

The Stealth Revolution in Personal Jurisdiction

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THE STEALTH REVOLUTION IN PERSONAL JURISDICTION

*Michael H. Hoffheimer**

Abstract

Since 2011 the Roberts Court has decided six personal jurisdiction cases that impose significant new constitutional restrictions on the power of courts and limit plaintiffs’ access to justice. But the Court’s opinions explaining those decisions have repeatedly denied that the Court is altering settled law.

This Article argues that the Court is engaged in a stealth revolution, a process of radically changing existing law while claiming to follow controlling precedent. By claiming to rely on precedent, the Court avoids the need to offer a clear rule of decision, fails to explain the policies that motivate its changing approach to personal jurisdiction, and fosters a narrative of lower court lawlessness that both devalues the work of the lower courts and erodes public confidence in the judiciary.

This Article urges the Court to acknowledge that it is reforming the law of personal jurisdiction, to provide reasons for its new restrictions on the power of courts that are grounded on constitutional principle and sound policy, and to construct a narrative that relates its programmatic reform of personal jurisdiction to the history and purpose of the Due Process Clause or to some other appropriate constitutional authority.

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Counsel, we're dealing with the jurisdictional rule, and when we do that, we want the rules to be as simple as possible.

Chief Justice John Roberts¹

This is not a rule the Constitution has required before.

Justice Sonia Sotomayor²

INTRODUCTION

In spring 2017, the Supreme Court of the United States decided two more personal jurisdiction cases, imposing new restrictions on where plaintiffs may force defendants to answer lawsuits.³ Following decades during which the Court decided no cases involving constitutional limits on personal jurisdiction,⁴ the Court has reviewed six lower court cases on the exercises of personal jurisdiction since 2011.⁵ Each time, the Court found that the lower court's exercise of personal jurisdiction violated the Constitution.⁶

Collectively, the Roberts Court's personal jurisdiction decisions are changing the shape of litigation. New restrictions on jurisdiction make it

1. Transcript of Oral Argument at 47, *Bristol-Myers Squibb Co. v. Superior Court* (*Bristol-Myers III*), 137 S. Ct. 1773 (2017) (No. 16-466).

2. *Bristol-Myers III*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

3. *See id.* at 1773 (majority opinion); *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017).

4. The Court's only personal jurisdiction case between 1987 and 2011 was *Burnham v. Superior Court*, 495 U.S. 604 (1990).

5. *See* *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011); *supra* note 3 and accompanying text. The decisions have attracted considerable scholarly attention. *See generally* Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101 (2015) (discussing general personal jurisdiction after Court's decision in *Daimler*); Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 KAN. L. REV. 549 (2012) (discussing general personal jurisdiction after Court's decision in *Goodyear*); Wendy Collins Perdue, *What's "Sovereignty" Got to Do With It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729 (2012) (discussing personal jurisdiction after *J. McIntyre* and *Goodyear*); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Mach., Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 497-98 (2012) (discussing the various opinions in *J. McIntyre*).

6. *See generally* *Bristol-Myers III*, 137 S. Ct. 1773 (holding California courts did not have personal jurisdiction over the defendant); *BNSF Ry.*, 137 S. Ct. 1549 (holding Montana courts did not have personal jurisdiction over the defendant); *Walden*, 134 S. Ct. 1115 (holding Nevada courts did not have personal jurisdiction over defendant); *Daimler*, 134 S. Ct. 746 (holding California courts did not have personal jurisdiction over defendant); *Goodyear*, 564 U.S. 915 (holding North Carolina courts did not have personal jurisdiction over defendants); *J. McIntyre*, 564 U.S. 873 (plurality opinion) (holding New Jersey courts did not have personal jurisdiction over defendant).

harder, and in some cases impossible, for plaintiffs to find available courts.⁷ Disputes where personal jurisdiction was once so well established that no defendant raised the issue would be barred today.⁸ Under the Court's new approach, historically significant cases could no longer be brought in any U.S. court.⁹ Some scholars have gone so far as

7. The actions commenced against the foreign corporations in *J. McIntyre, Daimler*, and *Goodyear* cannot be brought in any court in the U.S. See *infra* note 8 and accompanying text. Justice Sotomayor points out that actions against two corporations incorporated and headquartered in different states may now be impossible to bring in any single forum when the claims arise in different states. See *Bristol-Myers III*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

8. In *Goodyear*, Goodyear USA did not challenge general jurisdiction in North Carolina where it maintained major production facilities and was qualified to do business. 564 U.S. at 921. In *Phillips Petroleum Co. v. Shutts*, the defendant did not raise the issue of personal jurisdiction over itself; it was sued in Kansas where it was qualified to do business and operated numerous gas leases, and the class action sought recovery for identical wrongs committed in numerous states. 472 U.S. 797, 799 (1985). In *World-Wide Volkswagen Corp. v. Woodson*, where the regional East Coast retailer and distributor successfully challenged personal jurisdiction in Oklahoma, the German manufacturer and the nationwide importer did not challenge personal jurisdiction in Oklahoma where they engaged in substantial business. 444 U.S. 286, 298–99 (1980). General jurisdiction over the defendants in *Goodyear*, *Shutts*, and *World-Wide Volkswagen* would no longer be constitutionally permissible after *Daimler*, 134 S. Ct. 746, and *BNSF*, 137 S. Ct. 1549, and specific jurisdiction would not be available because the claims did not relate to forum conduct by the defendant.

In *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), no party and no member of the Court questioned personal jurisdiction over the corporate defendant, but jurisdiction would be doubtful today. See MICHAEL VITIELLO, ANIMATING CIVIL PROCEDURE 56–57 (2017) (explaining that forum would lack general jurisdiction after *Goodyear* and *Daimler* forum was not where corporation was “at home”).

In *Asahi Metal Industry Co. v. Superior Court*, a majority of Justices concluded that personal jurisdiction would be proper for claims by a California resident injured in California by a defective tire valve manufactured overseas that was present in California as the result of a chain of ordinary commercial transactions, and where it injured the plaintiff in the state. 480 U.S. 102, 117, 121 (1987) (Brennan, J., concurring in part and concurring in the judgment); *id.* at 122 (Stevens, J., concurring in part and concurring in the judgment). However, the Court held that specific personal jurisdiction was unconstitutional because it was unreasonable after the plaintiff's claims were dismissed, and the remaining claims were between the foreign national manufacturer and the foreign national component-manufacturer. *Id.* at 116 (majority opinion). Stream of commerce jurisdiction is in doubt after *J. McIntyre*, in which a plurality would no longer permit specific jurisdiction over the foreign manufacturers without additional evidence that the manufacturer targeted the forum state, and where concurring Justices found limited sales were insufficient. 564 U.S. at 887 (plurality opinion); *id.* at 888 (Breyer J., concurring).

9. For example, in *Holzer v. Deutsche Reichsbahn-Gesellschaft*, the New York courts obtained quasi-in-rem jurisdiction over the German national railroad in a lawsuit challenging the railroad's implementation of Nazi-era laws. 159 N.Y.S. 181, 183–84 (N.Y. Spec. Term 1936). Because the claims did not arise from or relate to the defendant's forum conduct, it would not be subject to personal jurisdiction; and, despite the volume of the corporation's business in New York, it would not be subject to general jurisdiction after *BNSF*, because the corporation was not incorporated or headquartered in New York. 137 S. Ct. at 1560.

to read the opinions as evidence of the Court's willingness to invalidate the most familiar and traditional forms of personal jurisdiction.¹⁰

The recent restrictions of personal jurisdiction have been celebrated and criticized.¹¹ Commentators, including the defense bar, have not been reluctant to recognize the holdings collectively as marking a radical break with the Court's prior decision.¹² Just as courts and scholars once described changes introduced by *International Shoe Co. v. Washington*¹³ as a "revolution,"¹⁴ commentators have labeled the Court's legal turn

10. See, e.g., Donald L. Doernberg, *Resolving International Shoe*, 2 TEX. A&M L. REV. 247, 298 (2014) ("If the constitutional test for general jurisdiction is 'essentially at home,' transient jurisdiction cannot stand."); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1413–14 (2015) (questioning continuing validity of jurisdiction based on service on registered agent).

11. See generally *Businesses Come Out on Top in Current Supreme Court Term*, INS. J. (June 21, 2017), <https://www.insurancejournal.com/news/national/2017/06/21/455250.htm> (describing pro-business outcome of cases); Edwin Chemerinsky, *Two End-of-Term Decisions Close the Courthouse Doors to Those Who Have Been Injured*, A.B.A. J. (July 6, 2017), www.abajournal.com/news/article/chemerinsky_again_closing_the_courthouse_doors ("The court has again effectively closed the courthouse door to those who have been injured.").

12. See, e.g., Brief of Amicus Curiae National Association of Manufacturers in Support of Petitioner at 7, *BNSF*, 137 S. Ct. 1549 (No. 16-405) ("In the past few years, the Court set forth the 'at home' standard for general jurisdiction This standard provides a clear and demanding test This high bar is needed"); M. Derek Harris, *U.S. Supreme Court Shifts Basic Personal Jurisdiction Rules*, A.B.A. LITIG. NEWS (Aug. 22, 2011), https://apps.americanbar.org/litigation/litigationnews/top_stories/082211-supreme-court-personal-jurisdiction.html ("In [2011], the Court rejected a quarter century old notion that placement of products in the 'stream of commerce' can subject foreign manufacturers to personal jurisdiction").

A client newsletter by a large defense-oriented firm characterizes even the unanimous decision in *Walden v. Fiore* as marking a "curtail[ment] of plaintiffs' freedom to select the forum of litigation." STEPHEN A. KINAIRD ET AL., "*Minimum Contacts*" Inquiry Cannot Be Minimal: The Supreme Court Rejects Broad Reading of the Effects Test for Personal Jurisdiction, STAY CURRENT: CLIENT ALERT FROM PAUL HASTINGS at 1 (2014), <https://www.paulhastings.com/docs/default-source/PDFs/stay-current--minimum-contacts-inquiry-cannot-be-minimal-u-s-supreme-court-rejects-broad-reading-of-the-effects-test-for-personal-jurisdiction.pdf>.

13. 326 U.S. 310 (1945).

14. Fifteen cases and over one hundred articles describe changes to personal jurisdiction after 1945 as a "revolution" or "revolutionary." (Westlaw search "revolution! /10 'international shoe' or 'personal jurisdiction'"); e.g., *Crosson v. Conlee*, 745 F.2d 896, 900 (4th Cir. 1984) (referring to "the revolution in personal jurisdiction wrought by the Supreme Court's enunciation of the 'minimum contacts' [standard]"); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 372 (D. Md. 1975) ("[*International Shoe*] worked its revolution on the due process requirements for asserting personal jurisdiction."); *McCrorry Corp. v. Girard Rubber Corp.*, 56 Erie C.L.J. 1, 3 (C.P. Pa. 1973) ("*International Shoe* . . . revolutionized the 'doing business' concept"); James S. Cochran, Note, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 TEX. L. REV. 1463, 1463 (1986) (footnote omitted) ("The theory of personal jurisdiction has undergone revolutionary change over the last four decades."). The trope first appeared in 1969. See *Fralely v. Chesapeake & Ohio Ry.*, 294 F. Supp. 1193, 1197 (W.D. Pa. 1969) (referring to Judge Hand attributing "revolutionary scope to the *International Shoe* case"); Note, *Jurisdiction in New York:*

since 2011 a “revolution” in personal jurisdiction.¹⁵

This Article explores one striking paradox of the Roberts Court’s personal jurisdiction jurisprudence: In explaining decisions that alter the fundamental power of courts, members of the Court repeatedly deny that they are altering existing law. On the contrary, they insist that the Court’s holdings are controlled by long-settled legal principles.¹⁶ Focusing on the most recent decision, *Bristol-Myers Squibb Co. v. Superior Court (BMS)*,¹⁷ this Article critically examines the Court’s practice of explaining its holdings as narrowly dictated by controlling precedent.¹⁸ Part II describes the case history and discusses the problem facing the lower courts and the reasons offered by the lower courts in finding personal jurisdiction. It then turns to the Supreme Court’s decision, considering the explanation offered by Supreme Court Justice Samuel Alito in his opinion for the Court and the concerns raised by Justice Sotomayor in her dissenting opinion. Finally, this Part contemplates a series of mysteries—elements of the decision that remain unexplained by the reasoning offered by the majority opinion. The Conclusion treats the opinion in *BMS* in the context of the Court’s pattern of denying that it is making significant changes to the law of personal jurisdiction. It argues that the Court’s claims that the outcome of its decision is determined by

A Proposed Reform, 69 COLUM. L. REV. 1412, 1417 (1969) (referring to “revolution wrought by *International Shoe*”). Earlier descriptions were more restrained. *E.g.*, Note, *Extending In Personam Jurisdiction by Enforcing State “Blue Sky” Laws Against Nonresidents*, 59 YALE L.J. 360, 366 (1950) (“Actually, the holding in *International Shoe* was not a radical departure from prior cases—it merely discarded the fictions of corporate ‘presence’ . . .”). The title of the present Article pays homage to Michael E. Solimine’s *Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1 (1998).

15. The Roberts Court’s transformation of personal jurisdiction law has been referred to as a revolution even by defenders of the new doctrines. *See, e.g.*, William Grayson Lambert, *The Necessary Narrowing of Personal Jurisdiction*, 100 MARQ. L. REV. 375, 427 (2016) (referring to *Goodyear* as inaugurating “a revolution of personal jurisdiction”). Perhaps the more appropriate trope is counterrevolution, to the extent that it cuts back on jurisdiction that was facilitated by earlier changes and is part of a broader procedural movement to alter the law. *See* VITIELLO, *supra* note 8, at 57 (describing approach of Court as “dramatic departure from a significant body of case law”).

16. On the Court, only Justice Sotomayor has called attention to the Court’s radical transformation of the law of personal jurisdiction. *See Bristol-Myers III*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting); *BNSF*, 137 S. Ct. at 1560 (Sotomayor, J., dissenting); *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (Sotomayor, J., concurring). In a fourth case, restricting stream-of-commerce jurisdiction, three Justices dissented. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 893, 909 (2011) (Ginsburg, J., dissenting, joined by Kagan & Sotomayor, J.J.) (providing appendix documenting widespread judicial acceptance of view rejected by Court).

17. 137 S. Ct. 1773 (2017).

18. In *Bristol-Myers III*, Justice Alito also (twice) referred to the decision as narrowly governed by “settled principles.” *Id.* at 1781, 1783; *see also infra* notes 113, 126 and accompanying text (quoting and discussing language of opinion).

precedent obscures the state of legal uncertainty for which the Court itself is largely responsible. Additionally, it argues that the Court's explanation fosters a narrative of lower court intransigence that devalues the contributions of lower court judges and erodes confidence in the courts. It ends by identifying practical and theoretical costs to law reform by stealth.

This Article argues that by means of the stealth revolution, the Court is implementing radical law reform without the hard work of constructing persuasive explanations that ground a new vision of personal jurisdiction in firm constitutional principle and appropriate social policy analysis. This Article contends that there are better ways to effect constitutional change.¹⁹ The Court should openly acknowledge that it is altering the law of personal jurisdiction, explain why new constitutional restrictions on the power of courts serve current social needs,²⁰ and relate its new approach to the history and purpose of the Due Process Clause, or perhaps find other suitable authority. Alternatively, the Court should slow the revolution, conform its personal jurisdiction decisions more closely to prior decisions under *International Shoe*, and leave future generations to ponder the motivations behind the Court's recent restrictions on personal jurisdiction.²¹

I. POLICING SPECIFIC PERSONAL JURISDICTION: *BRISTOL-MYERS SQUIBB CO. V. SUPERIOR COURT*

A. Background

Bristol-Myers Squibb Co. (BMS) is a pharmaceutical company, incorporated in Delaware, with its headquarters in New York and

19. Justice Kennedy's plurality opinion in *J. McIntyre*, see *infra* Section II.A, and Justice Werdegar's dissenting opinion below in *Bristol-Myers II*, see *infra* Subsection I.B.2.b, provide models of alternative explanations for reforming the law of personal jurisdiction that do not rely solely on tendentious use of precedent.

20. Over the years, judges and scholars alike have questioned whether the Due Process Clause provides appropriate constitutional authority for limits on personal jurisdiction. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324–25 (1945) (Black, J., separate opinion) (“I believe the Federal Constitution leaves to each State . . . a power . . . to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. . . . [I]t [is] a judicial deprivation to condition [the] exercise [of the state's power] upon this Court's notion of ‘fair play’ . . . [or convenience].”); Brief of Amicus Curiae Alan B. Morrison in Support of Respondents at 4, *Bristol-Myers III*, 137 S. Ct. 1773 (“The Court should no longer use the Due Process Clause to determine the constitutionality of . . . assertions of personal jurisdiction.”); Brief of Amicus Curiae Alan B. Morrison in Support of Respondents, *supra*, at 4, 6 (urging Court instead to impose limits under the dormant Commerce Clause).

21. Justice Sotomayor's separate opinions advocate this approach. See, e.g., *Bristol-Myers III*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting). Additionally, the author of this Article has written in support of it. See Cornett & Hoffheimer, *supra* note 5, at 167.

“substantial operations” in New York and New Jersey.²² BMS engages in commercial activities around the country, including in California where it operates five research and laboratory facilities that employ 160 people.²³ It employs another 250 sales representatives in California and maintains a political advocacy office in the state capital.²⁴

By the early 2000s, Plavix (a brand name for clopidogrel) was BMS’s bestselling product, and before the expiration of its patent, the second bestselling drug in the world with revenue on U.S. sales exceeding \$9 billion in 2009.²⁵ BMS actively sold the product in California.²⁶ “Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than \$900 million from those sales.”²⁷ Sales of the product in California constituted over one percent of BMS’s total sales.²⁸ Moreover, McKesson Corporation, headquartered in California, served as a major nationwide distributor of Plavix.²⁹

22. *Bristol-Myers III*, 137 S. Ct. at 1777–78. The opinion identified the state of incorporation, the state where it maintained headquarters, and the two states where it conducted “substantial operations.” This allowed the Court to avoid specifying which specific state was its principal place of business for purposes of determining where the corporation is “at home” for purposes of general jurisdiction. The appropriate test is uncertain. See Hoffheimer, *supra* note 5, at 596–99. The opinion of the Supreme Court of California explained that BMS employed “approximately 6,475 employees in the New York and New Jersey area, comprising 51 percent of its United States workforce.” *Bristol-Myers Squibb Co. v. Superior Court (Bristol-Myers II)*, 377 P.3d 874, 879 (Cal. 2016), *rev’d*, 137 S. Ct. 1773 (2017).

23. *Bristol-Myers III*, 137 S. Ct. at 1778.

24. *Id.*

25. E.J. Topol & N.J. Schork, *Catapulting Clopidogrel Pharmacogenomics Forward*, 17 NATURE MED. 40, 40 (2011).

26. *Bristol-Myers III*, 137 S. Ct. at 1778 (citing *Bristol-Myers II*, 377 P.3d at 879).

27. *Id.*

28. *Id.* (citing *Bristol-Myers II*, 377 P.3d at 879). Plaintiff’s counsel argued that this number underestimated the sales. Transcript of Oral Argument, *supra* note 1, at 32–33.

29. The lawsuits also named as defendant McKesson Corporation. McKesson is headquartered in San Francisco and had an ongoing commercial relationship with BMS involving distribution of BMS products around the country. *Bristol-Myers II*, 377 P.3d at 900. The Court of Appeals opinion identifies Delaware as McKesson’s place of incorporation. *Bristol-Myers Squibb Co. v. Superior Court (Bristol-Myers I)*, 175 Cal. Rptr. 3d 412, 416 (Cal. Ct. App. 2014) (opinion by Brick, J., for unanimous court), *aff’d*, 377 P.3d 879 (2016), *rev’d*, 137 S. Ct. 1773 (2017). But the plaintiffs did not allege and could not prove that McKesson distributed the Plavix that caused the nonresidents injuries outside California, nor provide evidence that McKesson distributed Plavix, and plaintiffs’ counsel conceded during oral argument before the state court that “he had no evidence tying McKesson to the Plavix that allegedly injured real parties outside [California].” *Bristol-Myers II*, 377 P.3d at 895, 900 (Werdegar, J., dissenting). The opinions did not describe the volume of products distributed nationally by McKesson, but plaintiffs’ counsel claimed McKesson distributed 700,000 Plavix pills per week outside California. Transcript of Oral Argument, *supra* note 1, at 32–33 (statement of plaintiffs’ counsel, Goldstein).

In 2005, an article raised concerns about the drug's safety.³⁰ In eight separate complaints filed in California state courts, a total of 678 plaintiffs asserted claims in California state courts against BMS and McKesson.³¹ The plaintiffs resided all over the country with the largest groups in Texas (92), California (86), and Ohio (71).³² Most of the plaintiffs (592) were neither residents of California, nor alleged that their claims arose directly from acts performed in California.³³ The claims all raised the same thirteen causes of action under California state law³⁴ and were consolidated.³⁵

30. *Bristol-Myers III*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) (referring to 2005 publication of article in *New England Journal of Medicine*). See generally F.K. Chan et al., *Clopidogrel Versus Aspirin and Esomeprazole to Prevent Recurrent Ulcer Bleeding*, 352 *NEW ENG. J. MED.* 238 (2005) (raising concerns about the safety of the drug) (not cited by any opinion or brief).

31. The plaintiffs may have joined McKesson for the purpose of preventing removal. *Bristol-Myers II*, 377 P.3d at 900 (Werdegar, J., dissenting) (noting BMS suggestion of possible motive for joining co-defendant). BMS removed some of the claims to federal court but they were remanded. See *Bristol-Myers I*, 175 Cal. Rptr. 3d at 416.

32. *Bristol-Myers II*, 377 P.3d at 878. This Article follows the practice of the opinions in referring to plaintiffs alleging injuries in California as California residents and to plaintiffs alleging injuries elsewhere as nonresidents. As Justice Sotomayor noted, this was a convenient shorthand (which she followed) and that “[f]or jurisdictional purposes, the important question is generally (as it is here) where a plaintiff was injured, not where he or she resides.” *Bristol-Myers III*, 137 S. Ct. at 1785 n.1 (Sotomayor, J., dissenting).

33. *Bristol-Myers II*, 377 P.3d at 878.

34. *Id.* at 878 (listing theories of strict products liability based on defective design and manufacturing, negligence, breach of express and implied warranties, deceit by concealment, negligent misrepresentation, fraud by concealment, unfair competition, false advertising, and loss of consortium). Remedies sought included injunctive relief (for false advertising) and damages for a variety of injuries (internal bleeding, heart attack, stroke, and death). *Id.* Eighteen of the claims alleged Plavix caused death. *Id.*

The majority opinion emphasizes that “[a]ll the complaints asserted 13 claims under California law.” *Bristol-Myers III*, 137 S. Ct. at 1778 (citing *Bristol-Myers II*, 377 P.3d at 878). According to plaintiffs’ counsel, most of the plaintiffs’ claims were not California statutory causes of action, and where they were, they were similar to common law claims. Brief of Respondents at 6–7 n.3, *Bristol-Myers III*, 137 S. Ct. 1773 (No. 16-466).

The case did not address what law would govern the claims, but there is no reason to suspect that California courts would have applied California law to the nonresidents’ claims. See generally Michael H. Hoffheimer, *California’s Territorial Turn in Choice of Law*, 67 *RUTGERS U. L. REV.* 167 (2015) (discussing strong trend in California decisions to apply law of state where injury was sustained).

35. *Bristol-Myers II*, 377 P.3d at 878 (observing that separate actions were assigned to single judge as coordinated matter).

B. State Court Proceedings

The California trial court refused to quash service of process.³⁶ The California Court of Appeal affirmed.³⁷ While the appellate court concluded that California did not have general jurisdiction under the facts,³⁸ it found that the trial court could exercise specific personal jurisdiction over all claims.³⁹ The California Supreme Court

36. California statutes authorize personal jurisdiction “on any basis not inconsistent with the Constitution of this state or of the United States.” CAL. CIV. PROC. § 410.10 (2017), *quoted in Bristol-Myers II*, 377 P.3d at 879. The trial court concluded from principles that were well established prior to *Daimler* that sales, a permanent business presence, and related activities were sufficient to support general jurisdiction. *Bristol-Myers II*, 377 P.3d at 878. BMS also maintained a registered agent in California. Brief of Respondents, *supra* note 34, at 5. But this fact was evidently not relied on by the California courts.

37. *Bristol-Myers I*, 175 Cal. Rptr. 3d 412, 415 (Cal. Ct. App. 2014) (opinion by Brick, J., for unanimous court), *aff’d*, 377 P.3d 879 (2016), *rev’d*, 137 S. Ct. 1773 (2017).

38. *Id.* at 424. The Court of Appeal had earlier denied the writ of mandate on the same day the Supreme Court announced *Daimler AG v. Bauman*. *Id.* at 415. The state high court directed it to reconsider in light of *Daimler*, and the Court of Appeal subsequently found no general jurisdiction. *Id.* at 418–24; *see also Bristol-Myers II*, 377 P.3d at 879 (stating that the Court of Appeal held that BMS’s activities in California were insufficient to subject it to general jurisdiction in the state). The Court of Appeal observed how *Daimler* significantly clarified the scope of the “at home” requirement announced in *Goodyear*. *Bristol-Myers I*, 175 Cal. Rptr. 3d at 422 (citation omitted) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923, 929 (2011) (“[A] further contouring of the law of general jurisdiction was by no means obvious from the *Goodyear* decision. This was especially true in light of the *Goodyear* court’s observation that ‘[t]he canonical opinion in this area remains’ *International Shoe* . . . and [*Goodyear*’s] own quoting of the traditional [continuous and systematic general business contacts] standard for general jurisdiction . . .”).

39. Judge Brick noted that nothing in *Daimler* suggested a restriction of specific personal jurisdiction, and he observed that finding specific personal jurisdiction required an analysis of (1) whether the defendant purposefully directed activities at the forum state; (2) whether plaintiff’s claims arise out of or are related to the activities; and (3) whether jurisdiction is reasonable. *Bristol-Myers I*, 175 Cal. Rptr. 3d at 425. Judge Brick relied on California authority that a “substantial nexus or connection” between the claims and defendant’s forum conduct is required for specific personal jurisdiction. *Id.* at 430 (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1099 (Cal. 1996)). He found that the volume and character of BMS’s sales and other activity established more than minimum contacts and that the nonresident plaintiffs’ injuries resulted from a common interstate marketing effort that established a substantial connection between BMS’s contacts in California and the nonresidents’ claims. *Id.* at 433–34. Judge Brick also proceeded to consider the issue of reasonableness and found that the exercise of personal jurisdiction over BMS was reasonable. *Id.* at 436–39.

Finally, Judge Brick separately considered the theory of pendent personal jurisdiction. He concluded that the doctrine, deriving from federal practice, did not apply because the claims were asserted by different plaintiffs; he nevertheless found that the policy behind the doctrine supported jurisdiction. *Id.* at 439 (“While pendent personal jurisdiction has no application to the issues before us, the policy behind it of encouraging judicial economy, avoiding piecemeal litigation, and encouraging convenience of the parties applies here with equal force.”); *see also Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1176 (9th Cir. 2004) (permitting

acknowledged the divergent criteria for general and specific personal jurisdiction.⁴⁰ California Supreme Court Chief Justice Tani Cantil-Sakauye's opinion for the majority found for general personal jurisdiction, and that specific personal jurisdiction was proper over the nonresidents' claims.⁴¹ Three members of the court dissented, concluding that neither general nor specific personal jurisdiction was proper over the nonresidents' claims.⁴²

1. General Jurisdiction

Chief Justice Cantil-Sakauye discussed the Supreme Court's decisions on general jurisdiction⁴³ and acknowledged that the Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*⁴⁴ and *Daimler AG v. Bauman*⁴⁵ "significantly elaborated upon its analysis of general jurisdiction, clarifying that in order to support the exercise of general jurisdiction over a corporation its contacts with the forum state must be so extensive as to render the company essentially 'at home' in the state."⁴⁶

The Chief Justice then reviewed the facts in *Goodyear* and *Daimler*,⁴⁷ noted *Daimler*'s comparison of in-state and out-of-state contacts,⁴⁸ and reasoned that general jurisdiction was not available outside of the places of incorporation and principal place of business except under "truly 'exceptional facts.'"⁴⁹ Applying the at-home standard, she concluded that general jurisdiction was not available over BMS.⁵⁰ The Chief Justice also

personal jurisdiction over defendant for state-law claims over which federal court has supplemental subject matter jurisdiction).

40. *Bristol-Myers II*, 377 P.3d at 880–81, 885.

41. *Id.* at 889.

42. *Id.* at 894, 909 (Werdegar, J., dissenting).

43. *Id.* at 880–84 (majority opinion) (discussing *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear*, 564 U.S. 915; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).

44. 564 U.S. 915.

45. 134 S. Ct. 746.

46. *Bristol-Myers II*, 377 P.3d at 881 (quoting *Daimler*, 134 S. Ct. at 751, and *Goodyear*, 564 U.S. at 919–20).

47. *Id.* at 883.

48. *Id.*

49. *Id.* at 883–84 (quoting *Daimler*, 134 S. Ct. at 761 n.19) ("BMS is not subject to the general jurisdiction of the California courts.").

50. Chief Justice Cantil-Sakauye concluded:

The United States Supreme Court's at home rule for general jurisdiction over a corporation . . . defeats the nonresident plaintiffs' claim that California may assert general jurisdiction over BMS. BMS may be regarded as being at home in Delaware, where it is incorporated, or perhaps in New York and New Jersey, where it maintains its principal business centers. Although the company's

considered and rejected the argument that the service on the corporation's registered agent in California established a basis for general jurisdiction.⁵¹

2. Specific Personal Jurisdiction

a. Majority

In contrast to general jurisdiction, Chief Justice Cantil-Sakauye noted that the determining specific jurisdiction inquiry requires an analysis of “the relationship among the defendant, the forum, and the litigation.”⁵² For this, she applied a three-part test that required consideration of (1) “whether the defendant has ‘purposefully directed’ its activities at the forum state;”⁵³ (2) “whether the plaintiff’s claims arise out of or are related to these forum-directed activities;”⁵⁴ and (3) “whether the exercise is reasonable and does not offend ‘traditional notions of fair play and substantial justice.’”⁵⁵

First, the Chief Justice found that the defendant purposely directed activities at California.⁵⁶ She explained that the liberty interest protected by the Due Process Clause requires some relationship between the defendant and the forum state so that the defendant has notice that it may be subject to the forum court’s jurisdiction.⁵⁷ Such activities “cannot be the result of the unilateral actions of another party or a third person.”⁵⁸ She illustrated this requirement with the example of a case in which a Nevada hotel was found to have directed acts at California when it had advertised heavily in California and targeted California customers.⁵⁹

ongoing activities in California are substantial, they fall far short of establishing that is it [sic] at home in this state for purposes of general jurisdiction.

Id. at 883.

51. *Id.* at 884 (“[A] corporation’s appointment of an agent for service of process, when required by state law, cannot compel its surrender to general jurisdiction for disputes unrelated to its California transactions.”); *see also id.* (quoting *Thomson v. Anderson*, 113 Cal. Rptr. 3d 262, 268 (Cal. Ct. App. 2003)) (“[D]esignation of an agent for service of process and qualification to do business in California alone are insufficient to permit general jurisdiction.”).

52. *Id.* at 885 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

53. *Id.* (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

54. *Id.* (citing *Helicopteros*, 466 U.S. at 414).

55. *Id.* at 885 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987)).

56. *Id.* at 886.

57. *Id.* at 885–86 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985)).

58. *Id.* at 886 (citing *Burger King*, 471 U.S. at 475).

59. *Id.* (“In doing so, [the hotel] necessarily availed [itself] of the benefits of doing business in California and could reasonably expect to be subject to the jurisdiction of courts in California.” (quoting *Snowney v. Harrah’s Entm’t, Inc.*, 112 P.3d 28, 31 (Cal. 2005)).

Given BMS's marketing activity, sales, and operations in California, she found that the corporation purposely directed acts at the forum state.⁶⁰

Second, Chief Justice Cantil-Sakauye concluded that the litigation arose out of or was related to BMS's contacts in California.⁶¹ Although the nonresident claims did not arise out of BMS's marketing or other acts directed at California, she explained, "A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of specific jurisdiction. Rather, as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of specific jurisdiction is appropriate."⁶² In determining whether the contacts established "a substantial connection," California courts had applied a sliding scale approach: "[T]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."⁶³ Applying this standard to BMS, she concluded that the nonresident claims against BMS were sufficiently related to BMS's activity directed to California to support specific personal jurisdiction over those claims:

Both the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state. Thus, the nonresident plaintiffs' claims bear a substantial connection to BMS's contacts in California. BMS's nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the company's contacts in California concerning Plavix.⁶⁴

As she summed up, the "nonresident plaintiffs' claims in this action . . . arise from the same course of conduct that gave rise to California Plaintiffs' claims."⁶⁵ The Chief Justice also noted that BMS's operation of research and laboratory facilities in California were related

60. *Id.* ("[T]here is no question that BMS has purposely availed itself of the privilege of conducting activities in California, invoking benefits and protection of its laws, and BMS does not contend otherwise.")

61. *Id.* at 888 ("The California plaintiffs' claims . . . certainly arise from BMS's purposeful contacts with this state, and BMS does not deny that it can be sued for such claims in California.")

62. *Id.* at 887 (quoting *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1096 (Cal. 1996)).

63. *Id.* at 889 (quoting *Vons*, 926 P.2d at 1098).

64. *Id.* at 888.

65. *Id.* at 894.

to the claims of negligent development of the drug, though the negligent development did not occur in California.⁶⁶

Third, she found that the exercise of personal jurisdiction was reasonable.⁶⁷ She considered the reasonableness factors that the Supreme Court had elaborated: the burden on the defendant, the interests of the forum state, the plaintiff's interest in relief, the interstate judicial system's interest in the most efficient resolution of controversies, and the shared interest of the states.⁶⁸ Based on these factors, she made the following findings: litigation in California was not unduly burdensome to the defendant;⁶⁹ although California did not have a clearly identified interest in providing a forum for the nonresidents' claims considered in isolation,⁷⁰ personal jurisdiction would be reasonable if it served plaintiffs' interest in a convenient and effective forum by filing the claims jointly in California;⁷¹ and shared interstate interests in efficiency and

66. *Id.* at 888 (“[T]he fact that the company engages in research and product development in these California facilities is related to plaintiffs’ claims that BMS engaged in a course of conduct of negligent research and design that led to their injuries, even if those claims do not arise out of BMS’s research conduct in this state. Accordingly, BMS’s research and development activity in California provides an additional connection between the nonresident plaintiffs’ claims and the company’s activities in California.”).

Anticipating the dissent’s objection that the nonresidents’ claims were not related to BMS’s conduct in California but merely constituted similar conduct, the Chief Justice wrote, the claims of residents and nonresidents alike were based on “a single, coordinated, nationwide course of conduct directed out of BMS’s New York headquarters and New Jersey operations center and implemented by distributors and salespersons across the country.” *Id.*

67. BMS did not contest the reasonableness of specific jurisdiction, and reasonableness would have been presumed after a finding that the defendant had directed acts at California and that the claims were sufficiently closely related to those acts. *See id.* at 885, 891 (discussing burdens under California law). Rather BMS argued that specific jurisdiction was improper due to the lack of a sufficient relationship between the claims and its activity in California. *See id.* at 891.

Chief Justice Cantil-Sakauye discussed BMS’s argument that the claims neither arose from the defendants’ contacts in California nor were related to the defendant’s contacts in California in the context of her discussion of reasonableness. *Id.* (“[T]hese arguments are more pertinent to consideration of whether the exercise of specific jurisdiction is reasonable, not whether the contested claims arise from or relate to the company’s forum activities.”).

68. *Id.* (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

69. *Id.* at 892. While conceding that there was some burden in defending against the nonresident claims, she noted that the burden was less than the burden of defending claims in as many as thirty-four different state courts. *Id.* at 891. Discovery was available to obtain information from nonresident plaintiffs, and there was no evidence that the costs of litigating in California were higher than elsewhere. *Id.* at 892.

70. *See id.* (“BMS . . . claims that California has no legitimate interest in adjudicating the claims of nonresidents because they have no connection to the state. Admittedly, the fact that the nonresident plaintiffs greatly outnumber the California plaintiffs does give us some pause.”).

71. *Id.* at 892–93.

finality supported litigation of the claims in a single forum.⁷²

To be sure, a single court hearing the claims of hundreds of plaintiffs is a significant burden on that court. But the overall savings of time and effort to the judicial system, both in California and interstate, far outweigh the burdens placed on the individual forum court. The alternative that BMS proposes would result in the duplication of suits in numerous state or federal jurisdictions at substantial costs to both the judicial system and to the parties, who would have to deal with disparate rulings on otherwise similar procedural and substantive issues.⁷³

The Chief Justice identified two substantive legal advantages that would be achieved by permitting litigation to proceed in a single forum: consolidating claims would prevent plaintiffs who recover the first judgment from bankrupting the defendant and preventing other equally situated defendants from recovering;⁷⁴ and coordinating litigation in a single forum could avoid inconsistent judgments and the “possible unfairness of punishing a defendant over and over again for the same tortious conduct.”⁷⁵

Chief Justice Cantil-Sakauye acknowledged that other states have sovereign interests in applying their laws to the disputes, but she noted that the preliminary decision as to personal jurisdiction did not prevent California courts from ultimately applying the substantive law of sister states.⁷⁶

b. Dissent

In her dissenting opinion, California Supreme Court Justice Kathryn Werdegar concluded that specific jurisdiction was constitutionally prohibited due to the lack of “*any* substantial nexus, causal or otherwise, between [the nonresidents’] claims and BMS’s activities in California.”⁷⁷ First, she contended that the majority decision was not supported by case

72. *Id.* at 893.

73. *Id.*

74. *Id.* (quoting *In re Exxon Valdez*, 229 P.3d 790, 795–96 (9th Cir. 2000)).

75. *Id.* (quoting *In re Exxon Valdez*, 229 P.3d at 796).

76. *Id.* at 894. The Chief Justice concluded that the choice of law analysis should not affect the jurisdictional inquiry. *Id.* The fact that “choice-of-law concerns might very well make a mass tort action unmanageable” should not be “determinative at this stage of the proceedings.” *Id.* See also *supra* note 34 and accompanying text (observing that California courts probably would not apply California law to all claims).

77. *Id.* at 895 (Werdegar, J., dissenting).

law.⁷⁸ Second, she argued that the majority approach eroded the substantial connection requirement and “impairs important functions of reciprocity, predictability, and limited state sovereignty served by the relatedness requirement.”⁷⁹ Third, she found that the erosion of the relatedness requirement has adverse consequences, making it impossible for nonresident companies to predict in advance whether they will be subject to jurisdiction in California,⁸⁰ and “extending jurisdiction over claims of liability well beyond [California’s] legitimate regulatory interest.”⁸¹ Fourth, she asserted that eroding the relatedness requirement “undermines an essential distinction between specific and general jurisdiction,” frustrating the shift that the U.S. Supreme Court inaugurated in *Daimler* to a “much tighter ‘at home’ limit.”⁸²

Because California has a strong interest in providing an accessible forum for California residents, Justice Werdegar recognized that considerations of efficiency might establish a valid California state interest in promoting joinder in cases where joining nonresident claims provided efficiencies that facilitated resolution of resident claims.⁸³ But she was skeptical about the benefits that the majority attributed to joinder in *BMS* where the large number of resident claims already provided an opportunity to join smaller cases that might not have been litigated efficiently by themselves.⁸⁴ Moreover, she noted that consolidation in

78. *Id.* at 896 (“The majority’s decision is not supported by specific jurisdiction decisions from the United States Supreme Court, this court, or the lower federal and state courts.”); *see also id.* at 897–98 (“Of the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation.”); *id.* at 898 (“Notwithstanding our relatively broad substantial connection standard, mere similarity of claims is an insufficient basis for specific jurisdiction.”); *id.* at 900–01 (“Neither [plaintiffs] nor the majority cites any decision, state or federal, finding specific jurisdiction on facts similar to those here. In fact, courts in both systems have *rejected* jurisdiction over drug defect claims made by plaintiffs who neither reside in nor were injured by conduct in the forum state.”).

79. *Id.* at 896.

80. *Id.*

81. *Id.* Justice Werdegar noted the forum state’s interest where a defendant’s forum activities are “legally relevant” to establish the plaintiffs’ claims. *Id.* at 899. In such a case the state arguably has an interest in regulating conduct in its territory. *Id.* Likewise a state has an interest in providing a forum for its residents. *Id.* In contrast, “California has no discernable sovereign interest in providing an Ohio or South Carolina resident a forum in which to seek redress for injuries in those states caused by conduct occurring outside California.” *Id.*

82. *Id.* at 896.

83. *Id.* at 904 (“On the facts of this case, there is no analogous state interest of similar force that would justify California courts adjudicating the nonresident plaintiffs’ claims. This is not a case in which the individual California plaintiffs would be stymied by procedural obstacles or restrictive damages rules were the nonresidents excluded from the action.”).

84. *Id.* at 904 (“Even if some of the California plaintiffs might have individual claims too small to justify suit, the consolidation of scores of such claims from within California would

BMS could not achieve maximum efficiency so as to protect the defendant from multiple inconsistent judgments because many claims were not before the California courts.⁸⁵

She questioned the majority's reliance on the in-state activity of the co-defendant distributor when that co-defendant's in-state activity was unrelated to the nonresidents' claims and did nothing to establish a relationship between *BMS* and the nonresident plaintiffs.⁸⁶ And she questioned the relevance of *BMS*'s own in-state activity—such as its research operations—when that activity, too, was not related to the claims in litigation.⁸⁷

Finally, Justice Werdegar offered a cogent affirmative argument in support of a rigorous enforcement of the substantial connection requirement. She proposed that the requirement served important functions. By ensuring a meaningful relationship between the defendant's activity and the claims, the requirement grounds personal jurisdiction in the reciprocal relationship of the defendant and the regulating state.⁸⁸ The requirement limits the potential litigation burdens faced by defendants that engage in limited in-state activity,⁸⁹ and reciprocity-based limits prevent states “from straying beyond their legitimate regulatory spheres”⁹⁰ and allow nonresident corporations to predict in advance whether they will be subject to jurisdiction in forum state courts.⁹¹

If *BMS* must answer in a California court for *Plavix* claims arising across the country simply because some Californians

remedy that insufficiency without the addition of hundreds of nonresidents' claims. California can thus provide an effective forum for its residents to seek redress without joining those claims to similar claims by nonresidents.”)

85. *Id.* at 905 (stating “these plaintiffs do not constitute the entire universe of those claiming injury from *Plavix*—far from it” and noting that pending litigation of *Plavix* claims included multidistrict litigation in federal court in New Jersey and individual, mass, and representative action in a number of states); *see id.* at 905 n.3 (identifying pending cases).

86. *Id.* at 900 (characterizing majority's reliance on state interest in regulating co-defendant *McKessen* as “ruddiest” of majority's “red herrings”).

87. *Id.* at 907 (“[T]he majority notes that *BMS* maintains some research facilities in California [with no relationship to *Plavix*] This second ground of relatedness is both illogical and startling in its potential breadth Will we in the next case decide that a company may be sued in California for dismissing an employee in Florida because on another occasion it fired a different employee in California . . . ?”).

88. *Id.* (citing Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 599 (2001) (“Reciprocity . . . refers to the idea that the litigation to which a defendant is exposed in a particular forum should bear some relationship to the benefits the company has sought by doing business in the state.”).

89. *Id.* at 908 (citing Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 SMU L. REV. 1313, 1345–46 (2005)).

90. *Id.*

91. *Id.*

have made similar claims, the link between the benefits BMS has sought by doing that business in the state and the liabilities to which it is exposed here has been severed. In the same way, predictability has been severely impaired, as the company's potential liabilities cannot be forecast from its state activities.⁹²

Because she focused on the majority's application of the second (relatedness) part of the jurisdictional analysis, Justice Werdegar did not address the reasonableness of exercising specific personal jurisdiction, observing only that "we should be restrained here [with respect to reasonableness] by the absence of any discernable state interest in adjudicating the nonresident plaintiffs' claims."⁹³

C. *The Supreme Court*

1. Majority Opinion: Correcting a Spurious Error

The only issue before the Court was specific jurisdiction over the nonresidents' claims.⁹⁴ Writing for the Court, Justice Alito described the facts, emphasizing the lack of relationship between BMS's activity in California and the nonresidents' claims.⁹⁵ He described BMS as a large international corporation with most of its activity outside California;⁹⁶ noted that the nonresident plaintiffs did not allege they obtained Plavix from any California source;⁹⁷ and added that BMS did not create its national marketing strategy for Plavix in California, or manufacture, distribute, or work on regulatory approval from the state.⁹⁸

Justice Alito also emphasized that the approach of the Supreme Court of California relaxed the required connection between claims and forum conduct in some situations:

The majority [below] applied a "sliding scale approach to specific jurisdiction." Under this approach, "the more wide-ranging the defendant's forum contacts, the more readily is

92. *Id.* at 909. To assure an appropriate connection between personal jurisdiction and state regulatory interest, she proposed that forum conduct be legally relevant in order to count in the jurisdictional analysis. *Id.* at 899.

93. *Id.* at 910.

94. The issue was initially presented by motions "to quash service of summons on the nonresidents' claims." *Bristol-Myers III*, 137 S. Ct. 1773, 1778 (2017) (citation omitted).

95. *Id.* at 1777–78.

96. *Id.* The opinion also minimized the commercial significance of the in-state sales. *Id.* at 1778 (citing *Bristol-Myers II*, 377 P.3d at 879) (noting that income from Plavix sold in California, while exceeding \$900 million, comprised "a little over one percent of the company's nationwide sales revenue").

97. *Id.*

98. *Id.* BMS engaged in all such activity either in New York or New Jersey. *Id.*

shown a connection between the forum contacts and the claim.” Applying this test, the majority concluded that “BMS’s extensive contacts with California” permitted the exercise of specific jurisdiction “based on a less direct connection between BMS’s forum activities and plaintiffs’ claims than might otherwise be required.”⁹⁹

He read the California court’s decision as finding this “attenuated” relationship established by the mere similarity of the residents’ and nonresidents’ legal claims.¹⁰⁰ And he noted the objection raised by the dissenting justices below that the California court’s approach effectively expanded specific jurisdiction so that it became “indistinguishable from general jurisdiction.”¹⁰¹

Turning to the constitutional limits on personal jurisdiction, he asserted that decisions since *International Shoe* have distinguished general and specific jurisdiction,¹⁰² and restricted general jurisdiction to an individual’s place of domicile and to places where a corporation “is fairly regarded as at home.”¹⁰³ “Specific jurisdiction,” he insisted, “is very different.”¹⁰⁴ He quoted language from prior opinions for specific jurisdiction where the civil action needed to arise out of or relate to the defendant’s contacts with the forum.¹⁰⁵ He quoted Supreme Court Justice Ruth Bader Ginsburg’s language where she distinguished general from specific jurisdiction and emphasized that specific personal jurisdiction required “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”¹⁰⁶

Justice Alito did not situate his discussion of relatedness in the context of fuller discussion of the requirements for specific personal jurisdiction. He neither adopted nor referred to the three-part test employed by the majority of the California Supreme Court. Instead, he mentioned general

99. *Id.* at 1778–79 (citations omitted) (quoting *Bristol-Myers II*, 377 P.3d at 889).

100. *Id.* at 1779 (“This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested).”).

101. *Id.* (quoting *Bristol-Myers II*, 377 P.3d at 896 (Werdegar, J., dissenting)).

102. *Id.* at 1779–80.

103. *Id.* at 1780 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).

104. *Id.*

105. *Id.* (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014)) (first citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985); and then citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

106. *Id.* (quoting *Goodyear*, 564 U.S. at 919) (“For this reason, ‘specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.’”).

interests common to evaluating all forms of personal jurisdiction: (1) the interest of the forum state; (2) the interests of the plaintiffs; and (3) the interest of the defendant.¹⁰⁷ He cautioned that the interests were not equivalent. “[T]he ‘primary concern’ is ‘the burden on the defendant.’”¹⁰⁸

For Justice Alito, ascertaining the burden on the defendant comprises two separate considerations. First, it “obviously requires a court to consider the practical problems resulting from litigating in the forum.”¹⁰⁹ In *BMS*, this consideration was not determinative because the defendant did not challenge the lower court finding that it would experience no practical burden in litigating the nonresidents’ claims in California.¹¹⁰ Second, ascertaining the burden on the defendant also involves a consideration of intangible principles of federalism because the burden to the defendant “encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”¹¹¹ As he explained, “restrictions on personal jurisdiction ‘are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.’”¹¹²

After elaborating the general considerations, however, Justice Alito did not further explain how they affected the evaluation of personal jurisdiction in the case. Instead, he announced that “[o]ur settled principles regarding specific jurisdiction control this case.”¹¹³ Repeating that specific jurisdiction requires a relationship between claims and forum conduct, he concluded, “[f]or this reason, the California Supreme Court’s ‘sliding scale approach’ is difficult to square with our precedents.”¹¹⁴ The sliding-scale approach reduced the requisite strength of a relationship where the volume of in-state activity was great. Justice Alito declared, “Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction.”¹¹⁵

Justice Alito explains what is missing: “What is needed—and what is missing here—is a connection between the forum and the specific claims

107. *Id.*

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

109. *Id.*

110. *Id.* at 1787 (Sotomayor, J., dissenting).

111. *Id.* at 1780 (majority opinion).

112. *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

113. *Id.* at 1781.

114. *Id.*

115. *Id.* Justice Alito bolstered the conclusion that general connections are not enough for specific jurisdiction by quoting language from previous opinions that even “continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.” *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927 (2011)).

at issue.”¹¹⁶ Justice Alito was clearly alarmed by the “danger” of a loose relatedness requirement,¹¹⁷ but he does not identify the precise adverse consequences of the sliding-scale approach. In holding that the case was resolved by precedent, he avoids explaining what purpose the relatedness requirement serves and what additional facts would satisfy the relatedness requirement.

Instead, he rejects specific personal jurisdiction over the defendant with respect to the nonresidents’ claims as an elementary error because he sees jurisdiction as based exclusively on contacts or activity by parties other than the defendant.¹¹⁸ “As we have explained, ‘a defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.’”¹¹⁹

By relying on precedent that prohibits attributing contacts to defendants through other parties, Justice Alito avoided announcing a new rule of decision. He did not state that all claims must directly arise from the defendant’s forum activity to support specific personal jurisdiction,¹²⁰ though his separate analysis of the nonresidents’ claims might support such a requirement. As he saw the facts, “all the conduct giving rise to the nonresidents’ claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction.”¹²¹

While avoiding announcing a new rule of decision, Justice Alito repurposed old lines of authority in applying them to the facts in *BMS*. No decisions by the Supreme Court had addressed the unique problem presented where plaintiffs joined their claims against a defendant who was concededly subject to personal jurisdiction based on its own forum conduct for other closely related claims that were the result of a nationwide marketing effort. He consulted no lower court opinions, but instead discussed two of the Court’s decisions that plaintiffs’ argument supported a broader construction of the relatedness requirement.¹²² He dismissed the arguments because the authorities failed to address the

116. *Id.*

117. He refers to “the danger of the California approach” in finding specific jurisdiction “without identifying any adequate link between the State and the nonresidents’ claims.” *Id.* He rejects as “sufficient—or even relevant” *BMS*’s in-state research unrelated to *Plavix*. *Id.*

118. *Id.* (citing and discussing *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014)).

119. *Id.* (quoting *Walden*, 134 S. Ct. at 1123). Justice Alito added, “This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents.” *Id.*

120. Justice Sotomayor points out that the Court’s decision did not require that the plaintiffs’ claims arise from the defendant’s forum conduct. *Id.* at 1788 n.3 (Sotomayor, J., dissenting) (noting that *BMS* had urged Court to adopt arising-out-of requirement but that the majority decision did not expressly endorse it, and the question “await[s] another case”).

121. *Id.* at 1782 (majority opinion).

122. *Id.*

issue of relatedness in the context of specific personal jurisdiction over a defendant.¹²³

He also dismissed the “last ditch contention”¹²⁴ that jurisdiction was supported by BMS’s arrangement with a California company to distribute Plavix nationally; he regarded the argument as flawed because plaintiffs did not allege that BMS engaged in “relevant acts” with the distributor in California and could not otherwise show that any of the injurious product consumed by the nonresidents plaintiffs in other states was distributed by the California distributor.¹²⁵

Justice Alito closed his opinion by repeating the message that the outcome was governed by the “straightforward application . . . of settled principles of personal jurisdiction.”¹²⁶ He expressed no sympathy for the potential hardship on plaintiffs; He characterized plaintiffs’ concerns as a “parade of horrors”¹²⁷ and emphasized that nothing in the Court’s opinion prevents residents and nonresidents from bringing joint claims in

123. *Id.* at 1782–83. Justice Alito distinguished *Keeton v. Hustler Magazine, Inc.*, where the nonresident plaintiff brought a defamation action in New Hampshire. *Id.* at 1782 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)). The forum state plainly had jurisdiction over plaintiff’s claims arising from in-state publication, but the Supreme Court held that she could also assert claims for damages in all other states under the single publication rule. *Id.* (citing *Keeton*, 465 U.S. at 774)). Justice Alito explained:

[*Keeton*] concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to a resident of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff’s claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law.

Id. (citing *Keeton*, 465 U.S. at 778 n.5). *But cf.* *BMW of N. A. v. Gore*, 517 U.S. 559, 585 (1996) (holding that computation of punitive damages under state law standard that permits considering wrongdoing in other state violates due process).

Justice Alito also distinguished *Phillips Petroleum Co. v. Shutts* on the ground that the decision addressed the due process rights of plaintiffs, not defendants. *Bristol-Myers III*, 137 S. Ct. 1773, 1783 (2017) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (holding in part that requiring nonresident plaintiffs whose claims did not arise in state to opt out of plaintiff class did not violate absent class members’ due process rights)) (“Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here.”)

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

a defendant's home state, nor does the opinion prevent nonresident plaintiffs from bringing their claims in their own home states.¹²⁸

2. Justice Sotomayor's Dissent: A Voice in the Wilderness

Dissenting, Justice Sotomayor repeatedly emphasized the undisputed jurisdiction over BMS for some claims, and thus focused on the question of whether BMS should also be subject to the additional, identical claims of nonresidents.¹²⁹ She called attention to the nationwide character of BMS's marketing and distribution of Plavix, and noted the economic significance of BMS's relationship with the California-based distributor.¹³⁰

Her summary of the history of personal jurisdiction differed from the majority's. While she agreed that *International Shoe* was the "pathmarking opinion,"¹³¹ where Justice Alito looked to that case for the source of the categorical distinction between specific and general jurisdiction, she found the emergence distinction in later cases.¹³² Her opinion opened by acknowledging that the Court's recent decisions had "imposed substantial curbs on the exercise of general jurisdiction."¹³³ And the reduced opportunities for general jurisdiction framed her discussion of specific jurisdiction.

Unlike the majority, she employed the three-part test for personal jurisdiction applied by the California courts.¹³⁴ First, the defendant must purposefully avail itself of the privilege of conducting activities in the forum state or purposefully direct conduct into the forum state.¹³⁵ Second, "the plaintiff's claim must 'arise out of or relate to' the defendant's forum

128. *Id.* Justice Alito expressly left open the question of whether the due process limits applicable to the states would apply equally to federal courts. *Id.* at 1784 (citing *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)).

129. *Id.* at 1785 (Sotomayor, J., dissenting) ("The question is whether [BMS] is subject to suit in California only on the residents' claims, or whether a state court may also hear the nonresidents' 'identical' claims.").

130. The dissenting opinion points out that "during the relevant time period, McKesson was responsible for almost a quarter of [BMS's] revenue worldwide." *Id.* at 1784.

131. *Id.*

132. She wrote with greater historical precision that the Court had categorically distinguished the two forms of jurisdiction only "for decades." *Id.* at 1785 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

133. *Id.* (citing *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014)).

134. *See supra* notes 49–55 and accompanying text.

135. *Bristol-Myers III*, 137 S. Ct. at 1785 (Sotomayor, J., dissenting) (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (plurality opinion)).

conduct.”¹³⁶ And third, “the exercise must be reasonable under the circumstances.”¹³⁷

The first and third parts of the test were not in dispute.¹³⁸ Like all the lower courts, she found that BMS’s conduct satisfied the second part, the relatedness requirement.¹³⁹ For Justice Sotomayor, the relatedness requirement was never designed to police the borders of specific and general jurisdiction, but rather to require some connection of the claim with the defendant’s forum conduct—thus preventing jurisdiction where claims were entirely unrelated.¹⁴⁰ She found the relatedness requirement satisfied without further scrutiny of the California elaboration of the substantial connection requirement because the nonresidents’ claims against BMS “concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States.”¹⁴¹ The fact that claims arose in many other states in no way prevented them from relating to the advertising and distribution efforts BMS made in California,¹⁴² and she would require nothing more than that the plaintiffs allege that they were injured “by the same essential acts.”¹⁴³

Justice Sotomayor denied Justice Alito’s claim that precedent compelled a tighter connection.¹⁴⁴ She read the same cases as “point[ing] in the other direction.”¹⁴⁵

136. *Id.* at 1786 (quoting *Helicopteros*, 466 U.S. at 414).

137. *Id.* (first citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–78 (1985); and then citing *Asahi Metal Indus. Co., v. Superior Court*, 480 U.S. 102, 113–14 (1987)); *see also id.* (“The factors relevant to such an analysis [of reasonableness under the third part of the test] include ‘the burden on the defendant, 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.’” (quoting *Burger King*, 471 U.S. at 477)).

138. *Id.* at 1787.

139. *Id.*

140. As an example of an unrelated claim that would not qualify for specific jurisdiction, she describes a lawsuit in California for personal injuries suffered in New York due to a corporation’s negligent maintenance of the sidewalk outside its New York headquarters. *Id.* at 1786. “But respondents’ claims against [BMS] look nothing like such a claim.” *Id.*

141. *Id.*

142. *Id.*

143. *Id.* This is because the relatedness requirement is easily satisfied for Justice Sotomayor. She proceeds to consider the third requirement and shows that the exercise of jurisdiction would not be unreasonable. *Id.* at 1786–87. In contrast, she concluded that personal jurisdiction was unreasonable under the facts in *Daimler AG v. Bauman*. 134 S. Ct. 746, 773 (2014) (Sotomayor, J., concurring in the judgment).

144. *Bristol-Myers III*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting).

145. *Id.*; *see also id.* (“[O]ur precedents do not require this result, and common sense says that it cannot be correct.”). She argued that the majority misapplied the holding of *Walden v. Fiore*

Because the exercise of personal jurisdiction over BMS would not be burdensome in any practical way, Justice Alito had relied on the abstract federalism values served by the Due Process Clause.¹⁴⁶ Justice Sotomayor observed, “The majority’s animating concern, in the end, appears to be federalism Indeed the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power”¹⁴⁷ She responded that the restrictions on personal jurisdiction that linked to territorial authority of states was designed to safeguard the exclusive power of states only when they had the sole legitimate interest in adjudicating a dispute and questioned the relevance of federalism safeguards when the defendant was a large corporation being sued for simultaneous acts in many states.¹⁴⁸

In closing, Justice Sotomayor lamented the practical consequences of the majority’s approach. What Justice Alito characterized as a “parade of horrors,”¹⁴⁹ she saw as real problems: “[T]he Court’s opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant’s nationwide course of conduct to sue that defendant in a single, consolidated action.”¹⁵⁰ She saw no legitimate interest served by a tight relatedness requirement that prevented the consolidation of such parallel claims.¹⁵¹ And she observed that forcing the consolidation of such cases in defendant corporations’ home states “hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.”¹⁵² She notes that two types of mass tort lawsuit will no longer be possible:

to the question of relatedness when that decision addressed exclusively the issue of whether the defendant purposefully directed conduct toward the forum state. *Id.* (citing *Walden v. Fiore*, 134 S. Ct. 1115 (2014)). And she read *Keeton v. Hustler Magazine, Inc.* as strong support for consolidating in-state and out-of-state claims. *Id.* at 1788 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)). While agreeing with the majority that all claims in *Keeton* were asserted by a single plaintiff and that there was no question the state court had personal jurisdiction over some the plaintiff’s claims, she regarded the number of plaintiffs as a “distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there no unfairness in such a result.” *Id.*

146. *See supra* notes 111–12 and accompanying text; *infra* Subsection II.C.4.

147. *Bristol-Myers III*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting).

148. *Id.* (“But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents’ claims that the other States do not share?”).

149. *See supra* note 127 and accompanying text (quoting Justice Alito).

150. *Bristol-Myers III*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

151. *Id.* (“What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated?”).

152. *Id.*

a nationwide lawsuit against a foreign national corporation that is not “at home” and thus not subject to general jurisdiction in any state,¹⁵³ and a mass action arising in multiple states against two or more corporations that are incorporated and headquartered in different states.¹⁵⁴

In broader context, she regards the new restriction on specific personal jurisdiction as placing real burdens on plaintiffs, burdens aggravated by the Court’s reduction of general jurisdiction in other cases. “Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, the effect of today’s opinion will be to curtail—and in some cases eliminate—plaintiffs’ ability to hold corporations fully accountable for their nationwide conduct.”¹⁵⁵

D. *Mysteries of the Majority: The Road Not Taken*

This Section considers perplexing aspects of Justice Alito’s opinion for the Court: its failure to articulate a clear rule of decision or to explain policies behind the holding that indicate the scope of the decision, its omission of any reference to the divisions among lower courts on the relatedness requirement, its studious avoidance of suggesting a complete framework for analyzing the constitutional limits on specific personal jurisdiction, and its heavy reliance on an abstract sovereignty interest attributed to states.

1. The Mystery of the Scope of the Holdings

The forceful rhetoric in Justice Alito’s opinion in *BMS*, in insisting the decision is governed by precedent, obscures the fact that the Court neither offers a clear rule of decision nor explains the policies that guide its decision. As the opinion’s treatment of prior cases makes clear, for civil actions in state court involving multiple plaintiffs, defendants, and claims, each plaintiff must independently establish valid personal jurisdiction over each defendant.¹⁵⁶ But the decision leaves important issues unresolved.

a. The Standard for Relatedness

Writing before the Court’s opinion in *BMS*, two scholars observed that the unresolved questions about the scope of specific personal jurisdiction included “the scope of the ‘relatedness’ requirement.”¹⁵⁷ After the

153. *Id.*

154. *Id.*

155. *Id.* (citation omitted).

156. *See id.* at 1781–82 (majority opinion).

157. *See* Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 790 (2017).

decision, prominent defense counsel explained,

One issue left open by the decision [in *BMS*] is how much of a connection between a plaintiff's claims and the forum state is required to permit the assertion of specific jurisdiction. The Court did not have to decide that issue because there was no connection *at all* between California and the claims of the non-California plaintiffs.¹⁵⁸

In rejecting California's application of a sliding-scale approach to relatedness, Justice Alito made no effort to resolve the split among lower courts as to whether specific jurisdiction claims must "arise from" the defendant's forum conduct.¹⁵⁹ Indeed, though repudiating the application of the approach to the facts in *BMS*, Justice Alito emphasized that the key error below lay in utilizing the approach to improperly attributed contacts to the defendant that were established by other plaintiffs, thus leaving room for argument that the sliding-scale approach might constitutionally apply to activity by the named defendant with respect to the party asserting a claim.¹⁶⁰ What the law requires, Justice Alito explains, is "a connection between the forum and the specific claims at issue."¹⁶¹

Because Justice Alito does not explain what relationship is required for specific jurisdiction, his opinion provides no guidance for a case where there is a minimal level of forum conduct that bears some relationship to the plaintiffs' specific claims, but which does not directly give rise to those claims. For example, the opinion does not explain whether specific jurisdiction might have been established if *BMS* conducted one meeting in California where *BMS* employees discussed the national marketing strategy, or if *BMS* trained staff in California involved in sales to consumers in other states. The opinion's scope is still less certain for cases that involve activity other than marketing. For example, it offers no guidance for a case where a manufacturer's dangerous product was brought into a state by a third person, the product

158. Andrew J. Pincus et al., *Supreme Court's Decision In Bristol-Myers Squibb v. Superior Court Rejects Expansive View of Specific Jurisdiction*, CLASS DEF. BLOG: CUTTING-EDGE ISSUES IN CLASS ACTION L. & POL. (June 19, 2017), <https://www.classdefenseblog.com/2017/06/supreme-courts-decision-bristol-myers-squibb-v-superior-court-rejects-expansive-view-specific-jurisdiction/>.

159. See *Bristol-Myers III*, 137 S. Ct. at 1781.

160. *Id.*

161. *Id.* The Court neither accepts nor rejects the defendant's argument that "relate to" means the same thing as "arise out of." Brief for Petitioner at 15–16, *Bristol-Myers III*, 137 S. Ct. 1773 (No. 16-466) (adopting a two-part framework for analyzing specific personal jurisdiction); see also *id.* at 17–22 (arguing that "arise out of" and "relate to" mean the same thing and require that the forum contacts bear a causal relationship to plaintiffs' claims).

foreseeably kills a forum resident, and the manufacturer directly sells many identical products.¹⁶²

b. Joinder of Claims Between a Single Plaintiff and Single Defendant

The scope of Justice Alito's claim-focused analysis is also uncertain. Does the required connection of claims to forum conduct now prevent a plaintiff who properly establishes personal jurisdiction over one defendant with respect to one claim need to separately establish personal jurisdiction with respect to other claims? If so, the opinion marks a radical break with the traditional understanding of personal jurisdiction as a doctrine that restricted the power of courts over parties, not claims.¹⁶³ His focus on claims might signal that each claim must be supported by personal jurisdiction,¹⁶⁴ though the opinion takes care to avoid stating a general rule requiring jurisdiction over each claim.

i. A Page of History

During the formative period in the development of constitutional limits on personal jurisdiction, it was well established that states could exercise general jurisdiction over any defendant who appeared in its courts.¹⁶⁵ Courts did not understand personal jurisdiction as a doctrine

162. According to some civil procedure scholars, the causation rule advocated by BMS would not permit specific jurisdiction over the out-of-state car manufacturer in a case like *World-Wide Volkswagen Corp. v. Woodson*, where the defective product was purchased outside the state and driven into the state by a nonresident, nor would it permit a resident defendant sued in the state to implead the manufacturer. Brief of Amici Curiae Civil Procedure Professors in Support of Respondents at 16–18, *Bristol-Myers III*, 137 S. Ct. 1773 (No. 16-466) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).

163. See *Bristol-Myers III*, 137 S. Ct. at 1778 (referring to BMS's motion to "quash service of summons on the nonresidents' claims").

164. This is reinforced to the extent members of the Court distinguish *Keeton* on the ground that in *Keeton* some injury occurred to the plaintiff in the forum state. Transcript of Oral Argument, *supra* note 1, at 34 (remarks of Justice Kennedy).

165. In *York v. Texas*, the plaintiff sued a Missouri resident in Texas and served the defendant in the state of Missouri. 137 U.S. 15, 16 (1890). The state courts conceded that "service upon the defendant in St. Louis was a nullity, and gave the [Texas] court no jurisdiction." *Id.* at 19. But rather than suffering a default judgment, the defendant appeared in the Texas proceedings and challenged the Texas judgment in the Texas courts. *Id.* at 16. Under Texas law the defendant's appearance waived all objections to service and jurisdiction, and the defendant raised a due-process challenge to the failure of Texas law to provide the privilege of a special appearance—the opportunity to challenge personal jurisdiction without becoming subject to jurisdiction. *Id.* at 17. The Supreme Court held that the Texas law prohibiting any defense of personal jurisdiction did not violate the Due Process Clause, because the defendant was not required to litigate and could challenge the validity of a void judgment at the time of execution. *Id.* at 21.

Texas and Mississippi were unusual in not permitting special appearances. See Edson R. Sunderland, *Preserving a Special Appearance*, 9 MICH. L. REV. 396, 397 (1911). Although over a dozen states strictly limited the privilege of special appearance so that a defendant's litigation

that was limited by claims; on the contrary, a defendant's litigation presence gave the forum court the power to decide all claims against the defendant.¹⁶⁶

Only after *International Shoe* expanded the reach of specific personal jurisdiction over claims related to the forum did courts confront the need to limit personal jurisdiction over unrelated claims.¹⁶⁷ Without some limits, courts could acquire unlimited personal jurisdiction whenever there were minimum contacts supporting jurisdiction over part of the case, and this would frustrate *International Shoe's* mandate to consider both the level of the defendant's activity in the forum state and the nature of the claims in ascertaining whether personal jurisdiction comported with fundamental justice.¹⁶⁸

The eventual judicial elaboration of the distinct categories of specific and general jurisdiction responded to the need to impose meaningful

of the merits established personal jurisdiction. *Id.* at 399–405 (summarizing case law). In finding that jurisdiction was permissible in such situations based on the de facto power of the forum court over persons entering an appearance, courts did not distinguish between the claims. The failure to provide the opportunity for special appearances was much criticized and was not followed by fifteen states or by federal courts. *E.g.*, *Harkness v. Hyde*, 98 U.S. 476, 479 (1878); *see also* *Sunderland, supra*, at 405 (discussing a federal case that declined to follow this failure and listing the fifteen jurisdictions that have not followed this failure). But no court held such restrictions were unconstitutional.

166. Specific jurisdiction based on litigation presence as a basis for general jurisdiction continues to dominate explanations of juridical power over counterclaims. *See* *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938) (“The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.”); *see also* Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1659 (2001) (discussing Court’s reasoning in *Adam v. Saenger* as providing authority for constitutionality of pendent personal jurisdiction).

167. The Federal Rules of Civil Procedure permit the liberal joinder of claims at the pleading stage, FED. R. CIV. P. 18(a), (b), and provide a model for many states, helping speed the demise of special appearances and their attendant restrictions on challenges to personal jurisdiction. *See* FED. R. CIV. P. 12 (permitting defense of personal jurisdiction to be joined with other defense without waiver of defense). The rules require the defense of personal jurisdiction to be raised either in a motion to dismiss or as an objection in an answer. *See* FED. R. CIV. P. 12(b)(2). The idea of jurisdiction based on presence in litigation survives, nevertheless, in situations where the court obtains jurisdiction because the defendant fails to raise the defense properly and where a defendant affirmatively invokes the juridical authority of the forum by serving a counterclaim. *See generally* Case Note, *Federal Rules of Civil Procedure: Curing an Apparent Waiver of Jurisdiction Defenses*: *Neifeld v. Steinber*, 32 MD. L. REV. 156, 158 (1972) (discussing divergent holdings in case law as to whether subsequent voluntary dismissal of permissive counterclaim restored defense of personal jurisdiction raised in answer).

168. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Simard articulates this compelling concern in explaining why FED. R. CIV. P. 4(k)(1) is not read literally to permit jurisdiction over all claims once a party is served. Simard, *supra* note 166, at 1646 (“Such an interpretation would blur the distinction between general and specific personal jurisdiction.”).

limits on power-based jurisdiction in an era when minimum contacts supported jurisdiction over one claim. Those categories also represented an effort to harmonize the developing case law with established practice.¹⁶⁹ Finding general jurisdiction based on litigation presence resulting from specific personal jurisdiction would deviate wildly from established practice.¹⁷⁰

Nevertheless, even after *International Shoe*, courts exercised broader personal jurisdiction over some claims over which they did not have specific personal jurisdiction. Federal courts first began to apply the doctrine of pendent personal jurisdiction in the late 1950s.¹⁷¹ By the 1970s, federal courts were exercising pendent personal jurisdiction over related claims in a variety of contexts,¹⁷² and over time most courts found pendent personal jurisdiction was permissible over defendants with

169. Scholars who coined the terminology of specific and general jurisdiction, in contrast to the courts, hoped to modify the substantive law, proposing a radical shrinking of general jurisdiction and an equally radical expansion of specific jurisdiction. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). See generally Hoffheimer, *supra* note 5, at 549 n.3, 583, 585 n.210 (discussing the influence of von Mehren and Trautman on Justice Ginsburg).

170. As states extended personal jurisdiction through long-arm statutes, they were free, if not required, to restrict the expansion of jurisdiction that might otherwise become available over related claims by requiring all claims to satisfy their long-arm statute or requiring all claims to bear some relationship to the claims over which the forum acquired specific jurisdiction through the long-arm statute. *E.g.*, *Fantis Foods, Inc. v. Standard Importing Co.*, 402 N.E.2d 122, 124 (1980) (holding state long-arm statute established personal jurisdiction over tort claim but not contract claim arising from same facts).

171. Cochran identifies one of the earliest cases invoking pendent personal jurisdiction as *Schwartz v. Bowman*. Cochran, *supra* note 14, at 1468 n.22 (citing *Schwartz v. Bowman*, 156 F. Supp. 361, 365 (S.D.N.Y. 1957), *appeal dismissed sub nom.*, *Schwartz v. Eaton*, 264 F.2d 195 (2d Cir. 1959)). “By the 1970s, all the circuit courts that had considered the issue [of pendent personal jurisdiction] found this extension of judicial power permissible.” *Id.* at 1471–72 n.46 (citing cases); see also Simard, *supra* note 166, at 1625–26 (footnotes omitted) (citing cases) (“While discussion can be found in cases dating back to the mid-1950s, the doctrine has been cited with increasing frequency during the last decade. The Second, Third, Fourth, Seventh, and District of Columbia Circuits have considered and applied the doctrine. Additionally, more than fifty decisions by United States District Courts discuss pendent personal jurisdiction, the majority of which uphold the application of the doctrine.”).

172. There were sufficient cases by 1965 to support a law review discussion. William D. Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56, 56–59 (1965) (discussing federal cases applying pendent personal jurisdiction). See generally Lewis D. Lowenfels, *Pendent Jurisdiction and the Federal Securities Acts*, 67 COLUM. L. REV. 474 (1967) (discussing pendent personal jurisdiction); Lewis R. Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 COLUM. L. REV. 423 (1970) (discussing pendent personal jurisdiction in the context of federal securities laws).

respect to claims that were sufficiently closely related to other claims over which the court had jurisdiction.¹⁷³

In historical context, pendent personal jurisdiction was not a new expansion of personal jurisdiction, but rather a way of restricting general jurisdiction resulting from litigation presence. Most federal courts engaged in the practice and developed sensible guidelines. No one seems to have suggested that pendent personal jurisdiction was unconstitutional. On the contrary, a few courts observed in passing that specific personal jurisdiction over one claim dispenses the need to evaluate the constitutionality of personal jurisdiction over other claims.¹⁷⁴

Justice Alito's focus on each claim leaves the status of pendent jurisdiction unsettled.¹⁷⁵ Indeed, nothing in the opinion indicates that the claim-by-claim approach should not apply rigorously to each claim by each party, or at least to each claim by each plaintiff.¹⁷⁶ As written, the

173. See Brief of Respondents, *supra* note 34, at 46 (citing WRIGHT & MILLER § 1069.7) (arguing that most federal courts and leading treatises approve of pendent personal jurisdiction); see also Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae in Support of Respondents at 13, *Bristol-Myers III*, 137 S. Ct. 1773 (2017) (No. 16-466) (citing Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 243–52 (2014)) (referring to the need for pendent personal jurisdiction); Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae in Support of Respondents, *supra*, at 14 (“Every circuit that has expressly considered the doctrine of pendent personal jurisdiction has endorsed it.”). *But see* Cochran, *supra* note 14, at 1486; Simard, *supra* note 166, at 1641–42 (discussing cases refusing to extend jurisdiction over additional claims).

174. *E.g.*, Nat'l “Write Your Congressman” Club v. Jackson, No. 3:96-CV-1288-D, 1996 WL 707013, at *3 (D. Tex. Dec. 4, 1996) (holding that jurisdiction over defendant with respect to tort claims gave the court jurisdiction over defendant for breach of contract claim); *Salpoglou v. Widder*, 899 F. Supp. 835, 838 (D. Mass. 1995) (reasoning that because court had personal jurisdiction over contract claim, requiring litigation over tort claim would not impose significant burden and would promote economy, thus satisfying state long-arm statute and Due Process Clause); *Home Owners Funding Corp. of Am. v. Century Bank*, 695 F. Supp. 1343, 1346 (D. Mass. 1988) (holding that intent to have a presence in a forum is not necessary to establish personal jurisdiction over tortious acts); *Nelson v. R. Greenspan & Co.*, 613 F. Supp. 342, 346 (holding that court had sufficient jurisdiction over a breach of contract claim because it was based on the same core facts as a fraud claim occurring in the forum) (E.D. Mo. 1985). See generally Simard, *supra* note 166, at 1639 & n.91 (discussing cases).

175. The plaintiffs argued, “That doctrine [pendent personal jurisdiction] fully resolves a case like this one, and conversely, petitioner’s bright-line rule necessarily scuttles this fair and efficiency-enhancing doctrine” Brief of Respondents, *supra* note 34, at 46. Counsel for the government argued against pendent personal jurisdiction. Transcript of Oral Argument, *supra* note 1, at 5 (“We’re absolutely fighting [pendent jurisdiction].”).

176. Justice Alito’s opinion provides no language suggesting that the claims-based analysis does not apply to additional claims brought by the same party. *Bristol-Myers III*, 137 S. Ct. at 1777–85. Moreover, the manner in which Justice Alito distinguished *Keeton*, by insisting the out-of-state damages arose from a single in-state claim, would be consistent with the requirement that each claim arise from defendant’s forum conduct. See *supra* note 123 and accompanying text

opinion leaves much uncertainty about all forms of jurisdiction over multiple claims between the parties, when one or more claim does not separately satisfy the requirements for specific personal jurisdiction.

ii. Unforeseen Consequences of Requiring Each Claim to Be Separately Supported by Specific Personal Jurisdiction

Until *BMS*, no Supreme Court decision hinted that personal jurisdiction might be lacking over a claim asserted by a party where a court had valid specific personal jurisdiction over the defendant based on related claims by another party. Requiring specific jurisdiction for each claim by each party would have unforeseen consequences on the joinder of claims and on the binding effect of prior litigation. Principles of *res judicata* require a plaintiff to consolidate closely related claims in a single civil action against the same defendant,¹⁷⁷ and liberal joinder rules permit a plaintiff to bring together all the claims he has against a single defendant¹⁷⁸ and permit the liberal joinder of parties.¹⁷⁹ Likewise, a defendant is required to assert against the plaintiff those counterclaims that are so closely related that they arise out of the same transaction or occurrence or series of transactions or occurrences.¹⁸⁰ The joinder rules also permit the defendant to assert any other counterclaim against the plaintiff.¹⁸¹

Limits on federal court subject-matter jurisdiction, not personal jurisdiction, restricted the joinder of claims and parties in federal court, and Congress empowered federal courts to hear most closely related claims, provided they form part of the same constitutional case.¹⁸²

(discussing Justice Alito's reliance on the fact that plaintiff asserted a single cause of action but one that supported damages in multiple states).

177. Under the doctrine of merger, related claims that form part of the plaintiff's cause of action merge in the litigated action and cannot be brought later. *E.g.*, *Ison v. Thomas*, No. 2006–CA–000289–MR, 2007 WL 1194374, at *1 (Ky. App. Apr. 13, 2007) (affirming ruling that plaintiff's personal injury claim merged with property damage claim).

178. FED. R. CIV. P. 18(a)–(b).

179. FED. R. CIV. P. 20(a)(1) (permitting joinder of plaintiffs if they assert rights arising out of the same transaction, occurrence, or series of transactions or occurrences and there are common questions of law or fact); *see also* FED. R. CIV. P. 21 (misjoinder not a ground for dismissal). The court may consolidate actions for trial that involve a common question of law or fact. FED. R. CIV. P. 42(a)(2). A court may sever any issue or claim “[f]or convenience, to avoid prejudice, or to expedite and economize.” FED. R. CIV. P. 42(b).

180. FED. R. CIV. P. 13(a).

181. FED. R. CIV. P. 13(b).

182. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). Some related claims do not qualify for joinder under a technical reading of the statute. *See* JOSEPH W. GLANNON, *CIVIL PROCEDURE EXAMPLES AND EXPLANATIONS* 327–28 (7th ed. 2013) (discussing authority that federal court lacks supplemental jurisdiction over compulsory counterclaim asserted by plaintiff against third-party defendant impleaded by defendant). The Constitution may also prevent

Although the Court has not directly addressed the question of whether personal jurisdiction provides additional limits over properly joined claims, it has assumed such jurisdiction is proper in a number of contexts. Thus, in *Phillips Petroleum Co. v. Shutts*,¹⁸³ the Court, like all parties, apparently assumed there was valid personal jurisdiction over the defendant for nonresidents' claims arising out of activity and injury occurring with no relationship to the forum.¹⁸⁴ In that case, the Court addressed only the issue of whether the state court had valid personal jurisdiction over plaintiff class members that did not opt out, and it found such jurisdiction was proper.¹⁸⁵ The Court similarly found personal jurisdiction proper over counterclaims based on the theory that the plaintiff, in litigating in a forum, submitted to that forum's personal jurisdiction.¹⁸⁶ The Court did not limit the scope of counterclaims to the scope of the plaintiff's original claims.¹⁸⁷

Requiring personal jurisdiction with respect to each claim against each party could leave courts powerless to decide claims that must be joined under the doctrine of merger or be waived, and give rise to unimagined, new challenges in collateral challenges regarding the partial validity of judgments.¹⁸⁸

supplemental jurisdiction over some claims or parties. *E.g.*, U.S. CONST. amend. XI (divesting federal court of subject matter jurisdiction of some claims against states by citizens of other states).

183. 472 U.S. 797 (1985).

184. *Id.* at 814. In *Shutts*, the defendant did not challenge personal jurisdiction over itself. *Id.* at 799. But the Court referred to the facts that today make personal jurisdiction uncertain over defendants in evaluating the court's power to bind absent class members who did not opt out. *Id.* at 813–14. Members of the Court have not been reluctant to raise sua sponte questions about personal jurisdiction in cases where the issue has been waived. *See* Transcript of Oral Argument at 4, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) (No. 10-76) (Justice Ginsburg opened argument by inquiring into personal jurisdiction over Goodyear USA, which had not challenged personal jurisdiction based on level of its commercial activity and physical presence in the forum state).

185. *Shutts*, 472 U.S. at 814. The meaning of the holding was actively debated in *Bristol-Myers III*, and the Court later limited the broad grant of jurisdiction to members of the plaintiff class. 137 S. Ct. 1773, 1783 (2017); *see supra* note 123 and accompanying text.

186. *Adam v. Saenger*, 303 U.S. 59, 67–68 (1938); *see supra* note 166 and accompanying text.

187. *Saenger*, 303 U.S. at 67–68.

188. The plaintiffs' counsel argued that a tight relatedness requirement could eliminate personal jurisdiction in routine cases like actions probating wills and in interpleader actions where nonresidents can be forced to litigate in the forum despite the lack of defendant conduct in the forum giving rise to the claims being litigated in the forum. Brief of Respondents, *supra* note 34, at 40–41. Plaintiffs' counsel similarly raised questions about whether permissive joinder and collateral estoppel would survive a constitutional rule requiring that claims arise from defendant's conduct in or targeting the forum. *Id.* at 30–31.

c. National Class Actions and the Federal Court Option

Nothing in Justice Alito's opinion provides a plausible ground for distinguishing class actions in state courts from the consolidated mass actions before the Court.¹⁸⁹ Lower courts are divided over whether the holding applies to actions,¹⁹⁰ but the Court's opinion may be read as authority that state courts lack personal jurisdiction over class actions outside a defendant's home state¹⁹¹ unless each plaintiff can establish specific personal jurisdiction over all claims.¹⁹² Such a result would be a departure from prior practice and would frustrate core goals of permitting class actions.¹⁹³ Justice Alito leaves open the possibility that mass actions

189. Class actions are certified pursuant to Federal Rule of Civil Procedure 23 or by a comparable state rule. *E.g.*, FED. R. CIV. P. 23(c)(1). The government emphasized that the case neither presented the issue of personal jurisdiction in a class action nor involved a state statute attempting to permit consolidation. Brief for the United States as Amicus Curiae Supporting Petitioner at 32 n.5, 33–34 n.6, *Bristol-Myers III*, 137 S. Ct. 1773 (No. 16-466). Justice Alito's opinion included no reference to such distinguishing characteristics of the litigation, suggesting, perhaps, that the Court found them unimportant. In contrast, Justice Sotomayor explicitly noted that the Court "does not confront the question whether its opinion here would also apply to a class action." *Bristol-Myers III*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting). But she offered no suggestion for distinguishing mass actions and class actions for purposes of personal jurisdiction. *See generally* Pincus et al., *supra* note 158 ("[*Bristol-Myers III*] provides class action defendants with powerful arguments to challenge class actions filed in states that cannot exercise personal jurisdiction with respect to absent class members' claims.").

190. *Compare* Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-CV-00564, 2017 WL 4224723, at *4–6 (N.D. Cal. Sept. 22, 2017) (stating "*Bristol-Myers*' holding applies only to mass actions, not class actions," and denying motion to dismiss out-of-state claims by nonresident plaintiffs), *with* Spratley v. FCA US LLC, No. 3:17-CV-0062, 2017 WL 4023348, at *7, *9 (N.D.N.Y. Sept. 12, 2017) (reasoning that *Bristol-Myers III* applies to class actions and dismissing proposed class claims by nonresident plaintiffs arising outside the state for lack of specific jurisdiction).

191. Justice Alito responded to the concerns about the elimination of forums by noting that actions could always be brought in the defendant's home state. *Bristol-Myers III*, 137 S. Ct. at 1783. Justice Sotomayor pointed out, however, that no forum will be available where multiple corporate defendants do not share a common home state. *Id.* at 1789 (Sotomayor, J., dissenting); *see supra* notes 153–154 and accompanying text. Moreover, with respect to class actions, not all states permit class actions. *See* MISS. R. CIV. P. (omitting rules 23 and 23.1 governing class actions and shareholder derivative actions). *See generally* Richard T. (Flip) Phillips, *Why Mississippi Needs a State Court Rule 23 Class Action Procedure for the 21st Century*, 63 MISS. LAW. 9 (2017) (arguing that Mississippi should adopt a class action rule); William F. Ray, *Mississippi Does Not Need State-Court Class Actions*, 63 MISS. LAW. 16 (2017) (debating desirability of adding rule permitting class actions).

192. The Court was advised of the potential impact of the decision on class actions. *See* Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae in Support of Respondents, *supra* note 173 (arguing that petitioner's proposed limits on specific jurisdiction would frustrate class action joinder under Federal Rule of Civil Procedure 23).

193. State courts had exercised personal jurisdiction over nonresident defendants in nationwide claims without objection. *E.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799

and class actions barred in individual states might be constitutionally permissible in federal courts when the defendants engage in minimum contacts with the United States.¹⁹⁴ But no federal statute or rule provides federal courts with personal jurisdiction over either mass or class actions in situations where personal jurisdiction is unavailable in state court.¹⁹⁵ Moreover, while commentators suggest that a federal court could constitutionally exercise broader personal jurisdiction than the state in which it sits, because the defendants' forum contacts are evaluated in connection with the entire United States,¹⁹⁶ the Court has not yet squarely held that this is the case. Indeed, any congressional expansion of personal jurisdiction to remedy the gap left by the Court's restriction of specific jurisdiction in *BMS* would paradoxically collide with the argument raised

(1985). The general personal jurisdiction that supported such litigation was eliminated by the Court's decisions in *Goodyear* and *Daimler*, and Justice Alito's opinion in *Bristol-Myers III* suggests the possible elimination of specific jurisdiction. Judge (then Professor) Diane Wood discussed the jurisdictional facts of the class action in *Shutts* against the background of personal jurisdiction law as it existed in the 1980s. See Diane P. Wood, *Adjudicator Jurisdiction and Class Actions*, 62 IND. L.J. 597, 612–18 (1987). At that time, most authorities assumed state courts had general jurisdiction. See *id.* at 616. But Judge Wood pointed out—decades before *Goodyear*—that if general jurisdiction were limited to the few places where a corporation was “home,” then the defendant would not be subject to general jurisdiction elsewhere. *Id.* at 614–15. She also considered specific jurisdiction and found that it, too, might be lacking. *Id.* at 617–18 (“[S]pecific jurisdiction . . . should either exist by definition between the defendant and all class members, or the class itself should be of the purely representational variety.”); see also Andrews, *supra* note 89, at 1321, 1373–74 (concluding that personal jurisdiction over the defendant in *Shutts* was unconstitutional, though the issue was not raised). Andrews argues more generally that state class actions violate defendant's due process rights when they are brought in states where the defendant is not subject to general jurisdiction and where the class includes claims by plaintiffs who reside outside and suffered injuries outside the forum. *Id.* at 1314, 1348–74.

194. “In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” *Bristol-Myers III*, 137 S. Ct. at 1783–84 (citing *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987)).

195. Federal courts have subject matter jurisdiction over nationwide class actions based on state law in many situations. See 28 U.S.C. § 1332(d)(2) (2012) (authorizing minimal diversity over class actions where amount in controversy exceeds \$5 million); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005) (holding supplemental jurisdiction exists over joined claims without respect to amount in controversy where one plaintiff satisfies requirements for diversity jurisdiction). In contrast, the sole basis for federal court personal jurisdiction in such cases remains FED. R. CIV. P. 4(k)(1)(A) (limiting federal court's personal jurisdiction to that of state trial court where it is sitting). For this reason, Professor Patrick Borchers proposes amending Rule 4(k)(2) to include cases brought in federal court on diversity of citizenship and alienage grounds. Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 419 (2017).

196. *E.g.*, Borchers, *supra* note 195, at 417; see also *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (observing that defendant may “in principle” be subject to personal jurisdiction in federal court but not in any state court).

in *BNSF* that Congress lacks the authority to legislate in a manner that erodes rights protected by the Fourteenth Amendment.¹⁹⁷

In any event, Congress does not appear eager to provide broader authority for federal courts to hear mass actions or class actions. Until it does, the Court's decision in *BMS* has the effect of removing cases from state courts without offering an alternative.

2. The Mystery of the Missing Cases

BMS originally urged the Supreme Court to review the decision of the California court in order to address a division of authority among the lower state and federal courts about the scope of the relatedness requirement for specific personal jurisdiction.¹⁹⁸ Amicus briefs urged the Court to grant review on the ground that the case “presents the Court with the opportunity to resolve a well-developed split” in the federal circuits and in the state supreme courts.¹⁹⁹

But Justice Alito's opinion makes no reference to the decisions of the lower courts, despite the fact that the emerging weight of authority probably supported the position adopted by the Court.²⁰⁰ To be sure, the Supreme Court would not need to canvass lower court decisions in order to promulgate constitutional rule of decision. But where lower courts have been divided over important matters, the Court has not been reluctant to explore the source of the division in order to illustrate how divergent judicial solutions may be reasonably grounded in legal authority or policy considerations.²⁰¹

197. Justice McKenna found this argument persuasive. *Tyrrell v. BNSF Ry.*, 373 P.3d 1, 13 (Mont. 2016) (McKinnon, J., dissenting) (“Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it.”), *rev'd*, 137 S. Ct. 1549 (2017).

198. See Petition for Writ of Certiorari at 9–20, *Bristol-Myers III*, 137 S. Ct. 1773 (No. 16-466) (citing cases) (“There is a deep and acknowledged split on the standard for relatedness.”).

199. Brief of Amicus Curiae GlaxoSmithKline, LLC in Support of Petitioner at 17, *Bristol-Myers III*, 137 S. Ct. 1773 (No. 16-466); see also Brief of Pharmaceutical Research and Manufacturers of America as Amicus Curiae in Support of Petitioner at 5, 7; *Bristol-Myers III*, 137 S. Ct. 1773 (No. 16-466) (referring to “persistent division of opinion in the lower courts” regarding the scope of the relatedness requirement for specific jurisdiction).

200. Cf. Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner at 13, *Bristol-Myers III*, 137 S. Ct. 1773 (No. 16-466) (citing the First Circuit) (arguing that a lower federal court had held that specific jurisdiction was not permissible where the plaintiff's claims arose independently from the defendant's forum contacts).

201. A good example is *Hertz Corp. v. Friend*, where the Court addressed the appropriate definition of a corporation's “principal place of business,” prescribed as one of the corporation's places of citizenship for purposes of diversity of citizenship subject matter jurisdiction under 28 U.S.C. § 1332(c)(1) (2012). 559 U.S. 77, 80 (2010). The Court examined the division among the

Moreover, the omission of any reference to the division of authority deprives the opinion of juridical context. Omitting any discussion of divergent judicial opinions on the issue prevents the Court from recognizing the legal uncertainty that rendered different conclusions reasonable, and this in turn reinforces the impression that the California court's approach was idiosyncratic and irrational—an impression that is not countered by any concrete discussion of the reasoning offered by the California courts.

The failure to address the division of lower courts allowed Justice Alito to avoid acknowledging the responsibility of the Supreme Court for the legal uncertainty over the requirement that a case must arise from “or” relate to the defendant’s forum contacts—specifically whether “relate to” denotes a connection different from arising from.²⁰² A significant textual source of lower court confusion was the Court’s opinion in *Helicopteros Nacionales de Colombia, S.A.*,²⁰³ where the Court first articulated the requirement for specific jurisdiction that the claim must arise from “or” relate to the defendants’ forum contacts.²⁰⁴ In articulating this requirement, the Court had expressly refused to decide whether “or” disjunctively suggested the possibility of a looser relationship than the causal relationship suggested by the requirement that a claim arise from the forum contacts.²⁰⁵

It is a mystery why the Court did not discuss or even refer to the division of authority among the lower courts, but doing so would require acknowledging the source of the lower court uncertainty. And this would

circuits and adopted the “nerve center” test employed by some lower courts—which “should normally be the place where the corporation maintains its headquarters.” *Id.* at 92–93.

In contrast, the Court’s failure to acknowledge lower court authority (pro or con) in its discussion of personal jurisdiction may reflect unarticulated programmatic goals. *Cf.* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 907 (2014) (discussing the Court’s treatment of lower court precedent and observing, in different context, that failure to identify substantial lower court authority “is worrying because it feeds the suspicion that the lower courts are invoked or ignored in a strategic way”).

202. The government argued that specific jurisdiction “ordinarily requires that some act giving rise to a nonresident plaintiff’s claim or injuries have occurred within the forum State.” Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 189, at 20. But the government acknowledged that the Court had reserved the question of whether “arising out of” and “related to” describe different connections. *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415–16 n.10 (1984)).

203. 466 U.S. 408.

204. *Id.* at 414.

205. *Id.* at 415 n.10 (“Absent any briefing on the issue, we decline to reach the questions (1) whether the terms ‘arising out of’ and ‘related to’ describe different connections between a cause of action and a defendant’s contacts with a forum, and (2) what sort of tie between a cause of action and a defendant’s contacts with a forum is necessary to a determination that either connection exists.”).

have challenged Justice Alito's narrative that Supreme Court precedent fully answered the issue presented in *BMS*.

3. The Mystery of the Problematic Precedent

Justice Alito's opinion rapidly dismisses the sliding-scale approach because it permits specific jurisdiction without "any adequate link" between the claims and the forum.²⁰⁶ While he asserts that the litigation relationship among the plaintiffs' cases is insufficient, he never explains why this is so.²⁰⁷ Instead, he relies on *Walden v. Fiore*²⁰⁸ as a precedent that "illustrates [the] requirement [of a connection between the forum and the specific claims]."²⁰⁹

Yet, from the Court's own summary, *Walden* provides little useful guidance. In *Walden*, the plaintiffs sought to establish specific jurisdiction over intentional tort claims based entirely on the foreseeability of injury occurring in the forum state.²¹⁰ The Court, following precedent, unanimously found that no contacts could be established for the defendant by the unilateral acts of the plaintiff.²¹¹

Unlike *Walden*, the defendant in *BMS* conceded it had extensive contacts in California, and it made a further concession that it had contacts that supported specific personal jurisdiction over some claims.²¹² Thus, *Walden* can provide analogous authority only after the Court has dismissed both the significance of *BMS*'s extensive forum conduct (for jurisdiction over the nonresident plaintiffs' claims) and the significance of the defendant's out-of-state conduct that caused injuries similar to the

206. *Bristol-Myers III*, 137 S. Ct. 1773, 1781 (2017).

207. In contrast, Justice Werdegar offered a reasoned explanation for why the litigation contacts should not count, emphasizing that contacts must be legally relevant and that narrowing jurisdiction promoted the goals of predictability and foreseeability that she attributed to the due process limits on specific jurisdiction. *Bristol-Myers II*, 377 P.3d 874, 899, 907 (Cal. 2016) (Werdegar, J., dissenting), *rev'd*, 137 S. Ct. 1773 (2017).

208. 134 S. Ct. 1115 (2014).

209. *Bristol-Myers III*, 137 S. Ct. at 1781 (citing *Walden*, 134 S. Ct. at 1124).

210. *Walden*, 134 S. Ct. at 1120.

211. *Bristol-Myers III*, 137 S. Ct. at 1781 (quoting *Walden*, 134 S. Ct. at 1123) ("[A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction."); *see also id.* at 1781–82 (quoting *Walden*, 134 S. Ct. at 1126) ("Because the 'relevant conduct occurred entirely [outside the forum state] . . . the mere fact that [this] conduct affected plaintiffs with connections to the forum State d[id] not suffice to authorize jurisdiction.'").

212. Petition for Review at 6, *Bristol-Myers II*, 377 P.3d 874 (No. 221038).

in-state injuries.²¹³ Yet, this was precisely the conduct that the lower courts looked to in finding personal jurisdiction.²¹⁴

Neither *Walden* nor any other case addressed the issue of first impression before the Court in *BMS*—whether a defendant properly before the California court on the residents’ claims was subject to personal jurisdiction on additional similar claims. But in arguably the closest case, the Court had permitted one state with specific jurisdiction over a libel claim brought by a nonresident to decide all damages against a defendant, even though most of the damages were experienced outside the state²¹⁵—a decision that Justice Alito distinguished on the ground that it concerned damages resulting from a single claim rather than multiple claims.²¹⁶

4. The Mystery of the Missing Methodology

Supreme Court decisions in the 1980s elaborated a two-part analysis for specific jurisdiction²¹⁷ that lower courts expanded into the three-part analytic framework applied by the lower courts in *BMS*: (1) the defendant’s acts or contacts must be in or purposefully directed toward the forum state; (2) the plaintiffs’ claims arise from or relate to the defendant’s forum contacts; and (3) the exercise of jurisdiction must be

213. Justice Alito observed that the contacts are weaker than those in *Walden* because the plaintiff in *Walden* was a resident of the forum state and suffered an injury in that state. *Bristol-Myers III*, 137 S. Ct. at 1782.

214. See *supra* notes 39, 61–66 and accompanying text.

215. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772, 781 (1984). Justice Alito found the case inapposite.

[*Keeton*] concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction . . . to consider the full measure of the plaintiff’s claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law.

Bristol-Myers III, 137 S. Ct. at 1782 (citing *Keeton*, 465 U.S. at 778).

216. See *supra* notes 123, 164, 176 and accompanying text (discussing the Court’s effort to distinguish *Keeton*).

217. First, there must be minimum contacts; second, the exercise of jurisdiction must be reasonable. *E.g.*, *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 103 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). In elaborating the test, the Court identified five specific factors to consider in determining reasonableness. Further, it observed that when a defendant established minimum contacts by directing activities at forum residents, then the defendant must make a compelling case that other factors would make specific jurisdiction unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). The application of these factors decided the outcome in *Asahi*, 480 U.S. at 113–14.

reasonable under the circumstances.²¹⁸ The controversy in the case concerned the application only of the second (relatedness) requirement.

It is not clear whether Justice Alito accepted the established framework. In rejecting California court's broad approach to relatedness, he reiterated the Court's dichotomy between general and specific jurisdiction, and recited the restriction on general jurisdiction to places where a corporation is "at home," typically where it is incorporated or maintains its principal place of business.²¹⁹

Their view of general jurisdiction was unnecessary to the opinion, because no party contended BMS was subject to general jurisdiction in California. In contrast to the detailed recital of doctrines governing general jurisdiction, Justice Alito's opinion is silent about appropriate methodological framework for analyzing specific jurisdiction. The silence may signal Justice Alito's repudiation of the approach to specific jurisdiction that has prevailed since the 1980s. He has neither employed that framework, nor referred to it in other opinions. His opinion in *BMS* makes clear that he does not regard reasonableness as a sufficient ground for specific jurisdiction, but his discussion may also suggest that he does not consider reasonableness a valid criterion. On the contrary, his treatment of the burden on the defendant discounts the concrete sources of inconvenience and prejudice that would be relevant to the reasonableness of jurisdiction, and focuses instead on abstract federalism interests.²²⁰

Other members of the Court have also distanced themselves from the once well-established two-part framework for specific jurisdiction. In *J. McIntyre Machinery, Ltd. v. Nicaastro*,²²¹ four Justices adopted a power-based approach to personal jurisdiction that focused on the defendant's voluntary submission to the adjudicatory jurisdiction of a particular sovereign.²²² Supreme Court Justice Anthony Kennedy wrote that personal jurisdiction is "in the first instance a question of authority rather than fairness,"²²³ and expressed skepticism about the reasonableness evaluation undertaken by the Court in deciding earlier cases.²²⁴

218. See notes 39, 52–55 and accompanying text (discussing approach of lower courts).

219. *Bristol-Myers III*, 137 S. Ct. at 1780 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011)).

220. See *supra* notes 109–11 and accompanying text (lack of inconvenience does not eliminate challenge to personal jurisdiction because personal jurisdiction also secures federalism interests).

221. 564 U.S. 873 (2011).

222. *Id.* at 883 (plurality opinion).

223. *Id.*

224. *Id.* ("[A] rule based on general notions of fairness and foreseeability[] is inconsistent with the premises of lawful judicial power."). Supreme Court Justice Antonin Scalia had refused without explanation to subscribe to the part of the *Asahi* opinion that employed the reasonableness

It remains a mystery whether Justice Alito's silence on the appropriate analytic framework indicates that he, too, rejects it,²²⁵ or whether he crafted the opinion for the Court in *BMS* to avoid confronting a legal issue on which members of the Court are sharply divided.²²⁶

5. The Mystery of the Sister-State Sovereign Interests

The final mystery in Justice Alito's opinion is the exact source and meaning of the sovereign interests of sister states that are promoted by the Court's restrictions on California's personal jurisdiction. Justice Alito sees these sovereign interests are "decisive"²²⁷ in a case like *BMS* where the litigation is not inconvenient to defendant in any practical way and

test. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1986) (listing all members of the Court except Justice Scalia as joining section II.B of opinion, which found personal jurisdiction unreasonable).

The Justices proposing the submission theory regard *Asahi* as rightly decided but due solely to the lack of minimum contacts. *J. McIntyre*, 564 U.S. at 882–83 (plurality opinion). I have suggested elsewhere that members of the Supreme Court may be prepared to repudiate the two-part (or three-part) approach to specific jurisdiction. MICHAEL H. HOFFHEIMER, *CONFLICT OF LAWS EXAMPLES AND EXPLANATIONS* 44 (3d ed. 2016). Justice Gorsuch's questions during oral argument may suggest he regards personal jurisdiction as principally a matter of power. Transcript of Oral Argument, *supra* note 1, at 25 (directing counsel to discuss issue of federalism developed in *J. McIntyre*).

225. Justice Alito did not join the opinion of the Justices propounding the submission theory. *J. McIntyre*, 564 U.S. at 887 (Breyer, J., concurring, joined by Alito, J.).

226. Justice Ginsburg criticized the submission theory in an opinion joined by Supreme Court Justices Elena Kagan and Sotomayor. *Id.* at 901 (Ginsburg, J., dissenting) ("[T]he plurality's notion that consent is the animating concept [of personal jurisdiction] draws no support from controlling decisions of this Court.").

227. *Bristol-Myers III*, 137 S. Ct. 1773, 1780 (2017). Justice Alito characterized the burden on the defendant as the "primary concern." *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). While acknowledging that the burden "obviously requires a court to consider the practical problems resulting from litigation in the forum," Justice Alito did not address practical inconveniences, and there appear to be none. *Id.* Instead, he added that

[the burden] also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the *claims* in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."

Id. (emphasis added) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). He repeated language from other opinions that the "essential attributes of sovereignty" include the power to try cases, and that the sovereign power "imply[s] a limitation on the sovereignty of all . . . sister States." *Id.* (alteration in original) (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 294). Justice Alito then wrote: "And at times, this federalism interest may be decisive." *Id.* Thus, in the end this federalism can prevent a forum from exercising personal jurisdiction "even if the forum State is the most convenient location for litigation." *Id.* at 1780–81 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 294).

might even achieve economies that benefit the forum, plaintiff, and defendant.²²⁸ Moreover, the constitutional requirement of some prior relationship between the defendant and the forum cannot explain the holding because, as Justice Sotomayor observed, BMS “purposefully availed itself” of the privilege of conducting business in California by the volume of its commercial activity in the state and by establishing minimum contacts with California that require it to litigate many claims in California.²²⁹ In requiring something more, Justice Alito relied instead on the sovereign interests of states outside California in localizing litigation. But the source of such sovereign interests is not clear,²³⁰ nor is it clear why such sovereign interests should be available as jurisdictional defenses to private parties in private litigation.²³¹ States themselves have not articulated such interests through legislation or common law rules. Moreover, if a corporation’s home state had directly legislated a prohibition against litigation in other state courts, other states would not be required to respect its legislation.²³² Similarly, if a corporation’s home state clothed its corporations with substantive immunity, other states would not be required to respect the immunity if they had legitimate reasons for disregarding it.²³³

228. See *supra* notes 71–76 and accompanying text (discussing reasoning of California court).

229. *Bristol-Myers III*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting). Since the defendant is required to respond to the residents’ claims in the forum, “it will not be harmed by having to defend against [the nonresidents’] claims.” *Id.* at 1786.

230. The constitutional source of the interests has been debated by members of the Court. See, e.g., *J. McIntyre*, 564 U.S. at 899 (Ginsburg, J., dissenting) (“[T]he constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty.”); see also *Shaffer v. Heitner*, 433 U.S. 186, 204 n.20 (1977) (“[T]he mutually exclusive sovereignty of the States . . . [is not] the central concern of the inquiry into personal jurisdiction”).

231. Because personal jurisdiction limits are grounded on the Due Process Clause, which protects the rights of persons from state action, the Court has emphasized that personal jurisdiction serves federalism values indirectly. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702–03 n.10 (1982).

232. See *Tenn. Coal, Iron & R.R. v. George*, 233 U.S. 354, 358–61 (1914) (holding that the Full Faith and Credit Clause does not require sister state to respect statute prohibiting litigation of statutory claim outside state creating cause of action).

233. In contrast to the “minimum contacts” required for a forum state to exercise personal jurisdiction under *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), due process requires a significant contact or significant aggregation of contacts creating state interests for a forum state to apply its own law. See *Allstate Ins. v. Hague*, 449 U.S. 302, 308 (1981). Although the formulaic requirement of “significant contacts” seemingly requires a closer relationship between the forum and the litigation than minimum contacts, the contacts for choice of law may include circumstances other than the defendant’s forum conduct. *Id.* at 317 (considering plaintiff’s residence and work history in finding significant aggregation of contacts).

II. DENIAL

Most commentators agree that the Court's decisions since 2011 have introduced significant changes to the law of personal jurisdiction.²³⁴ This Part reviews efforts by members of the Court to deny the change. It also considers serious adverse consequences of the stealth revolution.

A. *The Exception that Proves the Rule*

Justice Kennedy's plurality opinion in *J. McIntyre*²³⁵ provides the single exception to the Court's denial that it is introducing significant changes to the law of personal jurisdiction. In proposing a clear new rule

Justice Alito does not draw on the promising efforts by Judge Werdegar in her dissent, *see supra* notes 89–92 and accompanying text, or Judge Wood in her law review article, Wood, *supra* note 193, to relate the scope of a forum's personal jurisdiction to the scope of the forum state's regulatory interest over the corporation. Their theories fit imperfectly with the fact that the Court has explained the limits on forum jurisdiction as a function of the presumed interest of sister states, not the inherent interest in corporations to be free from unwarranted state control. In any event, it is hard to understand how the speculative interest imputed to sister states outweighs California's demonstrated interest in providing a convenient forum and the shared interests of all states in providing for the effective, economical adjudication of multistate disputes. *See Bristol-Myers III*, 137 S. Ct. at 1786–88 (Sotomayor, J., dissenting).

Attitudes towards regulating corporations have come a long way. As the respondents argued, “states [once] retained authority to subject all persons and property within the state to their jurisdiction—including *especially* any corporation wishing to do business therein.” Brief of Respondents, *supra* note 34, at 33 (citing *Paul v. Virginia*, 75 U.S. 168, 181–83 (1868)).

234. In addition to characterization of recent decisions as revolutionary, *see supra* note 15 and accompanying text, other scholars have referred to radical changes introduced by the Roberts Court's decisions. *See* Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 107 (2015) (“The Supreme Court's two most recent opinions [*Daimler* and *Walden*] . . . usher in a new era in the law of general and specific personal jurisdiction.”); Tanya J. Monestier, *Where Is Home Depot “at Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 292 (2014) (“The decision in *Daimler* effects a dramatic change to the law of personal jurisdiction in the United States.”); Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 503 (2015) (“[I]t shows that the Supreme Court has significantly reined in general jurisdiction to an extent that would have been surprising just four years ago. . . . [The] Court has tightened the concept of general jurisdiction to an extent that, until quite recently, would have been unfathomable.”); Trammell, *supra*, at 522 (“The last three years have witnessed a sea change in the Supreme Court's general jurisdiction case law.”); Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL. 209, 267–68 (2015) (considering pro-corporation and anti-plaintiff bias of cases); *see also* Vitiello, *supra*, at 276 (“[The Court] without a clear explanation of its underlying theory . . . radically[] scaled back . . . [the] availability [of general jurisdiction].”). *See generally* Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1 (2014) (describing the practical decline of traditional standards articulated in *International Shoe*).

235. *See J. McIntyre*, 564 U.S. at 879 (plurality opinion) (“This Court's *Asahi* decision may be responsible in part for that [lower] court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.”).

for stream-of-commerce cases, Justice Kennedy acknowledged that the outcome was not dictated by settled law.²³⁶ His opinion also differed notably from *BMS* and other opinions, conceding that the Supreme Court was itself responsible for the legal uncertainty confronting the lower courts. Instead of castigating lower courts for lawless disregard of controlling authority or for improperly grasping jurisdiction, Justice Kennedy expressed respect for the efforts of the lower courts to reach constitutionally appropriate results.²³⁷

B. *The Narrative of Lower Court Intransigence*

Supreme Court Justice Stephen Breyer's concurring opinion in *J. McIntyre*, in contrast, comported with the Court's practice in other opinions. He concurred with the holding but insisted, "In my view, the outcome of this case is determined by our precedents."²³⁸ He offered no suggestion for a new approach to the problem of stream of commerce, but declared simply that the case was factually distinguishable from other situations where the Court has approved of specific jurisdiction based on the stream of commerce theory.²³⁹ Justice Breyer's explanation followed the pattern set by Supreme Court Justice Clarence Thomas's opinion for a unanimous court in *Walden v. Fiore*, where the Court faced a difficult matter that it had never addressed—the sorts of contacts required for intentional torts where the tortfeasor foresees causing injury in the plaintiff's home state.²⁴⁰ Justice Thomas denied that the Court was addressing a new issue on which lower courts were divided. On the contrary, he explained: "Well-established principles of personal jurisdiction are sufficient to decide this case."²⁴¹

Opinions that present the case as narrowly controlled by precedent fail to acknowledge the legal indeterminacy that lower courts face and, accordingly, fail to recognize the value of the lower courts' efforts to achieve just results. Such opinions promote the view that the lower courts are failing to apply settled law.

236. *Id.* at 877.

237. Justice Kennedy explained, "the New Jersey Supreme Court issued an extensive opinion with careful attention to this Court's cases and to its own precedent." *Id.* And he noted that the judicial metaphor ("stream of commerce") may itself have caused confusion. *Id.* ("[T]he 'stream of commerce' metaphor carried the decision far afield."); *id.* at 881 ("[L]ike other metaphors, [it] has its deficiencies as well as its utility.").

238. *Id.* at 887 (Breyer, J., concurring); *see also id.* at 888 ("None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient.").

239. *Id.* at 887.

240. *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014).

241. *Id.* at 1126.

Members of the Court also communicate lack of confidence in the lower courts' personal jurisdiction decisions in other ways. In *Daimler*, Justice Ginsburg stigmatized the lower court rulings by her choice of words to describe California's exercise of personal jurisdiction as "exorbitant"²⁴² and "grasping."²⁴³ Justice Alito achieves a similar effect in *BMS* by referring to California's method of finding jurisdiction as "spurious."²⁴⁴ "Grasping" and "spurious" are not descriptive legal terms.²⁴⁵

In *BNSF*, Justice Ginsburg preceded her discussion of the issue by reciting a series of general rules she has announced in prior cases, but which have no immediate application to the issues before the Court.²⁴⁶ Her presentation of the history of personal jurisdiction as a sequence of relatively simple doctrines suggests that the plaintiffs and lower courts do not understand rudimentary legal principles.²⁴⁷ Her recitation of doctrines expands the volume of her opinion, and this obscures how little

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

243. *Id.* at 761.

244. *Bristol-Myers III*, 137 S. Ct. 1773, 1781 (2017).

245. "Grasping" connotes ruthlessness and its synonym is "covetous." *Grasping*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 508 (10th ed. 1998). "Spurious," like "bastard," pejoratively denotes illegitimate birth and more broadly connotes something false or forged. *Id.* at 1140 (defining *spurious*).

246. *See, e.g.*, *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1554 (2017) ("Our precedent . . . explains that the Fourteenth Amendment's Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not 'at home' in the State and the episode-in-suit occurred elsewhere."); *see also id.* at 1558 ("In *International Shoe*, this Court explained that a state court may exercise personal jurisdiction over an out-of-state defendant who has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

247. Her simplifying characterizations of precedent themselves advance a controversial reform agenda, concealing adjustments to the law articulated in previous opinions. For example, one of the sources of a contacts-based approach to general jurisdiction is *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). In order to amalgamate the case with her newer at-home standard, Justice Ginsburg explains, "In *Perkins* war had forced the defendant corporation's owner to temporarily relocate the enterprise from the Philippines to Ohio. Because Ohio then became 'the center of the corporation's wartime activities,' suit was proper there . . ." *BNSF*, 137 S. Ct. at 1558 (citations omitted). This is an oversimplification of the motives that led the company's president to bring the company's records to Ohio. During the war, the mining company had also maintained substantial assets in California. *Perkins v. Benguet Consol. Mining Co.*, 132 P.2d 70, 78 (Cal. Dist. Ct. App. 1942). But the company moved assets to Ohio and deposited them there in the name of the corporation's president only after California courts had exercised (general) in rem jurisdiction. *See Perkins*, 342 U.S. at 438; *see also Perkins*, 132 P.2d at 96; Cornett & Hoffheimer, *supra* note 5, at 563 & n.78. Justice Sotomayor protests that the majority opinion "could be understood to limit that exception to the exact facts of *Perkins*. That reading is so narrow as to read the exception out of existence entirely." *BNSF*, 137 S. Ct. at 1561 (Sotomayor, J., dissenting) (citation omitted).

text she devotes to the precise problem facing the Court. Following the summary of general principles animating the law of personal jurisdiction, she dismisses the Montana court's decision with little discussion, characterizing the lower court decision as resulting from an elementary failure to appreciate the scope of the Fourteenth Amendment.²⁴⁸ Her characterization of the state court decision reinforced the impression that the state court acted irrationally and without legal authority.²⁴⁹

But Justice Ginsburg's historical summary simplified the law to the point that it provides an inadequate frame for understanding the specific problem that the lower courts confronted. Thus, Justice Ginsburg writes that the "at home" doctrine merely "clarified" earlier cases recognizing general jurisdiction.²⁵⁰ In seeking to amalgamate the at-home doctrine to the Court's prior decisions, she fails to acknowledge that the at-home test constituted a significant shift in the law that produced substantial confusion among lower courts.²⁵¹

Similarly, her characterization of the Montana court's elementary failure regarding the broad applicability of Fourteenth Amendment norms reflects her own view that *Daimler* applies to all cases without regard to the type of claims or parties. But, her declaration that *Daimler* applies universally was the issue before the Court, and the assumption that it must apply to all kinds of cases fails to appreciate the specific challenges that lower courts faced in distinguishing Justice Ginsburg's broad language in *Daimler* from the unusual facts and extremely narrow issue that the Court purported to decide in that case.²⁵²

248. *BNSF*, 137 S. Ct. at 1558–59 (“The Montana Supreme Court distinguished *Daimler* on the ground that we did not there confront ‘a FELA claim or a railroad defendant.’ The Fourteenth Amendment due process constraint described in *Daimler*, however, applies to all state-court assertions of general jurisdiction . . . ; the constraint does not vary with the type of claim asserted or business enterprise sued.” (citation omitted)).

249. Justice Ginsburg likewise sought to dismiss the objections of the dissent as reflecting a basic misunderstanding of the law. *Id.* at 1559 n.4. She insisted *International Shoe* elaborated the dichotomy between specific and general jurisdiction and that Supreme Court Chief Justice Harlan F. Stone's famous formula requiring “minimum contacts” applied exclusively to specific personal jurisdiction. *Id.* Justice Ginsburg's note chastising Justice Sotomayor contains more words than the paragraph of the majority opinion that evaluates whether BNSF satisfies *Daimler*'s requirements for general jurisdiction in Montana. *Id.* Justice Sotomayor responded, pointing out the anachronism of this reading. *Id.* at 1561–62 (Sotomayor, J., dissenting).

250. *Id.* at 1559 (majority opinion).

251. *E.g.*, Cornett & Hoffheimer, *supra* note 5, at 114 n.60 (citing cases and articles indicating continuing confusion after *Goodyear* as to whether corporations could be subject to general jurisdiction where they engage in substantial activity outside their place of incorporation and principal place of business).

252. The Court granted review in *Daimler* to decide whether jurisdictional contacts of a subsidiary might constitutionally be attributed to a parent. Petition for Writ of Certiorari at i, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965). While eventually found to be

Justice Alito's opinion in *BMS* yields a similar impression of lower court intransigence. After reciting a series of long established legal doctrines,²⁵³ none of which were contested, he explains that specific jurisdiction limits personal jurisdiction to issues "deriving from, or connected with" the controversy.²⁵⁴ It is in this context that he announces that "settled principles regarding specific jurisdiction control this case."²⁵⁵ Nothing in his discussion acknowledges that none of the Court's previous decisions addressed a situation where nonresident claims were properly joined to residents' claims and defendant's forum conduct was sufficiently related to the residents' claims.²⁵⁶ In fact, the Court had apparently never held that a defendant properly before the Court on some claims was not subject to the court's jurisdiction for whatever additional claims the forum authorized under state law.

Instead, Justice Alito insists that *BMS*'s conduct was constitutionally insufficient, relying on the general principle, which was also uncontested, that some activity or occurrence must occur in the forum state.²⁵⁷ This is the context in which he announces that the sliding scale approach is "difficult to square with our precedents"²⁵⁸ and announces that the case is governed by the "straightforward application" of settled law.²⁵⁹

Finally, the Court communicates lack of confidence in the lower courts, further promoting the narrative of lower court intransigence, through its procedural decisions to decide cases on appeal rather than to remand them for the lower courts to decide by applying the proper standard. In *Daimler*, where the Court held that the U.S. Court of Appeals for the Ninth Circuit improperly failed to apply *Goodyear*'s "at home" standard, the Supreme Court could have remanded with directions to apply the right standard; instead, it decided for itself that personal jurisdiction was improper.²⁶⁰ Similarly, in *BNSF Railway Co. v.*

erroneous, the Montana court tried to make sense of recent and significant changes to the law of personal jurisdiction. *BNSF*, 137 S. Ct. at 1553–54. In distinguishing jurisdictional facts involving a railroad from those involving a foreign automobile manufacturer, the state courts demonstrated an understandable reluctance to over-apply the Court's new rules.

253. *Bristol-Myers III*, 137 S. Ct. 1773, 1779 (2017). Justice Alito emphasized that general jurisdiction is limited to where a corporation is at home, and that specific jurisdiction is "very different." *Id.* at 1780.

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

255. *Id.* at 1781.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 1783.

260. See Cornett & Hoffheimer, *supra* note 5, at 119 (discussing Court's options in *Daimler*). This was the procedure adopted by the Supreme Court of California in *Bristol-Myers II* with the result that the court of appeal found that there was no general jurisdiction. *Bristol-Myers I*, 175

Tyrrell,²⁶¹ where the Court held that the Montana courts failed to apply the “at home” standard, the Court could have remanded with instructions to apply the proper law; nonetheless, it decided the issue on appeal and on an arguably incomplete record.²⁶²

C. *The Costs of Stealth Revolutions*

1. Explanatory Inadequacy

The Court has not offered much explanation for its changes to the law of personal jurisdiction.²⁶³ But there is reason to think that at least some Justices mean to offer simple rules that will guide litigators and courts.²⁶⁴ If so, the Court’s overdependence on precedent frustrates its goal. Due to the Court’s failure to offer fuller explanations, its personal jurisdiction decisions create uncertainties about: (1) the reasons why general jurisdiction must constrict over time;²⁶⁵ (2) the reasons why general and specific jurisdiction must be conceptually exclusive and why there can be no hybridization;²⁶⁶ (3) the reasons supporting a tight relatedness requirement for specific jurisdiction; (4) the status of the two-part

Cal. Rptr. 3d 412, 415, 424 (Cal. Ct. App. 2014) (opinion by Brick, J., for unanimous court), *aff’d*, 377 P.3d 879 (Cal. 2016), *rev’d*, 137 S. Ct. 1773 (2017).

261. 137 S. Ct. 1549 (2017).

262. *See id.* at 1562 (Sotomayor, J., dissenting) (“[W]ith its ruling today, the Court unnecessarily sends a signal to the lower courts that the exceptional-circumstance inquiry is all form, no substance.”).

263. *E.g.*, Stanley E. Cox, *The Missing “Why” of General Jurisdiction*, 76 U. PITT. L. REV. 153, 157–77 (2014) (excellent discussion of the lack of reasons offered for the Court’s general jurisdiction decision by a scholar who is not unsympathetic to the change in law).

264. “Counsel, we’re dealing with the jurisdictional rule, and when we do that, we want the rule to be as simple as possible.” Transcript of Oral Argument, *supra* note 1, at 47 (statement of Chief Justice Roberts).

265. The Court’s opinions nowhere explain why the Court privileged domicile-based forms of general jurisdiction in erecting the rule that corporations are subject to personal jurisdiction where they are “at home,” nor do its opinions explain why general jurisdiction must be restricted to the corporation’s homes or why the home places should also be narrowly construed.

Some Justices assume but never explain why the rules for personal jurisdiction, as opposed to those for subject matter jurisdiction, must be simple or predictable. Simple rules do not necessarily promote predictability. A rule presuming valid personal jurisdiction following proof of service would equally promote predictability. A predictable rule that reduces otherwise valid state authority is predictably unconstitutional.

266. Brief of Professors of Civil Procedure and Federal Courts as Amici Curiae in Support of Respondents, *supra* note 173, at 6 (jurisdictional gap resulting from bifurcation of specific and general jurisdiction); *see also* Patrick J. Borchers, *The Problem with General Jurisdiction*, U. CHI. LEGAL F. 119, 139 (2001) (urging retention of some form of general jurisdiction due to gaps created by the Court’s restriction of specific jurisdiction).

methodological framework for specific jurisdiction;²⁶⁷ and (5) the reasons for avoiding constructions of specific jurisdiction that could replace older forms of general jurisdiction.

Moreover, the Court's assertion that its rulings are dictated by precedent creates two kinds of practical problems. The opinions provide insufficient guidance to lower courts about how to apply the holdings to future cases with different facts. And the Court's reluctance to craft clear rules of decision and to articulate the policies for its decisions fails to indicate the limits to their application and thus fails to prevent the possible overextension of holdings to cases where they may be inappropriate.

a. Fact-Specific Holdings Minimizing Change to Settled Law Confuse Lower Courts

On remand after *Daimler*, the California Court of Appeal in *BMS* concluded that the Court's holding did not affect existing practices with respect to specific jurisdiction.²⁶⁸ Anticipating the Court's broad reading of *Daimler*, Justice Werdegar dissented and concluded that there was no basis for specific jurisdiction.²⁶⁹ But she did so because she looked past the Court's claims in *Daimler* that it was merely applying settled law; she understood the trajectory of recent cases as signaling a broader break with past practices.²⁷⁰ And she recognized that the post-2011 decisions restricting general jurisdiction were motivated by underlying policy goals that strongly favored a tighter relatedness requirement for specific jurisdiction.²⁷¹ Justice Werdegar thus got the result right, but she did so

267. See *supra* notes 220–22 and accompanying text (discussing the Court's avoidance of the test in recent opinions).

268. See *Bristol-Myers I*, 175 Cal. Rptr. 3d 412, 415, 425 (Cal. Ct. App. 2014) (opinion by Brick, J., for unanimous court), *aff'd*, 377 P.3d 879 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017); Alani Golanski, *Why Daimler Accommodates Personal Jurisdiction in Mass Tort Litigations*, 80 ALB. L. REV. 311, 311–12, 332 (2017). The Court of Appeal reasoned that *Daimler* did not affect “flourish[ing]” specific personal jurisdiction. *Bristol-Myers I*, 175 Cal. Rptr. 3d at 425.

269. *Bristol-Myers II*, 377 P.3d 874, 896 (Cal. 2016), *rev'd*, 137 S. Ct. 1773 (2017).

270. *Id.* (Werdegar, J., dissenting) (emphasis added) (recognizing that *Daimler* “wrought . . . a much tighter ‘at home’ limit.”). Justice Werdegar understood that the Court's categorical separation between general and specific jurisdiction and its restriction of general jurisdiction reflected a policy that required courts to prevent specific jurisdiction from recapturing general jurisdiction. See *id.* at 896–97.

271. Justice Werdegar cautioned that the California court's approach, by minimizing relatedness, undermines an important distinction between specific and general jurisdiction. *Id.* at 896. Without any clear guidance from the Court's decisions, she attempted to identify constitutional principles served by the relatedness requirement, arguing that weakening relatedness extends personal jurisdiction beyond a state's legitimate regulatory interest. See *id.* at 896.

because she understood that the Supreme Court meant to do more than it said.

b. Lack of Articulated Rules and Policies Fails to Prevent Overapplication of Holdings

By relying on precedent without articulating rules of decision and policies, the Court also fails to provide necessary guidance that can serve to prevent the future extension of holdings to cases where they would be inappropriate. This danger is illustrated by the concerns raised by plaintiffs' counsel in *BMS* that a tight relatedness requirement for each claim could prevent personal jurisdiction over nonresident claimants necessary to settle decedents' estates.²⁷² Because the Court's opinion in *BMS* offers little independent explanation for the holding, it is hard to find clear policies that limit the reach of the holding.

2. Precedent as Pretext

The Roberts Court's personal jurisdiction decisions have moved relentlessly in one direction—the curtailment of personal jurisdiction—cumulatively resulting in a program of law reform that systematically benefits defendants. The lack of reasoned explanations for the legal change, coupled with the Court's unconvincing reliance on precedent,²⁷³ provides support for critics who propose that conservative values of members of the Court have led them to favor the interests of corporations and defendants,²⁷⁴ and to disfavor plaintiffs.²⁷⁵

Other scholars have sought to understand the Court's drive to restrict jurisdiction as an ideological commitment to territorial sovereignty or as a libertarian hostility toward courts reflected in hostility toward adjudicatory jurisdiction.²⁷⁶ But whether explained as motivated by individual bias towards a class of parties or by unarticulated ideological convictions, the Court's decisions lose any claim to neutrality and transparency, raising questions as to whether members of the Court can

272. See *Bristol-Myers III*, 137 S. Ct. 1773, 1783 (2017) (discussing argument in respondents' brief).

273. See *supra* notes 207–13 and accompanying text (discussing extension of *Walden* to different legal situation).

274. VITIELLO, *supra* note 8, at 69 (considering possible pro-corporate bias of conservative members of the Court).

275. *Id.* at 69–70 (discussing possible anti-plaintiff bias of Court).

276. See Robertson & Rhodes, *supra* note 157, at 788 (footnotes omitted) (“The personal jurisdiction cases speak more generally to the Roberts Court’s commitment to formalism and respect for territorial boundaries. . . . In general, the formalist approach favors bright-line rules over more malleable cost-benefit analyses. In the personal jurisdiction realm, the Court’s formalist approach suggests a sharply limited role for the judiciary as well as a skepticism of plaintiffs’ broad forum choices.”).

be persuaded by legal argument,²⁷⁷ and undermining core values of the rule of law.

3. Devaluing the Work of Lower Courts

In relying solely on its own prior decisions to craft bright-line rules that cabin lower court decision-making authority, the Court jettisons the accumulated experience of many lower court judges over many years.²⁷⁸ Yet, it is the lower court judges that have acquired the most direct experience in administering the rules governing personal jurisdiction, and they have most frequently observed the consequences of jurisdictional rules. The narrative of lower court intransigence prevents the Supreme Court from acknowledging the value of the work of the lower courts and deprives the Court of the accumulated experience of many judges.²⁷⁹

4. Discounting the Real Interests of the Forum State, Overprotecting the Intangible Interests of Other States, and Devaluing Plaintiffs' Interests

The Court's decisions since 2011 have reduced the adjudicatory jurisdiction of states and limited plaintiffs' access to courts. But, in failing to provide robust explanations to support its changes to the law, the Court has failed to adequately consider the sovereign interests of states and has devalued plaintiffs' need for access to courts at the same time that it has arguably overvalued the defendant's interest in avoiding litigation in particular forums.

For example, in attributing the "at home" doctrine to prior cases and applying it ever more aggressively, Justice Ginsburg never offers an explanation for why due process mandates general jurisdiction in the corporation's home places, why the corporate home states have an interest in clothing their corporations with jurisdictional immunity in

277. A sufficient explanation for the Court's explanatory reticence may be the failure of a majority of the Justices to agree on any coherent theory of personal jurisdiction. Cornett & Hoffheimer, *supra* note 5, at 155–58 (discussing conflicting views on the Supreme Court); *see also supra* notes 219–22 (discussing Supreme Court Justices' indecisiveness). But lack of agreement does not explain why members of the Court repeatedly deny or minimize the scope of constitutional change wrought by the decisions. Agreement on results without agreement on reasons could be communicated by seriatim opinions, none subscribed by a majority, as was the case in *J. McIntyre*.

278. *See* Robertson & Rhodes, *supra* note 157, at 789 ("The Court's formalist approach to shaping personal jurisdiction allowed the Court to jettison decades of lower-court doctrinal development.").

279. For example, the Court failed to acknowledge any of the arguments about splits of authority regarding the relatedness requirement, nor did it acknowledge the widespread approval of federal pendent personal jurisdiction by lower courts. *See* Brief of Respondents, *supra* note 34, at 46; Transcript of Oral Argument, *supra* note 1, at 5; *supra* Subsection I.D.1.a.i.

other states, or why other states where the corporations are active and present have no interest in providing a forum for claims unrelated to the forum.²⁸⁰ It is not clear what sovereign or party interests are served when the Court applies the “at home” doctrine in *BNSF* to prevent Mr. Nelson, the injured railroad worker, from litigating in a state that is more convenient to him. As result of the rules announced in *BNSF*, Mr. Nelson must now litigate far from his home state of North Dakota.²⁸¹ Even though the railroad employed him in his home state to drive its trucks around the country, he must either litigate in the state of Washington where he was injured or in Minnesota and Delaware, where the corporation makes its home.²⁸² The costs to the plaintiff are real. The inconvenience to the defendant of litigating in Montana is speculative.

Justice Alito’s opinion in *BMS* acknowledged that a determination of personal jurisdiction requires a consideration of the interests of the plaintiff and the state, but it emphasized that the primary concern is the protection of defendants from burdensome litigation.²⁸³ In fact, the opinion gave conclusive weight to the defendant’s abstract interest in being free from coerced litigation in any state lacking an appropriate interest in the litigation.²⁸⁴ Justice Alito failed to evaluate concrete, identifiable interests of the forum state.²⁸⁵ And he attributed the out-of-state corporate defendant’s abstract interest in avoiding personal jurisdiction to the collective interests of sister-state sovereigns in preventing personal jurisdiction where there was no forum conduct.²⁸⁶

280. The restriction of general jurisdiction to places where a corporation is at home was rationalized originally as a concession to the plaintiffs’ need for at least one forum. Von Mehren & Trautman, *supra* note 169, at 1177. But the concession to plaintiffs’ need does not explain why home states should be saddled with the burden of litigating claims against their own corporations when those claims arise elsewhere.

281. See *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1561 (2017) (Sotomayor, J., dissenting).

282. See *id.* (“It is individual plaintiffs, harmed by the actions of a farflung foreign corporation, who will bear the brunt of the majority’s approach and be forced to sue in distant jurisdictions with which they have no contacts or connection.”).

283. See *Bristol-Myers III*, 137 S. Ct. 1773, 1780 (2017).

284. See *supra* note 220 and accompanying text.

285. *Bristol-Myers III*, 137 S. Ct. at 1780–81. The California Supreme Court justices found that personal jurisdiction advanced forum regulatory interests. *Bristol-Myers II*, 377 P.3d 874, 892 (Cal. 2016). And Justice Werdegar, in dissenting below, carefully considered the possibility that economies of consolidation could benefit California residents sufficiently to support personal jurisdiction—though she ultimately found no such economies in the case. *Id.* at 904 (Werdegar, J., dissenting). Examining facts of case, she concluded that economy of scale could be achieved and all California plaintiffs could be adequately represented without presence of nonresidents, thus eliminating any real California state interest. *Id.*

286. *Bristol-Myers III*, 137 S. Ct. at 1780–81. As Justice Sotomayor objected, the assumption that non-forum states share an interest in effectively immunizing non-forum defendants for non-forum conduct makes no sense. *Id.* at 1786–87 (Sotomayor, J., dissenting). Especially with respect

Justice Alito supported the newfound sovereign interests by neither precedent nor constitutional principle. As with Justice Ginsburg's formal application of the at-home doctrine, Justice Alito effectively gave conclusive weight to one interest, the defendant's interest in avoiding litigation.²⁸⁷ Under the Court's enforcement of the defendant's intangible interest, it is not hard to envisage a case where states share common regulatory interests, but no state can enforce them. For example, in the dispute in *Shutts*,²⁸⁸ a petroleum corporation had wrongfully withheld millions of dollars of interest from royalty owners but the average claim was one hundred dollars. While each state had an interest in providing an effective forum for its resident plaintiffs (and possibly others), many smaller states would not have sufficient residents to make consolidated litigation feasible; indeed, it possible in such a case that no single state would have enough plaintiffs to make litigation cost-effective. Despite the fact that all states would share a common interest in providing a forum, the Court's decision in *BMS* could have the effect of depriving any state from exercising personal jurisdiction, other than the defendant's home state. Consequently, if the defendant were a foreign corporation headquartered outside the United States, no domestic forum would be available. And this result is grounded, ultimately, on the abstract interest of the defendant that is supposedly advancing the shared interest of non-forum states.²⁸⁹

In restricting both general and specific personal jurisdiction, the Court has relied on formal rules or privileged the abstract burden on the defendant, signaling that the regulatory interests of the forum state and the plaintiffs' need for a meaningful access to justice count for little to nothing in the constitutional calculus for personal jurisdiction.

CONCLUSION

With the 2017 decision of *BMS*, the Supreme Court has now decided six cases since 2011 that impose significant new constitutional restrictions on the permissible scope of personal jurisdiction. Yet, in the opinions explaining those decisions, members of the Court repeatedly deny that they are altering settled law.

to nationwide conduct and claims, it makes more sense to assume that the states share common interests.

287. *Id.* at 1780–81 (majority opinion) (noting that there are a variety of interests a court should consider when personal jurisdiction is at issue, but the primary interest is the burden on the defendant).

288. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 801 (1985).

289. *Phillips Petroleum Co.* was a Delaware corporation with its principal place of business in Oklahoma and would thus have been subject to general jurisdiction in Delaware and Oklahoma. *Id.* at 799. The average claim was \$100. *Id.* at 801. A foreign corporation with its headquarters overseas would not be subject to general jurisdiction in any state.

This Article closely examines *BMS* and the other Roberts Court personal jurisdiction decisions. It claims the Roberts Court is engaging in a stealth revolution—radically transforming the law of personal jurisdiction while insisting that the Court’s holdings are dictated by controlling precedent. This Article argues that the Court’s denial of change prevents the Court from elaborating a coherent explanation for its new approach, confuses lower courts and lawyers about the magnitude of the legal change, and fosters a narrative of lower court lawlessness that is not supported by the record.

This Article urges the Court to acknowledge that it is reforming the law of personal jurisdiction, to provide reasons for the new restrictions on the power of courts that are grounded on constitutional principle and sound policy, and to construct a narrative that relates its programmatic reform of personal jurisdiction to the history and purpose of the Due Process Clause or to some other appropriate constitutional authority. Alternatively, the Court should slow the revolution until a majority of Justices can explain the constitutional grounds that require depriving yet another state court of an essential attribute of sovereignty and yet another plaintiff of a day in court.