

Personal Jurisdiction and Political Authority

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The American law of personal jurisdiction has rested on the same conceptual framework for over 70 years, since *International Shoe Co. v. Washington*¹ laid down the governing standard in terms both of territorial contacts and overall fairness. In a famous passage from that opinion, the Supreme Court said, “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.’”² Recent decisions of the Supreme Court have not purported to alter this framework, although the same decisions have consistently reversed findings of jurisdiction by the lower courts,³ suggesting that the Court sees a need to make the limits on personal jurisdiction more definite and predictable. This concrete problem with the current analysis leads to a deeper, more abstract problem, over the nature of the limits on jurisdiction: do those limits serve primarily to allocate power between sovereign states—by reference to contacts and territory—or do they protect individual rights—by reference to fairness? In separate opinions, the Supreme Court has answered “both” without quite indicating how each is related to the other.⁴

This ambiguity in theory has led to deleterious consequences in practice by forcing together the disparate elements of sovereignty and individual rights into the more specific tests for personal jurisdiction. As articulated by the Supreme Court, these tests themselves are not altogether consistent.

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¹ 326 U.S. 310 (1945).

² *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court added only the qualification, elided in the quoted passage “if he be not present within the territory of the forum.” *Id.*

³ See, e.g., *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

⁴ *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (Personal jurisdiction “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (describing personal jurisdiction “as an instrument of interstate federalism”). Coincidentally, both of these seemingly contradictory statements were made in opinions by Justice White. For further discussion of these cases, see *infra* notes 45–51.

Personal jurisdiction depends, alternatively, on whether “the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law,”⁵ or on whether the forum is “the focal point” of the defendant’s activity which caused harm to the plaintiff,⁶ or on whether “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”⁷ No one of these tests is determinative, and they all compete for application in any specific case. The resulting decisions depend too much on fact-specific inquiries, leaving lower courts to balance for themselves the plaintiff’s right of access to justice against the defendant’s right to avoid the power of a remote sovereign.

Despite the radically different level at which the abstract and concrete problems arise, they are deeply intertwined. Uncertainty over the justification for the constitutional limits on personal jurisdiction creates uncertainty over the specific tests that give content to those limits. The way out of these theoretical and practical dilemmas also is the same, by re-examining the foundations of personal jurisdiction in the authority of the modern state over the individuals and institutions subject to its control. That inquiry, in turn, depends upon disentangling the relationship between jurisdiction over residents and nonresidents, where the term “residents” is taken in the broad sense of citizens, resident aliens, corporations and other artificial entities organized or headquartered in the forum state, and the term “nonresidents” includes everyone else. Residents have undertaken allegiance to the forum by making their home there, and in exchange, receive the protection of the forum’s law.⁸ Under current doctrine, residents are subject to “general jurisdiction,” which allows claims to be asserted against them in the forum even if the claims arise from their activities elsewhere.⁹ The relationship of allegiance and protection assigns a subordinate role to jurisdiction over nonresidents: Nonresidents in this

⁵ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁶ *Caldor v. Jones*, 465 U.S. 783, 789 (1984).

⁷ *World-Wide Volkswagen*, 444 U.S. at 297.

⁸ See *Calvin’s Case* (1608) 77 Eng. Rep. 377 (KB) (holding that a Scot born during the reign of James I was entitled to the privileges of English citizenship); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 *YALE J. L. & HUMAN.* 73, 74 (1997) (“*Calvin’s Case* became the basis of the American common-law rule of birthright citizenship, a rule that was later embodied in the Fourteenth Amendment.”). For a modern version of the argument for allegiance and protection, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 108–18 (1974).

⁹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 755–63 (2014); *Goodyear Dunlop Tires Operations, SA v. Brown*, 564 U.S. 915, 924–29 (2011).

sense usually are treated as quasi-residents: they receive fewer benefits, or none at all, from the forum state, and they are subject to correspondingly fewer obligations, including the obligation to defend actions against them in the forum state. They are subject under current doctrine only to “specific jurisdiction,” limited to claims based on their activities in the forum state.¹⁰

This way of looking at nonresidents, however, suffers from a profound difficulty. It presupposes that nonresidents have submitted to the assertion of state power in some embryonic form analogous to the acquiescence of residents. As we shall see, the presumed acquiescence by residents in the exercise of state power is problematic in itself. Many residents do not freely consent to the exercise of government authority over them, but instead have been forced by politics or circumstances to reside in the state where they find themselves. Authority can be asserted over them only for reasons of necessity—maintaining the integrity of a modern territorial state and its associated legal system. A modern state, according to this reasoning, cannot give adequate protection to any resident without receiving allegiance from all residents. An internal right to opt out of state authority would create too many opportunities for lawless behavior. The same reasoning, however, cannot be applied to nonresidents, who have, by definition, decided to locate elsewhere. In the absence of actual consent, they must remain free to dissolve their ties to the forum state. Otherwise, no one could ever escape the power of the forum state by leaving it and residing someplace else.

In terms of personal jurisdiction, analysis must begin, not with the resemblance between residents and nonresidents, but with the differences—not by examining the actions of nonresidents that could be construed as submission to jurisdiction, but by looking at the actions they could have taken to avoid jurisdiction. This approach dispenses with the need to inquire, as one of the prevailing tests has it, whether the nonresident has invoked “the benefits and protection” of the forum’s law.¹¹ In many cases, forum law is exactly what a nonresident defendant is seeking to avoid and exactly what the plaintiff hopes to obtain. “Protection” of forum law cannot be forced upon a nonresident defendant as a means of compelling “allegiance.” The presumption in those

¹⁰ *Walden v. Fiore*, 134 S. Ct. 1115, 1121–26 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–85 (2011) (plurality opinion).

¹¹ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

circumstances should not be in favor of personal jurisdiction, but against it. To put this point more precisely, a court cannot impose unreasonable costs on a nonresident's activities outside the forum state as a condition of avoiding personal jurisdiction within the forum state. Potential defendants must have reasonable means, measured by the costs of precautions they could take outside the forum, in order to avoid personal jurisdiction within the forum. The presumption against jurisdiction proposed in this article places real constraints on any attempt to bootstrap benefits forced on the defendant to generate a circular argument for also forcing the defendant to submit to state law. If the nonresident defendant does not have a choice, the forum does not have personal jurisdiction.

A presumption against jurisdiction in these circumstances matters for reasons that go far beyond the burdens of being sued in a distant forum.¹² Those burdens form only the tip of the iceberg of being subjected to the exercise of power by a government to which one has no allegiance. The Supreme Court has twice issued opinions in recent years constraining the extraterritorial reach of federal statutes, in fields as varied as securities and human rights law.¹³ These decisions rely upon a presumption against extraterritoriality which serves as the substantive analogue of limits on personal jurisdiction, with which they are systematically connected, again both in abstract and concrete terms. Abstractly, the same territorial limits on sovereignty come into play in determining the coverage of a statute—sometimes called “prescriptive jurisdiction”—and in determining the geographic scope of judicial power—known as “adjudicative jurisdiction.” As scholars of conflict of laws have long appreciated, the constitutional standards for choice of law strongly resemble those for personal jurisdiction.¹⁴ If the plaintiff can get personal jurisdiction over the defendant, the plaintiff can often persuade the forum to apply its own law to the case.¹⁵ Yet, as a matter of political theory, the gap of between the

¹² See *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 114–16 (1987) (noting that a foreign nation's interests as well as U.S. foreign relations policies should be taken into account when considering jurisdiction).

¹³ *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (human rights law); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (securities law).

¹⁴ RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 120 (5th ed. 2006) (“In broad outline the constitutional standards for choice of law are similar to the standards for judicial jurisdiction.”).

¹⁵ But not always. For a summary and critique of attempts by plaintiffs to engage in forum shopping for favorable law, see Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 732–33, 764–69 (2009). Noted scholars nevertheless have argued for a presumption in favor of applying the forum's law. BRAINERD CURRIE, *On the Displacement of*

actual exercise of government power—*de facto* authority—and genuine moral legitimacy—*de jure* authority—has yet to be convincingly bridged. Consent, association, practical reason, democratic participation, and the benefits of fair play have all been found insufficient to bind individuals to any particular government, let alone one that asserts jurisdiction over them as nonresidents. The gap yawns only wider as claims to sovereign power extend to nonresidents and as international civil litigation extends its reach to virtually every aspect of commerce, investment, and human rights.

This article tries to fill this gap at the right distance from existing law—not so far that it departs from the territorial premises of the authority of the modern state, but not so close that it simply ratifies the law as it stands today. A convincing answer must offer a systematic account of the constitutional limits on personal jurisdiction and provide guidance in resolving the close questions that continue to arise around those limits. Part I gives a brief summary of where personal jurisdiction fits into constitutional doctrine, under the Full Faith and Credit Clause of Article IV and the Due Process Clause of the Fourteenth Amendment. These constitutional sources incorporate, with different degrees of emphasis, the elements of sovereignty and individual liberty that must enter into any analysis of personal jurisdiction. Although they are necessary elements of any analysis, they have not been convincingly unified in a single account of personal jurisdiction. Part II tries to accomplish this task by examining current debates in the political theory of sovereignty and authority. These are then translated into legal theory, with its distinctive demands of fit with existing legal doctrine, and in particular, the universal claim of modern states to exercise both *de facto* and *de jure* authority over all those within its territory. This account seeks to unify the otherwise incommensurable concerns over the division of sovereign power at the level of states and nations with the individual rights that dominate the assertion of personal jurisdiction over individuals and artificial entities. The result is a presumption against the exercise of jurisdiction over nonresident defendants when they could not have avoided the power of the forum state. Part III then applies this presumption to several recent decisions of the Supreme Court and finds, with certain qualifications, that these decisions conform to what the presumption requires. The presumption also applies in similar fashion to cases involving the Internet, which are generally thought to be the most difficult confronting the courts today. The recent

decisions, and the issues they raise, make clear what should have been evident all along: that personal jurisdiction cannot be considered as an esoteric specialty, divorced from the broad trends in legal theory, constitutional law, international human rights, and international trade. Instead, it remains central to the ever more salient and pressing questions that have arisen over the scope of national sovereignty.

I. PERSONAL JURISDICTION IN THE CONSTITUTION

A. *The Full Faith and Credit Clause*

The foundations of personal jurisdiction in power and fairness have their counterpart in different provisions of the Constitution. Until the ratification of the Fourteenth Amendment, the Full Faith and Credit Clause in Article IV served as the only effective check upon the power of state courts to exercise personal jurisdiction.¹⁶ Like other provisions in Article IV, this clause addresses the relations among the states, strengthening them beyond the bonds of a treaty between independent nations. Thus, the Privileges and Immunities Clause requires each state to treat citizens of other states as it treats its own citizens, over a broad range of rights.¹⁷ The Extradition Clause, and less fortunately, the Fugitive Slave Clause, require each state to aid in the apprehension of individuals fleeing from other states.¹⁸ These clauses also drew upon principles of international law, and with their focus upon interstate relations, they readily support a view of personal jurisdiction based on sovereign interests.¹⁹

The antebellum decision in *D'Arcy v. Ketchum*,²⁰ for instance, referred directly to "international law as it existed among the States in 1790" in denying effect to a New York judgment which was the subject of collection efforts in Louisiana because "the defendant had not been served with process or voluntarily made defense."²¹ In this and similar cases, the courts relied upon international law as the means of protecting individual

¹⁶ U.S. CONST. art. IV, § 1.

¹⁷ *Id.* § 2, cl. 1.

¹⁸ *Id.* § 2, cl. 2-3.

¹⁹ See Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871-75 (1989) (noting that the Full Faith and Credit Clause invited, but did not require, interpretation according to the law of nations); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 545-48 (1981) (summarizing the background of the Full Faith and Credit Clause in principles of international law).

²⁰ 52 U.S. (11 How.) 165 (1851).

²¹ *Id.* at 176.

rights. In *D'Arcy*, the defendant sought protection from an adverse judgment rendered without personal jurisdiction,²² and in another antebellum decision, *Mills v. Duryee*,²³ a prevailing plaintiff succeeded in protecting his rights to enforce a judgment in one state that had earlier been obtained in another state. The plaintiff only succeeded because Congress, in legislation implementing the Full Faith and Credit Clause,²⁴ had elevated the force of sister-state judgments from the discretionary recognition given to foreign judgments as a matter of comity. At common law, the latter provided only *prima facie* evidence in favor of the plaintiff, while the statute made the former conclusive on the merits.²⁵ The statute protected the plaintiff's individual right to enforce the judgment as reflected in the relationship among the states as separate sovereigns.

B. The Due Process Clause

After the Civil War, the two faces of the constitutional limits on personal jurisdiction came into sharper relief. On the one hand, the reference in antebellum opinions to international law blossomed into full-fledged adoption of Joseph Story's theory of sovereignty as authoritatively set forth in his *Commentaries on the Conflict of Laws*.²⁶ The seminal opinion in *Pennoyer v. Neff*²⁷ paraphrased Story's theory in the following terms:

The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals."²⁸

²² *Id.* at 167–68.

²³ 11 U.S. 481 (7 Cranch) (1813).

²⁴ Act of May 26, 1790, ch. 11, 1 Stat. 122.

²⁵ *Mills*, 11 U.S. (7 Cranch) at 484–85.

²⁶ JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* §§ 20, 539 (1st ed. 1834).

²⁷ 95 U.S. 714 (1877).

²⁸ *Id.* at 722–23 (citing STORY, *supra* note 26, § 539).

After endorsing Story's theory of sovereignty, the Court went out of its way to cite the Due Process Clause as a new source for protecting individual rights from excessive assertions of personal jurisdiction.²⁹ The only issue in *Pennoyer* was whether a federal court in Oregon had to recognize the judgment of an Oregon state court under the same statute requiring full faith and credit as in *Mills*.³⁰ This holding did not rest on the Fourteenth Amendment because it had not been ratified when the proceedings in the Oregon state court took place. The Court nevertheless added:

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.³¹

The reasons to reach this conclusion have proved to be compelling, if not to every scholar,³² to every court which has subsequently taken the Due Process Clause to be the foundation of the constitutional law of personal jurisdiction.

²⁹ The Court offered an opinion on the limits imposed by the Fourteenth Amendment on the jurisdiction of state courts even though the amendment had not come into force when the original lawsuit in *Pennoyer* was filed. *Id.* at 733–34.

³⁰ *Id.* at 729.

³¹ *Id.* at 733. The Due Process Clause of the Fifth Amendment provided the obvious model for the Due Process Clause of the Fourteenth, but it has not figured prominently in decisions on personal jurisdiction because federal statutes and rules on this issue have seldom been questioned. *See infra* text accompanying notes 177–178.

³² These scholars have argued against the incorporation of international law into the constitutional restrictions on personal jurisdiction, preferring instead to leave that step to Congress, or in default of congressional action, to the interpretive processes of federal common law; and they object even more vehemently to the incorporation of these limits in the Due Process Clause. Transgrud, *supra* note 19, at 871–84; Whitten, *supra* note 19, at 555–70. Their approach would subordinate the protection of individual rights to Congress, which would have the final word (or perhaps the only word) on enforcement of the Full Faith and Credit Clause. These arguments, for all their originalist credentials, nevertheless overlook the awkward compromise that would have resulted from limiting the scope of the Due Process Clause. Judgments rendered without personal jurisdiction under the Constitution would have remained fully enforceable in the state where they were rendered. Nonresident defendants would be effectively ostracized from the forum state, along with their property, so long as a judgment remained standing against them. They could only return at the risk of collection proceedings against them.

The Due Process Clause would subsequently become controversial as the foundation for substantive due process,³³ but purely procedural decisions, like *Pennoyer*, caused no backlash or reaction. State courts readily acquiesced in testing their decisions on personal jurisdiction for conformity to the Due Process Clause.³⁴ Placing the constitutional restraints on personal jurisdiction in the Due Process Clause also had the distinct advantage of locating a procedural issue in a procedural clause of the Constitution.³⁵ The Due Process Clause adopted longstanding views of procedural regularity, whether framed in jurisdictional terms or in terms of the “law of the land” clauses to be found in state constitutions, with origins dating back to Magna Carta.³⁶ Procedural regularity, as the “law of the land” clauses made clear, had to be judged by the law of the forum, introducing a geographical element into the definition of procedural rights. Even if the forum eventually applied the substantive law of another state to the dispute, it applied its own procedural law, and it began even a choice of law analysis with its own choice of law rules.³⁷

C. The Implications of Due Process

Reliance on the Due Process Clause, however, has obscured and complicated the role of sovereign interests in this analysis. What was dictum in *Pennoyer* became the standard analysis in modern cases, even those on recognition of judgments. The entire opinion in *McGee v.*

³³ See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 174–75 (1988) (noting that between 1873 and 1877, it became accepted that the Fourteenth Amendment protected property from unreasonable regulation).

³⁴ See, e.g., *Eliot v. McCormick*, 10 N.E. 705, 710 (Mass. 1887) (limiting jurisdiction under state statute in light of *Pennoyer*).

³⁵ The same could not be said for the doctrine of substantive due process, which confronts the initial hurdle that, as John Hart Ely observed, “is a contradiction in terms—sort of like ‘green pastel redness.’” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980). Ely correctly points out in the accompanying footnote that “[b]y the same token, ‘procedural due process’ is redundant.” *Id.*

³⁶ Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 738–55 (1981).

³⁷ The same geographical component can be found in other clauses of Section 1 of the Fourteenth Amendment. The Equal Protection Clause requires states to give to “any person *within its jurisdiction* the equal protection of the laws.” U.S. CONST. amend. XIV, § 1 (emphasis added). Section 1 also confers national citizenship on “[a]ll persons born or naturalized in the United States, *and subject to the jurisdiction thereof*,” and makes them citizens of their state of residence. *Id.* (emphasis added). Taken as a whole, the terms of Section 1 reinforce the theory of allegiance and protection and invoke its geographical limits by reference to place of birth, residence, and jurisdiction. They make the Due Process Clause the natural home of constitutional analysis of personal jurisdiction.

International Life Insurance Co.,³⁸ for instance, is devoted to the Due Process Clause, although its precise holding is that the Texas courts had to give full faith and credit to a judgment from California. The shift in constitutional analysis away from the Full Faith and Credit Clause resulted in a corresponding shift in rationale, with much greater emphasis placed on individual rights. In *McGee*, those rights were satisfied in the absence of a contention that the defendant “did not have adequate notice of the suit or sufficient time to prepare its defenses and appear.”³⁹ Accordingly, there was limited room to consider the territorial limits on the power of the California courts. Collective interests in allocating sovereignty and facilitating interstate relations took second place to the question whether the defendant had received adequate notice and opportunity to be heard.

Decisions on the latter question created the foundation for much of civil procedure and often, as in the celebrated case of *Mullane v. Central Hanover Bank & Trust Co.*,⁴⁰ overlapped with issues of personal jurisdiction. This overlap has led to attempts to assimilate the two issues, as in another well-known case, *Asahi Metal Industry Co. v. Superior Court*,⁴¹ where a majority of the Supreme Court could agree only that the assertion of jurisdiction over a foreign manufacturer of a tire component would be subject to an undue burden by litigating in California.⁴² The precise location of state and national boundaries had little to do with this inquiry, which depended far more on distance, culture, and access to lawyers than it does on how many jurisdictional lines the defendant has to cross to reach the forum. The modern conception of sufficient notice, articulated in *Mullane*, made this point in the clearest possible terms: “The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”⁴³ Whether the notice goes across state or national boundaries has nothing to do with this test. The same holds true for more general tests for sufficient procedures, such as the balance struck under *Mathews v. Eldridge*,⁴⁴ between individual

³⁸ 355 U.S. 220 (1957).

³⁹ *Id.* at 224.

⁴⁰ 339 U.S. 306, 311–20 (1950).

⁴¹ 480 U.S. 102, 113–16 (1987). Other decisions have also endorsed a range of factors that make the exercise of jurisdiction reasonable, but without relying solely upon them, as *Asahi* did. *See, e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93 (1980).

⁴² *Asahi*, 480 U.S. at 113–16.

⁴³ *Mullane*, 339 U.S. at 315.

⁴⁴ 424 U.S. 319, 335 (1976).

interests, the risk of error in adjudication, and the cost of achieving greater accuracy. This calculus, however it is implemented, gives little scope, if any, for considerations of territorial sovereignty. The distinctive features of personal jurisdiction must lie elsewhere.

In *World-Wide Volkswagen Corp. v. Woodson*,⁴⁵ the Supreme Court looked for these limits in a diluted version of Story's theory of mutually exclusive sovereignty: "The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."⁴⁶ By this time, however, Story's theory and the rigid jurisdictional limits built upon it in *Pennoyer v. Neff* had come under sustained attack and succumbed to the currently reigning standard of "traditional notions of fair play and substantial justice" from *International Shoe*.⁴⁷ The interpretive strategy of incorporating considerations of sovereignty into this standard demonstrates just how malleable it is. It can bridge the gap and incorporate both the individual's own interests, protected by individual rights, and the collective interests of sovereign states, reflected in the territorial division of power between them. To the extent that these latter interests figure in the analysis, the defendant seems cast in the role of asserting *jus tertii*—asserting interests that are not its own and that could, seemingly, be adequately enforced by the sovereign states themselves.

The Supreme Court itself recognized this problem in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,⁴⁸ but did little to resolve it. The case concerned the waiver of an objection to personal jurisdiction based on failure to respond to discovery requests.⁴⁹ The Court reasoned that a waiver was possible only because limits on personal jurisdiction protected individual liberty: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."⁵⁰ In an accompanying footnote, the Court went on to recognize the territorial component of personal jurisdiction but to locate it exclusively in the Due Process Clause:

⁴⁵ 444 U.S. 286 (1980).

⁴⁶ *Id.* at 293.

⁴⁷ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

⁴⁸ 456 U.S. 694 (1982).

⁴⁹ *Id.* at 698–700.

⁵⁰ *Id.* at 702.

That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.⁵¹

This statement creates a stark contrast with *World-Wide Volkswagen*, decided only two years earlier, which gave independent weight to collective interests in territorial sovereignty.⁵²

The tendency to subordinate interests in sovereignty is evident in a leading article by Arthur von Mehren, who opposed “power theories” of personal jurisdiction to “fairness theories,” expressing a decided preference for the latter.⁵³ The former, in his view, depend upon power over the defendant to the exclusion of all other factors. Such theories apply most clearly to personal jurisdiction based on the defendant’s presence within the forum and or the presence of his property there.⁵⁴ Fairness theories, by contrast, include any factor relevant to jurisdiction. These theories “explicitly weigh the various considerations—including power—that can rationally influence a legal order’s decisions whether to assert adjudicatory jurisdiction over controversies involving nondomestic elements.”⁵⁵ The relevant considerations fall into three broad categories based on ties between the parties and the forum, the efficiency of litigation in the forum, and the substantive relationship between the underlying controversy and the forum.⁵⁶ The real contrast between the two kinds of theories lies in the exclusiveness of one and the inclusiveness of the other, which corresponds almost exactly to the difference between *Pennoyer* and *International Shoe*. Power theories are only concerned with power, in the sense of the implied

⁵¹ *Id.* at 702 n.10.

⁵² 444 U.S. at 293.

⁵³ Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 339–40 (1983) (noting that power theories look inward to the forum state while fairness theories look outward to activities with relations to other states).

⁵⁴ *Id.* at 285.

⁵⁵ *Id.* at 288.

⁵⁶ *Id.* at 288–89.

or express threat to use force, while fairness theories are concerned with everything that might be conceivably relevant to personal jurisdiction, including power itself. Everything is swept under the rug of fairness theories which, despite the name, leave unresolved the tension between individual rights under the Due Process Clause and interstate sovereignty under the Full Faith and Credit Clause. Until it is resolved, the balancing tests characteristic of modern jurisdictional analysis will continue to encompass a disordered array of incommensurable and indefinite factors. It is too late to go back to Story's theory of mutually exclusive territorial sovereignty as adopted in *Pennoyer*, but too difficult to build any competing theory on the elusive abstractions expressed in *International Shoe*. In order to distill the relevant factors into more determinate rules, as Lea Brilmayer and Matthew Smith have recently argued, we need "a fully articulated political justification."⁵⁷ The next part of this article begins to develop one.

II. PERSONAL JURISDICTION IN POLITICAL AND LEGAL THEORY

Current disputes in political theory reveal the uneasy case for sovereign authority of the nation state over those subject to its power. *De facto* authority based on the actual power of states cannot be equated with *de jure* authority, construed as the legitimate power of the state to coerce and the moral obligation of subjects to obey.⁵⁸ The gap between these two forms of authority only becomes wider when applied to nonresidents, who generate almost all the controversies over personal jurisdiction.⁵⁹ If a state has only an uncertain grasp on *de jure* authority over its own residents, how can it exert similar authority over nonresidents, over whom it has a more tenuous grasp even in terms of *de facto* authority? These objections to authority over residents lose much of their force when transposed from legal theory to political, both because of the need for legal theory to fit established law and the need for a state to assure protection of everyone within its defined territory. The objections to authority over nonresidents,

⁵⁷ Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617, 635 (2012).

⁵⁸ Scott J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 386 (Jules Coleman & Scott Shapiro eds., 2002); A. John Simmons, *On the Territorial Rights of States*, 11 PHIL. ISSUES 300–01 (2001).

⁵⁹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 563 U.S. 915, 925 (2011).

however, must be confronted directly in justifying personal jurisdiction over them.

A. Objections to Authority in Political Theory

Authority over residents cannot rest on the consent of individuals because so many do not consent or consent only under duress.⁶⁰ Those born within a state become subject to its authority whether or not they ever swear an oath of allegiance to it, and many who do take an oath do so under circumstances in which they had no option to refuse. Many people cannot emigrate, either individually or in groups, as David Hume emphasized over two centuries ago.⁶¹ In fact, even when emigration is a realistic option, it invariably leads to submission to the power of another state. Anarchy for an individual or a group does not constitute a realistic option in the modern world, where existing states have divided up all the habitable land among themselves.⁶² Alternative justifications for authority based on implied consent fare no better because the act of implied consent often is subject to the same forms of coercion.⁶³ The “principle of fair play” has also been put forward as an alternative to consent, by making freely accepted benefits the condition for imposing corresponding obligations.⁶⁴ But individuals who receive benefits from the state, even in the limited form of protection from violence, theft, and fraud, might prefer not to accept those benefits. They do so for the practical reason that they have little choice but to accept these public goods.⁶⁵ Like actual or implied consent, the principle of fair play supports a duty to obey the law only by presupposing that the individual has a realistic option to do something else.

Reconstruction of the usual concept of authority to refer only to the legitimacy of state coercion, rather than the duty of citizens or subjects to obey, cannot dispense with the need for some form of acceptance of the state’s legitimacy by citizens or subjects. State coercion attains a degree of legitimacy, even in the most authoritarian governments, only if those who

⁶⁰ A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATION* 57–100 (1979).

⁶¹ DAVID HUME, *Of the Original Contract*, in DAVID HUME, *ESSAYS: MORAL, POLITICAL, AND LITERARY* 475–76 (Eugene F. Miller ed., 1987).

⁶² CARA NINE, *GLOBAL JUSTICE & TERRITORY* 171 (2012).

⁶³ In the law, the resort to “constructive consent” goes a step further than implied consent to infer *de jure* authority from acts which have no element of consent, express or implied, inherent in them at all. See Transgrud, *supra* note 20, at 884–85 (basing jurisdiction on “political consent” defined as “the consent of the litigants or some other legitimating principle”).

⁶⁴ SIMMONS, *supra* note 61, at 101–08.

⁶⁵ *Id.* at 136–42.

administer the state's coercive apparatus accept it as legitimate. The state cannot rely upon threats "all the way down" without simply becoming a Stalinist dictatorship, in which every official and every subject lives in fear of everyone else. Someone has to accept the moral authority of the state,⁶⁶ and the fewer who do so, the weaker the state's hold on any sense of any duty to obey the law. The more the state depends upon coercion alone, the more it forsakes any claim to a sense of obedience by those subject to its commands and the more likely it is to lose the benefits of willing compliance with the law.⁶⁷ The costly alternative of relying solely upon sanctions and the threat to impose them leads away from legitimacy to tyranny, even on the narrow conception of legitimacy as morally justified coercion.

Joseph Raz, in his influential "service conception of authority," goes to the opposite extreme of expanding the concept of legitimacy by altering the calculus of practical reason of individuals subject to a legal system.⁶⁸ He finds a duty to obey based on an extended analogy to reliance on expert authority.⁶⁹ Just as ordinary people rely on the judgment of experts when they do not trust their own judgment, Raz argues that individuals subject to political authority do better by following the law than they could by following their own assessment of what is in their interests.⁷⁰ Laws enable individuals, in his view, to obtain benefits that could not, if left to their own devices, obtain for themselves.⁷¹ Yet even with this concession, Raz has established only a reason for individuals to submit to authority, not a substitute for submission itself. If individuals do not act on the balance of reasons that support acceptance of the state's authority of law, they have acted against their own interests but not in violation of any duty to the state. Practical reason gets him only part of the way across the gap between *de facto* and *de jure* authority.

This problem is particularly acute for nonresidents who present the hardest cases for the exercise of personal jurisdiction. Even if citizens of

⁶⁶ Shapiro, *supra* note 59, at 397–98.

⁶⁷ Noam Gur, *Actions, Attitudes, and the Obligation to Obey the Law*, 21 J. POL. PHIL. 326, 341–42 (2013).

⁶⁸ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 38–69 (1986).

⁶⁹ *Id.* at 52–53.

⁷⁰ *Id.* at 67–68.

⁷¹ *Id.* Raz concedes, however, that this form of authority does not operate uniformly across all laws and all individuals. He acknowledges that different individuals might have more or less reason to accept different laws as authoritative. *Id.* at 73–74. For a similarly qualified endorsement of the duty to obey the law, see George Klosko, *Are Political Obligations Content Independent?*, 39 POL. THEORY 498, 516 (2011).

other nations would do better to follow American law, and to submit to the jurisdiction of American courts, they have no duty to accept American authority for this reason. To be sure, Raz begins from the premise that a legal system exercises *de facto* authority over those within its territory, so that nonresidents are not directly of concern to him.⁷² But if they were, he would have to exclude them entirely from the service conception of authority. It does not provide a remotely plausible account of what individuals elsewhere owe to a sovereign with territorially limited power. What they have good reason to do falls far short of what they are obligated to do.

In this respect, Raz's theory fares no better—or for that matter, no worse—than other recent accounts of authority. Scott Shapiro limits the binding force of his argument to those who subject themselves to government by being empowered by it, as they are, in his view, in liberal democracies.⁷³ He, too, imposes strict conditions on the moral acceptability of such submission, but if these conditions are met, they generate moral reasons for an individual to respect the decisions made by fellow citizens through the democratic process.⁷⁴ On his view, disobedience to the will of the majority, although it might preserve the autonomy of the individual dissenter, denies autonomy to fellow citizens who participated with the dissenter in constituting the state and resolving disputes through its institutions.⁷⁵ This justification for authority, however, presupposes the same kind of choice as the principle of fair play: that the dissenter decided to accept the benefits of participation in the democratic process. In the absence of such a choice, the dissenter severs his ties with fellow citizens and shows no disrespect to them by disobedience.⁷⁶ Similar considerations apply to Ronald Dworkin's account of legitimacy based on associative obligations generated by the state's fidelity to principle.⁷⁷ He limits the reach of his argument to those who have a choice to remain within a political community animated by the overriding concern to treat each of its members with equal concern and respect.⁷⁸ Neither Shapiro's nor Dworkin's account works at all for nonresidents who have made no commitment to a state.

⁷² RAZ, *supra* note 69 at 26–27.

⁷³ Shapiro, *supra* note 59, at 435–39.

⁷⁴ *Id.* at 436–37.

⁷⁵ *Id.* at 437–38.

⁷⁶ *Id.* at 437 n.81.

⁷⁷ RONALD DWORCKIN, *LAW'S EMPIRE* 206–15 (1986).

⁷⁸ *Id.* at 213–14.

As John Simmons has pointed out, the prevailing accounts of authority do not fit with the implicit, territorially based presumptions of the modern nation state.⁷⁹ Even for an ideally just state, authority over particular individual or particular territory does not follow from the justice with which it governs.⁸⁰ The boundary problem, as Simmons has called it, would still leave open the question of authority of a just state over the people and resources within its control.⁸¹ An organization can meet the requirements of justice towards its members without, for that reason, acquiring authority over non-members. Individuals must affirmatively accept membership in an organization rather than have it thrust upon them. This objection to accounts of authority based on justice, like the objections to other accounts of authority, has far more force when applied to nonresidents rather than residents. In practice and in theory, they are far less likely than residents to have done any act that would constitute acceptance of membership in a political community. In fact, the objection presupposes that someone without any contact with the organization remains free of any obligation towards it—precisely the situation of nonresidents. The objection raises questions about authority over residents, but only to the extent that they can be assimilated to nonresidents. The closer political theory comes to particularized analysis and territorial considerations—essential components of the law of personal jurisdiction—the more it reveals the need to distinguish between residents and nonresidents.

B. Limits on Authority in Legal Theory

The authority deficit in political theory is hardly limited to personal jurisdiction, but extends to all forms of *de facto* authority exercised by the state: to make and enforce any law, whether substantive or procedural, whether applied to residents or nonresidents, within or outside the boundaries of the state. Wide swathes of the population might withhold the necessary acceptance of the benefits and protection of the state, defeating its claim to general *de jure* authority even as it continued to exercise broad *de facto* authority. Precisely because this critique of the authority of law in political theory sweeps so far, it might appear to be too remote from the essential concerns of legal theory, which are preoccupied

⁷⁹ A. John Simmons, *Democratic Authority and the Boundary Problem*, 26 *RATIO JURIS* 326, 326–27 (2013).

⁸⁰ *Id.* at 329–30, 350–56.

⁸¹ *Id.*

with identifying the conditions for the existence of a legal system and the validity of laws within it.⁸² Legal theory addresses the question of what the law is, and so necessarily has a descriptive component absent from political theory, which often presents an external critique of existing law rather than an internal rationalization of its content.

Among the descriptive components is the broad *de facto* authority exercised by a robust legal system within the boundaries of a modern state. Just to take two prominent examples, international law defines a state as “an entity that has a defined territory and a permanent population, under the control of its own government.”⁸³ In a similar vein, as noted earlier, the Fourteenth Amendment confers national citizenship on all persons born in the United States, “and subject to the jurisdiction thereof.”⁸⁴ They are citizens whether they accept the benefits of American law or not. No legal theory can disregard these foundational requirements, but must presuppose the existence of *de jure* authority to the extent that these norms are accepted as valid.

The premise that the state legitimately exercises power over residents dovetails with arguments of pragmatic necessity, based on the prevailing system of nation states. That system might change, and if so, legal theory would have to change with it,⁸⁵ but it cannot be neglected. As currently constituted, it presents a stark contrast between countries that impose some form of the rule of law and “failed states” in which rebellion and disorder prevail in a Hobbesian state of nature. In legal theory, as opposed to political theory, arguments of pragmatic necessity and conformity to established practice justify the assertion of power over residents, and indeed, over everyone within the state’s territorial boundaries. Ordinary laws, of course, allow for exceptions and limitations on their scope, but not for ad hoc exemptions created by those otherwise subject to their commands. Allowing exemptions or secession in this form would create a patchwork of coverage that would effectively invite residents to opt-out of onerous obligations, such as payment of taxes, which would, in turn, threaten the basic function of government in offering protection to those subject to its allegiance.

⁸² DWORKIN, *supra* note 78, at 31–44.

⁸³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (AM. LAW INST. 1987).

⁸⁴ U.S. CONST. amend. XIV § 1.

⁸⁵ The concepts of state, law, and sovereignty can be defined differently than under prevailing law and they have been contested along several dimensions. See NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 17–26, 123–36 (1999).

It would also threaten the existence of the state itself. In its modern, territorially defined form, the state exercises power in competition with other states defined in the same territorial terms. International law recognizes the practical necessity of territorial assertion of power, both to protect residents and to preserve the existence of the state.⁸⁶ The failure of a state to exercise such control would invite its dissolution and the absorption of its territory and population into a competing state. Legal theory must take account of such pragmatic concerns to achieve a minimal degree of fit with existing law and practice—a need much diminished in political theory and particularly in framing objections to the authority of law. So long as residents recognize the law’s *de facto* authority, one of the crucial conditions for the existence of a legal system has been satisfied: obedience to the law by those subject to its commands.⁸⁷

As a descriptive matter, all modern states recognize a distinction between authority within their territory and over residents and their authority outside their territory over nonresidents. They do not routinely assert “universal jurisdiction” over claims arising outside their territory.⁸⁸ Universal jurisdiction, by definition, prevents anyone, anywhere from escaping its grasp. By respecting territorial limits, modern states allow a degree of individual choice over whether to submit to their authority. As we shall see, this principle of individual choice has normative implications for the legal rights of individuals, most directly for those outside state boundaries but indirectly for those within them. In particular, with respect to personal jurisdiction, general jurisdiction over citizens and residents follows from the *de facto* authority of the state over those who reside within its borders. As the Supreme Court has said, in a case involving assertion of jurisdiction over a resident who was absent from the state:

“Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable” from the various incidences of state citizenship. The responsibilities of citizenship arise out of the relationship to the state which domicile creates. That

⁸⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201.

⁸⁷ H.L.A. HART, THE CONCEPT OF LAW 116–17 (2d ed. 1994).

⁸⁸ Such jurisdiction is limited to punishing crimes “generally accepted as an attack upon the international order,” such as piracy and slavery. JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 467–68 (8th ed. 2012); see also RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 404 (AM. LAW INST. 1987).

relationship is not dissolved by mere absence from the state.⁸⁹

This quotation assimilates residence to citizenship, and the opinion itself concerns the technical concept of domicile, which also requires an intent to reside indefinitely. Further complications, taken up later, involve the extension of general jurisdiction from natural individuals to artificial persons, notably corporations. These complications occasionally make for some difficult cases on who is “essentially at home” in the forum state, but general jurisdiction presents the least problematic case for the exercise of personal jurisdiction. The question is how far the implications of these easy cases on jurisdiction over residents extend for the hard cases of specific jurisdiction over nonresidents.

The short answer is: Not very far for nonresidents. A longer answer is: No further than the effects within the forum that a nonresident could feasibly have avoided from outside it. The law might discount the authority deficit for residents, but not for nonresidents. It must give them an opportunity to avoid state power because that is the only way it can give any such opportunity to residents. If changing status from resident to nonresident resulted in no change in the scope of state power, then the resident’s choice to go or stay would mean nothing. It would be no choice at all. If anything, it would make the emigrating resident worse off, by attenuating the benefits of protection from the state while preserving the burdens of being subject to state authority. Even within legal theory, the case for authority over residents depends upon the limits of authority over nonresidents. The presupposition of *de jure* authority over residents loses nearly all its plausibility if it leaves them with no choice at all but to accept the *de facto* authority of the state. Residents must have the right to emigrate—to choose no longer to be residents. American law recognizes this choice, as a formal matter, in imposing few effective constraints on emigration by free individuals and none at all on interstate travel.⁹⁰ Perhaps even these constraints, such as the need for a passport to leave the

⁸⁹ *Milliken v. Meyer*, 311 U.S. 457, 463–64 (1940) (citations omitted) (quoting *Lawrence v. State Tax Comm’n*, 286 U.S. 276, 279 (1932)).

⁹⁰ *Haig v. Agee*, 453 U.S. 280, 306 (1981) (upholding regulations that limit the revocation of a passport only if there is a likelihood of serious damage to national security or foreign policy); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1964) (“The Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”).

country,⁹¹ are still too strong, and the cost of emigration is still too high. But even with all these limitations, the contrast with states that prohibit emigration, such as North Korea, is dramatic.⁹² States that recognize a right to leave satisfy the most minimal conditions for creating a political community with authority over them. Residents cannot be made prisoners of personal jurisdiction.

The only way to avoid this result is to recognize how deeply entangled the rights of residents and nonresidents are. A close look at the arguments for authority over the former reveals the contours of authority over the latter. To put this point in narrower and more technical terms, the arguments for general jurisdiction illuminate the limits on specific jurisdiction, and in particular, the need to leave nonresident defendants with a realistic way of escaping the power of the state.⁹³ This principle provides the only way systematically to reconcile arguments at the collective level of sovereignty with arguments at the individual level of rights to liberty and property.

C. Limits on Political Authority as Limits on Personal Jurisdiction

It follows from the principle of limited authority over nonresidents that the forum state can act to protect its interests at their expense only if they had a real choice whether or not to engage in activity that triggered those interests. This principle also provides a systematic reason to emphasize defendants' rights over plaintiffs' rights. The legitimate exercise of sovereignty requires the parties' submission to the power of the state, which the plaintiff supplies by commencing an action in the forum and which the defendant can supply only by engaging in some activity that constitutes a similar choice. That choice is most apparent when the defendant consents to suit in the forum or waives an objection to personal jurisdiction by failure to make it in a timely fashion. We have just seen that general jurisdiction based on residence exhibits a similar choice, as does presence in the forum when process is served. In all of these cases, the defendant could have done otherwise at nominal cost to activity outside the state.⁹⁴

⁹¹ 8 U.S.C. § 1185(b) (2012).

⁹² DWORKIN, *supra* note 78, at 207.

⁹³ Choice of the forum state as a domicile justifies the assertion of general jurisdiction over an individual defendant, *Milliken*, 311 U.S. at 463–64, while the actions of a nonresident defendant or a corporation not “essentially at home” in the forum only justify specific jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 563 U.S. 915, 919 (2011).

⁹⁴ The only exception to this principle lies in a narrow and disputed range of cases of jurisdiction

Like the place of personal jurisdiction in constitutional law, its place in political and legal theory sounds themes already present in judicial decisions, although in fragmentary and inchoate form. In *World-Wide Volkswagen v. Woodson*,⁹⁵ the Supreme Court observed that the Due Process Clause “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”⁹⁶ This statement was offered as a gloss on the “foreseeability” relevant to jurisdictional analysis: not the foreseeability that the defendant’s product would arrive in the forum, but the foreseeability that “he should reasonably anticipate being haled into court there.”⁹⁷ The analysis offered here goes beyond these statements in a more objective, less psychological direction. Instead of predictability and foreseeability, it relies directly on the defendant’s ability to avoid “being haled into court.” Regardless of what the defendant could plan or foresee, which depends in part on what the law of personal jurisdiction is, the defendant must be able to make a choice.

The defendant’s right to avoid jurisdiction should take the form of a presumption, not strictly an evidentiary presumption, but one analogous to the presumption against the extraterritorial application of federal law. If the defendant could not have avoided the activity related to the forum—the minimum contacts under *International Shoe*⁹⁸—then jurisdiction should be presumptively denied. To be precise, the defendant must have reasonable alternatives available, based on the costs and benefits of precautions taken outside the forum, to avoid being haled into court inside the forum. Only activity outside the forum figures in this cost-benefit analysis because only those activities represent the exercise of the defendant’s liberty to be free from interference by the forum. Foregone opportunities within the forum

by necessity: where the plaintiff has no alternative to suing in the forum. Some class actions fall under this heading, as do certain in rem actions, trust, and divorce cases. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999) (class actions without the right to opt out); *Shaffer v. Heitner*, 433 U.S. 186, 207–08, 211 n.37 (1977) (in rem actions); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (administration of trust); *Estin v. Estin*, 334 U.S. 541, 544–45 (1948) (adjudication of marital status but not custody or property). Most of these cases can be rationalized on other grounds, however, based on the party’s contacts with the forum. For instance, in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), the Court upheld general jurisdiction in Ohio over a Philippine mining company because its operations in the Philippines were shut down by the Japanese occupation during World War II and it had removed its minimal operations to Ohio. 342 U.S. at 447–48.

⁹⁵ 444 U.S. 286 (1980).

⁹⁶ *Id.* at 297.

⁹⁷ *Id.*

⁹⁸ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

do not count because those opportunities plainly fall within the regulatory power of the forum. The forum, so to speak, can internalize the costs of exercising jurisdiction, but it cannot externalize those costs; it cannot export a disproportionate share of those costs, by requiring exorbitant precautions to avoid jurisdiction, to activity outside its boundaries. So, a defendant can be subject to personal jurisdiction for its activity outside the forum that results in harm within it only to the extent that the defendant could have taken reasonable precautions against such effects.

In special cases, the plaintiff might overcome this presumption where the forum state can protect her interests only by asserting jurisdiction. Yet the narrow and problematic existence of “jurisdiction by necessity”⁹⁹ demonstrates how difficult it is to assert jurisdiction over a defendant “with which the state has no contacts, ties, or relations.”¹⁰⁰ Apart from such exceptional cases, the defendant’s liberty interest marks the outer limits of the forum’s sovereign interests. For cases of general jurisdiction, as we have seen, the forum’s power over the defendant rests upon the defendant’s choice of residence there.¹⁰¹ For cases of specific jurisdiction, the analysis is complicated by the fact that the defendant’s contacts must also be related to the plaintiff’s claim, so that the defendant’s activity must be arguably illegal, in the sense at least of giving rise to civil liability.¹⁰² It follows that the nonresident defendant cannot be forced to cease, limit, or change activity that is clearly legal outside the forum. Even assuming that forum law would make the conduct illegal, the forum cannot force the defendant to cease from engaging in that conduct where it is legal. For a corporate defendant, the alternative to engaging in activity related to the forum cannot be simply to discontinue some line of business or to go out of business entirely. The defendant must be left with a real alternative, at reasonable cost to activity outside the forum, that leaves it free of the forum’s power. A business cannot be forced to take exorbitant precautions to limit the geographical scope of its activities, for instance, by barring third parties from taking any of its products into the forum. This approach does not result in wholly mechanical rules, but it imposes a degree structure on jurisdictional analysis that neither insists upon question-begging invocation of the territorial limits on state power nor degenerates into an indeterminate balancing test.

⁹⁹ See *supra* note 94 and accompanying text.

¹⁰⁰ *Int’l Shoe Co.*, 326 U.S. at 319.

¹⁰¹ See *supra* notes 89–90.

¹⁰² See *supra* notes 95–99.

Critics of the Supreme Court's recent decisions do not, in so many words, favor indeterminate balancing, but they do object to the obstacles that these decisions place in the way of plaintiffs.¹⁰³ They favor liberal rules expanding personal jurisdiction, usually for the benefit of resident plaintiffs at the expense of nonresident defendants.¹⁰⁴ They give greater emphasis to the plaintiff's interest in protection by the forum state than to the defendant's interest in avoiding the unauthorized exercise of state power.¹⁰⁵ Their position takes on a populist antipathy to corporations and other institutional defendants, or at least to extending to these artificial persons the same rights as natural individuals. Organizational defendants, on this view, have ample means of protecting their interests outside of litigation, through the deployment of economic resources and political influence. And they pose a particular risk of imposing externalities on the forum and its residents: Taking profits from the state while leaving the accompanying costs within the state. Arguments for insulating nonresident defendants from the exorbitant exercise of jurisdiction do not, on this view, translate well from natural individuals to foreign corporations. Yet advocates for this view must acknowledge that legal principles can move in the opposite direction. As jurisdiction expands over foreign corporations, it also expands over natural individuals. The interests of corporations serve, in this way, as a protection also for the interests of individuals.

In any event, nothing should turn in principle upon whether a business takes the form of a corporation rather than a sole proprietorship. Both are entitled to the same protection under the Due Process Clause.¹⁰⁶ It is the scope and scale of a business that should matter, especially as the analysis of jurisdiction turns to specific issues in concrete cases, but these factors cut both ways under the proposal advanced here. Critics of the recent decisions often point out that corporations regularly take precautions to

¹⁰³ Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 475–76 (2012). Miller emphasizes the fairness element in jurisdictional analysis, very much as von Mehren did, with this added observation: “And, personal jurisdiction challenges, of course, have nothing to do with the central justice questions—who should win and who should lose.” *Id.* at 477.

¹⁰⁴ *Id.*

¹⁰⁵ As the dissent emphasized in *McIntyre*: “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.’” 564 U.S. 873, 893–94 (Ginsburg J. dissenting) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 555 (1995)).

¹⁰⁶ *Santa Clara Cty. v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886).

limit their exposure to personal jurisdiction, and to liability generally, by such means as separate incorporation of subsidiaries.¹⁰⁷ But conversely, the availability of these alternatives, if they are not exploited, should increase an organization's exposure. Large organizations have more opportunities to limit the geographical scope of their activities, and if they fail to do so, they are more likely subject themselves to jurisdiction. As discussed in detail in Part III, this analysis should depend less on a general sentiment for or against large organizations, whose presence has become ubiquitous in modern society, but on an assessment of the options to limit their activities that are genuinely open to them. Existing law recognizes no general suspension of the limits on personal jurisdiction when applied to corporations, and many of the leading decisions, in fact, involve corporate defendants or individuals associated with them. These decisions have taken a more nuanced approach rather than expressed a categorical suspicion of corporations. We turn now to a discussion of these cases.

III. RECENT DECISIONS

The recent decisions of the Supreme Court address both general jurisdiction and specific jurisdiction. The former, despite attempts to extend its range, has been far less significant than the latter. The two decisions on general jurisdiction both observed that “general jurisdiction has come to occupy a less dominant place in the contemporary scheme,”¹⁰⁸ and both decisions identified only two previous occasions on which the Court had considered attempts to assert general jurisdiction over corporations.¹⁰⁹ The hard cases tend to be on specific jurisdiction, partly because the defendant usually has so few arguably relevant contacts with the forum and partly because those contacts must also be connected to the plaintiff's claim. As the Court has repeatedly observed, the inquiry “focuses on the relationship among the defendant, the forum, and the

¹⁰⁷ Collyn A. Peddie, *Mi Casa Es Su Casa: Enterprise Theory and General Jurisdiction over Foreign Corporations After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 63 S.C. L. REV. 697, 705–09 (2012); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 493–96 (2012).

¹⁰⁸ *Daimler AG v. Bauman*, 134 S. Ct. 746, 758 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 925 (2011) (quoting Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 628 (1988)).

¹⁰⁹ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

litigation.”¹¹⁰ Attempts to invoke general jurisdiction need not satisfy this last requirement—the defendant’s contacts need not be related to the plaintiff’s claim—and so they often appear to be evasions of the more exacting analysis required for specific jurisdiction. The discussion in this part proceeds in order of increasing difficulty, beginning with the recent decisions on general jurisdiction, then turning to those on specific jurisdiction, and finally considering some difficult cases left open by the Supreme Court. The aim is to test the proposed presumption against personal jurisdiction both descriptively, in fitting the Court’s past decisions, and prescriptively, in analyzing future cases that might be brought before it.

A. General Jurisdiction

The two decisions on general jurisdiction both involved attempts to obtain jurisdiction over a parent or a subsidiary corporation based on activities of a related corporation. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,¹¹¹ it was an attempt to obtain jurisdiction over subsidiaries based on the activities of the parent.¹¹² In *Daimler AG v. Bauman*,¹¹³ it was the reverse: an attempt to obtain jurisdiction over the parent based on activities of the subsidiaries.¹¹⁴ Neither attempt succeeded because the plaintiffs could not “pierce the corporate veil” to aggregate the activities of the related corporations, and even if they had, they still had to show that the target corporation was “essentially at home” in the forum state.¹¹⁵ Taken together, both decisions give corporations wide latitude to structure their operations in order to limit their exposure to personal jurisdiction. The fact that both decisions were unanimous as to the result, with only a single separate opinion by a single Justice, demonstrates how widely accepted this proposition is.

In *Goodyear*, the plaintiffs’ claim was for wrongful death from a bus accident in Paris allegedly caused by a defective tire manufactured by the Turkish subsidiary of Goodyear USA, an Ohio corporation that did substantial business in North Carolina, where the lawsuit was brought.¹¹⁶

¹¹⁰ *Fiore v. Walden*, 134 S. Ct. 1115, 1121 (2014) (citations omitted); see *McIntyre*, 564 U.S. at 881 (plurality opinion).

¹¹¹ 564 U.S. 915 (2011).

¹¹² *Id.* at 918.

¹¹³ 134 S. Ct. 746 (2014).

¹¹⁴ *Id.* at 751.

¹¹⁵ *Id.* at 758–60; *Goodyear*, 564 U.S. at 930.

¹¹⁶ *Goodyear*, 564 U.S. at 918.

The plaintiffs sued both Goodyear USA and its subsidiaries, among them the Turkish subsidiary that manufactured the tire.¹¹⁷ Only the subsidiaries objected to personal jurisdiction.¹¹⁸ The plaintiffs argued that they nevertheless were subject to personal jurisdiction because, considered collectively, the activities of the corporate defendants amounted to “continuous and systematic contacts” with the forum.¹¹⁹ This argument was accepted by the North Carolina courts, even though the plaintiffs did not argue for “piercing the corporate veil” until the case reached the Supreme Court.¹²⁰ Accordingly, they forfeited that argument in the Supreme Court, and they were left to count only the contacts that the subsidiaries had with North Carolina toward general jurisdiction.¹²¹ The subsidiaries sold only a small percentage of their tires in North Carolina, and although these tires numbered in the tens of thousands, none of them were related to the accident.¹²² According to the test for general jurisdiction, as reformulated by the Court, the subsidiaries were not “essentially at home” in North Carolina.¹²³

The opinion in *Daimler* elaborated on this analysis, adding that the corporation’s contacts with the forum had to be evaluated in the context of its overall business activity.¹²⁴ The plaintiffs’ claim was for human rights violations in Argentina during the “dirty war” there from 1976 to 1983.¹²⁵ The plaintiffs asserted claims against Daimler AG, the German parent corporation, based on the activities of its Argentine subsidiary, and they sued in a federal court in California based on the activities of Daimler’s subsidiary and exclusive distributor in the United States.¹²⁶ Unlike the plaintiffs in *Goodyear*, those in *Daimler* did argue for “piercing the corporate veil” in the lower courts, and they succeeded in persuading the Ninth Circuit that the actions of Daimler’s American subsidiary could be attributed to Daimler itself because the subsidiary performed services that were “important” to Daimler and established a sufficient agency relationship.¹²⁷ The Court rejected this argument because it “stacks the

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 919.

¹²⁰ *Id.* at 921–22.

¹²¹ *Id.* at 930–31.

¹²² *Id.* at 921.

¹²³ *Id.* at 919.

¹²⁴ *See Daimler AG v. Bauman*, 134 S. Ct. 746, 758–63 (2014).

¹²⁵ *Id.* at 751.

¹²⁶ *Id.* at 758–59.

¹²⁷ *Id.* at 759–60.

deck, for it will always yield a pro-jurisdiction answer.”¹²⁸ But even accepting the argument, the Court found no basis for concluding that Daimler was “essentially at home” in California.¹²⁹ Its headquarters were in Germany, where it manufactured all of its cars, and even its American subsidiary had most of its activities outside of California, in Delaware where it was incorporated and in New Jersey where it had its principal place of business.¹³⁰ It followed that “there would still be no basis to subject Daimler to general jurisdiction, for Daimler’s slim contacts with the State hardly render it at home there.”¹³¹

Only Justice Sotomayor disagreed with this reasoning. She would have relied instead on the unreasonableness of asserting jurisdiction over Daimler based on an open-ended consideration of a variety of factors: “the burden on the defendant, the interests of the forum State, the plaintiff’s interest in obtaining relief, and the interests of other sovereigns in resolving the dispute.”¹³² The Court alluded to these factors but only in recognizing the international dimensions of the case, which was brought by Argentine citizens and arose from events entirely in Argentina.¹³³ To the extent that the plaintiffs relied upon federal law, the Court noted that recent decisions have limited the extraterritorial application of federal statutes recognizing human rights claims.¹³⁴ But the majority, unlike Justice Sotomayor, sought to impose rigid limits on the assertion of general jurisdiction, preventing exactly the kind of expansionist interpretation invited by considering the range of factors that she relied upon. As in *Goodyear*, the Court did not want to allow plaintiffs and lower courts to blur the distinction between specific and general distinction by appealing to an indefinite and expansive concept of “doing business” through continuous activity within the state.¹³⁵ What would be sufficient for specific jurisdiction over claims arising in the forum remained insufficient for general jurisdiction over claims arising elsewhere.

In terms of the presumption proposed in this article, the Court allowed the defendant a greater range of activity that would insulate it from

¹²⁸ *Id.* at 759.

¹²⁹ *Id.* at 761–62.

¹³⁰ *Id.* at 752.

¹³¹ *Id.* at 760.

¹³² *Id.* at 765 (Sotomayor, J., concurring) (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–14 (1987)).

¹³³ *Id.* at 762 (majority opinion)

¹³⁴ *Id.* at 762–63.

¹³⁵ *See id.* at 761; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011).

personal jurisdiction in the forum state. By taking the precaution of doing business through subsidiaries and locating its principal activities elsewhere, Daimler avoided litigation unrelated to the forum state and redirected it to a forum where it had stronger ties. Conversely, in the absence of such precautions, the likelihood of finding personal jurisdiction increases accordingly. This explains the Court's focus, not shared by Justice Sotomayor,¹³⁶ on the relative level of the defendant's activity in the forum as compared to its activity elsewhere. If absolute levels of activity mattered, then the options available to large enterprises to avoid general jurisdiction would correspondingly shrink. To exaggerate only slightly, they would be subject to personal jurisdiction everywhere for any claim, regardless of any precautions they took. By contrast, requiring the plaintiff to establish specific jurisdiction results in a closer look in each case at the options available to the defendant.

B. Specific Jurisdiction

The two decisions on specific jurisdiction present a study in contrasts. The later of the two, *Walden v. Fiore*,¹³⁷ appears in retrospect to have been an easy case with a correspondingly limited holding. The earlier, *J. McIntyre Machinery, Ltd. v. Nicaastro*,¹³⁸ narrowly missed becoming a major precedent, only because no opinion commanded a majority of the Court. Together, these cases reveal exactly how far the standard from *International Shoe* can be pressed to yield concrete rules on personal jurisdiction. The Court's hesitation in framing these rules leaves it in the position of reviewing—and frequently in recent years, reversing—assertions of jurisdiction on the facts of each case. The last of its decisions upholding personal jurisdiction was *Burnham v. Superior Court*,¹³⁹ which nevertheless took the law in a decidedly conservative direction by endorsing the traditional rule that personal service on an individual defendant within the forum is sufficient for personal jurisdiction. The recent decisions may lead eventually toward similarly well-defined rules.

In *Walden*, the Court resolved an easy case to send much the same message as it had in *Goodyear* and *Daimler*: to prevent evasion of the

¹³⁶ *Daimler AG*, 134 S. Ct. at 769–70 (Sotomayor, J., concurring).

¹³⁷ 134 S. Ct. 1115 (2014).

¹³⁸ 564 U.S. 873 (2011).

¹³⁹ 495 U.S. 604 (1990). A slightly later decision, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), effectively accomplished the same result, but did it by reversing a decision that refused to enforce a forum selection clause, leaving in place a presumption in favor of such clauses as a basis for jurisdiction in the contractually selected forum.

requirements of specific jurisdiction, in this case by the attempt to shift the focus to the plaintiff's contacts with the forum rather than the defendant's.¹⁴⁰ The Ninth Circuit made this shift because the defendant, an officer of the Drug Enforcement Agency, seized and refused to return cash to the plaintiffs, knowing that they were from Nevada.¹⁴¹ The seizure, however, occurred in Atlanta, as the plaintiffs changed planes en route to Nevada, where the lawsuit eventually was brought.¹⁴² The defendant had no other contact with Nevada other than his knowledge of the plaintiffs' ultimate destination and residence.¹⁴³ Following several previous decisions, the Supreme Court held that "however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'"¹⁴⁴

The Court distinguished cases in which the defendant had targeted the forum and made it the "focal point" of an allegedly libelous publication circulated in the forum.¹⁴⁵ By contrast, in the Court's view, the focal point of the defendant's actions in *Walden* was limited to Georgia.¹⁴⁶ This distinction might be dismissed as conclusory because it simply translates the defendant's inadequate contacts into an inadequate state of mind: Knowing that the plaintiffs were from Nevada was different from intending to harm them there. It also might be discounted because the Court has effectively insisted that libel, and other claims for intangible losses, are just different. Seizure of cash has a readily identifiable physical location, while activity on the Internet, which the Court left open, does not.¹⁴⁷ Such attempts to recharacterize the facts, accurate though they may be, fail to answer the question why the facts should be recharacterized in this way. An examination of what the defendant might have done to avoid personal jurisdiction provides a more direct and more convincing means of distinguishing these cases: The defendant could not have done anything differently, short of failing to do his job of preventing the entry into this

¹⁴⁰ See *Walden*, 134 S. Ct. at 1119.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See *id.*

¹⁴⁴ *Id.* at 1122 (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)).

¹⁴⁵ See *id.* at 1123–24; see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773–75 (1984); *Calder v. Jones*, 465 U.S. 783, 788–90 (1984). The first of these cases finds intentional circulation in the forum sufficient for personal jurisdiction over the publisher of a magazine. See *Keeton*, 465 U.S. at 772. The second adds the plaintiff's domicile and the presence of sources there to obtain jurisdiction over individual reporters. See *Calder*, 465 U.S. at 785–86.

¹⁴⁶ *Walden*, 134 S. Ct. at 1124–25.

¹⁴⁷ See *id.* at 1125 n.9.

country of drugs and the proceeds of drug transactions. This was an entirely legitimate duty imposed on him by his employer.

That feature of the case reveals a deeper similarity between *Walden* and the decisions on general jurisdiction. All three refuse to bend the rules on personal jurisdiction because of the defendant's institutional affiliation. The defendant in *Walden* was sued under *Bivens v. Six Unknown Named Federal Narcotics Agents*¹⁴⁸ because he was federal employee. This did not make any difference to the Court, but it did for the Ninth Circuit, which relied upon the ability of the federal government to defend him in any court anywhere in the country.¹⁴⁹ To treat a claim against a federal agent as if it were against the Federal Government has an undoubted element of realism about it. The substantive law, however, makes a *Bivens* claim available only against a federal employee in his individual capacity, while the federal government retains its sovereign immunity from suit.¹⁵⁰ The liability of each is determined independently, and so, too, must their susceptibility to personal jurisdiction. Just as in the general jurisdiction cases, the Court refused to pierce the veil separating the defendant from his employer.¹⁵¹ In order to obtain specific jurisdiction over him, the plaintiffs had to prove his contacts with the forum, not those of his employer.

McIntyre presented a far closer case on personal jurisdiction, although like the other recent decisions, it was prompted by an expansive decision of a lower court. The case arose from a personal injury in New Jersey caused by a scrap-metal machine made in England by J. McIntyre Machinery Ltd., an English corporation.¹⁵² J. McIntyre marketed the machines in the United States through an exclusive distribution arrangement with an independent distributor, McIntyre Machinery America, Ltd. (McIntyre America), which sold one of these machines to the plaintiff's employer in New Jersey.¹⁵³ After the plaintiff was injured using the machine, he and his wife brought an action against J. McIntyre and McIntyre America in New Jersey state court. McIntyre America went

¹⁴⁸ 403 U.S. 388 (1971).

¹⁴⁹ *Fiore v. Walden*, 688 F.3d 558, 583–84 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1115 (2014). Although the Supreme Court only referred to the defendant's federal employment in the statement of facts, it accepted an amicus brief by the United States addressing the issue. Brief for the United States as Amicus Curiae Supporting Petitioner at 18–22, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574).

¹⁵⁰ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390–91 (1971).

¹⁵¹ *See id.* (implicitly recognizing role of United States but refusing to give it any weight in the jurisdictional analysis).

¹⁵² *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878 (plurality opinion).

¹⁵³ *Id.* at 878–79.

bankrupt and did not participate further in the proceedings, and J. McIntyre moved to dismiss for lack of personal jurisdiction. The trial court granted this motion, and on appeal, the New Jersey Supreme Court eventually found “that the record supports the exercise of jurisdiction over J. McIntyre under the stream-of-commerce doctrine.”¹⁵⁴ The court elaborated on its reasoning in these terms:

J. McIntyre, a company incorporated in the United Kingdom, targeted the United States market for the sale of its recycling products. It did so by engaging McIntyre America, an Ohio-based company, as its exclusive United States distributor for an approximately seven-year period ending in 2001. J. McIntyre knew or reasonably should have known that the distribution system extended to the entire United States, because its company officials, along with McIntyre America officials, attended scrap metal trade shows and conventions in various American cities where its products were advertised.¹⁵⁵

The case therefore presented the Supreme Court with a stark choice: whether or not to uphold jurisdiction in one state where the defendant’s product caused an injury, based on the product’s independent distribution in every state. The plurality opinion by Justice Kennedy said “no” for four justices.¹⁵⁶ The dissent by Justice Ginsburg said “yes” for three justices.¹⁵⁷ And the decisive opinion concurring in the result, by Justice Breyer joined by Justice Alito, said “not on the facts of this case.”¹⁵⁸

The plurality and the concurring opinions, read together, yield the conclusion that simply placing goods “in the stream of commerce” does not, without more, support specific jurisdiction, even if the goods cause injury in the forum state and even if the defendant knew that they might well end up there. The plaintiff must prove something more to establish a connection between the defendant and the forum. For the plurality, the defendant had to engage in “conduct purposefully directed at New

¹⁵⁴ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 592 (N.J. 2010), *rev’d*, 564 U.S. 873 (2011).

¹⁵⁵ *Id.*

¹⁵⁶ *McIntyre*, 564 U.S. at 877 (plurality opinion).

¹⁵⁷ *Id.* at 893–94 (Ginsburg, J., dissenting).

¹⁵⁸ *Id.* at 887–88 (Breyer, J., concurring).

Jersey.”¹⁵⁹ The inquiry was whether “the defendant can be said to have targeted the forum” or whether “the defendant’s activities manifest an intention to submit to a power of the sovereign.”¹⁶⁰ These tests echo previous formulations that emphasize the defendant’s state of mind, notably whether the defendant “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”¹⁶¹ The concurrence, although it paraphrases the last of these tests, insisted that any general proposition be fleshed out by further evidence, which it was the plaintiff’s burden to supply.¹⁶² Such evidence might have consisted of proof that the defendant made a “specific effort” to sell its machines in New Jersey or that New Jersey customers “regularly attended” trade shows.¹⁶³ The concurrence was content to rely upon the facts of each case, at least for the time being, although narrowly circumscribed to address the defendant’s connection with the forum.

The dissent, like the New Jersey Supreme Court, would have dispensed with any inquiry focused upon the defendant’s activities in New Jersey, beyond the fact that its machine ended up there in the regular course of business and then caused the plaintiff’s injury.¹⁶⁴ The dissent saw the crucial inquiry in national terms: “In sum, McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, ‘purposefully availed itself’ of the United States market nationwide, not a market in a single State or a discrete collection of States.”¹⁶⁵ State boundaries otherwise did not matter for the dissent, which framed the inquiry in terms of whether it was “fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury.”¹⁶⁶ By selling to a national distributor, the manufacturer effectively waived any objection to specific jurisdiction based on the territorial limits of the states. The startling conclusion to disregard state boundaries could only have been reached by assimilating the distributor’s contacts with those of the manufacturer. But Justice Ginsburg, the author of the dissent, foreswore any such attempt automatically to pierce the corporate veil in her opinion for the Court in

¹⁵⁹ *Id.* at 886 (plurality opinion).

¹⁶⁰ *Id.* at 882.

¹⁶¹ *Id.* at 877 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁶² *Id.* at 889–90 (Breyer, J., concurring).

¹⁶³ *Id.* at 889.

¹⁶⁴ *See id.* at 893–94 (Ginsburg, J., dissenting).

¹⁶⁵ *Id.* at 905.

¹⁶⁶ *Id.* at 903.

Goodyear, which was handed down the same day as *McIntyre*.¹⁶⁷ That leaves only a more basic shift in jurisdictional analysis towards what is “reasonable and fair” and away from “implied consent” as the basis for personal jurisdiction.¹⁶⁸

The dissent need not have gone this far. What underlies all the opinions in *McIntyre* is a limited conception of what acts of the defendant might have amounted to “implied consent,” or more precisely, might have had the same legal effect as actual consent. The dissent presumes that J. McIntyre could easily have limited its exposure to jurisdiction in New Jersey. The New Jersey Supreme Court itself addressed this issue in passing, citing one of its earlier decisions for this proposition: “If a manufacturer does not want to subject itself to the jurisdiction of a New Jersey court while targeting the United States market, then it must take some reasonable step to prevent the distribution of its products in this State.”¹⁶⁹ That court also found that McIntyre America structured its advertising and promotion with J. McIntyre’s “direction and guidance whenever possible.”¹⁷⁰ From these passages in the lower court’s opinion, a much narrower rationale for its decision can be constructed: at reasonable expense, J. McIntyre could have, but did not, limit the distribution efforts of McIntyre America to prevent direct sales in New Jersey. Neither the New Jersey Supreme Court nor Justice Ginsburg took this route, presumably because they thought that any such limiting instructions were utterly incompatible with J. McIntyre’s incentives to sell as many machines as possible in the American market. National marketing for them, just like submission to specific jurisdiction in every state, was an all-or-nothing proposition. Yet to take this view just repeats the fallacies underlying the argument for fair play as a source of authority. Just getting benefits from the state is not enough to establish authority over the defendant. Those benefits have to be accepted, which presupposes some degree of choice on the defendant’s part.

¹⁶⁷ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 (2011).

¹⁶⁸ *McIntyre*, 564 U.S. at 902 (Ginsburg, J., dissenting) (“The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness.”).

¹⁶⁹ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 592 (N.J. 2010), *rev’d*, 564 U.S. 873 (2011) (citing *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1138 (N.J. 1986)).

¹⁷⁰ *Id.* at 579. The plurality acknowledged this finding, but also emphasized that “there is no allegation that the distributor was under J. McIntyre’s control.” *McIntyre*, 564 U.S. at 878 (plurality opinion).

The plurality went to the opposite extreme of requiring some affirmative act by the defendant that manifested “an intention to submit to the power of a sovereign.”¹⁷¹ This step, too, recapitulates problems revealed by the debates over the political theory of authority. Affirmative, uncoerced acts of submission to authority remain hard to find, and they are still harder to find in the corporate context, as the organization’s intent must be discerned from the intent of the agents who act on its behalf and who might testify to their intent strategically after the fact. An objective perspective on what the corporation or other organization might have done dispenses with these inquiries, while at the same time preserving the options available to it. The plurality suggested how hard it might have been for J. McIntyre to limit the circulation of its machines in New Jersey by emphasizing findings that only one, or at most four, of its machines might have ended up in the state.¹⁷²

The concurring opinion went further in directly addressing the burdens faced by corporations, particularly foreign corporations, in deciding how to limit the scope of their exposure to litigation within the American market.¹⁷³ As that opinion noted, recovery rates on personal injury claims vary dramatically from one state or locality to another.¹⁷⁴ The same, no doubt, is true of the costs of imposing geographical limits on distribution. It might be easy to identify high-volume states and monitor distribution to them, but more difficult to do the same for low-volume states. Much also depends upon the distribution contract, which might give more or less control to the manufacturer. This is a fact-intensive inquiry, but it is the correct one, and it accommodates intuitions about when a manufacturer should be subject to jurisdiction, depending upon the volume of its sales in the forum and its control over them. In the absence of a realistic means of limiting its distribution scheme, a manufacturer should not be put to the choice of serving all of the American market, and being subject to specific jurisdiction in every state, or not serving any part of it. That choice leverages sales in some states as a basis for jurisdiction in other states. Whether J. McIntyre was faced with such a drastic choice could, of course, be the subject of legitimate disagreement, as the plurality and dissenting opinions illustrate. Or it could be resolved, as the concurrence did, by pointing to the plaintiff’s burden of proof. In the absence of evidence of

¹⁷¹ *McIntyre*, 564 U.S. at 882 (plurality opinion).

¹⁷² *Id.* at 878, 886.

¹⁷³ *Id.* at 892 (Breyer, J., concurring).

¹⁷⁴ *See id.*

how the defendant could have controlled distribution of its machines in the forum state, jurisdiction should be denied. This approach sets the terms for assessment of additional evidence in future cases. It makes the defendant's activities in the forum more than a matter of "a little more or a little less," a source of indeterminacy that was apparent even in *International Shoe*.¹⁷⁵ Instead, the evidence should be assembled and evaluated in light of the defendant's range of feasible options.

This approach would end the stalemate between incompatible and conclusory invocations of territory and power on the one hand, and what is reasonable and fair on the other. The two positions can be reconciled by recognizing the essential liberty interest of nonresident defendants in avoiding the assertion of power by the forum state. The liberty interest of nonresident defendants gives rise to a presumption which precludes open-ended appeals to fairness as a reason for forcing them into the forum. In any event, the plaintiffs in *McIntyre* could not have relied upon the unfairness of denying them any forum at all because they could have always sued J. McIntyre in England, or for that matter, in Ohio, where it had significant contacts through its distribution contract with McIntyre America, which was incorporated and had its base of operations there.¹⁷⁶ This nearby alternative forum should have assuaged concerns that J. McIntyre exploited the American market with no recourse against it here. The plaintiffs' interests come into play, as do those of the forum in applying its own law or protecting its residents, only when the acts of the defendant or the force of necessity bring all three together to resolve their differences under one source of authority.

The scope of that authority, as the plurality noted, varies with the territorial dimensions of the state.¹⁷⁷ A federal court, exercising jurisdiction under a federal statute, has the broader authority of a government with wider boundaries under the Due Process Clause of the Fifth Amendment.¹⁷⁸ Within our federal system, the difference between the power of the federal government and the power of any single state cannot be dismissed as an outdated formalism. It forms the basis for the division

¹⁷⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

¹⁷⁶ *McIntyre*, 564 U.S. at 896–897 (Ginsburg, J., dissenting). A long-term contract with a corporation's principal place of business in the forum has been held sufficient to support jurisdiction over claims arising out of that contract. *Burger King Corp. v. Rudzewick*, 471 U.S. 462, 478–82 (1985).

¹⁷⁷ *McIntyre*, 564 U.S. at 885 (plurality opinion). The Court also reserved such questions in *Fiore v. Walden*, 134 S. Ct. 1115, 1125 n.9 (2014).

¹⁷⁸ U.S. CONST. amend. V.

of government power, and with respect to prospective defendants, gives them notice of the activities that might subject them to jurisdiction. As international litigation assumes a greater role in the global economy, legislation and treaties to take account of its distinctive feature become more pressing concerns. The law of personal jurisdiction must await these changes in federal and international law. Otherwise, local courts might act on the understandable, but provincial, interest in expanding jurisdiction for the benefit of resident plaintiffs at the expense of nonresident defendants. The Supreme Court remains the principal institution capable of checking these expansionary tendencies. This article advances the presumption against jurisdiction as a more effective means of performing this function than case-by-case review. It remains to be seen how it might work in some of the cases left open by the Supreme Court.

C. Internet Cases

The concurrence in *McIntyre* expressed uneasiness that the case did not involve the effect of the Internet on personal jurisdiction, which Justice Breyer found to present far more significant issues than those raised by the meager record of J. McIntyre's contacts with New Jersey.¹⁷⁹ The absence of decisions and guidance from the Supreme Court on jurisdiction and the Internet has been frequently noted, if only because some of the leading lower court decisions have become badly outdated, especially *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,¹⁸⁰ which drew a distinction between purely passive and interactive websites. The former simply post information, while the latter allow the viewer to respond to the website's content. Since most websites now have interactive features, this distinction has lost whatever utility it initially had.

In that light, it is worth asking what difference the presence of J. McIntyre on the Internet might have made to the holding that New Jersey could not exercise jurisdiction over it. Here, as in other areas of law, the Internet makes all the difference on issues of application, but hardly any on issues of principle.¹⁸¹ The best possible outcome would lay down clear rules about what the defendant could do to avoid activity on the Internet with effects inside the forum state. This question rapidly becomes one

¹⁷⁹ *McIntyre*, 564 U.S. at 889–90 (Breyer, J., concurring).

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

¹⁸¹ See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208.

focused upon the technologically and economically feasible alternatives available to the defendant.

It would not break any new ground to find personal jurisdiction based on the direct solicitation by J. McIntyre of customers in New Jersey, regardless of the means by which the solicitation took place.¹⁸² Similarly, just providing customer service to buyers of its products in New Jersey would depend more upon the service provided, and its relation to the lawsuit, rather than upon the means of communication used. If J. McIntyre gave advice to a customer about repairing the machine, and allegedly, because of the repair, the machine injured the plaintiff, jurisdiction should be found whether the advice came by letter, fax, telephone, e-mail, or a website. Internet cases become more difficult for the same reason that *McIntyre* itself was difficult: When an intermediary, such as eBay or Amazon Marketplace, acts on behalf of a local seller to exploit the national or international market, where should jurisdiction be found? And the same answer in general should be given as in *McIntyre*: There is jurisdiction if the buyer could have limited the geographic scope of its activities and failed to do so; otherwise, not.

Claims based on the misuse of information could be analyzed along the same lines, which have a long history in the law of libel. The decisive inquiry should be whether the defendant could have limited the circulation and target of the information in question, whether it is allegedly a libel, an invasion of privacy, or a copyright, trademark, or patent violation. What courts find troubling in these cases is not the Internet, but the spread of information across state boundaries, which current technology now makes so much easier and cheaper. Just as the intangibility of the corporate form and of contractual obligations made “presence” problematic as a device for localizing disputes before *International Shoe*, the intangibility of information has made “minimum contacts” problematic afterwards. This problem is not essentially one of technology, which has facilitated the spread of information from the invention of the printing press onwards. Information has always “wanted to be free” in this sense, and its consequences for personal jurisdiction have been recognized for some time in libel cases. It was decisions in this field that gave rise to the form of specific jurisdiction based on the “focal point” of the defendant’s activities, or as the plurality in *McIntyre* frames it, “where the defendant can be said

¹⁸² See *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 221–23 (1957) (stating that the single act of soliciting a renewal of life insurance policy was sufficient for personal jurisdiction).

to have targeted the forum.”¹⁸³ This formulation again has a problematic element referring to the defendant’s state of mind, which would be eliminated by turning the inquiry around and giving it an objective cast. Instead of asking whether the defendant targeted the forum, it would be better to ask if the defendant could have avoided targeting the forum in the sense of causing effects there.

So, for instance, the owner of a bed-and-breakfast in England, operating under the name “Pebble Beach” because of its location on a beach of that description, was held to be outside the jurisdiction of the California courts in a trademark infringement action brought by the Pebble Beach Company that owns the famous resort there.¹⁸⁴ The English bed-and-breakfast had a website accessible from the United States, www.pebblebeach-uk.com, which undoubtedly had some effects in California because of its resemblance to the Pebble Beach Company’s website, which was the same except for the “uk” suffix.¹⁸⁵ Yet there was little the English operation could do to limit those effects within the forum, without pulling its website entirely from the Internet. And as in *McIntyre*, the defendant submitted no evidence of the precautions that the defendant could have taken to limit the geographical scope of its advertising.

These issues are not new. What is new is the technology that bears upon the defendant’s ability to exploit a geographically extensive market or a limited market. “Geolocation technology” can identify where prospective customers are and how broadly a particular message is disseminated, depending upon the willingness of customers to reveal this information, the capability of a system to limit its geographic accessibility, and the overall cost to the defendant.¹⁸⁶ If it were cheap and easy for the defendant to take limiting measures—so that it did not have to deal with customers in undesirable forums—jurisdiction would expand accordingly. The defendant could be put to the choice of using the Internet in a limited form or not at all. Conversely, if the technology were cumbersome and expensive, jurisdiction would contract with the range of feasible options available to the defendant. The analysis does not depend upon changing rules of law but on changing technology and economics. Just as

¹⁸³ *McIntyre*, 564 U.S. at 882 (plurality opinion). The libel case is *Calder v. Jones*, 465 U.S. 783, 788–90 (1984).

¹⁸⁴ *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155–60 (9th Cir. 2006).

¹⁸⁵ *Id.* at 1153–54.

¹⁸⁶ Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 65–78 (2011).

defendants have become freer to communicate and do business in a wider sphere, they subject themselves to personal jurisdiction to the extent that they do not act to limit how widely they broadcast their message.

Some might find the prospective trade-off imposed upon defendants troubling, and another case from California, *Boschetto v. Hansing*,¹⁸⁷ refused to find personal jurisdiction over an individual based on a single transaction, selling a car through eBay, to a resident of the forum. Under the analysis proposed here, this decision is almost certainly wrong. The buyer knew where the seller was located and dealt with him anyway. He did not need to do so.¹⁸⁸ In that respect, this case bears a striking resemblance to *McGee v. International Life Insurance Co.*,¹⁸⁹ a decision that long antedated the Internet and held that California could exercise personal jurisdiction based on a single re-insurance contract mailed into that state. The defendant there, as the defendant in this case, could have decided not to deal with a resident of the forum. The recent decision distinguishes *McGee* on the unconvincing ground that selling an insurance policy somehow creates a more substantial connection to the forum than selling a car or, less explicitly, that an individual seller in a single transaction has a less substantial connection than a business that regularly uses eBay.¹⁹⁰ Neither of these distinctions is convincing because both simply aggregate the amount of business the defendant does without relating it to the forum. This approach reduces personal jurisdiction to a question of “a little more or a little less.”¹⁹¹

Some parties to transactions and to lawsuits might prefer to avoid any judicial analysis of the options available to them because it makes the result too dependent on the facts of each case. What if eBay made the winning bid the final stage in formation of the contract? Or what if it did not allow geographic restrictions on listings? No legal rule can eliminate all disputes over personal jurisdiction because both parties have strong incentives to litigate this question. Plaintiff’s attorneys often have a geographically restricted practice, while defendants hope that by obtaining a motion to dismiss, the litigation might be dropped altogether. Equal and opposite preferences operate on both sides. To forestall these disputes, one

¹⁸⁷ 539 F.3d 1011, 1016–19 (9th Cir. 2008).

¹⁸⁸ For contracts for the sale of cars, a winning bid on eBay does not constitute a binding contract. *eBay User Agreement*, EBAY, <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Nov. 4, 2016).

¹⁸⁹ 355 U.S. 220, 221–23 (1957).

¹⁹⁰ *Boschetto*, 539 F.3d at 1017–19, 1017 n. 3.

¹⁹¹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

or both parties to a contractual relationship might seek to impose forum selection clauses. These clauses, along with other forms of alternative dispute resolution, have been widely enforced, and for parties who can take advantage of them, they transform the law on personal jurisdiction into a series of default rules.¹⁹² On the beneficial side, this allows the parties to devise their own rules with determinate outcomes. On the doubtful side, emphasized in law review articles, these clauses allow one party with superior bargaining power to impose an onerous contract of adhesion on the opposing party.¹⁹³

A less frequently appreciated consequence of such clauses runs in the opposite direction. Where they are available, most likely to a business that can set the terms of a contract, they supply yet another means by which a potential defendant could limit its exposure to litigation in the forum state. All of the recent decisions by the Supreme Court were tort cases, not involving any contractual relationship between the parties, so that none of the defendants had recourse to this alternative. Yet the decisions, by endorsing certain forums, for instance, where the defendant is “essentially at home,” implicitly support clauses that select the same forum.¹⁹⁴ When a defendant realistically has that option, and refuses to take it, the place where the plaintiff was injured has a much stronger claim to exercise personal jurisdiction. Conversely, a defendant can be forced into a forum selected by contract, when the forum meets the requirements of “fundamental fairness,”¹⁹⁵ because the most obvious form of submission to jurisdiction has been met—by an enforceable agreement.

IV. CONCLUSION

This article has sought to reduce the indeterminacy in the constitutional law of personal jurisdiction by organizing the factors usually mentioned in the opinions around the options open to the defendant to avoid jurisdiction. It begins from the premises of *International Shoe*, as have the recent decisions on personal jurisdiction, following the counsel of another

¹⁹² *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590–95 (1991).

¹⁹³ See Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browserwrap Agreements and the “Reasonably Communicated” Test*, 77 WASH. L. REV. 481, 504–10 (2002) (noting that forum selection clauses must be communicated in a clear and timely manner to consumers); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 661–62 (2005).

¹⁹⁴ See *Carnival Cruise*, 499 U.S. at 595 (approving of the forum selection clause selecting the defendant’s home state for any action arising from a cruise contract).

¹⁹⁵ *Id.* (finding that a forum selection clause must meet the requirement of fundamental fairness).

seminal decision, *Mullane v. Central Hanover Bank & Trust Co.*: “We disturb none of the established rules on these subjects.”¹⁹⁶ Analysis of personal jurisdiction based directly on the standards of “minimum contacts” and “fair play and substantial justice,”¹⁹⁷ however, yields too few such rules. This article proposes one, establishing a presumption against jurisdiction when nonresident defendants cannot structure their activities to avoid effects in the forum. To some extent, this presumption operates as a default rule which enables defendants to affiliate with the forum and to submit to its jurisdiction according to their own assessment of their interests. What is more important is that it functions as a rule—one that unites the principles of territorial sovereignty and liberty at the foundation of the constitutional law of personal jurisdiction.

¹⁹⁶ 339 U.S. 306, 314 (1950).

¹⁹⁷ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).