonableness dismissal and the doctrine of forum non conveniens share some similarities, but the Court's forum non conveniens decisions are a separate line of cases. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

112. *See Burnham v. Superior Court*, 495 U.S. 604 (1990). However, only Justice Brennan, writing for himself and three other Justices, engaged in a minimum contacts analysis. *Id.* at 637–39 (Brennan, J., concurring in the judgment).

given that the reasonableness test was the basis for the holding in *Asahi*, it seems strange that the Court did not address the test's five factors as alternative grounds for finding no jurisdiction or at least mention them. Moreover, two extensive opinions—one a concurrence in the judgment<sup>113</sup> and the other a dissent<sup>114</sup>—concluded that there was jurisdiction but made no serious effort to apply the five-factor test and discussed only minimum contacts. The reasonableness test earned a brief mention in Justice Ginsburg's dissent in *J. McIntyre*, but she did not address it at any length even though she argued that jurisdiction was constitutional.<sup>115</sup> In *Burnham v. Superior Court*,<sup>116</sup> a case reaffirming in-state service of process as a basis for jurisdiction over individual defendants, Justice Brennan engaged in a minimum contacts analysis in his concurrence in the judgment but did not mention the reasonableness test, even though *Asahi* had been decided just three years earlier.<sup>117</sup>

The Supreme Court finally addressed the reasonableness test's applicability to general jurisdiction in *Daimler*. Justice Ginsburg's opinion, which garnered eight votes, held that the auto giant Daimler-Chrysler was not at home in California, even though it had significant contacts—dealerships and the like—in the forum state.<sup>118</sup> The majority engaged in what Justice Sotomayor termed, in her concurrence in the judgment, a proportionality test with regard to contacts.<sup>119</sup> Why is it, she wondered, having greater out-of-state contacts should count against jurisdiction if the in-state contacts were substantial enough to make the assertion of jurisdiction fair?<sup>120</sup> Justice Sotomayor, however, concurred in the judgment because, in her view, the mostly foreign nature of the events and parties made jurisdiction unreasonable under the five-factor test.<sup>121</sup> This earned a rebuke from Justice Ginsburg who stated that reasonableness analysis is

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113. *Id.*

114. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 907–09 (2011) (Ginsburg, J., dissenting).

115. *Id.* Justice Ginsburg cited *Asahi* and referred to fairness considerations but did not explicitly engage in a two-step analysis. *See id.* at 908.

116. 495 U.S. 604 (1990).

117. *Id.* at 637–39 (Brennan, J., concurring in the judgment).

118. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

119. *See id.* at 772 (Sotomayor, J., concurring in the judgment).

120. *Id.* at 764 (“The problem, the Court says, is not that Daimler’s contacts with California are too few, but that its contacts with other forums are too many.”).

121. *Id.* at 765.

“superfluous” in general jurisdiction cases and applicable only in specific jurisdiction cases.<sup>122</sup>

But if the reasonableness test is applicable in specific jurisdiction cases, why did Justice Ginsburg not explicitly address it in her *J. McIntyre* dissent? She would have found that the defendant was subject to jurisdiction,<sup>123</sup> so if specific jurisdiction requires satisfaction of both the minimum contacts and the five-factor reasonableness test, she ought to have discussed both. To really know whether the Court is serious about the reasonableness test will require a specific jurisdiction case in which the Court finds that there are minimum contacts. The last case to do so unambiguously was the 1985 decision in *Burger King*,<sup>124</sup> so it might be a long wait.

The reasonableness test got barely a nod from the Supreme Court majority in its recent opinion in *Bristol-Myers Squibb Co. v. Superior Court*.<sup>125</sup> The majority found that the claims of the non-resident plaintiffs lacked specific jurisdiction because the contacts were not related to their claims.<sup>126</sup> Justice Sotomayor, who would have found specific jurisdiction, addressed it directly in her dissent.<sup>127</sup> It thus might be that she is the only Justice serious about the test.

#### E. What Counts as a Related Contact?

Particularly with the contraction of general jurisdiction, the question of what counts as a related contact is more important than ever because unrelated contacts are worthless to the plaintiff unless, in the case of corporations, they amount to a business’s headquarters or state of incorporation. Unfortunately, the Supreme Court has not said much of use on the topic.

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122. *Id.* at 762 n.20 (majority opinion).

123. *See* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 907–10 (Ginsburg, J., dissenting).

124. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985). One might make a case for the Supreme Court’s 1987 decision in *Asahi*, as Justice Stevens’s concurrence in the judgment would have found minimum contacts based on the volume of valves sold in the forum state. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 121–22 (1987) (Stevens, J., concurring in part and concurring in the judgment).

125. 137 S. Ct. 1773 (2017).

126. *Id.* at 1781 (“[T]he nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California.”).

127. *Id.* at 1786–87 (Sotomayor, J., dissenting) (“[T]here is no serious doubt that the exercise of jurisdiction over the nonresidents’ claims is reasonable.”).

As I have argued elsewhere, I do not believe that the *International Shoe* Court thought it was writing a landmark decision.<sup>128</sup> Rather, the problem was that common-law concepts of jurisdiction, based principally on power over tangible things such as real property and people, did not fit well with corporations.<sup>129</sup> The *International Shoe* Court faced two practical and pressing issues. The first was that jurisdiction over corporations was being rationalized in two distinct lines of cases. One line concerned whether the corporation was “present” in the forum (an effort to analogize to the physical presence of a person for purposes of service of process), and the other concerned whether the corporation’s business in the forum was sufficient to support the fiction that it implicitly consented to jurisdiction.<sup>130</sup>

The other practical problem was that, at the time, courts thought “mere solicitation” of businesses in the forum was insufficient to support jurisdiction, but solicitation plus other activities sufficed.<sup>131</sup> It seems likely that the International Shoe Co.’s odd business model of giving its sales force only one of a pair of shoes as demonstrators and requiring a customer to order the pair through its Missouri office was an effort to bring it within the definition of mere solicitation.<sup>132</sup>

The *International Shoe* Court erased the line between mere solicitation and solicitation plus by bringing both within the rubric of minimum contacts. The term minimum contacts also brought together the presence and implied consent cases, at least for corporations, under one analytical roof.<sup>133</sup> What the Justices seem to have

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128. See Borchers, *supra* note 5, at 14, 28 (explaining that *International Shoe* was a “fairly easy case” under the then-existing standards, and “[i]t is far from clear that the *International Shoe* Court meant to offer a grand unifying theory of judicial jurisdiction”).

129. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[I]t is clear that unlike an individual[, a corporation’s] ‘presence’ without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.”).

130. *Id.* at 314–15.

131. *Id.* at 315. It is difficult to miss the parallel to the current conundrum of whether resale alone or resale plus other activities is needed to support jurisdiction in products liability cases. See *supra* notes 42–56 and accompanying text.

132. See Borchers, *supra* note 5, at 28 (stating that International Shoe Co. likely used its business model to avoid jurisdiction).

133. *International Shoe*, 326 U.S. at 318; see also Erin F. Norris, Note, *Why the Internet Isn’t Special: Restoring Predictability to Personal Jurisdiction*, 53 ARIZ. L. REV. 1013, 1019 (2011) (explaining the use of the fictions of “presence” and “consent” to support jurisdiction and how the theories eventually merged to cover corporations that were “doing business” within a forum state).

forgotten—except for Justice Sotomayor<sup>134</sup>—is that *International Shoe* is an opinion couched in terms of fairness to the parties and had not even the faintest odor of sovereignty. The Court stated “due process requires only that in order to subject a defendant to a judgment *in personam*, . . . he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>135</sup> The decision is also couched in reasonableness terms, such as that due process requires only that “the state of the forum . . . make it reasonable . . . to require the corporation to defend the particular suit which is brought there.”<sup>136</sup>

The general-specific dichotomy arose from mostly dictum in *International Shoe*. The Court stated: “‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . . .”<sup>137</sup> The Court viewed this approach as being the simplest case for jurisdiction as the cause of action arose from the forum-state activities, and apparently the Court viewed the case itself as easy because the dispute was about whether the corporation owed the state funds for unemployment compensation for the salesman.<sup>138</sup>

The Court then described the straightforward case for not finding jurisdiction: “Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there.”<sup>139</sup>

Then came the sentence that launched general jurisdiction: “[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”<sup>140</sup> To Justice Sotomayor’s point regarding the radical contraction of general

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134. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1788 (2017) (Sotomayor, J., dissenting) (“The majority’s animating concern . . . appears to be federalism . . .”).

135. *International Shoe*, 326 U.S. at 316 (internal quotations omitted).

136. *Id.* at 317.

137. *Id.*

138. See *id.* at 320 (finding the activities carried out in the forum state to be neither irregular or casual).

139. *Id.* at 317.

140. *Id.* at 318.

jurisdiction to a defendant's home, the *International Shoe* Court viewed having a dozen salesmen and doing \$30,000 a year of business in the forum as continuous and systematic contacts,<sup>141</sup> which is a far cry from the forum state being the defendant's home.

Next came the sentence that launched specific jurisdiction: “[Some isolated contacts,] because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.”<sup>142</sup> In context, the Court here was clearly referring to forum contacts related to the suit. Note, however, that the *International Shoe* Court used the terms “related,” “connected,” and “arising from” as if they were synonyms.<sup>143</sup>

Semantically, the words “related” and “connected” connote a weaker relationship than “arising from.”<sup>144</sup> “Arising from”—in ordinary usage—implies that nearly all the events giving rise to the suit took place in the forum.<sup>145</sup> “Related” or “connected” implies that the contacts were part of a chain of events leading to the claim or at least connected with those events, but not necessarily the basis for liability itself.<sup>146</sup> There are easy cases in which the contacts clearly qualify for specific jurisdiction under any formulation. In one of the few post-*International Shoe* decisions to find specific jurisdiction, *McGee v. International Life Insurance Co.*,<sup>147</sup> the plaintiff sued for recovery on a life insurance policy sold in the forum to a forum resident.<sup>148</sup> On any theory, the cause of action was related to, connected with, and arose from the forum contacts.<sup>149</sup> Similarly, there are obvious cases of unrelated contacts. In *Goodyear*, the tires sold in the forum state by the defendant were not the ones that caused the injury.<sup>150</sup> Thus the defendant's activities in the forum did not bear even the most tenuous connection to the cause of action.

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141. *Id.* at 320.

142. *Id.* at 318.

143. *Id.* at 318–20 (using all three terms to delineate the sufficient level of contact to establish jurisdiction).

144. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 425 (1984) (Brennan, J., dissenting) (declaring a “substantial difference” between the two standards).

145. *See id.* (stating that the court neglected to acknowledge this difference).

146. *See id.* (“[T]he wrongful-death claim filed by the respondents is significantly related to the undisputed contacts between Helicol and the forum.”).

147. 355 U.S. 220 (1957).

148. *Id.* at 221–22.

149. *See id.* at 223 (holding that the suit was based on a contract that had a substantial connection with the forum state).

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

But intermediate cases are dividing the lower courts. Many cases follow what one might call the “vacation fact pattern.” The defendant advertises in the resident’s forum state, and the forum resident decides to take a vacation, trip, or cruise out of state. The forum resident is injured and returns home to sue.<sup>151</sup> Are the forum state contacts sufficiently close to the cause of action to be treated as related contacts for specific jurisdiction purposes? On the one hand, the plaintiff would never have experienced an injury but for the defendant’s intentional efforts to take advantage of the forum-state market. On the other hand, few—if any—of the liability-creating events took place in the forum.

Lower courts have staked out two major camps. The minority uses the “but for” test.<sup>152</sup> Under it, if the forum-state events have a causal relationship to the liability creating events, then the contacts are related.<sup>153</sup> In the vacation cases, if advertising in the forum lures the plaintiff out of state to the location where the accident took place, it is a specific jurisdiction case.<sup>154</sup>

A bevy of alternatives are applied elsewhere: the “substantive relevance” test,<sup>155</sup> the “proximate cause” test,<sup>156</sup> the “substantial connection to operative facts” test,<sup>157</sup> and so on. While these alternatives may have slight differences, they share the same basic feature of rejecting the but for test’s minimal requirement of a causal relationship. Instead, these tests demand that some or all of the

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151. *See, e.g.*, *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 573 (Tex. 2007) (holding that a travel company did not have sufficient contacts with the forum state in which it advertised in a wrongful death action regarding a child’s hiking death).

152. *See, e.g.*, *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990) (explaining that the “but for” test is similar, in its basic function, to the “arising out of” test), *rev’d on other grounds*, 499 U.S. 585 (1991).

153. *Id.*

154. *See id.* at 386 (finding that Carnival’s “forum-related” activities induced the plaintiff to take the cruise that precipitated her injury).

155. *See, e.g.*, *Tecre Co. v. Buttonpro, Inc.*, 387 F. Supp. 2d 927, 933 (E.D. Wis. 2005) (citing *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1990)) (noting that the substantive relevance test requires that “the forum contacts must be necessary to the proof of the cause of action”).

156. This test is analogous to the common law tort rule of causation, requiring but for causation, and proximate cause between the forum contacts and the cause of action. *See, e.g.*, *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992); *Pearrow v. Nat’l Life & Accident Ins. Co.*, 703 F.2d 1067, 1068–69 (8th Cir. 1983).

157. Here, courts require the cause of action to “lie in the wake of” the commercial activity in the forum. *See, e.g.*, *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 584 (Tex. 2007).

liability-creating events take place in the forum state for the case to be one of specific jurisdiction.<sup>158</sup>

The Supreme Court has done a masterful job of ducking the issue. In *Helicopteros Nacionales*, at least some of the events giving rise to liability may have taken place in the forum state of Texas.<sup>159</sup> One of the allegations was that negligent pilot training led to the helicopter crash in South America, and at least some training took place in Texas.<sup>160</sup> The majority, however, held that the plaintiffs had conceded a lack of relatedness and thus avoided specific jurisdiction analysis.<sup>161</sup> Justice Brennan's solo dissent did not read the plaintiffs' brief as conceding the issue.<sup>162</sup> He noted the different formulations in *International Shoe* and argued that liability strictly arising from the contacts was not a constitutional requirement for specific jurisdiction.<sup>163</sup>

In the Ninth Circuit's decision in *Shute v. Carnival Cruise Lines, Inc.*,<sup>164</sup> the facts fit the quintessential vacation case with the defendant's in-forum advertising inducing the plaintiff to take a cruise outside of Washington—the forum state and her home.<sup>165</sup> The plaintiff slipped and fell on the deck of the cruise ship, sustaining an injury, while the ship was at sea.<sup>166</sup> The back of her ticket, however, contained a clause limiting the forum to Florida.<sup>167</sup> The Ninth Circuit held the forum-selection clause unenforceable on unconscionability grounds and, applying the but for test, ruled that the defendant's in-forum advertising efforts were related contacts because they were part of the sequence of events leading to the accident.<sup>168</sup> The Supreme Court,

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158. See, e.g., *Marino*, 793 F.2d at 430; *Moki Mac*, 221 S.W.3d at 588.

159. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 410–11 (1984) (noting that the petitioner negotiated the contract in Texas, purchased goods from Texas, and sent pilots and management to Texas for training).

160. *Id.* at 411.

161. *Id.* at 415.

162. *Id.* at 425 n.3 (Brennan, J., dissenting).

163. *Id.* at 425, 427 (“[A] court’s specific jurisdiction should be applicable whenever the cause of action arises out of or relates to the contacts between the defendant and the forum.” (emphasis added)).

164. 897 F.2d 377 (9th Cir. 1990), *rev’d on other grounds*, 499 U.S. 585 (1991).

165. *Id.* at 379.

166. *Id.*

167. *Id.*

168. *Id.* at 386, 388–89 (noting that the defendant solicited the plaintiffs in Washington, and declining to enforce the forum-selection provision of the ticket because it was not freely bargained for).

however, ruled the forum-selection clause enforceable and never reached the question of whether the contacts were related.<sup>169</sup>

The Supreme Court addressed, in passing, the relatedness of contacts in its recent opinion in *Bristol-Myers Squibb Co.*<sup>170</sup> In that case, about 600 plaintiffs from thirty-four states brought an action in California state court alleging that the defendant's blood-thinning drug Plavix injured them.<sup>171</sup> All of the Justices agreed that general jurisdiction was lacking because the defendant's principal place of business was in New York and it was incorporated in Delaware.<sup>172</sup> About ninety of the plaintiffs were California residents; as to jurisdiction over their claims, there was no dispute because they had been prescribed the pill and ingested it in California.<sup>173</sup> But as to the non-California-resident plaintiffs, the Court found specific jurisdiction lacking because the only relationship between their suits and California was that they had engaged in similar conduct—being prescribed and ingesting the pills—in their home states as a result of a national campaign to market Plavix.<sup>174</sup> The eight-vote majority opinion shed no light on whether it viewed “arising from,” “related to,” and “connected with” as setting any different standard in the relationship of the contacts for specific jurisdiction purposes because in the majority's view, parallel conduct could not suffice under any theory.<sup>175</sup>

Justice Sotomayor dissented. She viewed the contacts as related because of the national reach of the defendant and because California was home to a company that had marketed Plavix.<sup>176</sup> She also pointed out the efficiency of having the essentially identical cases heard in one forum instead of thirty-four.<sup>177</sup>

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169. See *Carnival Cruise*, 499 U.S. at 589 (“Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument as to personal jurisdiction.”).

170. *Bristol-Meyers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017).

171. *Id.* at 1778.

172. See *id.* at 1778–79 (noting that the issue of general jurisdiction was properly decided by the lower court); see also *id.* at 1786 (Sotomayor, J., dissenting) (agreeing that the case lacked general jurisdiction).

173. *Id.* at 1782 (majority opinion) (considering claim of lack of specific jurisdiction only as to non-resident plaintiffs).

174. *Id.* at 1783.

175. *Id.* at 1782 (“[A]ll the conduct giving rise to the nonresidents' claims occurred elsewhere.”).

176. *Id.* at 1786 (Sotomayor, J., dissenting) (arguing that materially identical conduct in non-forum state constitutes a connected contact).

177. *Id.* at 1787.

*Bristol-Myers* shines little light on what counts as a related contact. The California Supreme Court’s and Justice Sotomayor’s view—that parallel conduct outside the forum state is sufficiently connected to count as a related contact—goes well beyond even the liberal but for test. As a result, the U.S. Supreme Court majority dismissed it with a wave of the hand, giving no hint as to how it would approach a vacation case or similar fact pattern.<sup>178</sup>

#### F. Virtual Contacts

All of the Supreme Court’s decisions, including the recent ones, are decidedly old school. They have involved things such as industrial machines sold at trade shows,<sup>179</sup> injuries working on a railroad,<sup>180</sup> tire blowouts,<sup>181</sup> and so on. Justice Stephen Breyer’s controlling concurrence in the judgment in *J. McIntyre* expressly addressed the possibility that the calculus might change if a case involved a product marketed and sold through a large online distributor such as Amazon.<sup>182</sup> The possibility that virtual contacts might raise different considerations earned a brief mention in *Walden*.<sup>183</sup> But these asides give lower courts no guidance.

Showing how desperate lower courts are for some path markers, in vast numbers they latched onto the Western District of Pennsylvania case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>184</sup> *Zippo*, an Internet trademark infringement dispute between two companies both using the word “Zippo,” proposed a sliding scale from highly interactive web sites to purely passive ones, the latter being essentially

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178. See *id.* at 1781–82 (reasoning that no connection existed between the forum state, California, and the claims non-residents brought in California for incidents occurring outside the state because the plaintiffs were not California residents and had not been harmed by conduct in California).

179. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878 (2011) (plurality opinion).

180. See *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1553–54 (2017).

181. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 106 (1987) (plurality opinion).

182. See *J. McIntyre*, 564 U.S. 880 (Breyer, J., concurring in the judgment) (questioning the extent of the majority’s holding in cases where a company “targets the world” through internet advertising and sales).

183. See *Walden v. Fiore*, 134 S. Ct. 1115, 1125 n.9 (2014) (describing “virtual contacts” as a difficult question best left “for another day”).

184. 952 F. Supp. 1119 (W.D. Pa. 1997).

billboards on the Internet.<sup>185</sup> The higher the level of interactivity, the greater the chance of establishing jurisdiction.<sup>186</sup> *Zippo* will go down in history as one of the most frequently cited district court cases.<sup>187</sup>

While *Zippo* was an admirable effort to bring order to the chaos, two decades hence its sliding scale is obsolete.<sup>188</sup> Even the humblest blogs are interactive in the sense that readers can post comments and email the blogger. Big distributors like Amazon have achieved a level of interactivity unimaginable when *Zippo* was written.<sup>189</sup> Not only can one search and compare items for purchase, based on one's past usage, such sites will suggest purchases and remind you of relatives' birthdays, to say nothing of gift-giving holidays. So-called "Cyber Monday" has begun to rival "Black Friday" in sales.<sup>190</sup> Thus, critical issues are unresolved in common fact patterns. Vast numbers of online purchases are made through highly interactive sites, yet it is not clear whether this means that the consumer should always be able to sue at home regarding a dispute involving the purchase.

Another confused area is internet libel. Even the most passive of websites can convey a poisonous message visible to anyone with unfiltered access to the internet.<sup>191</sup> In particular, the Court's decision in *Keeton* suggests that libel plaintiffs should be able to sue wherever the allegedly libelous message appears, given that the defendant in that

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185. *Id.* at 1124.

186. *See id.* at 1124–25 (reasoning that the more interactive a web site is, the more the website owner's conduct amounts to purposeful availment).

187. A 2017 Lexis search showed that federal courts had cited *Zippo* over 1000 times and state courts had cited the decision over 100 times. The frequency with which courts cited the case peaked around 2005, but recent cases still follow the decision. *See, e.g.*, *Bell v. Moawad Grp., LLC*, No. A-17-CA-00073-SS, 2017 WL 2841679, at \*4 (W.D. Tex. June 30, 2017).

188. To its credit, the *Zippo* court described e-commerce as being in its "infant stages." *Zippo*, 952 F. Supp. at 1123. Thus, it seems doubtful that the *Zippo* court imagined its opinion would exert influence twenty years later.

189. *Id.* at 1124 (describing the highest level of interactivity at that time as when "the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet").

190. *See* Charisse Jones, *Cyber Monday Smashes Online Sales Record*, USA TODAY (Nov. 29, 2016, 12:42 PM), <https://www.usatoday.com/story/money/2016/11/28/cyber-monday-set-top-last-year-sales/94552948> (discussing a Cyber Monday sales record of \$3.45 billion and a trend toward online purchasing even on Black Friday).

191. *See* Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 480 (2004) (explaining that distinguishing between web-based and print-based libel may be difficult to justify).

case sold only a small percentage of its magazines in the forum state.<sup>192</sup> But many courts have resisted this result, demanding instead that the libelous communication target the state, a showing often dependent on whether the communication makes specific reference to the state and so on.<sup>193</sup> As a result, lower courts are badly split on whether internet libel plaintiffs can sue at home or not.<sup>194</sup>

## II. THE PROPOSAL

In most cases, federal courts have the same territorial reach as their state court counterparts. Such has been the law for over half a century.<sup>195</sup> Currently this rule is contained in Federal Rule of Civil Procedure 4(k)(1)(A), which provides that federal courts have personal jurisdiction if the defendant “is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”<sup>196</sup> So, as a general proposition, a federal court in Nebraska has the same territorial reach as a state court in Nebraska, and so on for all states.

All states have enacted what are commonly known as long-arm statutes.<sup>197</sup> With respect to common law bases of jurisdiction—such as

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192. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772–73, 779–81 (1984) (permitting personal jurisdiction in a libel suit in New Hampshire even though “the bulk of the harm done to petitioner occurred outside New Hampshire” because the magazine had “continuously and deliberately exploited the New Hampshire market”); see also Borchers, *supra* note 191, at 480 (asserting that courts should treat personal jurisdiction in cases of libel on “passive” websites the same as cases of libel in physical publications because the resultant harm is equivalent).

193. See, e.g., *Young v. New Haven Advocate*, 315 F.3d 256, 258–59 (4th Cir. 2002) (“[A] court in Virginia cannot constitutionally exercise jurisdiction over the Connecticut-based newspaper defendants because they did not manifest an intent to aim their websites or the posted articles at a Virginia audience.”); *Griffis v. Luban*, 646 N.W.2d 527, 535 (Minn. 2002) (“While . . . Luban’s statements were intentionally directed at Griffis, whom she knew to be an Alabama resident . . . nothing in the record indicates that the statements were targeted at the state of Alabama or at an Alabama audience beyond Griffis herself.”); see also Borchers, *supra* note 191, at 473, 486–87 (discussing cases seemingly inconsistent with the Supreme Court’s decision in *Keeton*).

194. See Borchers, *supra* note 191, at 482 (identifying thirty-two post-*Keeton* reported decisions on internet libel jurisdiction, with thirteen concluding jurisdiction existed and nineteen concluding jurisdiction did not exist).

195. See, e.g., *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 226, 231 (2d Cir. 1963) (en banc) (finding no reason for federal courts to override an applicable state law in a diversity jurisdiction case).

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

197. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496–97 (2004) (elaborating that seven states have long-arm statutes “extend[ing] the state’s jurisdiction to the limits of due process,”

in-forum service of an individual or voluntary appearance—the common law provides the state with affirmative authority to assert jurisdiction, and such assertions are constitutional.<sup>198</sup> Consequently, about a century ago, states began pushing the common law's jurisdictional bounds with statutes. Most prominent among these were non-resident motorist statutes. These statutes appointed a state official as the agent for service of process for non-residents based on the fiction that, by using a state's roads, an out-of-state motorist implicitly consented to jurisdiction over auto accident suits in that state.<sup>199</sup> The Supreme Court upheld the constitutionality of these statutes as long as they required reasonable notice to the non-resident, usually by having the state official mail the complaint and summons.<sup>200</sup> After *International Shoe*, states began to enact more expansive general statutes to assert jurisdiction over all types of civil cases, hence the colloquial name long-arm statutes.<sup>201</sup>

These statutes fall into two broad categories. Some, such as California's, give their courts all of the jurisdiction that the Constitution allows.<sup>202</sup> Others, such as New York's, are detailed and provide jurisdiction on specific bases, such as over any person who "transacts business within the state."<sup>203</sup> While in some cases the latter stop short of the constitutional line, they cannot go beyond constitutional limits.<sup>204</sup> As a result, the Fourteenth Amendment's

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thirty states have long-arm statutes enumerating acts that subject a nonresident to the state's jurisdiction, and thirteen states have a hybrid of the two models).

198. See, e.g., N.Y. C.P.L.R. 301 (McKinney 2010) (incorporating expressly common law bases of jurisdiction); see also *Burnham v. Superior Court*, 495 U.S. 604, 612, 615, 619 (1990) (plurality opinion) (reaffirming the common law basis of in-state service).

199. See, e.g., *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (expanding the personal jurisdiction doctrine by condoning Massachusetts's novel theory of implied consent for out-of-state motorists).

200. See *id.* at 354, 356 (noting requirement of notice by mail in upholding the statute); *Wuchter v. Pizzutti*, 276 U.S. 13, 18–19 (1928) (striking down a statute with no express requirement of notice even though notice was given).

201. See McFarland, *supra* note 197, at 492–96 (discussing how *International Shoe* transformed the law of personal jurisdiction by authorizing service on non-residents outside the forum state).

202. CAL. CIV. PROC. CODE § 410.10 (West 2004) (providing that California courts have jurisdiction "on any basis not inconsistent with the Constitution").

203. N.Y. C.P.L.R. 302(1).

204. See McFarland, *supra* note 197, at 492–93 (explaining that states can exercise personal jurisdiction over non-residents only if the jurisdiction comports with the Fourteenth Amendment-derived "traditional notions of fair play and substantial justice" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

requirement of minimum contacts with the forum applies indirectly to federal courts, even though as organs of the federal government they normally would be subject to the Fifth Amendment. Thus, the Supreme Court has treated cases brought in federal court as if they had been brought in state court.<sup>205</sup>

Rule 4(k)(1) contains two exceptions purporting to give federal courts broader reach, however. One of long standing, which has launched thousands of Civil Procedure multiple-choice exam questions, is the “bulge rule.”<sup>206</sup> The bulge rule provides that a supplemental party brought in by Federal Rules of Civil Procedure 14 or 19 is subject to service of process within 100 miles (as the crow flies<sup>207</sup>) of the federal courthouse, if the service takes place in the United States.<sup>208</sup> It is clear from the rule that the physical act of service must take place in the “bulge area,” which can cover multiple states for many federal courthouses.

Courts have proposed three readings of the bulge rule. One is that the rule confers no extra-jurisdictional reach but merely authorizes delivery of the summons and complaint outside the forum state.<sup>209</sup> That reading, however, would render the rule meaningless, as the combination of Federal Rule of Civil Procedure 4 and state statutes that Rule 4 incorporates authorize delivery of the summons and complaint outside the forum state.<sup>210</sup> Courts are divided as to whether a party brought in by the bulge rule must have minimum contacts with the bulge area or with the “bulge state,” or the state where service took place.<sup>211</sup> However, under either interpretation the federal courts have modestly broader jurisdictional reach than their state court counterparts.

205. See, e.g., *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 463–64 (1985).

206. The bulge rule was adopted in 1963. See CHARLES ALAN WRIGHT & MARY KAY KANE, *THE LAW OF FEDERAL COURTS* 451 (7th ed. 2011).

207. See *Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 417 (5th Cir. 1979) (concluding that the proper way to measure the bulge area is to use straight-line air miles, “as the crow flies,” instead of road miles).

208. HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 487.

209. See, e.g., *Coleman v. Am. Exp. Isbrandtsen Lines, Inc.*, 405 F.2d 250, 251 (2d Cir. 1968) (involving a Pennsylvania corporation served with a summons for the Southern District of New York pursuant to the bulge rule despite its conducting no business in New York).

210. See *id.* at 251–52 (explaining that most states had already provided for out-of-state process via long-arm statutes, which federal courts could also utilize).

211. HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 487 (noting that the view that “the defendant must have minimum contacts with the ‘bulge’ area itself” is more common). Compare *Quinones v. Pa. Gen. Ins. Co.*, 804 F.2d 1167, 1174 (10th Cir. 1986)

The other Rule 4(k)(1) extension recognizes that Congress has enacted several statutes allowing nationwide service of process or using similar language.<sup>212</sup> As discussed more thoroughly below, lower federal courts have generally construed the constitutional requirement to be one of minimum contacts with the United States as a whole, not minimum contacts with the forum state.<sup>213</sup> Although dictum, the plurality opinion in *J. McIntyre* suggested that a national contacts test would apply to a federal statute giving the federal courts national reach in products liability cases.<sup>214</sup>

One of the best known examples of such a statute is the federal interpleader statute.<sup>215</sup> Interpleader allows the holder of a stake (commonly the proceeds of an insurance policy) to interplead rival claimants to the stake in order to avoid a multiplicity of suits and the possibility of multiple liability.<sup>216</sup> However, for this to be effective, the stakeholder needs to be able to bring all of the rival claimants to one forum, which would be impossible if the stakeholder could not get jurisdiction over all of them. Without any fuss, federal courts have assumed that the grant of nationwide jurisdiction here is constitutional.<sup>217</sup>

This brings us to the other major extension, which is Federal Rule of Civil Procedure 4(k)(2). Rule 4(k)(2) was drafted in response to the Supreme Court's decision *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*<sup>218</sup> The District Court determined that Louisiana's long-arm statute did not reach the defendants and dismissed the claims

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(favoring the rule that a district court may exercise jurisdiction over an out-of-state party with minimum contacts within the 100-mile bulge area), *with Coleman*, 405 F.2d at 252–53 (holding that a district court may exercise jurisdiction over an out-of-state party who has minimum contacts “with the state of service”).

212. See 15 U.S.C. §§ 22, 78aa (2012); 18 U.S.C. § 1915(d) (2012); 29 U.S.C. § 1132(e)(2) (2012); 42 U.S.C. § 9613(P) (2012); see also HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480 n.6 (collecting statutes).

213. See HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480–84 (relating how equivocal Supreme Court decisions led lower federal courts to construe the constitutional requirement as one of minimum contacts with the United States as a whole).

214. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884–85 (2011) (plurality opinion) (“For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case . . . . It may be that . . . the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case . . .”).

215. 28 U.S.C. § 2361 (2012).

216. See WRIGHT & KANE, *supra* note 206, at 531–32.

217. See, e.g., *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 229 (2d Cir. 1963) (en banc).

218. 484 U.S. 97 (1987).

against them.<sup>219</sup> The case was brought on a federal question theory.<sup>220</sup> A sharply divided Fifth Circuit, sitting en banc, agreed with the District Court that the state statute applied, while the dissent opined that the result amounted to a “bizarre hiatus in the Rules.”<sup>221</sup> The Supreme Court affirmed the Fifth Circuit’s en banc ruling, holding that the predecessor of Rule 4(k) (1) (A) meant what it said: if the Louisiana state courts would not have jurisdiction, then neither would a federal court situated in Louisiana.<sup>222</sup> But along the way, the Court mentioned the possibility of amending the Federal Rules.<sup>223</sup>

The *Omni Capital* decision spawned Rule 4(k) (2).<sup>224</sup> Rule 4(k) (2) provides that, if the case is one “aris[ing] under federal law,” federal courts have personal jurisdiction to the constitutional limit provided that no state could exercise jurisdiction.<sup>225</sup> Because Rule 4(k) (2) is directed at federal courts, the relevant provision of the Constitution is the Fifth Amendment.<sup>226</sup> Both the Advisory Committee on Rules of Civil Procedure (Rules Advisory Committee) report and most federal courts applying Rule 4(k) (2) have adopted some version of the national contacts test.<sup>227</sup>

My proposal is simple. Rule 4(k) (2) should be amended by adding “or cases in which jurisdiction is based on Section 1332 of Title 28,”

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219. *Id.* at 101–02.

220. *Id.* at 100.

221. *See Point Landing, Inc. v. Omni Capital Int’l, Ltd.*, 795 F.2d 415, 419 (5th Cir. 1986) (per curiam), *aff’d*, 484 U.S. 97; *id.* at 427–28 (Wisdom, J., concurring in part and dissenting in part).

222. *Omni Capital*, 484 U.S. at 108 (relying on then-Rule 4(e)).

223. *Id.* at 111 (“A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of . . . federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility . . . better rests with those who propose the Federal Rules of Civil Procedure and with Congress.”).

224. *See* FED. R. CIV. P. 4(k), advisory committee’s notes to 1993 amendment (recounting that the amended Rule 4(k) “corrects a gap in the enforcement of federal law . . . respond[ing] to the suggestion of the Supreme Court made in [*Omni Capital*]”).

225. FED. R. CIV. P. 4(k) (2).

226. *See* FED. R. CIV. P. 4(k), advisory committee’s notes to 1993 amendment (elaborating that “[t]he Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party”).

227. *See id.* (indicating that one of two versions of the national contacts test apply under the Fifth Amendment); HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480–84 (explaining that lower courts have used the three different national contacts tests).

which is the diversity and alienage statute, immediately after the words “under federal law” in the first sentence of the rule.

### III. PRACTICAL CONSIDERATIONS AND OBJECTIONS

Of course, no solutions to problems as intractable as those presented by personal jurisdiction law will either be perfect or immune from legal challenge. In this Part, I consider some of the limitations of, and possible challenges to, my proposal.

#### A. *How Much Would the Extended Rule 4(k)(2) Accomplish?*

An extended Rule 4(k)(2) would not affect cases like *World-Wide Volkswagen* and *Bristol-Myers* in which alternative state courts were available to the plaintiffs. In *World-Wide Volkswagen* and *Bristol-Myers*, the plaintiffs instead could have sued the dismissed defendants in New York state court.

An extended rule would, however, affect cases like *J. McIntyre*, assuming courts employ a national contacts test. The *J. McIntyre* plurality (and to a lesser degree, the concurrence in the judgment) made much of the fact that the defendant had not targeted New Jersey specifically.<sup>228</sup> There was, however, evidence in abundance that the defendant was targeting the U.S. market.<sup>229</sup> The plurality opinion,

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228. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 873, 886 (2011) (plurality opinion) (declaring that a British scrap metal company did not have sufficient purposeful contacts with New Jersey because the company sold its products through a U.S. distributor; sent representatives to trade shows in several states other than New Jersey; had provided only four machines that ended up in New Jersey; and, in New Jersey, had no offices or employees, paid no taxes, owned no property, and did not advertise); *id.* at 888 (Breyer, J., concurring in the judgment) (agreeing that the British company did not have sufficient contacts with New Jersey because the company wanted its U.S. distributor to sell its products indiscriminately to any willing purchaser in America; because the company’s representatives had attended trade shows in several U.S. cities, but not any in New Jersey; and because the U.S. distributor only once sold and shipped a machine to a New Jersey customer).

229. *Id.* at 896–97 (Ginsburg, J., dissenting) (pointing out that McIntyre UK’s president attended annual scrap recycling industry conventions across the United States; McIntyre UK exhibited its product at trade shows with the intention of reaching people across the United States; a McIntyre UK engineer had installed the company’s equipment in several states; until 2001, McIntyre UK distributed its products exclusively through an independent, Ohio-based company; in a letter to the independent distributor’s president, “McIntyre UK’s president spoke plainly about the manufacturer’s objective in authorizing the exclusive distributorship: ‘All we wish to do is sell our products in the [United] States—and get paid!’”; when the independent distributor was worried about U.S. litigation over McIntyre UK products, McIntyre UK

which concluded there was no jurisdiction, did not quarrel with the assertion that the British company had been targeting the domestic U.S. market.<sup>230</sup> A letter from the defendant's corporate officers, quoted by Justice Ginsburg's dissent, made it obvious that the corporation was trying to profit maximally from the U.S. market.<sup>231</sup>

An extension of Rule 4(k)(2) to diversity and alienage cases would cure the worst of the worst cases, in which a foreign corporate defendant purposefully and substantially benefits from the U.S. market but is immunized from suit in any U.S. court arising from those U.S. activities. Whatever one thinks about the merits of not allowing the *World-Wide Volkswagen*, *Walden*, or *Bristol-Myers* plaintiffs to sue in the U.S. forum of their choice, they had other U.S. forums available. But Mr. Nicastro, the *J. McIntyre* plaintiff, had no U.S. forum. His only option would be a suit in England, which likely would have been an impracticable pursuit.<sup>232</sup>

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"reassured its distributor that 'the product was built and designed by McIntyre Machinery in the UK and the buck stops here—if there's something wrong with the machine'"; the independent distributor sought guidance from McIntyre UK when promoting McIntyre UK's products at conventions; and McIntyre UK had been named as a defendant in several states (citations omitted)).

230. *Id.* at 885 (plurality opinion) ("In this case, petitioner directed marketing and sales efforts at the United States.").

231. *Id.* at 897 (Ginsburg, J., dissenting). Justice Ginsburg was also appropriately offended by the plurality's implicit endorsement of a foreign manufacturer being able to "Pilate-like" wash its hands of liability for a product by passing it through a nominally independent distributor. *Id.* at 893–94 ("Inconceivable as it may have seemed yesterday, the splintered majority today 'turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.'" (alteration in original) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995))).

232. England now allows contingency fees but retains the "loser pays" rule, so if Mr. Nicastro were to lose he would be liable for the defense's attorney's fees. See Quinn Emanuel Urquhart & Sullivan LLP, *Contingency Fees in England After April 2013*, LEXOLOGY, (Oct. 24, 2012), <https://www.lexology.com/library/detail.aspx?g=f053e1a5-6992-4ef0-a9d8-9bef404a85e6>. By one estimate, tort recoveries in the United States are roughly ten times those in England. See P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1012. Thus, even if Mr. Nicastro's lawyers had been able to foresee the jurisdictional dismissal, it seems unlikely that they would have seen it as a viable proposition to find an English lawyer and sue there. Moreover, Mr. Nicastro was injured on October 11, 2001. See *Nicastro v. McIntyre Mach. Am., Ltd.*, 945 A.2d 92, 96 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575 (N.J. 2010), *rev'd sub nom. J. McIntyre*, 564 U.S. 873. The statute of limitations in England for personal injuries resulting from negligence is three years from discovery of the injury, or six years from the injury, whichever is later, subject to

The revised Rule 4(k)(2) also will not clear up, in domestic cases anyway, troublesome issues such as whether a contact is related or the weight of virtual contacts. Those issues will have to be resolved by the Supreme Court, I hope in a sensible fashion.<sup>233</sup> But, at the very least, it would end the absurdity of the Mr. Nicastro of the world having no U.S. remedy except what modest amount they might get in a workers' compensation forum.

I agree with Professor Sachs that a federal statute dealing in a sensible way with all or most of the messy jurisdictional issues would be better, in theory, than extending Rule 4(k)(2).<sup>234</sup> But the statutory solution will not come to pass. As Professor Sachs notes, in 2009, the Foreign Manufacturers Legal Accountability Act (FMLAA) was introduced in the House with multiple versions submitted in subsequent Congresses.<sup>235</sup> Every iteration of it has failed to advance.<sup>236</sup> The bill is reminiscent of the old implied consent statutes in that, via federal regulatory agencies, it would require foreign companies to appoint agents for service of process and then would deem that appointment consent to personal jurisdiction in the state where the agent is located.<sup>237</sup> As Professor Sachs notes, groups supportive of tort plaintiffs endorsed the bill, which had sponsors from both parties, but it still proved controversial.<sup>238</sup>

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a maximum period of fifteen years from the negligent act. *Limitation Periods*, THOMAS REUTERS, Aug. 1, 2016, Practical Law, 1-518-8770. Thus, the statute of limitations in England barred Mr. Nicastro from recovering damages. It seems likely that most tort victims with close cases as to jurisdiction would attempt to bring the case in a U.S. forum and, if dismissed for lack of jurisdiction, would not pursue the matter in a foreign court for some combination of these reasons.

233. Based on the Court's recent performance, I am not holding my breath.

234. See Sachs, *supra* note 18, at 1325, 1330–31 (arguing that extending Rule 4(k)(2) “would preserve some troubling aspects of current law,” e.g., plaintiffs would likely still end up in inconvenient forums, and proposing instead that Congress enact a bill to establish nationwide personal jurisdiction for federal courts).

235. See *id.* at 1325–26; see also H.R. 3304, 114th Cong. (2015); H.R. 1910, 113th Cong. (2013); H.R. 3646, 112th Cong. (2011); H.R. 4678, 111th Cong. (2010); S. 1606, 111th Cong. (2009). When the first version of the bill was introduced in 2009, Democrats controlled both houses of Congress and the White House. Currently Republicans control all three. Party alignment in the federal government has not affected the fate of the FMLAA.

236. The latest version is H.R. 3304, 114th Cong. (2015). The FMLAA has not yet been introduced in the 115th Congress.

237. *Id.* § 5.

238. See Sachs, *supra* note 18, at 1325–26.

An extended Rule 4(k) (2) would be preferable for several reasons. First, although the rulemaking process is hardly simple, it is not the dismal political swamp that Congress is. If the FMLAA cannot advance, a bill offering a comprehensive statute directly affecting domestic defendants would be dead on arrival. U.S. business interests would fight vigorously against giving back the jurisdictional bonuses that the five defense-friendly decisions of this decade have handed them, the most important of which was—perhaps ironically—penned by one of the Court’s most liberal members, Justice Ginsburg, in limiting general jurisdiction over a corporation to its home.<sup>239</sup> Equally ironic, Justice Kennedy—perhaps the Court’s most vigorous proponent of the power of state sovereignty against the federal government<sup>240</sup>—reasoned that sovereignty can give the federal courts personal jurisdiction that the Constitution does not permit state courts.<sup>241</sup>

Second, the bill is limited to certain kinds of products and claims on them.<sup>242</sup> An extended Rule 4(k) (2) would not be so limited because it would apply to the full range of legal theories brought in diversity and alienage cases.

Third, an extended Rule 4(k) (2) would work to the benefit of both U.S. plaintiffs and defendants and result in fairer outcomes. Most cases covered by the extended rule would look like *J. McIntyre* or *J. McIntyre* with a U.S. co-defendant. If one takes the *J. McIntyre* facts but instead assumes the defendant is incorporated in Delaware with its principal place of business in New York (rather than both in England), the defendant would be subject to jurisdiction in New York and Delaware. Pursuing a case against the defendant in New York or Delaware is a far more tenable proposition than trying to litigate in England.<sup>243</sup> Thus, the English defendant has a considerable competitive advantage over the hypothetical U.S. defendant because the former can avoid relatively generous U.S. juries, while the latter cannot.<sup>244</sup>

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239. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 929 (2011).

240. See, e.g., *Alden v. Maine*, 527 U.S. 706, 711, 757 (1999) (establishing that state sovereign immunity prevents application of federal wage and hour laws to state employees).

241. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion).

242. H.R. 3304, 114th Cong. § 4(4) (listing the types of products to which the bill would apply).

243. See *supra* note 232.

244. See Atiyah, *supra* note 232, at 1012 (finding that tort recovery in the United States is typically ten times greater than in England).

If one assumes the facts of *J. McIntyre* but with a U.S. co-defendant,<sup>245</sup> an extended Rule 4(k)(2) would work to the advantage of the U.S. co-defendant. It would be a considerable benefit to the U.S. defendant to have the foreign defendant joined. If the U.S. defendant arguably is jointly and severally liable with the foreign defendant, the U.S. defendant could easily file an impleader claim against the foreign defendant in the same action if they were in the same court.<sup>246</sup> If the foreign defendant is not a party to the proceeding, then the U.S. defendant would be left in the position of the *Asahi* defendant, attempting to pursue a separate contribution and indemnity action in a foreign court.<sup>247</sup> Moreover, in the highly likely event that the case settles, the U.S. defendant would have the foreign defendant at the settlement table to contribute to any resolution, rather than attempting to calculate the odds and economics of passing off any portion of the settlement to an absent party.

While not comprehensive, an extended Rule 4(k)(2) is a realistic possibility and a broad federal statute is not. While an extended rule would not solve all the problems that jurisdictional law presents, it would solve the worst of them to the benefit of U.S. plaintiffs, defendants, and the fair administration of justice.

*B. Would Extending Rule 4(k)(2) Violate the Rules Enabling Act?*

Federal Rules, including the Federal Rules of Civil Procedure, are created by a relatively elaborate procedure controlled mainly by the Standing Committee of the Judicial Conference and the Rules Advisory Committee.<sup>248</sup> The latter drafts and proposes amendments to the Federal Rules, the Supreme Court chooses whether to promulgate them, and then Congress has several months to veto them.<sup>249</sup> For the

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245. There was a U.S. co-defendant in *J. McIntyre*, the U.S. distributor of the machines. See *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 577 (N.J. 2010), *rev'd sub nom. J. McIntyre*, 564 U.S. 873. However, the U.S. distributor ceased to distribute McIntyre machines in 2001. See *J. McIntyre*, 564 U.S. at 896 (Ginsburg, J., dissenting). This is because the distributor went bankrupt. See *Nicastro v. McIntyre Mach. Am., Ltd.*, 945 A.2d 92, 95 (N.J. Super. Ct. App. Div. 2008), *aff'd*, 987 A.2d 575, *rev'd sub nom. J. McIntyre*, 564 U.S. 873. Thus, for practical purposes, the case was solely against the English J. McIntyre.

246. See FED. R. CIV. P. 14(a).

247. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114–15 (1987) (noting that the third-party claim should be dismissed and is possibly governed by different law than the underlying claim).

248. See Wasserman, *supra* note 18, at 333–34 (describing the rulemaking process).

249. See *id.*

most part, the proposed amendments are enacted in the form they leave the Rules Advisory Committee's hands, though several decades ago there was the noted congressional override and a poorly drafted rewrite of the service-of-process rules.<sup>250</sup>

The Rules Enabling Act<sup>251</sup> authorizes rules if they do not “abridge, enlarge or modify any substantive right.”<sup>252</sup> Because federal rules are authorized by a federal statute, they are largely immune from the doctrine of *Erie Railroad Co. v. Tompkins*,<sup>253</sup> which has come to be understood to allow federal common law rules only if they will not promote forum shopping or result in inequitable administration of the laws.<sup>254</sup> Federal rules are within the scope of the Rules Enabling Act as long as they “really regulate procedure.”<sup>255</sup> Or, as Justice John M. Harlan put it, a federal rule need only be “arguably procedural” to pass muster.<sup>256</sup>

Contending successfully that a Federal Rule of Civil Procedure violates the Rules Enabling Act is an uphill climb, to say the least. Because the rule must pass through the Supreme Court's hands, for a litigant to successfully challenge a rule the litigant would have to convince a lower court and then possibly the Supreme Court itself that the Court erred in adopting the rule.<sup>257</sup>

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250. See WRIGHT & KANE, *supra* note 206, at 441 (highlighting the stark difference between the quality of proposed amendments based on the body that submits them, be it Congress or the Rules Advisory Committee).

251. 28 U.S.C. § 2072 (2012).

252. § 2072(b).

253. 304 U.S. 64 (1938).

254. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (holding that the outcome-determination test cannot be read without referencing the twin aims of *Erie* regarding forum shopping and inequitable administration of the laws).

255. *Id.* at 464 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

256. *Id.* at 476 (Harlan, J., concurring).

257. There have been a couple of close calls, however. At least twice, the Court has read rules in implausibly narrow fashions, apparently to avoid a serious argument that the rule was not really regulating procedure. In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), the Supreme Court read Federal Rule of Civil Procedure 3—which states when an action “is commenced by filing a complaint”—as not affecting the Oklahoma rule that statutes of limitation stop when the complaint and summons is served, not when the plaintiff files the complaint. *Id.* at 750–51. As a result, Federal Rule 3 was left with almost no meaning. The Supreme Court was concerned that reading Federal Rule 3 as trumping the stop-on-service rule would interfere with an Oklahoma substantive policy decision. *Id.* at 751. In *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the Supreme Court read language of Federal Rule of Civil Procedure 41—which governs voluntary dismissals—regarding if a dismissal is “with prejudice” as only precluding refiling of the action in the same federal court that the first action was filed. *Id.* at 505. The Court was concerned that if Rule 41 were read to preclude an

The Federal Rules of Civil Procedure contain two provisions that extend personal jurisdiction of federal courts beyond that of their state court counterparts. One is the long-standing bulge rule that gives a 100-mile bonus to federal courts in haling supplemental parties under Rules 14 and 19.<sup>258</sup> The other is the current version of Federal Rule of Civil Procedure 4(k)(2), which is limited to federal question cases.<sup>259</sup>

One might argue that the federal courts have special powers that allow for Rule 4(k)(2) for federal question cases but not diversity cases. However, it is difficult to see why this should be so. Diversity jurisdiction has existed since the First Judiciary Act of 1789, while general federal question jurisdiction did not become a permanent fixture until after the Civil War.<sup>260</sup> So it cannot be argued seriously that federal question jurisdiction is more fundamental than diversity. The likely reason for current Rule 4(k)(2)'s limitation to federal question cases is that it was a response to *Omni Capital*, which was a federal question case.<sup>261</sup> When the Rules Advisory Committee proposed Rule 4(k)(2) in its current form, it referred only to the special powers of federal courts without any reference to the basis upon which they exercised subject matter jurisdiction.<sup>262</sup> Although lower court cases addressing whether these provisions in the federal rules violate the Rules Enabling Act are not plentiful, they come down on the side of upholding the relevant rule.<sup>263</sup> Extending Rule 4(k)(2) to diversity and

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action in a state court in another state that Rule 41 would violate the basic federalism goals of *Erie*. *Id.*

258. See *supra* notes 206–11 and accompanying text.

259. See *supra* notes 218–27 and accompanying text.

260. See WRIGHT & KANE, *supra* note 206, at 102 (explaining that it was not until 1875 that Congress gave federal courts original jurisdiction over federal question cases); *id.* at 143 (“Ever since the First Judiciary Act, the federal courts have had original jurisdiction of so-called diversity cases, those involving a controversy between citizens of different states or between a citizen of a state and an alien.”).

261. See *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 100 (1987) (noting that the original complaints were filed under the federal Securities laws).

262.

There remain constitutional limitations on the exercise of territorial jurisdiction by *federal courts* over persons outside the United States. These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which was incorporated into federal practice by the reference to state law in the text of the former subdivision (e) that is deleted by this revision.

FED. R. CIV. P. 4(k)(2) advisory committee’s note to 1993 amendment (emphasis added).

263. See, e.g., *Keith v. Freiberg*, 621 F.2d 318, 319 & n.2 (8th Cir. 1980) (holding that Rule 4(d)(7), (e), and (f) of the Federal Rules of Civil Procedure and the Rules

alienage cases would be at least as arguably procedural as the bulge rule and the current version of Rule 4(k)(2).<sup>264</sup>

*C. Is Basing Federal Court Personal Jurisdiction on  
National Contacts Constitutional?*

Unless some form of a national contacts test applies to the proposed extension of Rule 4(k)(2), it would all be for naught. The Mr. Nicastro of the world would still be left without a U.S. forum against foreign defendants.

As noted above, it is difficult to see why the difference between extending personal jurisdiction in diversity and federal question cases should present any constitutionally significant distinction. As the Rules Advisory Committee noted, it is the fact that a federal court is hearing the case that brings into play the Fifth rather than the Fourteenth Amendment.<sup>265</sup> Moreover, the venerable bulge rule—which is not limited to federal question cases—would become ineffectual in diversity cases if minimum contacts with the forum state is a constitutional command both to state and federal courts in non-federal question cases.<sup>266</sup>

Of course, this assumes that the national contacts test, in one form or another, is the Fifth Amendment limitation. The Supreme Court has played coy on this issue. In *Stafford v. Briggs*,<sup>267</sup> the Court resolved the case on statutory grounds. In his dissent, however, Justice Stewart,

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Enabling Act are constitutional); *cf.* Archangel Diamond Corp. Liquidating Tr. v. OAO Lukoil, 75 F. Supp. 3d 1343, 1365 (D. Colo. 2014), *aff'd*, 812 F.3d 799 (10th Cir. 2016) (applying Rule 4(k)(2) in determining whether jurisdiction is proper in the face of constitutional challenges to such jurisdiction); *Dechand v. Ins. Co. of Pa.*, 732 F. Supp. 1120, 1122 (D. Kan. 1990) (upholding federal rules governing joinder in light of Kansas statute).

264. Other federal rules extend the reach of federal courts. Admiralty Supplemental Rules B and C have been interpreted to create nationwide personal jurisdiction in admiralty cases where the vessel is seized and Bankruptcy Rule 7004(f) gives bankruptcy courts nationwide personal jurisdiction. See HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 494–97. In admiralty proceedings, the “general common law” still applies, and in adversary proceedings in bankruptcy courts (suits by and against the debtor) state law applies. See, e.g., *In re Kewanee Boiler Corp.*, 270 B.R. 912, 925 (Bankr. E.D. Ill. 2002) (“[T]he mere presence of state law issues does not mean that jurisdiction over bankruptcy issues should be left to the state courts . . .”). The applicable law has no bearing on whether the national contacts standard applies.

265. See FED. R. CIV. P. 4(k)(2) advisory committee’s note to 1993 amendment (“These restrictions arise from the Fifth Amendment rather than from the Fourteenth Amendment . . .”).

266. See *supra* notes 206–11 and accompanying text.

267. 444 U.S. 527 (1980).

joined by Justice Brennan, disagreed with the majority's statutory reading, and reached the constitutional issue of whether a federal court could exercise national personal jurisdiction.<sup>268</sup> They concluded that minimum contacts with the United States as a whole, not the forum state, was the constitutional requirement under the Fifth Amendment.<sup>269</sup> The majority opinion neither endorsed nor rejected the dissent's proposed constitutional test. In two cases in 1987 involving foreign defendants, the Court wrote brief footnotes stating that the Fifth Amendment standard was not relevant because Fourteenth Amendment standards were applicable under what is now Rule 4(k)(1)(A); thus, the Court had no need to decide the issue and said the same in throwaway dictum in *Bristol-Myers*.<sup>270</sup>

Lower courts take various views. One is the pure national contacts standard, which allows jurisdiction in any federal court anywhere in the United States, if the defendant has minimum contacts with the United States.<sup>271</sup> At the other pole is the view that the Fifth and Fourteenth Amendment standards are identical.<sup>272</sup> The middle view is that while the national contacts test is the basic one, the plaintiff

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268. *Id.* at 553–54 (Stewart, J., dissenting).

269. *Id.*

270. *Bristol-Myers Squibb Co. v. Superior Court*, 173 S. Ct. 1773, 1784 (2017) (leaving open the question of whether the Fifth Amendment applies to federal court personal jurisdiction); *Omni Capital Int'l. Ltd. v. Rudolph Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (stating the court has no occasion to address the Fifth Amendment's applicability to personal jurisdiction through national contacts); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.\* (1987) (declining to address congressional authority of granting personal jurisdiction to federal courts "over alien defendants based on the aggregate of *national* contacts").

271. *See, e.g., In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 207 (2d Cir. 2003) (per curiam) (holding that a federal court's minimum contacts analysis must look to a corporation's contacts with the United States as a whole to determine if the federal court's exercise of personal jurisdiction is consistent with due process); *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 567 (6th Cir. 2001); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at \*23 (S.D.N.Y. Oct. 20, 2015) (agreeing that the national contacts test is consistent with Second Circuit precedent), *rev'd in part on rehearing*, 11 MD 2262 (NRB), 2016 WL 1301175 (Mar. 31, 2016); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 33 (D.D.C. 2010) (applying the national contacts test as the test for diversity jurisdiction); *see also HAY, BORCHERS & SYMEONIDES, supra* note 21, at 497 (discussing the application of pure national contacts test as the standard in bankruptcy cases).

272. *See, e.g., Republic of Panama v. BCCI Holdings (Luxembourg), S.A.*, 119 F.3d 935, 942 (11th Cir. 1997) (noting appellee's argument that under both Amendments, courts must look past the defendant's contacts with the forum state).

cannot pick out an unreasonably inconvenient forum.<sup>273</sup> The middle view has found favor among commentators.<sup>274</sup> A majority of the lower federal courts facing the issue appear to have adopted some form of the national contacts test.<sup>275</sup>

There are other strong suggestions that some form of the national contacts test applies under the Fifth Amendment.<sup>276</sup> The 1993 Rules Advisory Committee's notes to Rule 4(k) (2) assume that some form of the national contacts test applies.<sup>277</sup> If some form of the national contacts test does not apply, Rule 4(k) (2) would be of almost no effect. Rule 4(k) (2) (A) requires that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction."<sup>278</sup> If the Fifth and Fourteenth Amendment standards are identical, Rule 4(k) (2) would be of effect only in the rare case that the defendant had minimum contacts with a forum state that has a long-arm statute that stops short of the constitutional line, the defendant's contacts fall between the constitutional and statutory lines, and no other state is available. Moreover, the venerable bulge rule<sup>279</sup> would be of no effect. Congress also clearly believes that it has the power to authorize federal court personal jurisdiction on a nationwide basis as it has several times so legislated.<sup>280</sup>

The Supreme Court plurality in *J. McIntyre* also appeared to endorse the possibility of broader personal jurisdiction for federal courts. Recognizing the implications of its sovereignty-based approach, the plurality wrote: "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States, but not of any particular State."<sup>281</sup> Then later, after noting that the defendant clearly targeted the U.S. market, the

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273. *Id.* at 944–48.

274. HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 483 & n.22 (endorsing the test and noting other commentators who favor it).

275. *See id.* at 482–83; *see also BCCI Holdings*, 119 F.3d at 948 (suggesting a regional approach with personal jurisdiction being proper for a bank with few contacts in Florida but numerous contacts up and down the coast).

276. *See Sachs*, *supra* note 18, at 1319–20 (explaining that although the Supreme Court has never ruled as to whether national personal jurisdiction is constitutional under the Fifth Amendment, "the issue is about as settled by precedent as it could be" in favor of a national contacts test).

277. *See* FED. R. CIV. P. 4(k) (2) advisory committee's note to 1993 amendment.

278. *See* FED. R. CIV. P. 4(k) (2) (a).

279. *See supra* notes 206–11 and accompanying text.

280. *See* 15 U.S.C. §§ 22, 78aa (2012); 18 U.S.C. § 1915(d) (2012); 29 U.S.C. § 1132(e) (2) (2012); 42 U.S.C. § 9613(P) (2012); *see also* HAY, BORCHERS & SYMEONIDES, *supra* note 21, at 480 n.6 (collecting statutes).

281. *J. McIntyre Mach. Co. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion).

plurality stated: “It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts.”<sup>282</sup> The plurality also did not attach any significance to the applicable law: “Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey.”<sup>283</sup>

All of this appears to be an endorsement of the constitutionality of an extension of Rule 4(k)(2) to diversity and alienage cases and a rejection of the suggestion that the applicable law makes a difference. The plaintiff in *J. McIntyre* could only have brought the action in federal court on alienage grounds, as products liability law is state law. The only arguably significant difference is that extending Rule 4(k)(2) would not be direct action by Congress. But as discussed above, it would be a permissible exercise of the power granted by Congress under the Rules Enabling Act, and Congress would be able to veto the change. Thus, it is difficult to see why—under the plurality’s view—it would make any constitutional difference had Mr. Nicastro been allowed to bring his action in New Jersey federal court under an extended Rule 4(k)(2) or a federal statute.

Of course, this only accounts for four votes on the Court and flows from a sovereignty rationale that the concurrence in the judgment did not remark on and the dissent rejected.<sup>284</sup> But it seems likely that the Justices who signed the *J. McIntyre* concurrence or the dissent would find an extended Rule 4(k)(2) constitutional, even if they rested their votes on a fairness rather than a sovereignty rationale. An extended Rule 4(k)(2) would apply directly only to foreign defendants because had the *J. McIntyre* defendant been domestic, the plaintiff could have sued the defendant corporation in its home state.<sup>285</sup> The dissent argued that it was unfair for a “foreign industrialist” to take advantage of the U.S. market, yet be immunized from suit in the most convenient U.S. forum.<sup>286</sup> The concurrence’s reluctance to lay down absolutist

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282. *Id.* at 885.

283. *Id.* at 885–86.

284. *See id.* at 899 (Ginsburg, J., dissenting).

285. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 929 (2011) (explaining that a court may assert general jurisdiction over a foreign subsidiary of a U.S.-based corporation only when the corporation’s affiliations with the forum state are continuous and systematic).

286. *J. McIntyre*, 574 U.S. at 893 (Ginsburg, J., dissenting). A further hint that the dissenters would endorse an extended Rule 4(k)(2) is their approving citation of commentary urging that for foreign defendants the United States be viewed as a single

anti-jurisdictional rules would militate against any blanket finding that an extended Rule 4(k) (2) is unconstitutional.<sup>287</sup>

As a practical matter, an extended Rule 4(k) (2) would apply mainly in cases that look like *J. McIntyre*.<sup>288</sup> Under any version of a national contacts test, the defendant would have to purposefully direct its commercial activities toward the United States to its benefit.<sup>289</sup> Inevitably, there will be at least one state in which the bulk of the operative events took place, as was so with New Jersey in *J. McIntyre*. As the dissenting Justices already think it constitutional to sue in that state, they surely would find jurisdiction under an extended Rule 4(k) (2). For the plurality Justices, if there were federal law authorization, their sovereignty concerns would be addressed.

#### CONCLUSION

Extending Federal Rule of Civil Procedure 4(k) (2) to diversity and alienage cases would not resolve all the uncertainties and—in my view—unfair results produced by current jurisdictional law. But it would likely cure the worst of the injustices, which is leaving a U.S. plaintiff with no U.S. forum when a defendant exploiting the U.S. market injures the plaintiff in the United States and the suit is based on the defendant's U.S. activities. Extending Rule 4(k) (2) requires meeting and overcoming two substantial legal objections. The first is whether the extension would be allowed under the Rules Enabling Act. However, the Supreme Court has twice promulgated rules giving federal courts personal jurisdiction that their state court counterparts do not have. One is the bulge rule extending a federal court's reach to 100 miles from the courthouse over supplemental parties brought in under either Federal Rule 14 or 19.<sup>290</sup> The other is the current version of Rule 4(k) (2). Although the Supreme Court has never ruled on the question, the bulk of the authorities—including hints from the Supreme Court itself—suggest that the Fifth Amendment (which would be applicable instead of the Fourteenth) is satisfied by minimum contacts with the United States as a whole, rather than the more

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market. *Id.* at 904 (citing Peter Hay, *Judicial Jurisdiction over Foreign-Country Corporate Defendants—Commentary on Recent Case Law*, 63 OR. L. REV. 431, 433 (1984)).

287. *See id.* at 890 (Breyer, J., concurring in the judgment).

288. *See supra* notes 242–47 and accompanying text.

289. *J. McIntyre*, 574 U.S. at 885 (plurality opinion).

290. Federal courts sitting in bankruptcy and admiralty also have, by rule, extended jurisdiction. *See supra* note 264.

familiar rule that there must be minimum contacts with the forum state. An extended Rule 4(k)(2) would be a practicable way to promote the fair administration of justice.