SWEEPING GENERAL JURISDICTION UNDER THE SPECIFIC JURISDICTION RUG: A DOCTRINAL MAP OF THE CONTRACTION AND EXPANSION OF PERSONAL JURISDICTION AS TOLD BY *FORD*

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INTRODUCTION

Both specific personal jurisdiction and general personal jurisdiction are rooted in fairness and the protections of the Due Process Clauses.[1] The critical distinction has always been that specific personal jurisdiction requires a *relationship* between the litigation and the defendant's connection with the state, while general jurisdiction is generated by so many contacts that this relationship component is unnecessary. Although the precise test for specific personal jurisdiction has evolved since its inception in *International Shoe*,[2] the components of that test have mostly materialized into three separate inquiries. For specific personal jurisdiction to exist: (1) a defendant must have minimum contacts with a forum state; (2) the litigation must be sufficiently connected to those contacts; and (3) the exercise of personal jurisdiction must also be fair and reasonable within traditional margins.[3]

While the United States Supreme Court has decided cases that help identify what was meant or not meant by minimum contacts[4] and has provided a rubric for reasonableness,[5] it has said little about how to quantify the relationship that the contacts must have with the litigation. Circuit courts have been split as to whether the contacts must be a "but for" cause of the litigation, a "proximate cause" of the litigation, or a sliding scale of contacts and reasonableness,[6] yet none of these courts have addressed the full language of the given test – that the litigation "arise out of *or* relate to" the contacts.

In January 2020, the Supreme Court granted certiorari in a pair of cases poised to answer the question of how the "arise out of

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[1] Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[2] *Id.*

[3] *See, e.g.,* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473-74, 476 (1985).

[4] *See, e.g.*, Hanson v. Denckla, 357 U.S. 235 (1958).

[5] *See, e.g.*, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

[6] *See, e.g.*, Victor N. Metallo, *"Arise out of" or "Related to:" Textualism and Understanding Precedent Through Interpretatio Objectificata, "Objectified Interpretation" – A Four Step Process to Resolve Jurisdiction Questions Utilizing the Third Circuit Test in O'Connor as a Uniform Standard*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 415 (2011).

or relate to" part of the test in specific jurisdiction functions[7] – instead, the Court muddied the waters and the distinction between specific and general jurisdiction.

This article is intended to give a doctrinal map of the specific personal jurisdiction test as outlined by the majority in *Ford Motor Co. v. Montana Eighth Judicial District Court* and then compare that test to all the cases that the majority used as precedent for its assertion. As the journey through the map is completed, it becomes clear that, while prior iterations of the Supreme Court may have discounted the "relate" language in the test, all the current Court has done is reinvigorate a nebulous and unhelpful doctrine.

I. THE TEST IN *FORD*

Ford Motor Co. v. Montana Eighth Judicial District Court includes two consolidated cases – one from Montana and the other from Minnesota.[8] In each case, the forum state for litigation is where the plaintiff lived and where the injury occurred resulting from the use of the allegedly defective product.[9] Although Ford Motor Company ("Ford") conducted extensive business in those states, it did not sell the particular cars at issue to the plaintiffs there.[10] In that sense, its business in the forum state was unrelated to the litigation. Ford argued to the state courts that specific personal jurisdiction did not exist because, even though Ford had contacts with the states, the litigation did not *arise from* those contacts.[11] In other words, there was no causal connection between the forum state contact and the lawsuit.

Montana and Minnesota courts both rejected this argument largely because Ford "'purposefully [sought]' to 'serve the market[s]'", and thus personal jurisdiction over it would be fair.[12] Ford appealed, and the Supreme Court granted certiorari and consolidated the cases to answer whether Ford was indeed subject

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[7] Ford Motor Co. v. Bandemer, 140 S.Ct. 916 (2020); Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 140 S. Ct. 917 (2020).

[8] 592 U.S. 351, 356 (2021).

[9] *Id.*

[10] *Id.* at 357.

[11] *Id.* at 356.

[12] *Id.* at 357 (internal quotation marks omitted).

to specific personal jurisdiction in the respective state courts.[13] In the end, the Court affirmed both state courts and concluded that the "'relationship among the defendant, the forum[s], and the litigation'—[was] close enough to support specific jurisdiction."[14]

Justice Kagan, writing for the majority, asserted that this inclusion of a "relationship" concept in the specific jurisdiction test tracked prior case law.[15] Although Justice Gorsuch cautioned in his concurrence that the correct question was the constitutional requirements of due process (not just what the Supreme Court has written about the test),[16] the majority's position that it steeped its conclusion in precedent bears inquiry into what precedent actually required and how the test has changed over time.[17]

What is the test that Justice Kagan outlined in *Ford*? She started with due process limitations on a state court's power to exercise jurisdiction over a defendant and with the seminal case of *International Shoe*.[18] The Court's focus on "minimum contacts" in that case led to an emphasis on the defendant's relationship to the forum state and recognized two types of personal jurisdiction: specific and general.[19]

General jurisdiction is not case-linked. The current formulation of general jurisdiction allows its exercise only when "a defendant is 'essentially at home' in the State."[20] Claims do not have to relate to a defendant's contacts within the state, "[b]ut that breadth imposes a correlative limit: Only a select 'set of affiliations with a forum' will expose a defendant to such sweeping

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[13] *Ford*, 592 U.S. at 358.

[14] *Id.* at 371 (quoting Walden v. Fiore, 571 U.S. 277, 284 (2014)) (second alteration added).

[15] *Id.* at 364 (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 n.5 (2014)).

[16] *Id.* at 379 n.2 (Gorsuch, J., concurring).

[17] *See id.* These questions can be taken in turn, but ultimately the question of what precedent requires must be consistent with due process to be constitutional.

[18] *Id.* at 358 (majority opinion).

[19] *Ford*, 592 U.S. at 358-59. More discussion about the development of these doctrines will occur throughout the article as the creation of a doctrinal map occurs starting with *International Shoe* and ending with *Ford*. *See infra* sections IX and X (discussing the major modern development of general personal jurisdiction). This dichotomy also ignores the transient presence doctrine from *Pennoyer* affirmed in *Burnham v. Superior Court of California.* 495 U.S. 604 (1990). It also ignores registration jurisdiction, recently affirmed as an avenue for consent in *Mallory v. Norfolk Southern Railway Co. See* 600 U.S. 122 (2023).

[20] *Ford*, 592 U.S. at 358.

jurisdiction."[21] The Court in *Daimler AG v. Bauman* identified the relevant "homes" of a corporate defendant as the places it has citizenship: its place of incorporation and its principal place of business.[22] Because Ford had its citizenship in Delaware and Michigan, it was impossible to attach general jurisdiction over it in Minnesota or Montana.[23]

Specific jurisdiction, on the other hand, *is* case-linked. Justice Kagan explained that "[i]t covers defendants less intimately connected with a State, but only as to a narrower class of claims."[24] A defendant must voluntarily, purposefully avail itself of a State to have the requisite contacts, "[y]et even then—because the defendant is not 'at home' [as with general jurisdiction]—the forum State may exercise jurisdiction in only certain cases."[25] This limitation requires a relationship or a link between the lawsuit and the contacts; "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State . . . ."[26]

Justice Kagan articulated two values that undergird both specific and general jurisdiction: fair treatment of defendants and the protection of interstate federalism.[27] For specific personal jurisdiction, there is "reciprocity between a defendant and a State."[28] The defendant reaps the benefits and privileges of acting within a state and is subject to the courts of that state for related misconduct.[29] That said, a defendant has the power to structure its behavior to "lessen or avoid exposure to a given State's courts."[30] A defendant may decide whether the benefits are worth

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[21] Ford Motor Co. v. Mont. Eigth Jud. Dist. Ct., 592 U.S. 351, 358 (2021) (quoting Daimler AG v. Bauman, 571 U.S. 117, 137 (2014)).

[22] 571 U.S. 117 (2014). *Daimler* also leaves the door open for exceptional circumstances where a corporate defendant is "at home" in a state that isn't captured by citizenship, but that catch-all has yet to be illuminated by the Court. *See id.*

[23] *Ford*, 592 U.S. at 359.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 359-60 (quoting Bristol-Myers Squibb Co. v. Superior Court, 582 U.S. 255, 262 (2017)).

[27] *Id.* at 360. This formulation seems reductive given the mass of factors for fairness that the Court articulates in *World-Wide*. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

[28] *Ford*, 592 U.S. at 360.

[29] *Id.*

[30] *Id.* (citing *World-Wide Volkswagen*, 444 U.S. at 297).

the costs when deciding whether to purposefully avail itself of a certain state. As to interstate federalism, specific personal jurisdiction respects a state's sovereign power to try a suit and ensures that states with less interest in a suit do not encroach on states that have greater interest.[31]

Ford freely admitted that it had purposefully availed itself of the markets in both Montana and Minnesota.[32] The only real contention was the connection of those contacts to the lawsuit – how well the connections were case-linked for purposes of case-linked jurisdiction.[33] Ford argued that "[specific personal] [j]urisdiction attached 'only if the defendant's forum conduct *gave rise* to the plaintiff's claims.'"[34] It believed the test should be limited to a "strict causal relationship."[35]

Justice Kagan's rejoinder was that the relationship between contacts and litigation required for specific personal jurisdiction could be more than just a causal link.[36] The most common formulation of the test, she wrote, is that the suit "arise out of *or relate to* the defendant's contacts with the forum."[37] This language is disjunctive: contacts may prompt litigation by causally creating them *or* contacts may merely relate to the litigation to be sufficient. Immediately, she clarified that this formulation "does

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[31] *Ford*, 592 U.S. at 360. Interestingly, many horizontal disputes over which substantive law governs a case often refer to whether a state has more or less interest in a case. *See, e.g.*, Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847 (2015). However, exercise of federal specific personal jurisdiction usually does not engage on whether a state has the greatest or best interest in a case, only whether there is *sufficient* interest to comport with fairness or due process. *See, e.g.,* Burger King Corp. v. Rudzewicz, 471 U.S. 482-83 (in comparing state interests, the Court said, "we cannot conclude that Florida had no legitimate interest … [Rudzewicz] has not demonstrated how Michigan's acknowledged interest might possibly render jurisdiction in Florida *unconstitutional*.") (emphasis in original).

[32] *Ford*, 592 U.S. at 361.

[33] *Id.*

[34] *Id.* (quoting Brief for Petitioner 13).

[35] *Id.*

[36] *Id.* at 362.

[37] *Id.* (quoting Bristol-Myers Squibb Co. v. Super. Ct. of California, 582 U.S. 255, 263 (2017)).

not mean anything goes . . . '[R]elates to' incorporates real limits, as it must to adequately protect defendants foreign to a forum."[38]

After establishing that this "relates to" piece is not some new formulation, the majority applied the entire test to Ford.[39] The relationship that the majority identified between the defendant and the litigation was that Ford had "systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So, there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction."[40]

This logic is difficult to track because the Court used the contacts to qualify for *both* the existence of minimum contacts *and* the relationship with the litigation. Under this analysis, more contacts would support the inference of a relationship. So how many contacts are sufficient? While Ford's "veritable truckload of contacts" was enough, the Court provided no test for future relationship analysis.[41] Further, the majority mentioned, in a footnote, that "isolated or sporadic transactions" have long been treated differently from "continuous ones,"[42] which seems to confuse the concepts of specific and general jurisdiction. The whole point of specific jurisdiction is that it *can* attach to an isolated, singular transaction, *if* that transaction creates the litigation, and it is otherwise constitutionally fair to assert such jurisdiction. Continuous contacts are left to general jurisdiction.

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[38] *Ford*, 592 U.S. at 361. Justice Gorsuch in his concurrence notes that the majority identifies the need for limits without clarifying what the limits actually are. *Id.* at 376 (Gorsuch, J., concurring). Indeed, if the limits are fairness-related, then the last component of specific jurisdiction, its "otherwise fair" requirement would seem to be sufficient. *See Int'l Shoe*, 326 U.S. at 316.

[39] *Ford*, 592 U.S. at 364-65. While the plaintiffs make no argument and offer no proof that 'but for' Ford's service of the state markets, the cars would have been purchased and used, the majority speculated that it is possible that such a causal link existed. *Id.* at 367. However, the majority believed that the burden should not be on the plaintiffs to prove why they bought the car, so the causal argument still did not carry the day. *Id.*

[40] *Id.* at 365 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

[41] *Id.* at 371.

[42] *Id.* at 366, n.4. This same footnote leaves open the question of internet transactions and how they would fit into the test.

Justice Kagan asserted that her ultimate conclusion, that jurisdiction existed over Ford, was appropriate because it was supported by the key values that undergird personal jurisdiction: fairness to defendants and interstate federalism.[43] She contended that, as precedent explained, applying jurisdiction to Ford allowed it to be treated fairly as a defendant.[44] By serving the state markets, Ford created a reciprocal relationship with each state, giving the company fair notice that it would be subject to jurisdiction there.[45] The test also allowed states with a real interest to host the litigation, which further supported interstate federalism.[46] Thus, the values supporting specific jurisdiction were reified by the relationship test.

Curiously, the majority never treated fairness as a discrete inquiry in the application of specific personal jurisdiction – only using the existence of contacts and the relationship of those contacts to the litigation to assert authority.[47] While fairness and burdens are part of the values underlying the test, there was no separate analysis in Justice Kagan's formulation to determine whether jurisdiction would be otherwise fair and reasonable.

Justice Alito concurred in the judgment but recoiled at adding a relatedness component to the test for specific personal jurisdiction as too broad and unwieldy.[48] He asserted that the appropriate test was still a causal link, but that the link was met.[49] He wrote that it was easy to infer even without plaintiff proof that the cars would not have caused injury in the relevant states without the contacts.[50] Therefore, he argued the necessary causal link was met, noting that "'arise out of' and 'relate to' overlap and are not really two discrete grounds for jurisdiction. The phrase 'arise out of or relate to' is simply a way of restating the basic 'minimum contacts' standard adopted in *International*

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[43] *Ford*, 592 U.S. at 367-68.
[44] *Id.* at 367.
[45] *Id.* at 368.
[46] *Id.*
[47] *See supra* notes 15-30 and accompanying text.
[48] *Ford*, 592 U.S. at 373 (Alito, J., concurring).
[49] *Id.* at 372 (Alito, J., concurring).
[50] *Id.* (Alito, J., concurring).

Shoe."[51] That test holds that minimum contacts must exist, "which means that the contacts must be '*such* that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[52] The touchstone is fairness, and, according to Justice Alito, jurisdiction here was not unfair to Ford.

Justice Gorsuch, joined by Justice Thomas, also concurred in the judgment with a separate opinion.[53] He found the majority's test "far from clear" and lamented that "[n]ot only does the majority's new test risk adding new layers of confusion to our personal jurisdiction jurisprudence[, t]he whole project seems unnecessary."[54] Justice Gorsuch identified a possible problem with the *International Shoe* framework itself, which created a "doubtful dichotomy" of general and specific jurisdiction.[55] He urged a rethinking of the framework but finally concluded that "[p]erhaps it was, is, and in the end always will be about trying to assess fairly a corporate defendant's presence or consent. *International Shoe* may have sought to move past those questions. But maybe all we have done since is struggle for new words to express the old ideas."[56]

Reading all the opinions together, the only point of agreement among the justices was that personal jurisdiction did exist over Ford.[57] However, the majority added new depth to the test for specific jurisdiction; now, contacts can either give rise to the litigation *or* be sufficiently related to it to establish specific personal jurisdiction. Every written opinion alluded to or confirmed the existence of causation being met, with a minority of the Court relying on only causation to create jurisdiction.[58] Rather than solve the issue that lower courts were split over and clarify exactly which type of causation was required for specific personal

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[51] *Ford*, 592 U.S. at 374 (Alito, J., concurring). This understanding essentially renders the "arise out of and relate to" language in the test as surplusage.

[52] *Id.* at 372 (emphasis added) (Alito, J., concurring).

[53] *Id.* at 375 (Gorsuch, J., concurring).

[54] *Id.* at 378. (Gorsuch, J., concurring).

[55] *Id.* at 384 (Gorsuch, J., concurring).

[56] *Id.* at 383 (Gorsuch, J., concurring).

[57] *Ford*, 592 U.S. at 371 (majority opinion) (noting that "Justice Barrett took no part in the consideration or decision of these cases").

[58] *Id.* at 354, 372 (Alito, J., concurring), 375 (Gorsuch, J., concurring).

jurisdiction, the Court muddied the waters and opened the lower courts to new floodgates of litigation.

To create a doctrinal map, it is necessary to use the cases that Justice Kagan herself provided in the opinion.[59] Across eighteen pages she used only eleven cases to illustrate that the test the majority applied already existed in precedent.[60] To track the Supreme Court's language about specific and general jurisdiction over time, it is necessary to start with *International Shoe* in 1945, as the majority does.

II. *INTERNATIONAL SHOE*

As Justice Kagan pointed out in her *Ford* opinion, *International Shoe* is the canonical decision in the modern era demonstrating due process restricting a state's power to exercise jurisdiction over a defendant. [61] In that case, the Court decided whether due process permitted jurisdiction over a company foreign to the forum state. The Court granted certiorari in *International Shoe* to decide whether the corporation had "rendered itself amenable to proceedings in the courts of that state."[62] While this is the moment that the tides shifted away from physical presence as a requirement to jurisdiction and over to minimum contacts, it can be easy to lose consent in the mix. Physical presence was historically seen as a proxy for consent – if one is voluntarily in the territorial jurisdiction of a state, one is also consenting to face its courts. Relaxing this physical presence requirement did not alter the consent-based element but shifted it;

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[59] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Keeton v. Hustler Mag., Inc., 465 U.S. 770 (1984); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Asahi Metal Indus. Co. v. Super. Ct. of California, 480 U.S. 102 (1987); Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915 (2011); Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277, 285 (2014); Bristol-Myers Squibb Co. v. Super. Ct. of California, 582 U.S. 255 (2017).

[60] *See generally Ford*, 592 U.S. at 354-71.

[61] *Id.* at 358.

[62] *Int'l Shoe*, 326 U.S. at 311.

now, choosing to have deliberate minimum contacts with the forum created consent to face forum courts.[63]

Physical presence as a predicate of jurisdiction, as explained in *Pennoyer v. Neff*, reflected then-understood principles of public law.[64] These principles stood for the overall proposition that states had exclusive sovereignty over their territory and no sovereignty or authority outside their territory.[65] Thus, if one was physically present inside the territory, the state and its courts had authority over that person as a defendant.

Yet the *Pennoyer* Court also required personal *service* in that state for a constitutional exercise of personal jurisdiction.[66] This requirement created a judicial conflation of notice and personal jurisdiction. While personal jurisdiction is the *authority* of a court over a defendant, notice is the *exercise* of that authority over the defendant; it is the action of bringing the defendant physically before the court. While the constitutional constraint for this authority and its exercise are the same – due process – they are distinct concepts. If due process itself is about the ultimate fairness of the proceeding, then proper notice is a necessary but not sufficient requirement to make the proceeding fair. Over time, the concepts of notice and personal jurisdiction have matured separately but relatedly.

This important shift by the *International Shoe* Court from presence to minimum contacts expanded a court's authority from reaching only physically present defendants to include absent

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[63] Author's Note: In this way all personal jurisdiction is fair, and satisfies due process, *because* it is consent-based, either through direct consent like the waiver-trap or a forum selection clause, or the structuring of behavior and citizenship to generate contacts.

[64] 95 U.S. 714, 722 (1877). If you thought you were getting out of a discussion on personal jurisdiction without one reference to *Pennoyer*, you were sorely mistaken. *Pennoyer* attached the due process clause to the idea of personal jurisdiction. *Id.* at 733 ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such [state] judgments may be directly questioned . . . 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.").

[65] *Id.* at 722.

[66] *Id.* at 733 ("To give such [legal] proceedings any validity . . . [the defendant] must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."). The Court noted exceptions to this rule for status or in rem proceedings, but for in personam personal jurisdiction, this appeared to be the rule. *Id.* at 733-34.

defendants.[67] An absent defendant, located outside the physical territory of a state, could still have minimum contacts with the forum state. The Court explained "the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such *contacts* of the corporation."[68]

To conclude that contacts were required, the Court was compelled by the similar shift in notice requirements. Chief Justice Stone intoned that physical presence was historically required for personal jurisdiction, "[b]ut now that the *capias ad respondendum* has given way to personal service of summons or *other form[s] of notice*, due process requires only . . . minimum contacts."[69] This acknowledgment suggested a lockstep maturation of notice and personal jurisdiction – concepts which remain intertwined.

When creating this new boundary line of contacts, the Court first struggled with the quantity necessary but ultimately determined that the boundary line could not "be simply mechanical or quantitative . . . a little more or a little less."[70] Contacts establish the reciprocal relationship mentioned by Justice Kagan in *Ford*, because "to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state."[71] Those benefits justify a court requiring the corporation to respond to a suit brought before the state court, and such a burden could

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[67] *Int'l Shoe*, 326 U.S. at 316-17.

[68] *Id.* (emphasis added).

[69] *Id.* at 316 (second emphasis added).

[70] *Id.* at 319. To arrive at this conclusion, the Court mentioned that "continuous and systematic" contacts have looked like presence to "justify suit against [a corporation] on causes of action arising from dealings entirely distinct from those activities" but there were also "single or isolated items of activities" that required more connection. *Id.* at 317-18. This language formed the basis for case-linked and non-case-linked jurisdiction or specific and general personal jurisdiction. *Int'l Shoe*, 326 U.S. at 317-18. *See, e.g.*, Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

[71] *Int'l Shoe*, 326 U.S. at 319.

"hardly be said to be undue."[72] In application of this contacts-based test to the issue at hand, the Court determined "[those] operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there."[73] The contacts caused the corporation to "render[] itself amenable" to the lawsuit.[74] Thus, the contacts were also a proxy for consent to jurisdiction.

International Shoe revolutionized the application of personal jurisdiction, shifting the focus from presence to contacts. Therefore, the language in that case focused on the contacts themselves and how contacts can satisfy due process.[75] The contacts with the forum state and the reciprocal relationship are what made jurisdiction fair, and thus constitutional. The relationship language in the case is very sparing, but the majority concluded that "[International Shoe] having rendered itself amenable to suit upon obligations *arising* out of the activities of its salesman in Washington, the state may maintain the present suit *in personam*."[76] This language suggested a relationship between the contacts and the litigation.

III. *HANSON V. DENCKLA*

The next case to occur chronologically in the cited precedents of *Ford* is *Hanson v. Denckla* from 1958, which supported the idea

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[72] *Int'l Shoe*, 326 U.S. at 319. The Court also mentioned that calculation of burdens, including the "inconveniences[] which would result to the corporation from a trial away from its 'home' or principal place of business[,]" is relevant to the contacts analysis. *Id.* at 317. This burden calculation foreshadowed inclusion of the fairness principles that surface in later cases.

[73] *Id.* at 320-21. Not relevant here is, of course, the crushing ambiguity of what it means to comport with traditional notions of fair play and substantial justice, which is something that Justice Black warned of in his dissent. *Id.* at 325 (Black, J., dissenting).

[74] *Id.* at 321 (majority opinion).

[75] *Id.* at 315-317.

[76] *Id.* (first emphasis added). This language appears earlier in the opinion in more of a test form: "so far as [a defendant's] obligations *arise out of or are connected with* the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Id.* at 319 (emphasis added).

of purposeful availment as a component of minimum contacts.[77] The *Hanson* Court noted that personal jurisdiction over nonresidents was beginning to expand even then because "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome."[78] Even so, the Constitution provided limitations to personal jurisdiction, not merely to overcome burdens or inconveniences to litigation, but because of "the territorial limitations on the power of the respective States."[79] This reasoning suggests that there are two requirements at play (or two facets of a singular requirement): 1) the existence of minimum contacts, and 2) a corresponding burden analysis to ensure fairness. The Court separated the personal jurisdiction issue from any issue of notice, because

> [t]here [was] no suggestion that the court failed to employ a means of notice reasonably calculated to inform nonresident defendants of the pending proceedings . . . The alleged defect is the absence of those '*affiliating circumstances*' without which the courts of a State may not enter a judgment imposing obligations on persons . . . .[80]

Achieving minimum contacts could not be done with "[t]he unilateral activity of those who claim some relationship with a nonresident defendant."[81] In order to create minimum contacts "it is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and

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[77] Hanson v. Denckla, 357 U.S. 235 (1958); *See* Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. 351, 359 (2021) (("The defendant, we have said, must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.'") (quoting *Hanson*, 357 U.S. at 253) (alterations in original)).

[78] *Hanson*, 357 U.S. at 250-51.

[79] *Id.* at 251.

[80] *Id.* at 246 (footnotes omitted). *See also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) (illustrating the constitutional requirement that proper notice must be reasonably calculated to inform a defendant of the proceedings). This is an example of the separation of notice from the concept of personal jurisdiction and use of different tests to satisfy different dimensions of the due process requirement.

[81] *Hanson*, 357 U.S. at 253.

protections of its laws."[82] The key to an adequate minimum contact was purposeful availment and the creation of a reciprocal relationship between the parties. Justice Kagan used *Hanson* primarily for its purposeful availment language.[83]

In *Hanson*, a woman created a trust in Delaware and later moved to Florida where she died and her will was admitted to probate.[84] The issue was whether Florida had personal jurisdiction over the case and the trust.[85] The majority in the 5-4 decision compared *Hanson* to an insurance case from the year before, *McGee v. International Life Insurance Company*.[86] In *McGee*, the Court "upheld jurisdiction because the suit 'was based on a contract which had substantial connection with that State.'"[87] In contrast, the *Hanson* case "cannot be said to be one to enforce an obligation that *arose* from a privilege the defendant exercised in Florida."[88] Justice Black, in a dissent joined by Justice Burton and Justice Brennan, disagreed, arguing that Florida's *connection* to the case was so strong that "it could hardly be denied that Florida had sufficient interest so that a court with jurisdiction

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[82] *Hanson*, 357 U.S. at 253. (emphasis added).

[83] *Ford*, 592 U.S. at 359, 361, 371(citing *Hanson*, 357 U.S. at 253).

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

[85] *Id.* at 243. The corollary issue was whether Delaware had to give full faith and credit to the Florida decision. *Id.*

[86] *Id.* at 251-52. (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957)). The language used by the court in *McGee* was whether "the suit was based on a contract which had substantial connection with that State," which was a rather fuzzy lens for minimum contacts. *McGee*, 355 U.S. at 223. The connections identified by the Court in that case were that "[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id.* The Court put real emphasis on California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* Thus, there was some confusion between defendant-initiated connection to the forum state and the State's interest. *Id.* Perhaps this was made clearer with the addition of the "purposeful availment" language in *Hanson*. There was no argument on the issue of notice in *McGee* and thus the Court did not address it. *Id.* at 224.

[87] *Hanson*, 357 U.S. at 252 quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223(1957)).

[88] *Id.* (emphasis added). The cases also differed because California had enacted legislation to demonstrate its interest in insurance. *Id.*

might properly apply Florida law, if it chose . . . ."[89] In a separate dissent, Justice Douglas wrote that "[t]he question in cases of this kind is whether the procedure is fair and just, considering the interests of the parties. Florida has such a plain and compelling relation to these out-of-state intangibles . . . ."[90] These differing opinions reveal confusion among the justices on the nature of the relationship between the proffered minimum contacts and the forum state – does the contact need to *cause* the lawsuit or merely be *connected* to it? And is fairness a separate requirement or does it infuse all the requirements for specific personal jurisdiction? Even as more litigation followed, more clarity did not.

IV. *WORLD-WIDE VOLKSWAGEN V. WOODSON*

The case list used by Justice Kagan jumped more than twenty years in the future after *Hanson* to the 1980 case of *World-Wide Volkswagen v. Woodson*.[91] The *World-Wide* Court encountered internal pushback when considering whether to extend specific personal jurisdiction over nonresident defendants with limited contacts to the forum state.[92] The plaintiff was in a car accident in Oklahoma and sued multiple parties for products liability, including World-Wide Volkswagen, the regional distributor, and Seaway, the retailer dealer who sold him the vehicle.[93] World-Wide distributed the car to New York dealers, and the car was sold by Seaway to the plaintiff in New York.[94] The injury occurred in Oklahoma, where the car allegedly

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[89] *Hanson*, 357 U.S. at 258 (Black, J., dissenting). The majority had been clear that "[t]he issue is personal jurisdiction, not choice of law." *Id.* at 254 (majority opinion). Justice Black acknowledged this but argued that personal jurisdiction and choice of law "are often closely related and to a substantial degree depend upon similar considerations." *Id.* at 258 (Black, J., dissenting). The point is that the dissent believed Florida, the forum state, did have a substantial connection to the case. *Id.* (Black, J., dissenting).

[90] *Id.* at 263 (Douglas, J., dissenting).

[91] Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 592 U.S. at 360 (2021). She used this particular case to demonstrate values reflected by the specific personal jurisdiction formulation, and said the test as written here requires clear notice to defendants. *Id.* at 366. She also identified its factual similarity to *Ford*. *Id.* at 367.

[92] *See generally* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[93] *Id.* at 288.

[94] *Id.* at 289 ("[World-Wide] distribute[d] vehicles, parts, and accessories . . . to retail dealers in New York, New Jersey, and Connecticut.").

malfunctioned.[95] There was no evidence of *any* contact between World-Wide and Oklahoma other than the plaintiff taking the vehicle to that state.[96]

Thus, the issue was whether this paltry connection was sufficient under the minimum contacts test.[97] Again, the defendants did not argue a lack of notice, and the Court outlined separate requirements of due process: "that the defendant be given adequate notice of the suit *and* be subject to the personal jurisdiction of the court."[98] The Court then relayed the purposes of the minimum contacts test – to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[99] The purposes are thus two-fold as Justice Kagan identified: fairness and federalism.

The Court admitted that protecting the defendant was usually "described in terms of 'reasonableness' or 'fairness'" in line with the language from *International Shoe* that the exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"[100] Even so, while the defendant is a "primary concern," he must be

> considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief . . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.[101]

While not exhaustive, these five factors appear to provide a rubric for determining whether exercise of specific personal

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[95] *World-Wide Volkswagen Corp.*, 444 U.S. at 288.

[96] *Id.* at 289.

[97] *Id.* at 291.

[98] *Id.* (emphasis added) (citing Mullane v. Cent. Hanover Trust Co., 339 U.S. 306, 313–14, (1950) and Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945) separately for each principle).

[99] *Id.* at 291-92.

[100] *Id.* at 292 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[101] *Id.*

jurisdiction in any case meets the traditional notions of fair play and substantial justice in a way that incorporates both fairness and interstate federalism.[102] Notably absent from this list is any descriptor or dimension as to what qualifies a minimum contact as sufficiently "minimum" or even "connected" to the litigation. This distinct language and focus suggest that the fairness considerations are *separate* from the analysis of whether minimum contacts exist.

Indeed, the Court's analysis bears out these assumptions. Once the test and rubric are established, the Court first turned to evaluate whether the proffered contacts were sufficient.[103] It found "a total absence of those affiliating circumstances that are a necessary *predicate* to any exercise of state-court jurisdiction."[104] Purposeful availment, the touchstone for a minimum contact under *Hanson*, is missing when a plaintiff *unilaterally* connects himself to the forum state.[105] This unilateral action overlaps with notice, which is not whether proper service of process is given for the lawsuit, but whether a defendant's behavior in a forum state puts him on notice of the possibility of *any* lawsuit.[106] What is "critical to due process analysis" is not the foreseeability of the product making its way into the forum state, but the *foreseeability of litigation*.[107] Defendant-initiated conduct is believed to be structured to receive benefits from a forum state. This reciprocal relationship between the defendant and the forum constitutes purposeful availment. This availment puts that defendant on "clear notice that it is subject to suit there" so that the defendant "can act to alleviate the risk of burdensome litigation" by ceasing contact or through other means.[108]

But World-Wide was not purposefully availing itself or even serving the Oklahoma market, neither directly nor through a

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[102] *World-Wide Volkswagen Corp.*, 444 U.S. at 292 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[103] *Id.* at 295.

[104] *Id.* (emphasis added).

[105] *See id.* at 298.

[106] *Id.* at 297.

[107] *Id.*

[108] *World-Wide Volkswagen*, 444 U.S. at 297. The Court also mentions procuring insurance or passing on the cost to consumers as preventative measures in addition to simply severing the connection to the State. *Id.*

stream of commerce analysis to which the Court alluded.[109] The plaintiff was the one who took the vehicle from New York to Oklahoma, and that unilateral activity was clearly insufficient for minimum contacts.[110] While the Court acknowledged that World-Wide made money from distributing a uniquely mobile product, and indeed could foresee people driving a car to Oklahoma, it was not enough to sustain a finding of specific personal jurisdiction.[111]

The Court found, "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not *stem from* a constitutionally cognizable contact with that State."[112] That said, if World-Wide was seeking to serve the market of Oklahoma with its sales in New York, New Jersey, and Connecticut, that would be a different story.[113] Here is where the overlap between *World-Wide* and *Ford* comes into focus – Justice Kagan essentially argued that Ford *was* seeking to serve the Montana and Minnesota markets through sales in those states.[114] The nationwide scope of sales established purposeful availment of all those markets; with the added affirmative acts in the relevant states of advertising, offering/selling replacement parts, and so forth, the existence of contacts became hard to ignore. But the issue in *Ford* was *never* contacts with the forum state (like it was in *World-Wide*); instead, it was the *relationship* between those contacts and the litigation.

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[109] *World-Wide Volkswagen*, 444 U.S. at 297-98. Thus, while the Court (in multiple opinions) gives language about the stream of commerce, *World-Wide* is not a stream of commerce case. *Id.* at 298; *id.* at 316 (Marshall, J., dissenting); *id.* at 320 (Brennan, J., dissenting).

[110] *Id.* at 298 (majority opinion).

[111] *Id.* at 297-98 ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the *stream of commerce* with the expectation that they will be purchased by consumers in the forum State." (emphasis added)).

[112] *World-Wide Volkswagen*, 444 U.S. at 299 (emphasis added).

[113] *Id.* ("[I]f the sale . . . is not simply an isolated occurrence, but arises from the efforts of the [defendant] to serve . . . the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner . . . .").

[114] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 363 (2021) ("And indeed, this Court has stated that specific jurisdiction attaches in cases identical to the one here—when a company like Ford serves a market for a product in the forum State and the product malfunctions there.").

Three dissents were penned against the six-justice majority in *World-Wide*.[115] Justice Marshall, joined by Justice Blackmun, framed the test succinctly: due process required an absent defendant to have minimum contacts with the forum state and so it forbade jurisdiction over a defendant with *no contacts* to the forum state.[116] For Justice Marshall, the concepts of fairness and substantial justice applied to the *evaluation* of the quality and nature of the contacts.[117] In other words, only *fair* contacts support a finding of constitutionally sufficient minimum contacts. And here, "jurisdiction is premised on the deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles."[118]

Those affirmative actions to serve a market sound suspiciously like the actions in *Ford*. The key (as it usually is for purposeful availment) is the benefit that the defendant stands to receive. Justice Marshall explained that "the 'quality and nature' of commercial activity is different, for purposes of the *International Shoe* test, [when] a defendant obtains no economic advantage."[119] Again, this is limited to the analysis of the relevant contacts themselves.

Justice Blackmun added in his dissent how critical he found the "nature of the instrumentality under consideration."[120] He focused heavily on the nature of automobiles and their ability to travel long distances over multiple states.[121] Selling cars created a financial benefit which partially derives from the fact that cars travel long distances.[122]

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[115] *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting); 313 (Marshall, J., dissenting); 318 (Blackmun, J., dissenting).

[116] *World-Wide Volkswagen*, 444 U.S. at 313 (Marshall, J., dissenting).

[117] *Id.* (Marshall, J., dissenting).

[118] *Id.* at 314 (Marshall, J., dissenting). Later, he added, "[w]hile they did not receive revenue from making direct sales in Oklahoma, they intentionally became part of an interstate economic network, which included dealerships in Oklahoma, for pecuniary gain. In light of this purposeful conduct I do not believe it can be said that petitioners 'had no reason to expect to be haled before a[n Oklahoma] court.'" *Id.* at 315 (Marshall, J., dissenting) (quoting Shaffer v. Heitner, 43 U.S. 186, 216 (1977)).

[119] *Id.* at 317. (Marshall, J., dissenting).

[120] *Id.* at 318 (Blackmun, J., dissenting).

[121] *Id.* at 318-19 (Blackmun, J., dissenting).

[122] *World-Wide Volkswagen*, 444 U.S. at 318-19 (Blackmun, J., dissenting).

Justice Brennan, in the longest dissent, chafed against the majority's formulation of the specific personal jurisdiction test and analysis as too narrow.[123] He argued the majority spent too much time working on the contacts analysis between the forum state and the defendant and too little time working out how reasonable it was to hale the defendant into court.[124] Rather than being independent inquiries, Justice Brennan believed that "[t]he existence of contacts, so long as there were some, was merely *one way* of giving content to the determination of fairness and reasonableness."[125]

This would create a sliding scale rather than discrete steps to test specific personal jurisdiction – more contacts would make jurisdiction fairer while fewer contacts would require other considerations to balance the scale. Here, Justice Brennan looked at the other considerations, including the forum state's interest, the connection of the litigation to the forum, and the defendant's burden to conclude that jurisdiction was not unreasonable or unfair.[126] For him, the focus should be on whether the plaintiff can "demonstrate sufficient contacts *among* the parties, the forum, and the litigation to make the forum a reasonable State in which to hold the trial."[127]

V. *KEETON V. HUSTLER MAGAZINE, INC.*

A few years after the *World-Wide* decision, in 1984, the Court decided two cases used by Justice Kagan in the *Ford* opinion:

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[123] *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting).

[124] *Id.* at 299-300. (Brennan, J., dissenting).

[125] *Id.* at 300 (emphasis added) (Brennan, J., dissenting). The language, he points out from *International Shoe*, is just whether the particular exercise of jurisdiction offends traditional notions of fair play and substantial justice. *Id.* (Brennan, J., dissenting).

[126] *Id.* at 302 (Brennan, J., dissenting).Thus, for Justice Brennan, the connection language is lumped into the reasonableness analysis. Justice Brennan also found the focus on the defendant's burden may be outdated and noted that he "cannot see how a defendant's right to due process is violated if the defendant suffers no inconvenience." *Id.* at 309. (Brennan, J., dissenting). Certainly today, with Zoom hearings in full force, it is unlikely any defendant can argue personal inconvenience to a forum.

[127] *Id.* at 312 (emphasis added) (Brennan, J., dissenting).

Keeton v. Hustler Magazine, Inc.[128] and *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[129] *Keeton*, coming first chronologically, was a defamation case connected to New Hampshire.[130] The plaintiff resided in New York, and the defendant was an Ohio corporation with its principal place of business in California.[131] The only defendant connection to the forum state of New Hampshire was 10,000 to 15,000 copies of its magazine sold in that state each month.[132] Yet the Court found that the "[defendant's] regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine."[133] Thus, minimum contacts existed, but the question remained whether exercise of personal jurisdiction was otherwise fair.[134]

Part of the inquiry into whether the contacts made the exercise of personal jurisdiction fair was whether New Hampshire had an interest in the case; the Court conceded that it mattered "whether [the defendant's] activities relating to New Hampshire are such as to give that State a legitimate interest in holding [the defendant] answerable on a claim *related to* those activities."[135] Because false statements, like libel, harm readers of the statements, New Hampshire had a right to "employ its libel laws to discourage the deception of its citizens."[136] Although the lower court had focused on the plaintiff's lack of connection to New Hampshire, the Supreme Court discounted that completely, noting that it "ha[d] not to date required a *plaintiff* to have 'minimum contacts' with the forum State before permitting that State to

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[128] Ford Motor Co. v. Montana Eighth Jud. Ct., 592 U.S. 351, 359 (2021) (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984) for the idea that minimum contacts must be the defendant's own choice and not random, isolated, or fortuitous).

[129] *Id.* at 365 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) for the language that a "strong 'relationship among the defendant, the forum and the litigation' [is] the 'essential foundation' of specific jurisdiction").

[130] *Keeton*, 465 U.S. at 772.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 773-74.

[134] *See id.*

[135] *Id.* at 776 (emphasis added).

[136] *Id.* The state might also have an interest in protecting someone's reputation in New Hampshire from libel, even if that person had previously been anonymous in the state. *Id.* at 777. Moreover, one state had to provide a forum for multistate damages, so why not New Hampshire? *See id.* at 776.

assert personal jurisdiction over a nonresident *defendant*."[137] It is only the defendant's contacts that mattered. The defendant had "continuously and deliberately exploited the New Hampshire market, [so] it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine."[138] That said, unlike in *Ford*, the tort in *Keeton* was occurring or being caused, in part, *by* the contacts with New Hampshire. When the third parties in New Hampshire were exposed to the defamatory material (the magazines sold and circulated in New Hampshire), it was that exposure which *created* a count of defamation. In contrast, the plaintiffs in *Ford* were not harmed or injured by cars sold as contacts with Montana or Minnesota.[139] Therefore, the contacts Ford had with those states neither created the harm nor the lawsuit.

In the *Keeton* decision, Justice Brennan cautioned in a concurrence that lower courts should not read too much into the forum state's interest as outcome determinative because "the restriction on state sovereign power . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the *only* source of the personal jurisdiction requirement and the Clause itself makes no

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[137] *Keeton*, 465 U.S. at 779 (emphasis added). Although the plaintiff's residence may be relevant as a consideration or a connection among the parties and the litigation, it is not a prerequisite. *Id.* at 780. Plaintiffs consent to fairness of a forum by filing in the forum.

[138] *Id.* at 781 (citing *World-Wide Volkswagen*, 444 U.S. at 297-98). The citation to *World-Wide* is noted by Justice Kagan in *Ford*, thus converting the dicta in *World-Wide* into binding precedent. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 364 (2021).

[139] *Ford*, 592 U.S. at 361. Whether another causal relationship could be teased out was a possibility alluded to by the Court but not confirmed. *Id.* at 361-66.

mention of federalism concerns."[140] Using barely more than 200 words to concur, he undercut so blithely a fundamental component of the public international law that informed *Pennoyer*,[141] and which was affirmed by Justice Kagan herself in *Ford*: interstate federalism.[142]

VI. *HELICOPTEROS NACIONALES DE COLOMBIA, S.A. V. HALL*

The other case decided in 1984, and used by Justice Kagan in *Ford*, was *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[143] There, the Court identified two paths to personal jurisdiction for the lawsuit: general or specific jurisdiction.[144] Helicopteros, a Colombian operation, provided helicopter transportation for oil and construction companies in South America.[145] When a helicopter crashed in Peru, the company was sued in Texas for wrongful death.[146] The only contacts the company had in Texas were: (1) a negotiation session in Houston; (2) several purchases of helicopters, spare parts, and accessories in Fort Worth; and (3) the training of various personnel in Fort Worth.[147]

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[140] *Keeton*, 465 U.S. at 781 (Brennan, J., concurring) (emphasis added) (quoting Ins. Corp. v. Compagnie des Bauxites, 456 U.S. 694, 702-03, n. 10 (1982)). Justice Brennan added "[t]hese contacts between the [defendant] and the forum State are sufficiently important and sufficiently *related* to the underlying cause of action to foreclose any concern that the constitutional limits of the Due Process Clause are being violated." *Id.* (emphasis added) (Brennan, J., concurring) (referring to *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982)). *See also* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982)) ("[The personal jurisdiction requirement] flows not from Art. III, but from the Due Process Clause. 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." (emphasis added)). This is staggering if true as the Court in *Pennoyer* connects personal jurisdiction to the Due Process Clause but conducts its analysis of a State's territory as a primary concern. Pennoyer v. Neff, 95 U.S. 714, 722-23 (1877). That opinion does not mention the word "fair." *See id.*

[141] *Pennoyer*, 95 U.S. at 722 (1877) (Using two principles of "public law" or public international law relating to the sovereignty of nation-states and applying them to domestic states.).

[142] Ford Motor Co. v. Montana Eighth Judicial Dist., 592 U.S. 351, 368 (2021).

[143] 466 U.S. 408 (1984). *See Ford*, 592 U.S. at 359, 365.

[144] *Helicopteros*, 466 U.S. at 414.

[145] *Id.* at 409.

[146] *Id.* at 410, 412.

[147] *Id.* at 410-11.

Starting with due process as the constitutional paradigm, the Court reviewed the test for specific jurisdiction, writing, "[w]hen a controversy *is related to or 'arises out of'* a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction."[148] The Court continued, "[e]ven when the cause of action does not *arise out of or relate to* the foreign corporation's activities in the forum State, due process is not offended by . . . subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation."[149] This linguistic dichotomy separates the analytical concepts of specific personal jurisdiction and general personal jurisdiction – one relates to the litigation and one does not. That said, both pathways to jurisdiction still require a form of contacts. The parties all agreed that the litigation was *unrelated* to the contacts with Texas and therefore no specific personal jurisdiction could be had.[150] To determine whether general jurisdiction existed, the Court looked for "continuous and systematic" contacts with the forum state that would allow jurisdiction for *unrelated* litigation.[151]

To confirm this analysis, the Court distinguished Helicopteros' contacts with Texas and Benguet Consolidated Mining's contacts with Ohio from the 1952 case of *Perkins v. Benguet Consolidating Mining Co.*[152] In that case, the president of a Philippine mining company had kept a temporary office in Ohio, but during the Japanese occupation of the Philippines, he had

> kept company files and held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on two active Ohio bank accounts, engaged an Ohio bank to act as transfer agent, and

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[148] *Helicopteros*, 466 U.S. at 414 (emphasis added) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)).

[149] *Id.* (emphasis added) (footnote omitted) (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)).

[150] *Id.* at 415.

[151] *Id.* at 416 (emphasis added).

[152] *Id.* at 414-16.

> supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines.[153]

The *Helicopteros* case thus largely helped to define general personal jurisdiction rather than provide much definition to specific personal jurisdiction.[154] Yet Justice Kagan drew upon the case's language for the proposition that it is *essential* for specific personal jurisdiction to stem from the existence of a *relationship among* the defendant, the lawsuit, and the forum state.[155] Even so, the *Helicopteros* Court declined to provide an explanation of what this foundational relationship must look like to satisfy due process.

VII. *BURGER KING CORP. V. RUDZEWICZ*

Justice Kagan used the next chronological case, *Burger King Corp. v. Rudzewicz*, to support her formulation of the specific jurisdiction test: it begins with contacts known as "purposeful availment";[156] next, the litigation must "arise out of or relate to the defendant's contacts";[157] and lastly, the exercise of jurisdiction must be fair in a way that, among other requirements, does not impair interstate federalism.[158] *Burger King* was decided in 1985 (just a year after both *Keeton* and *Helicopteros*) and involved a franchise agreement between the burger company and Michigan residents.[159]

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[153] *Helicopteros*, 466 U.S. at 415. In a later decision, the Court explained that Ohio's exercise of general jurisdiction was permissible in *Perkins* because Ohio was the corporation's principal, if temporary, place of business. Keeton v. Hustler Mag., Inc., 465 U.S. 770, 779-80, n.11. This means general jurisdiction was still exercised in a location where the corporation had citizenship.

[154] It is true that this definition is not compelling, leaving courts to wrestle with complicated factual inquiries to determine if an instant case was closer to *Perkins* or *Helicopteros* for almost another thirty years. *See* Zoe Niesel, *Daimler and the Jurisdictional Triskelion*, 82 TENN. L. REV. 833, 848 (2015).

[155] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 365 (2021).

[156] *Id.* at 359 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)). Justice Kagan also uses *Burger King Corp.* as evidence that the Court has repeatedly invoked and reaffirmed "dicta" from *World-Wide Volkswagen. Ford*, 592 U.S. at 364 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).

[157] *Id.* at 360 (quoting Bristol-Myers Squibb Co v. Super. Ct. of Cal., 582 U.S. 255, 262 (2017)).

[158] *Id.* at 368.

[159] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464 (1985).

When describing the test for specific personal jurisdiction and writing for the Court, Justice Brennan argued that part of the purpose of the Due Process Clause is to provide "fair warning that a particular activity may subject [a defendant] to the jurisdiction of a foreign sovereign."[160] If jurisdiction is asserted by a state, then this "fair warning" can exist only "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities."[161] If a company is reaching out and creating "continuing relationships and obligations with citizens of another state", whether by selling products in the stream of commerce or publishing defamatory material, it will be subject to "sanctions in the other State for the consequences of their activities."[162] Again, the foreseeability here is not about whether one's actions will create foreseeable injury, but whether litigation itself is foreseeable because of the individual's connection to the state.[163] Justice Brennan wrote,

> Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has *availed* himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is *presumptively not unreasonable* to require him to submit to the burdens of litigation in that forum as well.[164]

Of course, the problem here is conflating the *existence* of a minimum contact through purposeful availment with the *fairness* inquiry. From this language, Justice Brennan appears to believe that if a defendant has constitutionally sufficient contacts, then

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[160] *Burger King Corp.*, 471 U.S. at 472 (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

[161] *Id.* (quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984), then quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984)). Remember that Justice Brennan dissented in *World-Wide* and chided the majority for focusing too much on contacts analysis. *World-Wide Volkswagen*, 444 U.S. at 299-301.

[162] *Burger King Corp.*, 471 U.S. at 473. (citing *World-Wide Volkswagen*, 444 U.S. at 297-98; *Keeton*, 465 U.S. at 776; Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)).

[163] *Burger King Corp.*, 471 U.S. at 474.

[164] *Id.* at 475-76 (emphasis added).

jurisdiction is fair, and no more must be considered.[165] As a baseline, the contacts create a rebuttable presumption that jurisdiction is fair.[166]

Justice Stevens, joined by Justice White in dissent, noted a "significant element of unfairness" in the case as well as skepticism to whether purposeful availment had even taken place.[167] As none of the prongs of specific jurisdiction were met in his view, the lower court correctly dismissed the case.[168]

VIII. *ASAHI METAL INDUSTRIES, LTD. V. SUPERIOR COURT OF CALIFORNIA*

Two years after the *Burger King* case, the Supreme Court wrestled with the idea of the stream of commerce as a purposeful availment of a forum state in the *Asahi* case.[169] Justice Kagan used an *Asahi* citation alongside a *Goodyear* citation to show a reaffirmance of the "dicta" in *World-Wide*– "when a corporation has 'continuously and deliberately exploited [a State's] market, it must reasonably anticipate being haled into [that State's] court[s]'

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[165] Justice Brennan recognized that once minimum contacts are established, "these contacts may be considered in light of other factors" for purposes of fairness, which "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King Corp.*, 471 U.S. at 476-77. Thus, Justice Brennan was still playing with a spectrum of contacts and fairness rather than a threshold of minimum requirements that must be met before other pieces are considered. Although he wrote "[n]evertheless, minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities," he did not explain how this could ever be so. *Id.* at 477-78.

[166] *Id.* at 477 ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."). In *Burger King*, the defendant did not point to other factors to "persuasively [] outweigh" the exercise of jurisdiction based on contacts. *Id.* at 482.

[167] *Id.* at 487-488. (Stevens, J., dissenting).

[168] *Id.* (Stevens, J., dissenting).

[169] Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 105 (1987) ("This case presents the question of whether the mere awareness on the part of a foreign defendant that [its] components . . . would reach the forum State in the stream of commerce constitutes 'minimum contacts' . . . such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).

to defend actions 'based on' products causing injury there."[170] All the same, the bulk of *Asahi* is a plurality, and the case focused on the creation of a minimum contact and the fairness of a suit, with little being said about the necessary relationship between these two components.

The *Asahi* case arose after a motorcycle accident in California in 1979 severely injured Gary Zurcher and killed his wife.[171] Alleging a product defect in his motorcycle tire, tube, and sealant, Zurcher sued Cheng Shin Rubber Industrial Company, the manufacturer of the tube, in a California state court.[172] Cheng Shin filed a cross-complaint seeking indemnification from Asahi Metal as the manufacturer that had assembled the tube into the tire.[173] When the other claims had settled, and the dust had cleared, the only remaining claim was Cheng Shin against Asahi, a Taiwanese company suing a Japanese company in a California state court.[174] The question was whether Asahi could be haled into a California court.

The majority said no, relying on the fairness rubric from *World-Wide Volkswagen*.[175] While the Court could not form a majority to say whether minimum contacts existed here, the majority agreed on the idea that minimum contacts operated as a fulcrum to shift a court into a fairness analysis.[176] Once "minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even serious burdens placed on the alien defendant."[177] Among wholly foreign parties, California had no interest in being the forum state, and even Cheng Shin as a "plaintiff" did not choose the forum.[178] The international component weighed against

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[170] Ford Motor Co. v. Mont. Eighth Jud. Ct., 592 U.S. 351, 364 (2021) (alterations in original).

[171] *Asahi*, 480 U.S. at 105-06.

[172] *Id.*

[173] *Id.* at 106.

[174] *Id.*

[175] *Asahi*, 480 U.S. at 113 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). This majority included eight justices for this slender portion of the opinion. *Id.* at 105.

[176] *See id.*

[177] *Id.* at 114.

[178] *Id.* at 114-15.

jurisdiction as well.[179] Almost every justice could agree that it was simply fundamentally unfair to impose jurisdiction.

This agreement was separate from the fractured opinions over whether minimum contacts existed at all. In Justice O'Connor's plurality (joined by Chief Justice Rehnquist, Justice Powell, and Justice Scalia), she wrote that even if Asahi was aware that its tire assembly would be sold in California after being carried there by the stream of commerce, this would not create a minimum contact with California.[180] Due process required something *more* than *awareness* of where a product might be sold.[181]

To be constitutional, a minimum contact must be "purposefully directed toward the forum [s]tate."[182] With no record evidence of Asahi somehow purposefully availing itself of California, no jurisdiction could be had.[183] Justice O'Connor and the Court thus segregated the analysis: first contacts, and then fairness to create two necessary buckets rather than one overall consideration of fairness with contacts as a dimension of that consideration. Justice Kagan's citation in *Ford* also goes to this language from *World-Wide Volkswagen* about serving the market,[184] but the plurality used that language to discuss only how to create a constitutionally sufficient minimum contact, not to link the minimum contact to the litigation.

In *Asahi*, Justice Brennan penned a concurrence joined by Justices White, Marshall, and Blackmun to counterpoint the plurality and conclude that Asahi *had* purposefully availed itself of the California market.[185] Brennan argued that the "stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to

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[179] *Asahi*, 480 U.S. at 115.

[180] *Id.* at 112 (plurality).

[181] *Id.*

[182] *Id.*

[183] *Id.* at 112-13 (plurality).

[184] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 364 (2021) (citing *Asahi*, 480 U.S. at 110 (plurality)).

[185] *Asahi,* 480 U.S. at 116 (Brennan, J., concurring). Finally, Justice Brennan had his missing example of "one of those rare cases" where even though minimum contacts exist, jurisdiction is not fair and reasonable. *Id.* (Brennan, J., concurring) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)).

distribution to retail sale."[186] Therefore, in his view, mere awareness that a product would be sold somewhere else was purposeful availment of that market and its benefits. This was enough to generate a minimum contact with the forum state that would lead to further analysis over whether personal jurisdiction was itself fair.

Justice Brennan cited the same language from *World-Wide* here as Justice O'Connor did in the majority (and as Justice Kagan later would in *Ford*), but the citation helped support whether contacts were "sufficient" or "insufficient" and not whether the contacts *related* to the litigation.[187] For Justice Brennan, this language showed that the prior Court distinguished "between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there."[188] The lynchpin here is the defendant-initiated nature of the contact that links it to purposeful availment rather than the relationship of that contact to the litigation.

Justice Stevens wrote a separate concurrence in *Asahi* which Justices White and Blackmun joined.[189] He disavowed the need for contacts analysis in all cases, contending that an "examination of minimum contacts is *not always necessary* to determine whether a state court's assertion of personal jurisdiction is constitutional."[190] If exercising personal jurisdiction is inherently unfair, then there is no need to establish a threshold for the creation of a minimum contact.[191]

Asahi was not the last Supreme Court decision to wade into the stream of commerce waters, but Justice Kagan in *Ford* did not mention the 2011 decision of *J. McIntyre Machinery, Ltd. v.*

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[186] *Asahi,* 480 U.S. at 117 (Brennan, J., concurring).

[187] *Id.* at 119 (Brennan, J., concurring).

[188] *Id.* at 120 (Brennan, J., concurring) (alteration in original) (citation omitted).

[189] *Id.* at 121 (Stevens, J., concurring).

[190] *Id.* (Stevens, J., concurring) (emphasis added) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985)).

[191] *Id.* at 122 (Stevens, J., concurring). Justice Stevens argued that even if a test for purposeful availment in the stream of commerce context was needed, it should focus on some "determination that is affected by the volume, the value, and the hazardous character of the components." *Id.* (Stevens, J., concurring). This just further fractures the test possibilities for a stream of commerce analysis.

Nicastro.[192] Although *Nicastro* is a plurality opinion just like *Asahi*, it gives some insight into the tension of the personal jurisdiction analysis.[193]

Justice Kennedy, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, articulated that jurisdiction "is in the first instance a question of authority rather than fairness."[194] The case revolved around a products liability issue arising in New Jersey from a machine manufactured by a purely English company that had little contact with the United States.[195] Justice Kennedy recounted the test for personal jurisdiction as: "[a] court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign 'such that that maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"[196]

For jurisdiction to exist, a defendant must *submit* to the sovereign in some way – either through explicit consent or the implied consent of his actions. Justice Kennedy listed different "course[s] of conduct" that may lead to general jurisdiction – explicit consent, presence in a state during service of process, and citizenship or domicile.[197] Specific jurisdiction is "a more *limited* form of submission to a State's authority for disputes that 'arise out of or are connected with the activities within a state.'"[198] This concept of "manufacturers or distributors 'seek[ing] to serve' a given State's market" is what "manifest[s] an intention to submit

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[192] 564 U.S. 873 (2011) (plurality). Justice Kagan does not use *Nicastro* in her *Ford* opinion, and discussing it now does disturb the chronological timeline of this map, but the similarity of *Asahi* and *Nicastro* warrants this out-of-order discussion.

[193] *See generally id*. (plurality).

[194] *Id.* at 883 (plurality).

[195] *Id.* at 878. (plurality). J. McIntyre sold to a United States' distributor which sent the machine to New Jersey, attended some annual conventions to advertise for its machines in the United States (but not New Jersey), and had about four machines that ended up in New Jersey. *Id*. (plurality).

[196] *Id*. at 880 (plurality) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Interestingly, he wrote that in the products liability context "it is the defendant's purposeful availment that makes jurisdiction consistent with 'traditional notions of fair play and substantial justice.'" *Id*. (plurality). This makes it seem like the minimum contacts analysis can be the only analysis that counts.

[197] *Nicastro*, 564 U.S. at 880-81 (plurality).

[198] *Id.* at 881 (plurality) (emphasis added) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

to the power of a sovereign" – satisfying purposeful availment and creating a minimum contact with the forum state.[199]

Justice Kennedy felt that this approach was inapposite with Justice Brennan's *Asahi* concurrence, which focused on fairness and foreseeability rather than "lawful judicial power."[200] Because the defendant in *Nicastro* did not "engage in any activities . . . that reveal[ed] an intent to invoke or benefit from the protection of [the state's] laws[,] [the state court] is without the power to adjudge the rights and liabilities of [the defendant]."[201]

Justice Ginsburg, joined by Justice Sotomayor and Justice Kagan, authored the dissent in *Nicastro*.[202] She identified the issue as one of specific personal jurisdiction which "turns on an 'affiliatio[n] between the forum and the underlying controversy.'"[203] But the considerations for this type of jurisdiction "derive from considerations of due process, not state sovereignty."[204] Quoting the same precedent as Justice Brennan had in *Keeton*,[205] the dissent intoned,

> [t]he restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the *only source* of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.[206]

Thus, the appropriate approach is to pivot back to fairness concerns and keep the focus on "[t]he relationship among the

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[199] *Nicastro*, 564 U.S. at 882 (plurality).

[200] *Id.* at 883 (plurality).

[201] *Id.* at 887. Justice Breyer wrote a concurrence here, joined by Justice Alito, which also focused on what is necessary to generate a minimum contact. *Id.* (Breyer, J., concurring). He was irritated by the plurality's attempt to "refashion basic jurisdictional rules" and saw both its view and the state court's view as too extreme. *Id.* at 888-91 (Breyer, J., concurring).

[202] *Id.* at 893 (Ginsburg, J., dissenting).

[203] *Id.* at 899 (Ginsburg, J., dissenting) (alteration in original) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

[204] *Id.* (Ginsburg, J., dissenting).

[205] Keeton v. Hustler Mag., Inc., 465 U.S. 770, 782 (1984) (Brennan, J., concurring).

[206] *Nicastro*, 564 U.S. at 900 (Ginsburg, J., dissenting) (emphasis added) (quoting Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03, n.10 (1982)).

defendant, the forum, and the litigation" to see whether due process will permit jurisdiction over the defendant.[207] As J. McIntyre purposefully availed itself of the benefits of selling to the United States market, it also availed itself of the market of each state where its distributor sold the machine.[208] The Court's opinions were split over what kind or how much purposeful availment was sufficient, but the theory that undergirds this split is about the nature of personal jurisdiction itself and its connection to the Due Process Clause. Justice Kagan later chose not to settle this dispute over whether personal jurisdiction is primarily about sovereignty or fairness – when writing the *Ford* majority opinion she chose both.[209]

IX. *GOODYEAR DUNLOP TIRES OPERATIONS, S.A. V. BROWN*

Justice Kagan's *Ford* precedent chart jumps forward in time from *Asahi* in 1987 to *Goodyear Dunlop Tires v. Brown* in 2011. Justice Kagan uses *Goodyear* merely to support the distinction between specific and general jurisdiction with a case that was largely concerned with the existence of general personal jurisdiction.[210] The decision in *Goodyear* was unanimous, and the opinion was written by Justice Ginsburg.[211]

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[207] J. MaIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 900 (2011) (Ginsburg, J., dissenting) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)). Justice Ginsburg wrote "[t]he modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness." *Id.* at 903 (Ginsburg, J., dissenting). The language in *Insurance Corp. of Ireland* contrasts personal jurisdiction with subject matter jurisdiction – the former protects individual liberty through the Due Process Clause while the latter is tied to a vesting of judicial power in Article III. *Ins. Corp. of Ireland*, 456 U.S. at 702-03. Therefore the "test for personal jurisdiction requires that 'the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *Id.* (alterations in original) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[208] *Id.* at 905 (Ginsburg, J., dissenting).

[209] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 360 (2021).

[210] *Ford Motor Co.*, 592 U.S. at 358 ("That focus [on the nature and extent of the defendant's relationship to the forum state has] led to our recognizing two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction.") (citing Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 919 (2011)). Justice Kagan also points out that *Goodyear* recites the language about serving a market, thus reaffirming that language. *Id.* at 364.

[211] *Goodyear*, 564 U.S. 915 (2011).

In *Goodyear*, a bus accident occurred in France because of a potentially defective tire manufactured in a Turkish plant owned by a United States company.[212] The plaintiffs sued in North Carolina state court, asserting that Goodyear regularly engaged in commercial activity there, which meant it could be subjected to personal jurisdiction in the state.[213] Obviously, there was no argument for specific personal jurisdiction in that case, but Justice Ginsburg was forced to discuss specific jurisdiction to differentiate it from the general jurisdiction at issue. While general jurisdiction looks for contacts that are "'so continuous and systematic' as to render [the defendant] essentially at home in the forum state [,] . . . [s]pecific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction."[214]

This language suggests a connection between the minimum contacts themselves and the litigation be *more* than a mere vague relatedness. It also provided an outer boundary to general jurisdiction: rather than simply being a set of indistinct continuous and systematic activity that was "more like" *Perkins* rather than *Helicopteros*, the contacts had to render a corporate defendant "essentially at home."[215] While there was some ambiguity as to what it meant for a corporation to be "at home," this was a significant contraction in general personal jurisdiction. Corporations could have continuous and systematic activity in a multiplicity of states but would be at home in far fewer.

While Justice Ginsburg repeated the language from *World-Wide* about "serving a market" (and reified it as more than dicta according to Justice Kagan in *Ford*),[216] she only discussed what can create a contact or what is purposeful availment.[217] She did

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[212] *Goodyear*, 564 U.S. at 918.

[213] *Id.*

[214] *Id.* at 919 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

[215] *Id.* Although this is essentially what the Court still does in reaching this new formulation of the test. *Id.* at 929 ("Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina.").

[216] *Ford Motor Co.*, 592 U.S. at 364.

[217] *Goodyear*, 564 U.S. at 927.

not use this language to build a bridge between the contacts and the litigation. The state court there had latched on to a stream-of-commerce analysis that "elided the essential difference between case-specific and all-purpose (general) jurisdiction."[218] The state court made an error in focusing on stream-of-commerce because, as Justice Ginsburg explained for the Court, while putting a product in the stream of commerce may "bolster an affiliation germane to *specific* jurisdiction[,]" it will not "warrant a determination that . . . the forum has *general* jurisdiction over a defendant."[219]

Conclusions about specific jurisdiction were still dicta here (even when quoting dicta from a previous case). The dicta itself also focused on what *created* the minimum contact, not on the bridge between the contact and any further reasonableness analysis. In a footnote, Justice Ginsburg clarified that "even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction *unrelated* to those sales."[220] While that would seem to be the reason general jurisdiction cannot be had, specific jurisdiction has its own relatedness component that also does not fit within this statement. How can any specific jurisdiction in *Ford* be had that is *unrelated* to the contacts or sales to the state? Is the majority in *Ford* transmogrifying the contacts themselves into the relationship needed to connect the contacts to a fair assertion of jurisdiction? If so, the Court missed the mark.

X. *DAIMLER V. BAUMAN*

The next pair of cases used by Justice Kagan in the *Ford* opinion surfaced in 2014 – just three years after *Goodyear*.[221] Chronologically, the first case of the two was *Daimler AG v. Bauman*. In *Ford*, Justice Kagan used *Daimler* to make her case for specific personal jurisdiction, explaining that the Court bestowed jurisdiction when "a California plaintiff, injured in a

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[218] *Goodyear*, 564 U.S. at 927.

[219] *Id.*

[220] *Id.* at 930, n.6 (emphasis added).

[221] *See generally* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351 (2021); *see also* Daimler AG v. Bauman, 571 U.S. 117 (2014); Walden v. Fiore, 571 U.S. 277 (2014).

California accident involving a Daimler-manufactured vehicle, sue[s] Daimler [in California state court] alleging that the vehicle was defectively designed."[222] The Court in *Daimler* also reused the language of contacts that "'must arise out of or *relate to* the defendant's contacts' with the forum."[223]

Daimler itself involved activities outside the United States.[224] Twenty-two Argentinian residents filed a complaint in the United States under the Alien Tort Statute and Torture Victim Protection Act of 1991, claiming a subsidiary of Daimler had engaged in various nefarious acts.[225] The core issue was whether Daimler, as the parent company, could be sued in a federal court in California.[226] Justice Ginsburg, again writing for the majority of the Court, called such an exercise of personal jurisdiction "exorbitant" and "barred by due process constraints on the assertion of adjudicatory authority."[227]

Justice Ginsburg began her opinion by recounting the storied history of personal jurisdiction and again affirming that it centers on "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States . . . ."[228] Two tributaries stemmed from this headwater: specific and general personal jurisdiction. The majority identified specific jurisdiction as "the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role."[229]

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[222] *Ford Motor Co.*, 592 U.S. at 364 (citing *Daimler*, 571 U.S. at 127, n.5). Justice Kagan claims this is a "paradigm example [] of how specific jurisdiction works." *Id.*

[223] *Id.* at 359 (emphasis added) (quoting *Daimler*, 571 U.S. at 127).

[224] *Daimler*, 571 U.S. at 120-21.

[225] *Id.*

[226] *Id.* The Ninth Circuit had at first only addressed the issue of agency and whether Daimler as a parent company could be implicated by its subsidiary's contacts. *Id.* at 124 (citing Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1096-1106 (2009)). But this agency argument did not carry the day, and the majority stated "[e]ven if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California . . . ." *Id.* at 136.

[227] *Id.* at 122.

[228] *Daimler*, 571 U.S. at 126 ((quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (embodied in the shift from *Pennoyer* to *International Shoe*)).

[229] *Id.* at 128 (alterations in original) (internal quotations omitted). Justice Ginsburg outlined the development of specific jurisdiction relating to serving markets in a footnote, connecting the service of a market to purposeful availment rather than strictly to the relationship between that availment and the ultimate litigation. *Id.* at 128, n.7.

The more condensed history of general jurisdiction following *International Shoe* started with the recognition of continuous and systematic contacts in *Perkins* (but not in *Helicopteros*), and then the *Goodyear* Court added "at home" to the analysis.[230] While "[s]pecific jurisdiction has been cut loose from *Pennoyer*'s sway, [the Court has] declined to stretch general jurisdiction beyond limits traditionally recognized."[231]

In contrasting general and specific jurisdiction, Justice Ginsburg dropped a footnote to explain how the distinction manifested during oral argument of the case.[232] She noted:

> Two hypothetical scenarios were posed: *First*, if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler in California court alleging that the vehicle was defectively designed, that court's adjudicatory authority would be premised on specific jurisdiction. *Second*, if a similar accident took place in Poland and injured Polish plaintiffs sued Daimler in California court, the question would be one of general jurisdiction.[233]

In the transcript of the oral argument, Daimler's counsel admitted that in the first example, specific jurisdiction *may* be had if Daimler had purposefully availed itself of the forum.[234] The word "premised" is doing a lot of work in this hypothetical – the two scenarios suggest the former is somehow related to California which triggers *possible* specific personal jurisdiction, while the latter is completely unrelated and depends only on general personal jurisdiction. But it is impossible to draw a clear line from this example to the holding in *Ford*. In the first hypothetical, a court cannot even begin to analyze whether the litigation arises from or relates to a defendant's contacts with the forum state without first knowing what contacts the defendant has with California. The contacts form a baseline, threshold inquiry for specific personal jurisdiction. While the first scenario has more

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[230] *Daimler*, 571 U.S. at 122.

[231] *Id.* at 132.

[232] *Id.* at 127, n.5. This is the same paradigm example that Justice Kagan relies on in *Ford. Ford Motor Co.*, 592 U.S. at 364.

[233] *Daimler*, 571 U.S. at 127, n.5.

[234] *Id.*

relationship to the forum state than the latter, that may not be all that due process requires.

Yet the *Daimler* Court did not focus on solving the riddle of specific personal jurisdiction; instead, the Court focused defining the scope of general personal jurisdiction.[235] The majority thus took the opportunity in *Daimler* to clarify (and in its view, modernize) the role of general jurisdiction.[236] Justice Ginsburg explained that "*Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there."[237] For individuals, general jurisdiction is the place of their domicile; for corporations, their citizenships likewise are where they are "at home" – their place of incorporation and their principal place of business.[238] This was a *radical contraction* of the doctrine of general jurisdiction – limiting the places where it could be exercised to two precise locations instead of anywhere "continuous and systematic" business was taking place.[239] The latter interpretation would leave defendants unable to properly structure their behavior to avoid litigation.[240]

Justice Sotomayor in her concurrence took a different path to arrive at the same result.[241] She separated the jurisdiction analysis into two prongs – "the contacts prong" and "the reasonableness prong."[242] Both general and specific jurisdiction analyses do (and should) engage both prongs. While the former asks whether the contacts themselves are sufficient, the latter asks whether asserting personal jurisdiction under the given

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[235] *Daimler*, 571 U.S. at 133.

[236] *Id.* at 134-142.

[237] *Daimler*, 571 U.S. at 137.

[238] *Id.*

[239] *Id.* at 138. This is the view that plaintiffs argued for – general jurisdiction "in every State in which a corporation 'engages in substantial, continuous, and systematic course of business.'" *Id.* (quoting Brief for Respondents 16-17, and nn.7-8). Justice Ginsburg wrote such a "formulation . . . is unacceptably grasping." *Id.* These locations of citizenship are only the paradigm of general jurisdiction, as Justice Ginsburg left open the idea of "exceptional" circumstances that might still fit the mold. *Id.* at 138, n. 19 (referencing *Perkins* and its temporary principal place of business in Ohio). The Court did not elucidate what other examples of an exceptional circumstance might look like. *Id.*

[240] *Id.* at 139.

[241] *Daimler*, 571 U.S. at 142 (Sotomayor, J., concurring).

[242] *Id.* at 143 (Sotomayor, J., concurring).

circumstances would be unreasonable.[243] She noted that while the Court has never decided that the reasonableness prong concretely applies to general jurisdiction, the lower courts had uniformly applied it.[244] This may be true because suing someone where they are "at home" can never be objectively unfair. She argued that considerations of fairness or reasonableness would "resolve this case" as it involved foreign parties with no reason to litigate in California.[245]

More importantly, the concurrence acknowledged the contraction of general personal jurisdiction analysis that the majority had made.[246] Justice Sotomayor wrote that precedent had "established a straightforward test for general jurisdiction: Does the defendant have 'continuous corporate operations within a state' that are 'so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities'?"[247] This test focused only on the defendant's contacts with the forum and not its contacts with any other states.[248] The narrowing approach of the majority, which looked to where a corporation is at home and then compared contacts across different locations, would "unduly curtail[] the States' sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries."[249] It would upset the reciprocal relationship between the State and a corporate defendant who avails itself of the forum and reaps the benefits of a given market.

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[243] *Daimler*, 571 U.S. at 143 (Sotomayor, J., concurring).

[244] *Id.* at 144, n. 1 (Sotomayor, J., concurring).

[245] *Id.* at 146 (Sotomayor, J., concurring).

[246] *Daimler* 571 U.S. at 149, 154 (Sotomayor, J., concurring).

[247] *Id.* at 149 (Sotomayor, J. concurring) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)).

[248] *Daimler*, 571 U.S. at 154-55. (Sotomayor, J., concurring). Justice Sotomayor took issue with what she felt was the majority's "proportionality" analysis which compared Daimler's contacts in California and other locations to determine that the corporation was not at home in California. *Id.* at 154. (Sotomayor, J., concurring).

[249] *Id.* at 157 (Sotomayor, J., concurring). The other "deep injustice[s]" the decision would create include treating small businesses unfairly compared to larger companies, creating an incongruity with transient presence jurisdiction for individuals and no analog for corporations, and shifting the risk of loss from corporations to individuals. *Id*. (Sotomayor, J., concurring).

In fact, this very change in general jurisdiction analysis is what led to the decision in *Ford*. Under an older view of "continuous and systematic contacts" there is no doubt that Ford purposefully availed itself of the Montana and Minnesota markets and conducted substantial business there – a perfect candidate for litigation unrelated to any specific contact with the market and thus general jurisdiction. But now, under a modern "at home" analysis, general jurisdiction is *only* available against Ford in Delaware and Michigan where it is incorporated and headquartered.[250] Plaintiffs can choose to either trek to these states and litigate or try to make a tenuous connection between the forum and the litigation in a longshot attempt to establish specific personal jurisdiction. The decision in *Ford* proves that this type of jurisdiction did not die with *Daimler* but only relocated to another position within the framework.

XI. *WALDEN V. FIORE*

The second case decided in 2014 and used by Justice Kagan in her *Ford* opinion was *Walden v. Fiore*, which focused on the contours of specific personal jurisdiction.[251] In *Walden*, a police officer working with the DEA seized cash from two passengers traveling through the Atlanta airport.[252] The cash was in bags owned by Gina Fiore and Keith Gipson, residents of Nevada.[253] Fiore and Gipson brought a *Bivens* claim against the officer in federal court in Nevada, alleging a violation of their Fourth Amendment rights.[254] The defendant moved to dismiss for lack of personal jurisdiction as he had no contacts with Nevada, and the district court granted the motion.[255] The Ninth Circuit, however, reversed because the defendant had "expressly aimed" his conduct

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[250] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 359 (2021). No exceptional circumstances were mentioned in *Ford* that might still give rise to general jurisdiction. *See id.*

[251] *Id*. at 359 (citing *Walden v. Fiore*, 571 U.S. 277, 285 (2014)).

[252] *Walden*, 571 U.S. at 279.

[253] *Id.* at 279-80. The couple also had residency in California and showed the police officer their California identification. *Id.*

[254] *Id.* at 281.

[255] *Id.*. The District Court relied on *Calder v. Jones* to hold that even knowing his actions would cause effects in another state was not sufficient, on its own, to create personal jurisdiction. *Id. See also* Calder v. Jones, 465 U.S. 783 (1984).

toward Nevada "with knowledge that it would affect persons with a 'significant connection'" to the state.[256] The ultimate question became whether the officer purposefully availed himself of the forum of Nevada and therefore, created a reciprocal relationship worthy of being treated as a minimum contact.[257]

Justice Thomas, writing for a unanimous court, held that Nevada could not attain personal jurisdiction over the defendant.[258] The opinion targeted "the 'minimum contacts' necessary to create specific jurisdiction" rather than the other components of the test: relationship and fairness.[259] As was true since at least *World-Wide*, "a *plaintiff's* contacts with the forum State cannot be 'decisive in determining whether the *defendant's* due process rights are violated.'"[260] The minimum contacts analysis also revolved around "the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[261] This defendant-focused inquiry allowed for analysis of the reciprocal relationship with the forum -- the crux of purposeful availment.[262]

Justice Thomas explained that these principles similarly applied in the intentional tort context, using the precedent of *Calder v. Jones*.[263] *Calder* was a libel suit so the Court focused on "the various contacts the defendants had created with California (and not just with the plaintiff) by allegedly writing the allegedly libelous story."[264] Because the plaintiff was injured in California *and* the defendants intended that effect and made various other connections to the forum state in pursuit of creating and

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[256] Walden, 571 U.S. at 282. (quoting Fiore v. Walden, 688 F.3d 558, 581 (9th 2011)).

[257] *Id*. at 283-84.

[258] *Id.* at 282.

[259] *Id.* at 283.

[260] *Id*. at 285 (emphasis added) (quoting Rush v. Savchuk, 444 U.S. 320, 332 (1980)); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

[261] *Walden*, 571 U.S. at 285.

[262] *Id*. at 284-85.

[263] *Id.* at 286-87 (citing Calder v. Jones, 465 U.S. 783 (1984)).

[264] *Id.* Part of this relationship inquiry was answered by the fact that the "brunt of the injury was suffered by the plaintiff in [California]." *Id*. at 287. The plaintiff was a Hollywood actress, and the publication was intended to affect her career in California. *Calder*, 465 U.S. at 788-89.

disseminating the story, jurisdiction was appropriate.[265] Thus, "[t]he proper question is *not where the plaintiff experienced a particular injury* or effect but whether the defendant's conduct connects him to the forum in a meaningful way."[266]

In *Walden*, the alleged tort occurred in Atlanta even though the effects or consequences of that tort might have been felt in Nevada.[267] As the police officer in *Walden* "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada[,] . . . [he] formed no jurisdictionally relevant contacts with Nevada."[268] Minimum contacts are a threshold requirement to the specific personal jurisdiction analysis. Without relevant contacts, specific personal jurisdiction cannot (and did not) exist.

Justice Kagan wrote that the petitioners in *Ford* fell back on the use of *Walden* as a "last resort," but that it had "precious little to do with the cases before [the Court]."[269] While the defendant in *Walden* had zero contacts with the forum state of Nevada, Ford had a "veritable truckload" with the forum states of Montana and Minnesota.[270] Though Ford had purposefully availed itself of the benefits of these states, the analysis should not end there. Once a threshold of contacts is met, the shift in specific personal jurisdiction analysis should be the connection of *those identified* contacts with the litigation at hand and then ultimately the fairness of jurisdiction. Contacts alone cannot satisfy due process. Justice Kagan acknowledged a need for this relationship and said that "the place of a plaintiff's injury and residence" are relevant to that consideration even though those facts alone could not

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[265] *Walden*, 571 U.S. at 288. The Court explained that the reputational injury occurred in California due to "the nature of the libel tort" and the need for communication to third parties before harm can occur. *Id.* at 287. This issue is similar to the one that arises in *Keeton* – the tort occurs where the offending material is circulated. *Id*; Keeton v. Hustler Mag., Inc., 465 U.S. 770, 777 (1984).

[266] *Walden*, 571 U.S. at 290 (emphasis added).

[267] *Id.* at 288.

[268] *Id.* at 289.

[269] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 792 U.S. 351, 370 (2021). Although the *Walden* Court had asserted that serving a market can be a proxy for purposeful availment. *Id.* at 359 (citing to *Walden*, 571 U.S. at 285).

[270] *Id.* at 371.

generate personal jurisdiction in *Walden*.[271] The difference in *Ford* is that the plaintiffs were injured in the relevant forum, and the same products that injured them were also sold in those states.[272] Unfortunately, those facts alone do not help create an analytical predicate for how to tell whether other contacts are sufficiently related to the litigation. The combination of a plaintiff injury and serving a market was also relevant to the last case Justice Kagan uses for precedential value in *Ford*.

XII. *BRISTOL-MYERS SQUIBB V. CALIFORNIA*

The most recent case that Justice Kagan relied on in *Ford* was decided in 2017: *Bristol-Myers Squibb v. Superior Court*.[273] Bristol-Myers, a large pharmaceutical company, developed and sold a prescription drug called Plavix.[274] The company had no citizenships in California and did not develop the drug in California, but it was sued by California plaintiffs (and others) in a California state court for violations of state law including "products liability, negligent misrepresentation, and misleading advertis[ement] claims."[275] The plaintiffs from outside of California did not claim that they obtained the drug in California nor that they were injured in California.[276] On the issue of personal jurisdiction, the Supreme Court of California ultimately used a sliding scale approach to find jurisdiction because "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the

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[271] *Ford Motor Co.*, 792 U.S. at 371. Justice Kagan acknowledged that the interests of Montana and Michigan were higher than the interests of the states where the cars were originally sold. *Id.* at 368. But this comparison of interests is relevant to the fairness analysis under *World-Wide* and is not a substitution for relationship analysis. *See generally* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[272] *Ford Motor Co.*, 592 U.S. at 371.

[273] *See* Bristol-Myers Squibb Co. v. Super. Ct. of California, 582 U.S. 255 (2017).

[274] *Id.* at 259.

[275] *Id.*

[276] *Id.*

claim."[277] The dissent argued the majority had overlooked the "arise from" component – while Bristol-Myers had many contacts with California, the litigation of the non-residents did not arise from those contacts.[278]

To resolve this issue, the Supreme Court, in a majority opinion written by Justice Alito, started with "[t]he primary focus of our personal jurisdiction inquiry [,] the defendant's relationship to the forum [s]tate."[279] Again, minimum contacts are a threshold inquiry for the specific personal jurisdiction analysis. Describing how specific jurisdiction differs from general and shifting to the second prong of the analysis, Justice Alito wrote, "there must be 'an *affiliation* between the forum and the underlying controversy . . .'" because "specific jurisdiction is confined to adjudication of issues *deriving from*, or *connected with*, the very controversy that establishes jurisdiction."[280] Critically, "[w]hen there *is no such connection*, specific jurisdiction is lacking *regardless* of the extent of [the] defendant's *unconnected* activities in the State."[281] Thus, the sliding scale used by the California Supreme Court was inappropriate as "a loose and spurious form of general jurisdiction" because it "relaxed" the connection requirements if the contacts were extensive.[282] The constitutionally required missing piece was "a connection between the forum and the

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[277] *Bristol-Myers*, 582 U.S. at 260. The California Superior Court originally denied the motion to dismiss because of Bristol-Myers "continuous and systematic" contacts with California as a predicate for general personal jurisdiction, but after *Daimler* was forced to retract this holding and look to specific personal jurisdiction instead. *Id.* This demonstrates the squeeze of this type of jurisdiction from general to specific because of a corporation's extensive contacts with a forum state.

[278] *Bristol-Myers*, 582 U.S. at 261.

[279] *Id.* at 262.

[280] *Id.* (emphasis added) (quoting Goodyear Dunlop Tires Operations, S.A. v Brown, 564 U.S. 915, 919 (2011)). He also discussed the final prong of reasonableness in the context of the various interests at play, primarily the interests of the defendant. *Id.* at 262. These interest-based restrictions were "a consequence of [the] territorial limitations on the power of the respective States" more than "immunity from inconvenient or distant litigation." *Id.* at 263.

[281] *Id.* at 264 (emphasis added).

[282] *Id.* Justice Alito said of this approach, "[o]ur cases provide no support for this approach . . . . For specific jurisdiction, a defendant's general connections with the forum are not enough." *Id.*

specific claims at issue."[283] As a final attempt, the plaintiffs attempted to prove that Bristol-Myers was a national distributer, but "[t]he requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction."[284] This meant that the Court had to find personal jurisdiction over each defendant to satisfy due process – meaning the plaintiffs had to find a location with general jurisdiction over the company to assert unrelated claims.[285]

Yet the "loose and spurious form of general jurisdiction"[286] that the Court appeared to shun in *Bristol-Myers* seems to be *exactly* what migrated into the specific personal jurisdiction jurisprudence of the Court in *Ford*. Justice Kagan quoted this "arise out of or relate to" language in the specific personal jurisdiction test from *Bristol-Myers*.[287] The existence of this connection to the litigation ensured that "States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy."[288] Justice Kagan argued that the *Bristol-Myers* case proved that the relationship requirement of the

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[283] *Bristol-Myers*, 582 U.S. at 265. The majority felt that *Walden* illustrated this point as well because in that case "the *relevant* conduct occurred entirely in Georgia . . . ." *Id.* (quoting Walden v. Fiore, 581 U.S. 277, 291 (2014)). However, the threshold of minimum contacts were not met in that case to merit a discussion on the connection between the contacts and the litigation. Justice Alito distinguished two other cases from the case at hand. *Id.* 266-67. First *Keeton v. Hustler Magazine* because in that case there *was* harm that occurred in the forum state, while in *Bristol-Myers* no harm occurred in the forum state to the non-resident plaintiffs. *Id*. at 266 (citing Keeton v. Hustler Mag., Inc., 465 U.S. 770, 776 (1984)). Second, in *Phillips Petroleum Co. v. Shutts*, there was a class action suit which dealt with the due process rights of non-resident *plaintiffs* and not *defendants* and so the case was inapposite. *Id.* at 266-67 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)).

[284] *Bristol-Myers*, 582 U.S. at 268 (quoting Rush v. Savchuk. 444 U.S. 320, 322 (1980).

[285] *Id.* ("Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over [Bristol-Myers Squibb].")

[286] *Id*. at 264.

[287] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 359 (2021) (quoting *Bristol-Myers*, 582 U.S. at 272).

[288] *Id.* (quoting *Bristol-Myers*, 582 U.S. at 263). Again, this is typically a horizontal choice-of-law consideration usually reserved for which state is the most interested in the litigation. *See, e.g.*, Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847 (2015). Personal jurisdiction may be constitutionally appropriate in multiple locations and is not looking for the State in which jurisdiction is the most fair. *See World-Wide*, 444 U.S. at 292.

test does not require "causation" but only a connection or affiliation between the forum and the underlying controversy. The problem is that there is *no connection* in *Ford* between the litigation and the contacts that Ford has with the forum states. While purposeful availment of serving the markets surely existed (by the "truckload"),[289] and it would be reasonable for those courts to assert specific personal jurisdiction over Ford, there is no relationship between the market being served and the plaintiffs being injured in those states. The difference between *Ford* and *Bristol-Myers* cannot be that the plaintiffs were injured in the forum state in the former and not in the latter, because the *plaintiff's* affiliation with the forum state has never been an outcome determinative factor.

CONCLUSION

While Justice Kagan's march through prior Supreme Court precedent does reveal the existence of a fairly consistent three-pronged analysis for specific personal jurisdiction and repeated disjunctive language of the second prong,[290] her opinion fails to tie all the loose threads together. From *International Shoe* onward, precedent suggests that to establish an appropriate connection for case-linked or specific personal jurisdiction, the litigation must "arise out of or relate to" a defendant's contacts with a forum.[291]

But in *Ford*, the Court actually expanded this second prong of the specific jurisdiction test – it did not settle whether the causal relationship between contacts and the litigation should be proximate or factual and instead added (or re-emphasized) a long-languished relationship component between the two. While it may now be clear that there must be a threshold of appropriate contacts for personal jurisdiction, once that threshold is met, the focus should shift to whether an exercise of jurisdiction is fair based on those contacts. The "serving a market" language is tied to a defendant creating a reciprocal relationship with the forum – purposeful availment.[292] That language or its concept does

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[289] *Ford Motor Co.*, 592 U.S. at 369-70.
[290] *See*, Appendix 708, *infra*.
[291] *Id.*
[292] *Ford Motor Co.*, 592 U.S. at 357.

nothing to suggest a *connection* between that service and the ultimate litigation that is taking place.

There are several pieces to the specific jurisdiction puzzle that the Supreme Court still must clarify. First is the issue of the values that underlie the Due Process Clause limitations on personal jurisdiction as a whole – as recently as 2011 the Court was still divided over whether fairness, territorial limitations, or both, guided the application of the clause to jurisdiction.[293] This division might cause the Court to recast the entire understanding of personal jurisdiction.[294] Given that sixty-seven years elapsed between *Pennoyer* and *International Shoe*, and it has now been almost eighty years since *International Shoe*, it is reasonable to conclude that a reframing of the constitutional question may be necessary. If "fairness" is the true cornerstone of due process and personal jurisdiction, it is time to reconceive the test from that perspective and truly cut the test "loose from *Pennoyer*'s sway."[295]

The second recurring issue is the relationship (no pun intended) of the prongs to one another. Are there truly three separate requirements for specific personal jurisdiction that must independently be met: minimum contacts, relationship, and fairness? Or is it a sliding scale approach where the more contacts that exist, the fairer jurisdiction might be?[296] When the Court in *Ford* refused to engage in a distinct analysis of the reasonableness factors from *World-Wide*, it could be a misstep or a signal that a sliding scale might be on the horizon. This would really be a reversion to Justice Brennan's preferred analysis from *World-Wide*.[297]

Last, the "relate to" language has truly existed in the test all this time, but as a piece of the connection inquiry and not just a placeholder measuring number of contacts. The *International Shoe* Court specifically decried resting jurisdiction on

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[293] *See* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011).

[294] *See Ford Motor Co.*, 592 U.S. at 383-84 (Gorsuch, J., concurring).

[295] Daimler AG v. Bauman, 571 U.S. 117, 118 (2014).

[296] The Court openly rejects this approach in *Bristol-Myers* calling it "a loose and spurious form of general jurisdiction." *Bristol-Myers*, 582 U.S. at 264. But then it seems to accept it in *Ford* while finding such extensive contacts that a separate fairness analysis is unnecessary. *Ford Motor Co.*, 141 S. Ct. at 1026.

[297] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980).

"quantitative" metrics like counting contacts.[298] If this relationship part of the connection prong must exist and be analyzed independently, as suggested by the *Ford* recitation of the test, then the Court must now clarify what it means to create a relationship between contacts and the litigation rather than just implying that excessive contacts coupled with a plaintiff injury is sufficient.[299] This issue rose to the forefront of jurisdiction jurisprudence *because of* the contraction of general jurisdiction in *Daimler*.

Without a home for litigation wherever a corporate defendant does "continuous and systematic" business (rendering most national chains subject to general jurisdiction in any state), the only move for litigants is to make an argument that doing business in a state is somehow "related to" their injuries in that state.[300] An analysis of the lower courts' struggle with the test before and after landmark cases would perhaps demonstrate this shift through more detailed examples and provide a deeper understanding of the practical implications of that contraction and perhaps provide a way forward.

In *Ford*, the Supreme Court accomplished nothing more than blurring the lines between specific and general jurisdiction by allowing plaintiffs to use a corporate defendant's unfocused business activities in a forum state to assert specific jurisdiction—something formerly used to generate to general jurisdiction. If the key difference between the two branches of this doctrine is the degree to which the contacts are connected or linked to the litigation, that must be the focus of the jurisprudence going forward.[301] It is not enough for the Court in *Ford* to declare that "systematic serv[ice]" of a market for products that allegedly "injured [plaintiffs] in those States" is sufficient for specific

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[298] Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[299] *Ford Motor Co.*, 592 U.S. at 359-60. Solving the circuit split on the issue of causation would also help to streamline the analysis.

[300] Of course, this analysis may become obsolete given the acceptance of the Court of registration jurisdiction for businesses in 2023. *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023).

[301] Obviously, the other key difference is the nature of the contacts themselves, with specific personal jurisdiction requiring only minimum contacts while general personal jurisdiction requires a defendant to be at home.

personal jurisdiction.[302] Systematic contacts are part of a traditional general jurisdiction rubric, while specific, discrete contacts *connected* to the litigation serve as the basis for specific jurisdiction. Rather than confuse the issue or focus only on the quantitative "truckload" of contacts that Ford provided, it is time for the Court to clarify the test or relinquish it and start again.

[302] *Ford Motor Co.*, 595 U.S. at 365.

APPENDIX

Specific Jurisdiction Test Language from Justice Kagan's Cited Cases in Ford[303]	
International Shoe v. Washington, 326 U.S. 310, 321 (1945).	• "***Contacts*** or ties with the state of the forum to make it reasonable and just, according to our ***traditional conception of fair play and substantial justice*****,** to permit the state to enforce the obligations which appellant has incurred there."
Hanson v. Denckla, 357 U.S. 235, 251, 253 (1958).	• "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the '***minimal contacts***' with that State that are a prerequisite to its exercise of power over him." • "The cause of action in this case is not one that ***arises out of*** an act done or transaction consummated in the forum state." • "[I]t is essential in each case that there be some act by which the defendant ***purposefully avails*** itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 292 (1980).	• "[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist '***minimum contacts***' between the defendant and the forum State." • "The relationship between the defendant and the forum must be such that it is '***reasonable*** . . . to require the corporation to defend the ***particular***

[303] All citations that appear in the chart are cleaned up and emphasis is added.

	suit which is brought there.'" • 5 factors for consideration in fairness: burden on defendant, plaintiff's interest in relief, forum State's interest, interstate interest in efficiency, shared interest of the several States in substantive social policies.
Keeton v. Hustler Magazine, Inc. 465 U.S. 770, 775 (1984).	• "In judging minimum contacts, a court properly focuses on 'the ***relationship*** among the defendant, the forum, and the litigation.'"
Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).	• "When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that 'a relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction."
Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985).	• "Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [due process] is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum and the litigation ***results*** from alleged injuries that 'arise out of or relate to' those activities."
Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 108, 113 (1987).	• "'[The] constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established 'minimum contacts' in the forum state." (plurality) • 5 factors from *World-Wide* as necessary considerations of "reasonableness." (majority)
Goodyear Dunlop Tires Operations,	• "Specific jurisdiction . . . depends on an '***affiliatio[n]*** between the forum and the

S.A. v. Brown, 564 U.S. 915, 919 (2011).	underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of 'issues ***deriving from, or connected with, the very controversy*** that establishes jurisdiction.'"
Daimler AG v. Bauman, 571 U.S. 117, 127 (2014).	• "Adjudicatory authority . . . in which the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum' is today called 'specific jurisdiction.'"
Walden v. Fiore, 571 U.S. 277, 284 (2014).	• "For a State to exercise jurisdiction consistent with due process, the defendant's ***suit-related*** conduct must create a substantial connection with the forum State."
Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 582 U.S. 255, 262 (2017).	• "Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, 'the *suit*' must '***arise out of or rela[t]e to*** the defendant's contacts with the forum.' . . . '[it] is confined to adjudication of issues ***deriving from, or connected with, the very controversy*** that establishes jurisdiction.'"