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Personal Jurisdiction: The Walls Blocking an Appeal to Rationality

Richard D. Freer*

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Personal jurisdiction is a gateway to the judicial system. Without it, a plaintiff cannot vindicate her claims and the community cannot benefit from private enforcement of the law. In 2011, the Supreme Court returned to personal jurisdiction after a twenty-one year hiatus. Over the next six years, the Court decided six personal jurisdiction cases¹ that constitute what we can call the “new era.” In all six cases—three addressing general jurisdiction² and three addressing specific jurisdiction³—the Court rejected adjudicatory power. Scholarly reaction to the Court’s new era has criticized what commentators consider an

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1. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

2. *BNSF*, 137 S. Ct. 1549; *Daimler*, 571 U.S. 117; and *Goodyear*, 564 U.S. 915.

3. *Bristol-Myers Squibb*, 137 S. Ct. 1773; *Walden*, 571 U.S. 277; and *J. McIntyre*, 564 U.S. 873.

inappropriate constriction of personal jurisdiction and, with it, access to courts.⁴

The Court has significantly restricted general jurisdiction, which permits a forum to exercise authority over a defendant for claims unrelated to its forum activities. As a result, more cases will fall within specific jurisdiction, which requires that the claim have some affiliation with the defendant's contacts with the forum. In *Access to Justice, Rationality, and Personal Jurisdiction*,⁵ Professor Adam Steinman urges an interesting tack: To determine whether a case qualifies for specific versus general jurisdiction, the court should assess "remedial rationality."⁶ It should ask whether there is a "rational basis" for the court to hear the case. If there is, the court applies a specific jurisdiction analysis.⁷ If there is not, the case is assessed for general jurisdiction (and likely dismissed under the new-era version of that form of authority).

Professor Steinman identifies three fact patterns in which the new era has undermined access to justice: what he calls the "home state," "safety net," and "aggregation" scenarios.⁸ In each, application of his test could find that a court has a rational basis for hearing the case. This conclusion would be based upon factors such as the forum state's interest, relative balance of hardships, alternative fora available to the plaintiff, and convenience of litigation. Employing remedial rationality as "an overarching standard" will foster a flexibility now lacking in jurisdictional doctrine.⁹

As always, Professor Steinman's proposal is imaginative, thoughtful, and thought-provoking. The Court has always insisted that state authority to exercise personal jurisdiction is limited by the due process clause of the Fourteenth Amendment. A staple of due process analysis in other areas is "rational basis" review, yet, as Professor

4. See Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 747–59 (2018) (making the argument and citing commentary).

5. Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401 (2018).

6. *Id.* at 1449. Except for the addition of remedial rationality, Professor Steinman's proposal does not revamp extant specific jurisdiction doctrine under *International Shoe*. The proposal "preserves current doctrine's core requirement of minimum contacts. It embraces the due-process notion of rationality merely to inform the crucial line between specific and general jurisdiction." *Id.*

7. *Id.* at 1447–50. Professor Steinman focuses on specific jurisdiction under *International Shoe*. He leaves to one side the "traditional bases" of personal jurisdiction and accepts the newly restricted field of general jurisdiction established in the new era. *Id.* at 1460–61.

8. See *id.* at 1405–06. I will not address the "aggregation" scenario in detail. See *infra* note 72.

9. Steinman, *supra* note 5, at 1452.

Steinman demonstrates, the Court has not used a “rationality standard” in assessing personal jurisdiction.

In my view, the appeal to rationality is an appeal to the “fairness factors” that courts employ under the “reasonableness” prong of *International Shoe Co. v. Washington*.¹⁰ For over half a century, the Court has built a wall between plaintiffs and any appeal to such reasonableness (or rationality) factors. That wall is the rigid requirement that the defendant forge a volitional contact with the forum. The new era shows increasing fealty to this primacy of contact in the *International Shoe* analysis. In the wake of the Court’s restriction of general jurisdiction, the Court is putting up a second wall: a strict requirement, set out in *Bristol-Myers Squibb*, that the plaintiff’s claim be closely related to the defendant’s contacts with the forum.

There are thus two barriers between plaintiffs and access to the “fairness factors” that support the reasonableness of jurisdiction. I am not sanguine that the Court will adopt an approach, even one so cogent as Professor Steinman’s, that would give plaintiffs an end-run around those walls.

I. REASONABLENESS AND RATIONALITY

Professor Steinman’s remedial rationality is rooted in the forum’s interest in providing (and ability to provide) meaningful relief. Thus, in the “home-state scenario,” he appeals to a state’s interests in allowing an in-state plaintiff to sue at home and avoiding the unfairness of making that plaintiff sue in a distant court, particularly when she might lack the wherewithal to do so.¹¹ In the “safety-net scenario,” he cites the national interest in providing a forum in which U.S. citizens may enforce substantive rights that may be lost if a U.S. court were not available.¹² In the “aggregation scenario,” Professor Steinman argues that the lack of a single forum for assertion of negative-value claims “may make meaningful access to justice impossible,”¹³ which would render jurisdiction in the present forum rational.

All of these factors—the forum’s interest, relative burdens of access to justice, consideration of plaintiff’s alternative fora, the need to aggregate negative-value claims—are accounted for in extant doctrine, albeit not under the rubric of “rational basis” or “remedial rationality.” Rather, each is relevant to an assessment of whether the exercise of

10. 326 U.S. 310 (1945).

11. Steinman, *supra* note 5, at 1420–21.

12. *Id.* at 1428.

13. *Id.* at 1432.

jurisdiction comports with “fair play” or “reasonableness” under *International Shoe*.¹⁴ In the early days of *International Shoe*, the Court accorded such factors significant weight.

The Court decided *International Shoe* in 1945. On its face, the Court’s famous statement of the due process standard for personal jurisdiction required two things: (1) the defendant must have “minimum contacts” with the forum, and (2) the exercise of jurisdiction must comport with “fair play and substantial justice.”¹⁵ In *International Shoe*, the Court did not define or explain what would constitute a relevant contact. Neither did it prescribe relevant factors for assessing whether the exercise of jurisdiction would be fair. On these points, *International Shoe* was a blank slate.

The first person to write on that slate was Justice Black. He had concurred in *International Shoe*, but in language that sounded more like a dissent. To him, the facts of the case easily satisfied the then-widely adopted “solicitation-plus” rule that would render the defendant subject to jurisdiction in Washington, so there was no need for the Court to make a broad pronouncement. Black was especially critical of the Court’s injection of “uncertain elements,” “vague . . . criteria,” and “elastic standards” into jurisdictional doctrine.¹⁶ He worried that open-ended concepts of fairness might be used to *restrict* state-court personal jurisdiction. Specifically, he was concerned that nine Justices’ views of what might be “fair” could “deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more ‘convenient’ for the corporation to be sued somewhere else.”¹⁷

When the Court applied the new standard in the 1950s, Black seized the opportunity to steer the Court toward an expansive view, to maximize state-court authority. In the first two specific jurisdiction cases to apply the new standard—*Travelers Health Ass’n. v. Virginia*¹⁸ in 1950 and *McGee v. International Life Insurance Co.*¹⁹ in 1957—Black wrote for the Court in upholding state-court jurisdiction over out-of-state insurance companies. His opinions are notable in three ways.

14. Professor Steinman recognizes that the factors supporting rationality of jurisdiction may “overlap” with the factors assessed in the reasonableness prong of *International Shoe*. *Id.* at 1450 n.276. I believe that his rationality factors would all be cognizable in a reasonableness analysis under *International Shoe*. More importantly, I think the Court likely would see them as such.

15. Due process requires that the defendant “have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe*, 326 U.S. at 316. There can be no personal jurisdiction in a state with which the defendant has “no contacts, ties, or relations.” *Id.* at 319.

16. *Id.* at 323, 325 (Black, J., concurring).

17. *Id.* at 325.

18. 339 U.S. 643 (1950).

19. 355 U.S. 220 (1957).

First, the requirement of “minimum contacts” was not a high bar: according to the record in *McGee*, the defendant had sold only one contract of insurance in California (breach of which constituted the plaintiff’s claim).²⁰ It was sufficient that “the suit was based on a *contract* which had substantial connection with [the forum] state.”²¹ Thus, the fact that the *relationship between the parties* had some connection with the forum sufficed.

Second, there was no separation of contact and fair play. The approach was a *mélange*—a mixture of elements relating to contact and elements determining whether jurisdiction would be fair under the circumstances. No single factor held primacy. Everything relating to the reasonableness of jurisdiction was relevant.

Third, Black gave content to “fair play and substantial justice.” Specifically, he appealed to the state’s interest in providing a courtroom for a citizen harmed by the nonresident defendant, the plaintiff’s interest in seeking justice at home and avoiding suing in a distant state, the efficiency of litigating where the witnesses may be found, the need for a convenient forum for the assertion of negative-value claims, and the fact that defendants, engaged in a far-flung business, ought to be amenable to suit in multiple states.

Black’s list of factors supporting the reasonableness of jurisdiction included the factors urged by Professor Steinman. In discussing the “home-state scenario,” for example, Professor Steinman would employ remedial rationality, under which the court would engage in a “pragmatic inquiry into the reasons for adjudicating the case in this forum.”²² Specifically:

[t]he home state has a strong interest in adjudicating the case, which is brought on behalf of an in-state plaintiff who was injured as a result of in-state occurrences. To require the plaintiff to seek judicial remedies outside her home state can impose significant cost and inconvenience. The plaintiff . . . may lack the wherewithal to access justice elsewhere. From the plaintiff’s perspective, the relevant events and injuries are home-state events that warrant judicial remedies from home-state tribunals.²³

These points mirror Justice Black’s opinion in *McGee*:

[T]he suit was based on a contract which had substantial connection with that State. . . . It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would

20. “[S]o far as the record before us shows, respondent has never solicited or done any insurance business in California apart from the policy involved here.” *McGee*, 355 U.S. at 222. I agree with Professor Vitiello that the opinion “did not suggest that the result turned on who solicited whom.” MICHAEL VITIELLO, *ANIMATING CIVIL PROCEDURE* 27 (2017).

21. *McGee*, 355 U.S. at 223 (emphasis added).

22. Steinman, *supra* note 5, at 1451.

23. *Id.* at 1421.

be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.²⁴

In addition, Professor Steinman urges that rationality include the sorts of factors considered in *forum non conveniens* analyses. Black expressly embraced that approach, and urged, for example, consideration of “where witnesses would most likely live and where claims . . . would presumably be investigated.”²⁵ Indeed, he noted that “such factors have been given great weight in applying the doctrine of *forum non conveniens*.”²⁶ Thus, Black’s list of factors relating to fair play and substantial justice include those adumbrated by Professor Steinman as supporting rationality of jurisdiction. The problem—and the need animating Professor Steinman’s proposal—is that Black’s methodology did not survive.

II. THE CONTACT WALL

A. *De-emphasizing Reasonableness*

Mere months after *McGee*, which was a unanimous decision, the Court abruptly changed course in *Hanson v. Denckla*.²⁷ The Court split five-to-four, with Chief Justice Warren writing for the Court and Justice Black dissenting. All of a sudden, factors such as the forum state’s interest, plaintiff’s interest, relative burden for the parties, and trial convenience were separated from the assessment of whether the defendant itself had created a sufficient contact with the forum.

Under *Hanson*, a contact qualifies only if it results from the defendant “purposefully avail[ing]” itself of the forum.²⁸ Though the *relationship* between Mrs. Donner and the Delaware bank had plenty of connection with Florida in *Hanson*,²⁹ the Court focused not on the relationship, but on the defendant itself. The connection between the Delaware bank and Florida was caused by Mrs. Donner’s moving to Florida. This “unilateral activity” of a third party could not suffice; the tie must result from *an act by the defendant itself*.³⁰ Overnight, then, the Court’s focus shifted from the *forum* to the *defendant*, from

24. *McGee*, 355 U.S. at 223.

25. *Travelers Health Ass’n. v. Virginia*, 339 U.S. 643, 649 (1950).

26. *Id.*

27. 357 U.S. 235 (1958).

28. *Id.* at 253.

29. By any reasonable measure, the Delaware bank in *Hanson* had far more contact with Florida (eight years’ worth honoring requests and doling out money to and for the benefit of Floridians) than the insurance company had with California in *McGee*. In *McGee*, as noted, the contract on which suit was based was the only contract sold by the defendant in California.

30. *Hanson*, 357 U.S. at 253

reasonableness of jurisdiction to defendant's forging a purposeful contact.

In 1980, in *World-Wide Volkswagen Corp. v. Woodson*,³¹ the Court formally bifurcated the *International Shoe* standard into separate prongs—"contact" and "fairness" (or "reasonableness")—and raised the former to primary status. Under *World-Wide*, a contact between the defendant and the forum—caused by the defendant's purposeful availment of the forum—is an *absolute prerequisite* to jurisdiction. Only after finding a relevant contact may the court assess the fairness or reasonableness of jurisdiction. Without a relevant contact, there simply can be no jurisdiction, no matter how fair or reasonable the present forum may be.³²

The Court further de-emphasized the assessment of reasonableness in *Burger King Corp. v. Rudzewicz*.³³ In that case, the defendants had established volitional ties with Florida. They argued that jurisdiction in that state did not comport with the fairness prong of *International Shoe*. The Court created a presumption: once there is a relevant contact, jurisdiction is presumed to be reasonable. The burden is on the defendant to "present a compelling case" that jurisdiction is "so gravely difficult and inconvenient" that [he] unfairly is at a 'severe disadvantage' in comparison to his opponent."³⁴ Not only that, but the defendant "may not defeat jurisdiction . . . simply because of his adversary's greater net wealth."³⁵ Given the ease of modern travel, the Court concluded that it was not unconstitutionally inconvenient to have the individual defendants litigate in the corporate plaintiff's backyard in Florida. The *Burger King* presumption makes it nearly impossible for defendants to defeat jurisdiction by appealing to the fairness factors. Instead, most make their stand by arguing that they did not purposefully avail themselves of the forum; they put their eggs in the contact basket.

At the end of the twentieth century, then, the fairness assessment of *International Shoe* (1) was pushed to secondary position (irrelevant in cases in which there was no contact) and (2) was not used to *support* the exercise of jurisdiction. After *Burger King*, the Court has

31. 444 U.S. 286 (1980).

32. In *World-Wide*, the Court catalogued the "fairness" factors: (1) the burden on the defendant (a "primary concern"), (2) the forum state's interest in adjudicating the dispute (for which the Court cited *McGee*), (3) the plaintiff's interest in convenient and effective relief, (4) the interstate judicial system's interest in efficiency, and (5) the shared interest of states in furthering fundamental substantive social policies. *Id.* at 292. These correspond to the reasonableness bases supporting jurisdiction in *McGee*.

33. 471 U.S. 462 (1985).

34. *Id.* at 477–78.

35. *Id.* at 483 n.25.

seen the reasonableness prong as a veto—a way to defeat jurisdiction—rather than as factors favoring jurisdiction. This is because after *Hanson*, the only times the Court has addressed the fairness prong (more than in passing) has been in efforts to *defeat* jurisdiction, not to support it.³⁶ Remarkably, *McGee* is the last case in which the Court used factors such as those urged by Professor Steinman to *support* jurisdiction.

B. *The New Era and J. McIntyre*

The result in *J. McIntyre* is shocking: a New Jersey citizen, injured at his place of employment in New Jersey, using a machine purchased by his New Jersey employer, cannot sue the British manufacturer of the machine in New Jersey. The manufacturer had exploited the U.S. market and had instructed its U.S. distributor to sell as many machines (in as many states) as it could.

The case presented the same legal issue on which the Court split in *Asahi Metal Industry Co. v. Superior Court*:³⁷ what constitutes purposeful availment (and therefore a contact between the defendant and the forum) in a stream-of-commerce case. In *Asahi*, the Court famously failed to generate a majority opinion. Four Justices (led by Justice Brennan) concluded that placing a product into the stream of commerce, knowing that it would be marketed in the forum, constitutes purposeful availment of the forum.³⁸ Four others (led by Justice O'Connor) required something more than that; the defendant must focus on the specific forum in some more direct way, such as by providing customer service there.³⁹

Twenty-four years later, in *J. McIntyre*, the Court again failed to produce a majority opinion in a stream-of-commerce case.⁴⁰ Four Justices (led by Justice Kennedy) adopted something like the O'Connor view from *Asahi*. Three Justices (led by Justice Ginsburg) embraced

36. In *Burger King*, the effort failed; jurisdiction in Florida was not unfair. In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), the effort succeeded because the case at that point had no business being in a U.S. court. More recently, Justice Sotomayor, concurring in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), argued that the defendant had sufficient contacts with California to justify jurisdiction, but that the fairness prong be invoked to defeat it.

37. 480 U.S. 102 (1987).

38. *Id.* at 117 (Brennan, J., concurring).

39. *Id.* at 112 (O'Connor, J., concurring).

40. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). *Asahi* involved attempted jurisdiction over the manufacturer of a component in a finished product. *J. McIntyre* involved attempted jurisdiction over the manufacturer of a finished product. Only Justice Ginsburg, in dissent in *J. McIntyre*, attached importance to this difference, suggesting that the maker of a finished product has more control over where its products will go than the maker of a component. *Id.* at 907–08 (Ginsburg, J., dissenting).

something like the Brennan view from *Asahi*. The two Justices in the middle (Breyer and Alito) refused to take sides, concluding that neither test was satisfied on the record of the case.

Legally, then, *J. McIntyre* does nothing new. The difference between it and *Asahi* is that in *J. McIntyre* the conclusion regarding contact *mattered*. It meant that the plaintiff could not sue in his home state. In *Asahi*, the contact assessment was ultimately irrelevant because eight Justices agreed that the case should be dismissed under the fairness prong of *International Shoe*. After the California plaintiff settled his claim, the litigation was between a Taiwanese company and a Japanese company on a claim of contractual indemnity. That dispute simply did not belong in a U.S. court.⁴¹

The *J. McIntyre* fact pattern presents what Professor Steinman calls the “home-state” scenario. He appeals to the strong rational basis for a New Jersey court to hear the case. The rationality is undeniable. New Jersey had an interest in providing a forum for its citizen and in the safety of an in-state work environment. The plaintiff had an interest in suing at home and not being required to travel to seek compensation for a harm suffered in-state. New Jersey was the center of gravity; witnesses to the accident and to the plaintiff’s injuries were in New Jersey, and New Jersey tort law likely would apply on the merits. All of these factors would support “remedial rationality” under Professor Steinman’s proposal.

But each of those factors would apply under the reasonableness prong of *International Shoe*. The problem in *J. McIntyre* was not a lack of factors rendering jurisdiction fair or reasonable or rational. The problem was the Court’s conclusion that there was no relevant contact between J. McIntyre and New Jersey (despite the obvious fact that its machine caused the injury in New Jersey). If the Court had found that J. McIntyre had a relevant contact with New Jersey, the fairness prong of extant doctrine (for reasons stated in the preceding paragraph) would have supported jurisdiction. There would be no need for remedial rationality; current doctrine would handle the case correctly—if *there were a relevant contact*.

I have never understood why the Brennan wing of the Court did not make a simple economic argument concerning contact in stream-of-

41. As Dean Hay has explained, *Asahi* was essentially a *forum non conveniens* case. Peter Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 19–20 (1988). This observation recognizes the connection between the fairness analysis of *International Shoe* and *forum non conveniens*, which Black noted in *McGee*.

commerce cases.⁴² Let's say Defendant manufactures components in State X; it sells them to Distributor in State Y. Distributor puts the components into the finished widget, which it sells to retailers in State Z. The fact that there is a market for the finished product in State Z means that D will sell more components. Were that not so, Distributor would not buy so many components from D.

This simple sketch explains why J. McIntyre did purposefully avail of New Jersey. J. McIntyre made money *because there was a market for its product in New Jersey; people in that state wanted to buy it*. Amenability to suit (and the probable application of New Jersey tort law) is a cost of doing business by making money in a given state.⁴³

Again, once we find a relevant contact between J. McIntyre and New Jersey, the reasonableness prong of existing law would make the case for jurisdiction in New Jersey overwhelming. We have not seen the Court use fairness factors to *support* jurisdiction because we have not seen the Court find a relevant contact in close cases. If the plaintiff can establish contact, we do not need “remedial rationality” as a separate step—the reasonableness prong of existing law will serve the same function.

C. The Future of the Contact Wall

Are we likely to see a lowering of the contact wall anytime soon? Professor Steinman is right to counsel that *J. McIntyre* does not rule out a liberal view of contact in the stream-of-commerce situation. After all, Justices Breyer and Alito might adopt the Ginsburg view on the topic. Even so, the general signs from the Court seem ominous.

First, even Justice Ginsburg, who wrote a stinging dissent in *J. McIntyre*, has given up on the *mélange* approach.⁴⁴ In *Daimler*, a general jurisdiction case, she noted in passing that specific jurisdiction is governed by the two-step approach of *World-Wide*; reasonableness

42. Professor Steinman notes the need for a contact. He also notes that, in most cases, an out-of-state manufacturer will have garnered some benefit in the forum state. Steinman, *supra* note 5, at 1444–45. My simple economic test shows how this might be done.

43. I am not speaking here about national contacts, but contact between J. McIntyre and New Jersey. It made money from the sale to the New Jersey company that employed the plaintiff. Even if this were the only machine it sold into that state, specific jurisdiction for a claim arising from the operation of *that very machine* does not impose upon the defendant a burden for which it was not compensated.

44. I could be wrong, but think that her dissent in *J. McIntyre*, which gave “prime place to reason and fairness,” 564 U.S. at 903, was consistent with a return to the *mélange* test of *McGee*. Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 584 (2012).

may be consulted only *after* a contact is established.⁴⁵ True, she will find a contact on a more liberal basis than her conservative colleagues, but gone is any argument that reasonableness is anything but secondary to contact.

Second, Justice Kennedy's plurality opinion in *J. McIntyre*, though speaking for only four Justices, repeatedly refers to the defendant's "submitting" to jurisdiction. This language may be nudging the contact requirement of *International Shoe* toward a requirement that the defendant consent to jurisdiction.⁴⁶ The same opinion also declares that an improper exercise of personal jurisdiction "would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."⁴⁷ The Court expressly rejected this "interstate federalism" as a basis for personal jurisdiction in *Insurance Corp. of Ireland v. Compagnie de Bauxites*.⁴⁸ Nonetheless, Justice Alito's majority opinion in *Bristol-Myers Squibb*—signed by eight Justices, including Justice Ginsburg—notes the "federalism interest" in personal jurisdiction doctrine.⁴⁹ So there may be some ferment toward a new territorialism, which focuses on a perceived intrusion on state sovereignty rather than the reasonableness of jurisdiction. Such an orientation would take more attention away from a consideration of reasonableness of jurisdiction.⁵⁰

Finally, in *J. McIntyre*, one is struck by the remarkable efforts of Justices Kennedy and Breyer to avoid finding that there was a relevant contact between the defendant and New Jersey. Each shows an obsession with the contact prong of analysis by raising hypothetical cases. Kennedy worries that a small Florida farmer who sells produce through a middleman for national distribution "could be sued in Alaska or any number of other States' courts without ever leaving town."⁵¹ Breyer expresses concern that an Appalachian potter selling through a distributor might be haled into court in Hawaii to answer for a defective

45. *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014). She also rejects the idea that the assessment of reasonableness is a "free-floating test." *Id.*

46. See Miller, *supra* note 4, at 748 ("The language is somewhat reminiscent of the Court's opinion 134 years earlier in *Pennoyer v. Neff*."); Charles W. ("Rocky") Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 442 (2012).

47. *J. McIntyre*, 564 U.S. at 884.

48. 456 U.S. 694, 702–03 n.10 (1982).

49. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1780 (2017). The Court quotes *World-Wide* for the proposition that due process implies a limitation on the sovereignty of sister states and that it operates as an instrument of interstate federalism. *Id.* at 1780–81. The latter point was expressly rejected in *Insurance Corporation*.

50. In *World-Wide*, the Court cited the federalism interest as underpinning the requirement of a contact between the defendant and the forum. 444 U.S. at 292–93.

51. 564 U.S. at 885 (plurality opinion).

coffee mug.⁵² In the international context, Breyer is concerned that “a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors” might be sued “in virtually every State in the United States.”⁵³

With respect, these concerns are silly. The answer in these cases is not to strain to find that the defendant has no contact with the forum. The answer is to let the fairness factors do some of the work.⁵⁴ Yes, the Florida farmer selling through a distributor has a contact with Alaska. But on the facts of a given case, jurisdiction in Alaska might not be fair. Yes, the Appalachian potter selling through a distributor has a contact with Hawaii, but courts would likely conclude that jurisdiction in Hawaii—arising from a single defective coffee mug—would not be reasonable. Yes, the Egyptian shirt maker selling through a distributor has a contact with many states in the United States, but jurisdiction in any of them might be unreasonable, depending on the size of the claim and other factors.

Without a return to the *mélange* approach or a relaxation of what constitutes a contact under *International Shoe*, an appeal to reasonableness (or rationality) seems unavailing. And with a contact, the reasonableness prong of *International Shoe* serves the same function (with no adjustment to applicable law). Finding a contact puts the ultimate conclusion in the hands of the fairness factors—to uphold jurisdiction in *J. McIntyre* and to reject it as to the Appalachian potter.

III. THE RELATEDNESS WALL

A. *The New Focus on Relatedness in Specific Jurisdiction*

Historically, courts could exercise general jurisdiction when the defendant had significant contacts with the forum. One common phrase was that general jurisdiction was proper if the defendant’s ties with the forum were “continuous and systematic.”⁵⁵ This is no longer the law. In

52. *Id.* at 891–92 (Breyer, J., concurring).

53. *Id.* at 892.

54. In *Burger King v. Rudzewicz*, Justice Brennan suggested that the fairness factors “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.” 471 U.S. 462, 477 (1985). This linkage of the contact and fairness prongs would have made it impossible to dismiss a case without at least glancing at the reasonableness factors. In my view, Professor Steinman’s thesis is consistent with Justice Brennan’s suggestion. The Court has never acted on the suggestion; indeed, no Justice has referred to it.

55. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952) (general jurisdiction based upon defendant’s “continuous and systematic” business in Ohio).

three opinions, the Court, led by Justice Ginsburg, has slashed the doctrine. It now applies only if the defendant's ties with the forum render it "at home" in that state. As a result of *Goodyear*, *Daimler*, and *BNSF*, corporations⁵⁶ are subject to general jurisdiction in at most two states: (1) where incorporated, and (2) in the state of its principal place of business.⁵⁷

And there's more: a footnote in *Daimler* announced that the fairness prong of *International Shoe* does not apply in general jurisdiction cases (an issue that was not argued or briefed in *Daimler*).⁵⁸ The fairness factors—accessible in specific jurisdiction cases only if the plaintiff can get past the significant hurdle of establishing defendant's purposeful availment of the forum—play no role in general jurisdiction.

Remarkably, then, the Court has abolished contacts-based general jurisdiction. Its definition of "at home" returns general jurisdiction to grounds recognized long before *International Shoe*.⁵⁹ This evisceration creates a gap. Falling into the gap are cases that would have satisfied contacts-based general jurisdiction but now must qualify for specific jurisdiction. *Bristol-Myers Squibb* is such a case. Before the new era, some courts would have considered the defendant's contacts with California so continuous and systematic as to support general jurisdiction. In the new era, however, because the defendant was neither incorporated nor had its principal place of business there, *Bristol-Myers Squibb*—and many other cases⁶⁰—must sink or swim under specific jurisdiction.

In *Bristol-Myers Squibb*, hundreds of plaintiffs (some residents of California, most not) sued the pharmaceutical company for personal

56. In none of the cases has the Court given a test for where an unincorporated association will be deemed "at home."

57. "[I]t is virtually inconceivable that [interstate] corporations will ever be subject to general jurisdiction in any location other than their principal places of business or of incorporation." *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1560 (Sotomayor, J., concurring in part and dissenting in part). In theory, a corporation might be "at home" in a third state based upon its activities there. In fact, though, it seems unlikely, *Daimler* establishes that the activities are to be judged on a proportionality basis; thus, a corporation can be at home based upon activities only if the business transacted in that state constitutes a substantial proportion of its overall business. Moreover, *Goodyear* establishes that general jurisdiction cannot be based upon a business's purchases or sales in the forum.

58. *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014).

59. Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2002–04 (2014).

60. The Court seems to have no appreciation for how the new era of general jurisdiction cuts back on well-established doctrine. As one of many examples, in *Goodyear*, one defendant was Goodyear USA, an Ohio corporation headquartered in that state. It was sued in North Carolina on a claim arising in France. Because it had three manufacturing plants and employed hundreds in North Carolina, it did not challenge general jurisdiction. Today it would.

injuries allegedly caused by its blood-thinning drug Plavix.⁶¹ The contact requirement presented no problem: Bristol-Myers Squibb had research and laboratory facilities in California, along with 160 employees, 250 sales representatives, a lobbying force, and it sold millions of Plavix pills there, generating billions of dollars in revenue.⁶²

The problem was relatedness: the claims by non-California plaintiffs were not sufficiently affiliated with the defendant's contacts with the state to qualify for specific jurisdiction. The California Supreme Court had upheld specific jurisdiction by employing a "sliding scale."⁶³ According to it, when a defendant has considerable ties with the forum, relatedness requires only that the non-Californians' claims be substantively and factually similar to the claims asserted by California residents. This requirement was satisfied, according to that court, because the Plavix pills that injured the non-Californians were identical to those that harmed the Californians, as was the allegedly misleading marketing of the product.

The Supreme Court rejected the effort as "a loose and spurious form of general jurisdiction."⁶⁴ There is no sliding scale. Either the claims by non-Californians relate sufficiently to the defendant's forum activities or they do not. If they do not, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."⁶⁵

In 1984, Justice Brennan suggested that the line between general and specific jurisdiction was nuanced.⁶⁶ He pointed out the difference between a requirement that the plaintiff's claim "arise out of" the defendant's contact with the forum and that it "relate to" that contact. The latter phrase, Brennan suggested, should require a lesser connection with the forum than the former.⁶⁷

In *Bristol-Myers Squibb*, the Court showed no interest in such subtlety. It employed the phrase "arise out of or relate to" with no suggestion that there might be a distinction between the two.⁶⁸ Quoting language from the new-era general jurisdiction cases, the Court requires "an affiliation between the forum and the underlying

61. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1778 (2017).

62. *Id.*

63. *Id.* at 1775.

64. *Id.* at 1781.

65. *Id.*

66. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 425 n.3 (1984) (Brennan, J., dissenting).

67. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 319 (Brennan, J., dissenting). It is possible that the Court's rejection of the "sliding scale" approach in *Bristol-Myers Squibb* constitutes rejection of Justice Brennan's suggestion in *Helicopteros*.

68. *Bristol-Myers Squibb*, 137 S. Ct. at 1786.

controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."⁶⁹ The Court noted that the Plavix pills that allegedly harmed the non-Californian plaintiffs were not manufactured, packaged, labeled, or sold in California. The pills were not prescribed or ingested in California, and no harm was suffered (by the non-Californians) in California. Accordingly, the non-Californians' claims were not sufficiently affiliated with the defendant's California contacts.

Apparently, then, for specific jurisdiction, the *very product* that causes harm must have some connection to the forum.⁷⁰ "The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."⁷¹ This view of relatedness will make it more difficult to aggregate the claims of plaintiffs who are injured in different states by different (though identical) products.⁷² And, as we

69. *Id.* at 1780 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). I cannot help but think that the Court was concerned that a California court would find a way, under that state's flexible choice-of-law rules, to apply pro-plaintiff California law to all plaintiffs. Denying personal jurisdiction allowed the Court to elude that issue.

70. Thus, it seems likely that the plaintiff in *J. McIntyre* could have sued the English company in Ohio under specific jurisdiction; the very product that injured the plaintiff passed through Ohio on its way to New Jersey.

71. *Bristol-Myers Squibb*, 137 S. Ct. at 1781. The last line from the quotation is curious. Personal jurisdiction is exercised over defendants, not over claims. The Court undoubtedly meant that California lacked personal jurisdiction over *Bristol-Myers Squibb* for the claims of the non-Californians.

72. Space limitations preclude me from addressing at length Professor Steinman's "aggregation" scenario. As Justice Sotomayor detailed in her dissent in *Bristol-Myers Squibb*, the strict requirement of relatedness thwarts multi-state aggregation. In cases involving negative-value claims, claims may never be asserted. 137 S. Ct. at 1784 (Sotomayor, J., dissenting). Professor Steinman argues that the fact that a single court is not able to adjudicate all claims provides a rational basis on which a court might exercise specific jurisdiction. Again, this seems to me to be something a court would assess under the reasonableness analysis. Indeed, the Court expressed a similar concern in *McGee*: "When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). Without a showing of relatedness, however, I do not see how the court can rely on this factor.

Moreover, the argument that a single forum is necessary to permit vindication of claims seems doomed. This is the same Court that has upheld waivers of aggregation in the arbitration context, notwithstanding that individual arbitration will not be economically feasible. In that context, the Court left plaintiffs with no viable recourse to enforce their claims. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (the fact that it is not economically feasible to arbitrate individually "does not constitute the elimination of the right to pursue that remedy"). It is unlikely that the Court will be moved by the need to accommodate aggregation in the litigation context. Plaintiffs in the litigation context are already better off than those subject to class arbitration waivers: in litigation, under *Bristol-Myers Squibb*, a case asserting nationwide claims can be asserted where a single defendant is at home.

now explore, it may create significant problems for U.S. plaintiffs suing foreign defendants.

B. Relatedness and the Need for a U.S. Forum

The Court has not explained why it limited general jurisdiction. In *Daimler*, however, the Court hinted that it was fearful of “F-Cubed” cases, which involve foreign plaintiffs, foreign defendants, and a claim arising in a foreign country.⁷³ Justice Ginsburg—as Kennedy and Breyer did in *J. McIntyre*—fell prey to a hypothetical case. She worried that upholding general jurisdiction in *Daimler* would allow a Polish driver, injured in a Polish auto crash, to sue a German auto maker in California.⁷⁴

Again, the Court’s reaction is to restrict doctrine rather than to let the reasonableness prong of *International Shoe* play any role. A reasonable approach would have been to hold that even if the defendant’s (attributed) contacts with California were continuous and systematic, jurisdiction in the United States was not reasonable on the facts. That approach is now impossible because the Court has removed a fairness analysis from general jurisdiction.

Though the restrictions on general jurisdiction may have been spurred by fear of F-Cubed cases, they are not limited to such cases. They apply to U.S. plaintiffs. One worrisome situation is what Professor Steinman calls the “safety net” scenario. Here, a foreign defendant has significant contacts with a U.S. forum but is not “at home” there. A U.S. plaintiff is injured by the foreign defendant. General jurisdiction in a U.S. court now is not an option (because the company is not incorporated or headquartered in the United States).⁷⁵ When suit in the foreign country is not feasible, the U.S. plaintiff is left with no remedy unless the U.S. forum exercises specific jurisdiction.⁷⁶

Professor Steinman argues for specific jurisdiction here because “it would be rational for the forum state to adjudicate the availability of

73. *Daimler* was such a case—Argentinian plaintiffs sued a German defendant in California, for claims that arose in Argentina. *Daimler AG v. Bauman*, 571 U.S. 117, 120–21 (2014).

74. *Id.* at 121.

75. One hopes that the Fifth Amendment, applicable in some cases in federal court, might be read more broadly than the Fourteenth, not only by embracing national contacts but also by reverting to the continuous and systematic test for general jurisdiction. See *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (“[W]e leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”).

76. Professor Twitchell pointed out that the need for general jurisdiction to fill gaps created a narrow interpretation of specific jurisdiction. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 681 (1988).

the requested judicial remedies.”⁷⁷ He relies on the fact that the United States has an interest in providing a U.S. forum (even when the claim arose overseas) lest the defendant “escape accountability.” In many cases arising under federal law, U.S. substantive policy may be thwarted by a failure to exercise jurisdiction.⁷⁸ In addition, the plaintiff has an interest in suing at home; among other things, she may be injured and find it difficult to travel abroad to litigate.

All of these interests are part of the reasonableness prong of *International Shoe*. The problem is how to gain access to them. I fear that *Bristol-Myers Squibb* has replaced the rigid two-step approach of *World-Wide* with a rigid three-step analysis for specific jurisdiction. First, there must be a contact, based upon defendant’s purposeful availment of the forum. Second, the plaintiff’s claim must “arise out of or relate to” the defendant’s conduct. Third—only if the first two are met—the court may consider the reasonableness of jurisdiction.

In the “safety net” scenario, the problem is relatedness. Professor Steinman proposes that the link between the contact and the claim is provided by the rationality of the forum’s hearing the case. Specifically, “the existence of a rational basis for the forum to adjudicate the availability of judicial remedies in a given case provides the requisite ‘affiliatio[n]’ between the forum and the underlying controversy.’”⁷⁹

The argument is ingenious but, in my opinion, unlikely to prevail. It is true that “the Court has failed to provide . . . an underlying theory for identifying what kind of ‘affiliation’ between the forum and the underlying controversy is sufficient.”⁸⁰ But *Bristol-Myers Squibb* seems clear in requiring “a connection between the forum and the

77. Steinman, *supra* note 5, at 1446. If there is no rational reason for the court to hear the dispute, it would be considered a general jurisdiction case and would be dismissed because the defendant is not “at home” in the forum.

78. Applying *Daimler* in the international context would negate significant policies of the United States. For example, the Anti-Terrorism Act (ATA), 18 U.S.C. §§ 2331-2339, creates a civil right of action for citizens of the United States injured or killed by international terrorism. In one case, citizens of the United States sued the Palestine Liberation Organization and the Palestinian Authority in federal court for wrongful death and personal injury suffered in terrorist attacks in Israel. They alleged that those defendant organizations had supported the attacks. The court, acting before *Goodyear*, upheld general jurisdiction based upon defendants’ continuous and systematic ties with the United States. After jury trial, plaintiffs won a judgment that, trebled under the ATA, amounted to over \$655,000,000. After *Daimler*, the Second Circuit held that the judgment must be set aside and the case dismissed with prejudice. Applying *Daimler*, neither defendant organization was “at home” in the United States. *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2016). See Ariel Winawer, Comment, *Too Far From Home: Why Daimler’s “At Home” Standard Does Not Apply to Personal Jurisdiction Challenges in Anti-Terrorism Act Cases*, 66 EMORY L.J. 161 (2016).

79. Steinman, *supra* note 5, at 1447.

80. *Id.* at 1446–47.

specific *claims* at issue.”⁸¹ Though the Court acknowledged that the forum state’s interest and plaintiff’s interest in proceeding in the present court are among the “variety of interests” at play in determining whether there is jurisdiction,⁸² it did not consult those interests after finding no relatedness in *Bristol-Myers Squibb*. I fear that a finding of no relatedness (like a finding of no contact) ends the inquiry; factors supporting reasonableness of jurisdiction are irrelevant.⁸³

Professor Steinman’s plea in the “safety net” scenario—that “denying personal jurisdiction would thwart access to justice due to the lack of viable alternatives”—sounds like “jurisdiction by necessity,” which the Court has mentioned from time to time but never adopted.⁸⁴ To me, *Bristol-Myers Squibb* signals that the Court wants to ensure that specific jurisdiction not be expanded unduly to fill the gap created by the curtailing of general jurisdiction.⁸⁵ Allowing reasonableness concerns to override the relatedness requirement seems unlikely.

CONCLUSION

I cheer Professor Steinman’s appeal to rationality as supporting the exercise of specific jurisdiction. But I believe the Court will see the factors he identifies as the fairness or reasonableness factors that have always been part of the *International Shoe* calculus. The Court has spent years relegating those factors—which once occupied a place of primacy—to distant importance. Plaintiffs may appeal to them only after scaling the wall imposed by the “contact” requirement. Those who do must scale the emerging wall imposed by the “relatedness” requirement. A Court that has built these barriers is unlikely to allow a plaintiff to avoid them, even with an appeal to rationality.

81. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017) (emphasis added).

82. *Id.* at 1780.

83. In one way the Court’s opinion in *Bristol-Myers Squibb* hints at a return to the *mélange*. It notes that jurisdiction depends on a “variety of interests,” of which “burden on the defendant” is the “primary concern.” *Id.* The Court quickly subjugated the notion, however. *Bristol-Myers Squibb* admitted that litigation in California did not present a substantial burden. Notwithstanding, the Court rejected jurisdiction because of the lack of relatedness. Apparently, then, fairness factors cannot make up for a lack of relatedness.

84. See *Helicopteros Nacionales de Colombia, S.A v. Hall*, 466 U.S. 408, 419 n.13 (1984) (“We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.”).

85. In dissent, Justice Sotomayor laments the constriction of general jurisdiction and laments what she sees as the “first step toward a similar contraction of specific jurisdiction.” *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).