Toward a New Equilibrium in Personal Jurisdiction

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In early 2014, the Supreme Court decided two new personal jurisdiction cases that will have a deep and wide-ranging impact on civil litigation in the coming decades: Daimler AG v. Bauman *and* Walden v. Fiore. Bauman *eliminates the traditional "continuous and systematic" contacts test for general jurisdiction, and* Walden *significantly retracts the ability of courts to exercise personal jurisdiction over out-of-state defendants whose actions have in-state effects. Taken together, both cases will make it significantly more difficult for plaintiffs to exercise control over where lawsuits are filed. In some cases, such as large-scale class actions, the new decisions may make it impossible to identify a single forum where multiple defendants can be sued together and will therefore shift the balance of litigation power from plaintiffs to defendants.*

This Article examines the effect that these rulings will have on future litigation and suggests solutions to the problems that will arise in the wake of these decisions. It analyzes how the Court's new jurisprudence has shifted the balance of power in the jurisdictional framework, and it explores areas of future litigation. We predict four areas in which disputes are likely to

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become more salient: first, the "connectedness" requirement of specific jurisdiction; second, the availability of personal jurisdiction over pendent claims that form part of a single case or controversy; third, the future availability of personal jurisdiction over a defendant whose out-of-state conduct has caused effects within the forum state; and fourth, the availability of "consent jurisdiction" based on the appointment of a registered agent for service of process. Even before the Court's 2014 cases, circuit splits had arisen over the propriety of jurisdiction in each of these four areas. Now that the Court has limited other grounds for personal jurisdiction, we predict those pre-existing splits will become more critical to resolve and will take on a central role in future litigation.

Our Article suggests solutions to the problems that will inevitably arise in the wake of these decisions, and it proposes a method of recalibrating specific jurisdiction to account for the demise of general contacts jurisdiction and the limitation on effects-test jurisdiction. It recognizes that International Shoe v. Washington *described two categories of specific jurisdiction (not just one), and it builds on this two-tier framework to reach a new equilibrium. When the defendant's forum activities fall within* International Shoe*'s "continuous and systematic" category, the balance of individual and state interests should tilt toward authorizing jurisdiction as long as some loose connection exists between the forum and the actions that give rise to the litigation. Thus, in cases that would have been eligible for general jurisdiction in the past, the forum relatedness requirement should be relaxed. In contrast, for adjudicatory jurisdiction in the "single or occasional" acts scenario, the state must have a tighter link to its sovereign regulatory interests. This rebalanced jurisdictional framework would therefore take into account the defendants' liberty interests as protected by* Bauman *and* Walden *without sacrificing the states' sovereign interest in protecting their citizens.*

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INTRODUCTION

Sometimes it is clear from the moment the Supreme Court accepts certiorari in a case that its ultimate decision will have wide-ranging effects that shift the balance of power in society at large.[1] Sometimes a case's influence only becomes apparent years later.[2] The Court's procedural jurisprudence tends to fall into the latter category, with reaction to pivotal cases coming in waves: first sending the procedure buffs into a frenzy of activity, then expanding more broadly to encompass civil litigators who must struggle to incorporate the new rulings into their litigation strategy.[3] It takes more time for the district courts to absorb the changes and apply them to the cases that follow,

[1] Illustrations include *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[2] *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) (clarifying the conflict between Federal Rules and state law); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (refining the *Twombly* plausibility standard); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (adopting a "plausibility" pleading standard); Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448, 479 (2011) ("The *Shady Grove* decision is a classic sleeper case that failed to command the attention of the media and the broader public, precisely because of the obscurity of the legal issues entailed in the litigation . . . . Nonetheless, the *Shady Grove* decision is vitally important.").

[3] *See generally* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1840-56 (2014) (explaining how the Supreme Court's jurisprudence has led to a "fourth era" of civil procedure, marked by increasingly restricted court access and a diminution in the number of civil trials).

but once they do, the impact of the Court's changing jurisprudence becomes apparent: the tides of litigation shift to reveal new winners and new losers.[4]

The last four decades have seen a number of procedural rulings from the Supreme Court that markedly influenced the course of civil litigation.[5] The current procedural revolution began in the 1980s with a trilogy of cases clarifying the standard of summary judgment and making it relatively easier for defendants to obtain summary judgment rulings.[6] In the 1990s, the Supreme Court applied an influential "gatekeeping" standard for expert evidence, which raised additional hurdles for plaintiffs relying on expert testimony.[7] The first decade of the new millennium brought us the so-called *Twiqbal*[8] pleading cases, which made pre-trial (and pre-discovery) dismissal easier for defendants.[9] In 2011, the Court heard two personal jurisdiction cases: in one case, the Court's opinion did not gain a majority,[10] while the

[4] *See generally* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Supreme Court*, 162 U. PA. L. REV. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347360 (empirically testing the effects of *Twombly*, *Iqbal*, and the summary judgment cases over a multi-year timeframe, and finding that the cases had a significant pro-defendant result).

[5] *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309-10 (2013) (highlighting "the transformation of the procedural landscape" over the last few decades); Subrin & Main, *supra* note 3, at 1877-88 (describing an anti-litigation and anti-rights trend in procedural jurisprudence).

[6] The trilogy includes *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986). *See* Clermont & Eisenberg, *supra* note 4 (manuscript at 6-7) (discussing the impact of the summary judgment cases).

[7] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589, 597 (1993); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 158 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146-47 (1997); Miller, *supra* note 5, at 313 ("*Daubert*'s high threshold has been particularly burdensome — financially, logistically, and sometimes both — for plaintiffs.").

[8] Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[9] *See* Clermont & Eisenberg, *supra* note 4 (manuscript at 17) ("If the Supreme Court wanted to help out defendants through its summary judgment trilogy and *Twombly-Iqbal* pleading decisions, the data indicate that the Court has succeeded."); Miller, *supra* note 5, at 331 ("By demanding that the plaintiff plead facts demonstrating that the claim has substantive plausibility, rather than a statement that is legally sufficient and gives notice of the plaintiff's claim, these two cases represent a procedural 'sea change' in plaintiffs' ability to survive the pleading stage.").

[10] *See generally* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (delivering a plurality opinion where six justices agreed on the judgment, but only four joined the lead opinion's rationale).

other decision imposed a seemingly minor limit on the availability of general jurisdiction.[11] Nonetheless, those cases hinted that the Court might adopt more significant limitations on personal jurisdiction in future cases, and in 2014, the Court fulfilled that promise in *Daimler AG v. Bauman*[12] and *Walden v. Fiore*.[13] The two cases limit the power of states to exercise adjudicative jurisdiction over non-residents and will significantly shift the balance of power in civil litigation.[14]

This Article explores the landscape of civil litigation after *Bauman* and *Walden*. Part I introduces the legal landscape in which the two cases arose. In Part II, the Article critically examines the Court's opinions, analyzing what the Court has changed, exploring points of contention between the justices, and explaining the importance of what the Court has left unsaid and undecided. Part III builds on these open questions by examining how the balance of power has shifted in the jurisdictional framework and exploring the likely areas of future litigation. It predicts four areas in which disputes are likely to become more salient: first, the "connectedness" requirement of specific jurisdiction; second, the availability of personal jurisdiction over pendent claims that form part of a single case or controversy; third, the future availability of personal jurisdiction over a defendant whose out-of-state conduct has caused effects within the forum state; and fourth, the availability of "consent jurisdiction" based on the appointment of a registered agent for service of process. Even before the Court's 2014 cases, circuit splits had arisen over the propriety of jurisdiction in each of these four areas. Now that the Court has limited other grounds for personal jurisdiction, those pre-existing splits will become more critical to resolve and will take on a central role in future litigation.

Finally, Part IV proposes a rebalanced jurisdictional framework that takes into account not only the defendants' liberty interests as protected by *Bauman* and *Walden*, but also the states' sovereign interests in protecting their citizens and providing a forum for redress. By making it more difficult for courts to exercise personal jurisdiction over out-of-state defendants, the Supreme Court has tilted the balance of power toward the defense side of the spectrum. The shifting balance does not just make litigation more difficult for plaintiffs; instead, it creates a risk that the state's ability to adjudicate claims of wrongdoing against its citizens will become so compromised that it is unable to function

[11] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2856 (2011).

[12] 134 S. Ct. 746 (2014).

[13] 134 S. Ct. 1115 (2014).

[14] *See infra* Parts III, IV.

effectively. Nevertheless, this risk does not have to be reality — re-calibrating the jurisdictional framework can maintain a balance between the interests of the plaintiff, the defendant, and the state. Going forward, we argue that courts should apply a two-tier specific jurisdictional analysis we uncovered from *International Shoe Co. v. Washington*.[15] In balancing the relationship of the parties, the case, and the forum, the analysis requires that the cause of action bear a closer nexus to the forum when the defendant's relationship with the forum is isolated or sporadic and allows a looser relationship with the suit in cases where the defendant's relationship with the forum is continuous and systematic.[16] Recognizing different categories of specific jurisdiction can bring the parties' interests back into balance, protecting the ability of plaintiffs to bring suit — and maintaining the safeguards of our federalist system — without sacrificing defendants' liberty interests.

I. PERSONAL JURISDICTION IN THE SUPREME COURT'S 2013 TERM

The Supreme Court's personal jurisdiction cases of 2014 significantly shift the balance of litigation power between plaintiffs and defendants. Imagine the following hypothetical, which is loosely based on a string of similar cases involving recreational travel:[17]

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[15] 326 U.S. 310 (1945).

[16] This standard would accomplish some of the goals of Justice Brennan's desired sliding-scale test, yet without obviating the distinction between general and specific jurisdiction or displacing the defendant-centered liberties and sovereignty concerns that the Supreme Court has emphasized in the years since his proposal. *See* Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 552 (2012) ("Brennan espoused what can be called a 'mélange' approach, under which all factors relevant to an *International Shoe* analysis — contact, state's interest, burden on the defendant, etc. — are considered together ad hoc to assess jurisdiction under a general rubric of fairness. Ultimately, Brennan lost this battle. The Court adopted a rigid, defendant-centric, two-step model in which the issue of contact between the defendant and the forum is primary."). Although forceful arguments can be marshaled to support Brennan's favored approach, we believe that it is unlikely that the Court is currently poised to jettison its insistence on a defendant's purposeful contact with the forum, especially in light of the decisions in *Nicastro* and *Walden*. *See infra* Parts II, III.

[17] *E.g.*, Myers v. Casino Queen, Inc., 689 F.3d 904, 908-09 (8th Cir. 2012); Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 711 (1st Cir. 1996); Shute v. Carnival Cruise Lines, 897 F.2d 377, 379 (9th Cir. 1990) (abrogated on other grounds); Marino v. Hyatt Corp., 793 F.2d 427, 427 (1st Cir. 1986); Pearrow v. Nat'l Life & Accident Ins. Co., 703 F.2d 1067, 1068-69 (8th Cir. 1983); Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317, 318-19 (2d Cir. 1964); Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 572-73 (Tex. 2007).

Escaping a brutally cold winter, a Michigan family vacations at a luxury resort in Florida — a resort that is owned and operated by a famous national hotel corporation with operations worldwide, including several in each of the fifty U.S. states. This particular hotel was not as profitable as it used to be; the operators were contemplating a major remodeling, but, in the meantime, had neglected regular maintenance activity. During the Michigan family's vacation, the elevator malfunctions, severely injuring the youngest child. May the plaintiffs bring a lawsuit against the hotel owners in the family's home state of Michigan? If, instead of suing, the parents had posted a negative review of the resort online, alleging that the hotel owner had embezzled funds intended for maintenance and upkeep, could the hotel sue them in Florida for defamation?

Historically, the conventional judicial wisdom would have answered "yes" to both questions. Although courts were far from unified, cases were allowed to proceed on similar facts more often than not.[18] Two Supreme Court opinions from the 2013 term, however, have likely stood this conventional wisdom on its head. These two decisions, *Daimler AG v. Bauman*,[19] and *Walden v. Fiore*,[20] will have a tremendous effect on case valuation and civil litigation strategy.[21]

Until the Supreme Court's decision in *Bauman*, most courts would have allowed a Michigan court to exercise personal jurisdiction over the

[18] *See Myers*, 689 F.3d at 914; *Nowak*, 94 F.3d at 719-21; *Shute*, 897 F.2d at 389; *Pearrow*, 703 F.2d at 1068-69; *cf. Gelfand*, 339 F.2d at 320-22 (setting out the factors that conventional judicial wisdom ought consider in light of *International Shoe*); *Moki Mac*, 221 S.W.3d at 584 (same, including more recent personal jurisdiction jurisprudence). *But see Marino*, 793 F.2d at 431-30.

[19] 134 S. Ct. 746 (2014).

[20] 134 S. Ct. 1115 (2014).

[21] Even before the Supreme Court decided *Bauman*, civil procedure scholars participating in an online roundtable concluded that the case would have a significant impact on litigation procedure no matter how the Court came out. For discussions of the *Bauman* decision's potential impacts, see generally Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67 (2013); Howard M. Erichson, *The Home-State Test for General Personal Jurisdiction*, 66 VAND. L. REV. EN BANC 81 (2013); Burt Neuborne, *General Jurisdiction, "Corporate Separateness," and the Rule of Law*, 66 VAND. L. REV. EN BANC 95 (2013); Suzanna Sherry, *Don't Answer That! Why (and How) the Supreme Court Should Duck the Issue in* DaimlerChrysler v. Bauman, 66 VAND. L. REV. EN BANC 111 (2013); Linda J. Silberman, *Jurisdictional Imputation in* DaimlerChrysler AG v. Bauman*: A Bridge Too Far*, 66 VAND. L. REV. EN BANC 123 (2013). Once the case was decided, it was clear that it would have an even larger effect than originally predicted, and that numerous issues were left unresolved by the case. *See generally* Donald Earl Childress III, *General Jurisdiction After* Bauman, 66 VAND. L. REV. EN BANC 197 (2013) (discussing the obvious, and perhaps unforeseen, implications of the *Bauman* decision).

defendant hotel corporation. Because the corporation operates nationwide (administering, in our hypothetical, a number of hotels located in Michigan), a court would have almost certainly have found that the corporation possessed "continuous and systematic" contacts with the forum state of Michigan that were substantial enough to allow it to be sued on any cause of action, whether or not that cause of action had any connection with the forum state.[22] Jurisdiction over defendants for disputes unrelated to the forum is called "general personal jurisdiction," and until now, first-year Civil Procedure casebooks taught students that national corporations with substantial operations in all fifty states (such as McDonalds or WalMart) would likely be subject to general personal jurisdiction in all fifty states, meaning that a traveling plaintiff, like the family in the hypothetical, would be able to sue in a home forum.[23]

In *Bauman*, however, the Supreme Court sharply curtailed the use of general jurisdiction, concluding that a court may only exercise general jurisdiction in the forum or fora where the defendant is "at home" — most often, only in the defendant's state of incorporation and state of its principal place of business.[24] The Court left unchanged (at least in this case) the concept of specific jurisdiction — the familiar idea that a defendant can be subject to jurisdiction for an action arising out of its "minimum contacts" with that forum, as long as the exercise of such jurisdiction would comport with "traditional notions of fair play and substantial justice."[25] Thus, our hypothetical traveling family would

[22] Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 767 (1988) ("Courts currently measure the sufficiency of unrelated business contacts between the forum state and the defendant with the continuous and systematic test: the defendant's activities in the forum state must be continuous and systematic to support jurisdiction."). *See generally* Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 862-67 (2004) [hereinafter *Clarifying General Jurisdiction*] (discussing numerous cases upholding general jurisdiction over nonresident corporations conducting business operations from forum locales). While numerous academics contended that general jurisdiction should be more circumscribed and only available in limited fora, this prevailing academic view could not, in the years before *Goodyear* and *Bauman*, "be reconciled with even the narrowest jurisdictional holdings of federal and state courts." *Id.* at 809.

[23] *See, e.g.*, JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK 259 (2011) (concluding that McDonald's, for example, would likely be subject to jurisdiction in all 50 states). This teaching comported with dicta in *Rush v. Savchuk*, 444 U.S. 320 (1980), which noted that "State Farm is 'found,' in the sense of doing business, in all 50 States" and that such forum contacts would support adjudicative jurisdiction "even for an unrelated cause of action." *See id.* at 330.

[24] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014).

[25] *Id.* at 754 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct.

still have a choice of jurisdictions for filing suit: Florida, where the cause of action arose; Delaware, where the hotel chain is incorporated; or New Jersey, where its corporate headquarters (and thus its principal place of business) is located. But they could not sue in their home state of Michigan, regardless of the number of hotels that the corporation operated within the state — at least, they could not sue in Michigan unless they could establish a connection between the defendant's Michigan contacts and the plaintiff's cause of action. If the plaintiffs could establish such a connection, the case could fall within the guidelines for specific jurisdiction.

A month after releasing *Bauman*, the Supreme Court decided its second personal jurisdiction case of the 2013 term, *Walden v. Fiore*.[26] *Walden* dealt with specific jurisdiction, rather than general jurisdiction. In particular, it examined the so-called "effects test," which can subject a defendant to personal jurisdiction when out-of-state acts have a foreseeable effect within the target forum.[27] This time, the result was more predictable; onlookers had expected that the Court would conclude that the U.S. Court of Appeals for the Ninth Circuit's jurisdictional holding went too far in requiring a law enforcement officer from Georgia to defend a property seizure case in Nevada that arose from actions the officer took at the Atlanta airport.[28] Confirming these expectations, the Court unanimously reversed the Ninth Circuit judgment and dismissed the underlying case.[29] Although the result itself was not unexpected, the case nevertheless significantly limited the reach of effects-test jurisdiction over out-of-state defendants whose actions have in-state consequences. And while the Court was careful to state in dicta that it was not deciding whether internet-based speech could be considered "targeted" at out-of-state residents, the Court's holding makes internet-based jurisdiction much more difficult going forward; thus, our Michigan family who gives the hotel a negative online review is likely to be insulated from suit outside their home forum.[30]

2846, 2848 (2011) and Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[26] Walden v. Fiore, 134 S. Ct. 1115 (2014).

[27] *See generally id.* (discussing the intricacies of the "effects test").

[28] *See, e.g.*, William Baude, *Argument Analysis: An Attempt to Find a Narrow Ground of Agreement*, SCOTUSBLOG (Nov. 7, 2013, 7:39 PM), http://www.scotusblog.com/2013/11/argument-analysis-an-attempt-to-find-a-narrow-ground-of-agreement/ (predicting that Walden would prevail on personal jurisdiction).

[29] *See Walden*, 134 S. Ct. at 1126.

[30] *Compare* Kauffman Racing Equip., LLC v. Roberts, 930 N.E.2d 784 (Ohio 2010) (allowing personal jurisdiction in the plaintiff's home state based on allegedly defamatory internet postings), *with* BroadVoice, Inc. v. TP Innovations LLC, 733 F.

In short, these two cases significantly limit states' authority over out-of-state defendants. This Part therefore examines the cases more closely, examining the contexts in which they arose, the arguments made by counsel, and the holdings of the Court. Understanding what the Court changed (and what the Court left open) is key to predicting how the shifting equilibrium of personal jurisdiction will expand or contract litigant interests going forward.

A. Limiting General Jurisdiction: Daimler AG v. Bauman

The plaintiffs in *Daimler AG v. Bauman* sought damages against Daimler based on events that occurred during the so-called Argentinian "Dirty War" of the late 1970s and early 1980s.[31] The plaintiffs were Argentinian nationals who had either worked for Mercedes-Benz Argentina (a Daimler subsidiary) or had family members who worked for the company.[32] They alleged that Mercedes-Benz Argentina had "collaborated with state security forces to kidnap, detain, torture, and kill" company employees, and they sought relief against parent-company Daimler, a German corporation headquartered in Stuttgart.[33] The plaintiffs filed suit in a federal court in California in 2004, seeking relief under both the Alien Tort Statute ("ATS") and the Torture Victim Protection Act ("TVPA").[34]

The plaintiffs asserted two possible grounds for personal jurisdiction over Daimler: first, that Daimler's own contacts with California were substantial enough to subject the company to general jurisdiction in that state; and second, in the alternative, that the contacts of Mercedes-Benz USA ("MBUSA"), an "indirect subsidiary" of Daimler, were substantial enough for general jurisdiction and that those contacts should be imputed to Daimler so that Daimler would also be subject to general jurisdiction within California.[35] The district court found neither ground sufficient, and dismissed for lack of jurisdiction.[36] The Ninth Circuit initially affirmed the dismissal, but subsequently granted a motion for rehearing and concluded that the agency relationship was

Supp. 2d 219, 227 (D. Mass. 2010) (denying personal jurisdiction on similar facts).

[31] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 750-51 (2014).

[32] *Id.* at 751.

[33] *Id.* at 750-51.

[34] *Id.* at 751.

[35] *Cf. id.* at 752 (noting the district court's dismissal of the case because neither Daimler's nor MBUSA's contacts with the forum were substantial enough to confer general jurisdiction).

[36] *Id.*

sufficient to allow a California court to exercise jurisdiction over Daimler.[37]

Yet between the time the Ninth Circuit ruled in 2011 and the time the case reached the Supreme Court in 2013, the legal landscape had changed significantly for the plaintiffs' underlying claims. First, in 2012, the Supreme Court held that corporations and other organizations could not be subject to liability under the TVPA — only natural persons could be defendants in actions under the TVPA.[38] Then, in the spring of 2013, the Supreme Court held that a presumption against extraterritoriality applies to suits brought under the ATS, making it more difficult for plaintiffs to use the statute as a means of redressing injuries caused by foreign actors in foreign jurisdictions.[39] Thus, by the time the Supreme Court decided the personal jurisdiction issue in *Bauman*, the plaintiffs' underlying case was already substantially weakened; it was clear that the TVPA claim could not proceed against Daimler, and it was unlikely that the ATS claim could overcome the presumption against extraterritoriality.[40]

Even though the underlying case was severely weakened, the jurisdictional issues remained very much alive. From a personal jurisdiction standpoint, *Bauman* presented a nice vehicle to follow up the Supreme Court's most recent ruling on general jurisdiction. In 2011, the Court had ruled that foreign subsidiaries of the Goodyear tire company would not be subject to personal jurisdiction in North Carolina to defend a claim arising out of an auto accident in France.[41] The Court found the case to be a relatively easy one, as the foreign subsidiaries had only minor connections with North Carolina.[42] A small number of tires from the subsidiaries made their way into North Carolina each year, but none of those North Carolina–based tires had given rise to the claim at issue, as the accident had occurred in France.[43] The Court suggested that general jurisdiction was appropriate only when the defendant's contacts with a state were so significant as to render the defendant "essentially at home in the forum State," and it had no trouble concluding that meager contacts of the foreign

[37] *Id.* at 753.

[38] *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710 (2012).

[39] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

[40] *See Bauman*, 134 S. Ct. at 762-63 ("Recent decisions of this Court, however, have rendered plaintiffs' ATS and TVPA claims infirm.").

[41] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011).

[42] *See id.* at 2851.

[43] *Id.*

subsidiaries did not come close to meeting that standard.[44] Thus, because the contacts were so limited, *Goodyear* left open the question of what it meant for a corporation to be "essentially at home" in a jurisdiction — how extensive would the contacts need to be, in order to render the corporation "essentially at home"?[45]

Bauman gave the Court the opportunity to answer that question. Justice Ginsburg authored the Court's opinion, which was joined by the entire Court with the exception of Justice Sotomayor, and gave a decisive answer: except in very rare circumstances, a corporation is "at home" only where it is domiciled — its state of incorporation and the state where it maintains its principal place of business.[46] The Court assumed for the sake of argument that MBUSA was indeed "at home" in California (though that conclusion is certainly called into question by the Court's holding) and also assumed for the sake of argument that all of MBUSA's contacts could be imputed to Daimler.[47] The MBUSA contacts imputed to Daimler were undeniably continuous, systematic, and substantial: MBUSA maintained a regional office in California, as well as two other facilities for sales and repair.[48] In spite of these contacts, the Court concluded that Daimler would not be "at home" in California because it was "neither . . . incorporated in California, nor . . . [has] its principal place of business there."[49]

The Court acknowledged "the possibility that in an exceptional case, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and

[44] *See id.* (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

[45] For discussions of the meaning of "essentially at home," see generally Lindsey D. Blanchard, Goodyear *and* Hertz*: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. 865 (2013); Meir Feder, Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671 (2012); Michael H. Hoffheimer, *General Personal Jurisdiction After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 60 U. KAN. L. REV. 549 (2012); Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527 (2012).

[46] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 761-62 (2014). In *Goodyear*, the Court described general jurisdiction as appropriate in fora in which the defendant was "essentially at home," "fairly regarded as at home," or "in [a] sense at home." *See Goodyear*, 131 S. Ct. at 2851, 2853-54, 2857. In a judicial sleight of hand, *Bauman* dropped the qualifications from *Goodyear* and instead phrased the governing inquiry as merely whether the defendant was "at home." *See Bauman*, 134 S. Ct. at 761-62.

[47] *See Bauman*, 134 S. Ct. at 760.

[48] *See id.* at 752 ("Although MBUSA's principal place of business is in New Jersey, MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine.").

[49] *Id.* at 761.

of such a nature as to render the corporation at home in that State."[50] The Court cited *Perkins v. Benguet Consolidated Mining Co.*[51] for that proposition, explaining that the Court had allowed Ohio courts to exercise jurisdiction over a Filipino corporation during World War II, during a period of time when the Japanese occupation prevented the company from engaging in mining operations and the corporate president temporarily moved to Ohio where he "kept an office, maintained the company's files, and oversaw the company's activities."[52]

Although the Court acknowledged that an exceptional case like *Perkins* might justify exercising general jurisdiction outside of a corporation's domicile, it left little room to consider applying that exception to more ordinary cases. Notably, the Court did not perceive the need to apply the particular facts of Daimler's California contacts to see whether they justified such a departure. Instead, the Court disposed of that idea in a footnote, stating simply that the case "presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level."[53] This conclusion is particularly striking in light of the fact that the Court had accepted, for the sake of argument, the idea that all of MBUSA's California contacts could be attributed to Daimler — contacts which included several California facilities (including a regional office in the state) and car sales amounting to $4.6 billion annually.[54] The Court therefore left little wiggle room for a party to argue that substantial in-state sales would be enough to render a corporation "at home" in a given state. To foreclose any remaining doubt, the Court explicitly stated that the formula commonly applied for general jurisdiction (that a corporation "engages in a substantial, continuous, and systematic course of business") is not only insufficient, but also "unacceptably grasping."[55]

The Court did not see any need to consider the "reasonableness" factors originally set out in *World-Wide Volkswagen v. Woodson*[56] and further developed in *Asahi Metal Industry Co. v. Superior Court*.[57] In the Court's view, any reasonableness analysis is "superfluous" to the general jurisdiction analysis.[58] If a corporation is "genuinely at home in the

[50] *Id.* at 761 n.19 (citation omitted).
[51] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).
[52] *Bauman*, 134 S. Ct. at 756 (citing *Perkins*, 342 U.S. at 448).
[53] *Id.* at 761 n.19.
[54] *See id.* at 766-67 (Sotomayor, J., concurring).
[55] *See id.* at 761.
[56] 444 U.S. 286 (1980).
[57] 480 U.S. 102 (1987).
[58] *See Bauman*, 134 S. Ct. at 762 n.20.

forum State," the Court concluded, then there is no question that jurisdiction is reasonable.[59] The obvious inference from the Court's holding is that if the corporation is *not* "genuinely at home" in the forum state, then it doesn't matter how reasonable it would be to exercise jurisdiction over the corporation. Thus, the Court's analysis ended with its conclusion that Daimler was neither headquartered nor incorporated in California.[60] After determining that Daimler was not at home in California, jurisdiction was improper without even examining how the fairness factors would apply to the case.[61]

Interestingly, however, even though the Court did not apply the individual fairness factors first set out in *World-Wide Volkswagen*, the Court's decision nevertheless was based on an underlying theory of fairness to the defendant. The Court emphasized the importance of predictability, stating that predictability in jurisdiction allows the defendant to structure its conduct "with some minimum assurance as to where that conduct will and will not render them liable to suit."[62] In the Court's view, subjecting a defendant to suit in every state in which it has "sizable" sales would amount to an "exorbitant exercise of all-purpose jurisdiction" that would impair the defendant's ability to control the forums in which it could be called upon to defend itself in court.[63]

In the final section of the opinion, the Court buttressed its decision with a call to international comity. The Court quoted the Solicitor General's brief, which had highlighted the objection of a number of foreign governments to "some domestic courts' expansive views of general jurisdiction," explaining this hindered efforts to negotiate a multilateral judgment-enforcement treaty and could discourage foreign investment.[64] In contrast, a domicile-based approach had the international advantages of familiarity and predictability. The Court noted that the European Union already followed a similar approach, allowing a corporation to be sued in the nation in which it is domiciled, and concluded that "[c]onsiderations of international rapport" supported the conclusion that Daimler could not constitutionally be subject to general jurisdiction in California.[65]

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[59] *See id.*

[60] *See id.* at 761.

[61] *See id.* at 761-62.

[62] *See id.* at 762 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

[63] *See id.*

[64] *See id.* at 763.

[65] *See id.*

B. A Warning Signal: Justice Sotomayor's Concurring Opinion in Bauman

In a sharply pointed concurrence, Justice Sotomayor disagreed with the Court's decision to link general jurisdiction with domicile. Although she agreed with the ultimate judgment, she would have decided the case on reasonableness factors alone.[66] In her view, the combination of "Argentine plaintiffs," "a German defendant," a cause of action "for conduct that took place in Argentina," and no evidence of any connection to the United States made it unreasonable for a California court to exercise jurisdiction over the defendant.[67]

Justice Sotomayor criticized the majority's domicile-based analysis of general jurisdiction. She stated that the majority's approach compares the relative magnitude of a defendant's contacts in different states (to determine in which states the defendant is most "at home") instead of more properly assessing the overall magnitude of the defendant's contacts in the forum state.[68] Justice Sotomayor argued that the Court's relative comparison is inconsistent with the underlying theory of personal jurisdiction, which she described as one of "reciprocal fairness" — a defendant who has chosen to "invoke the benefits and protections of a State" should also be subject to judicial authority of that state.[69] Justice Sotomayor argued that the majority's approach will do nothing to increase the predictability of where the defendant may be subject to jurisdiction, and that applying the individual fairness factors would have been ample protection against any exorbitant exercise of jurisdiction.[70]

Finally, Justice Sotomayor asserted that the *Bauman* opinion will give rise to four distinct injustices. First, it diminishes the "States' sovereign authority to adjudicate disputes" involving defendants who have engaged in substantial in-state activity and who may have caused harm to in-state residents.[71] Second, the decision means that multinational corporations may evade general jurisdiction more easily than a small business could do so.[72] A multinational corporation with four in-state factories could evade general jurisdiction as long as its headquarters and place of incorporation reside elsewhere, whereas a smaller business with

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66 *See id.* at 765 (Sotomayor, J., concurring).

67 *Id.*

68 *See id.* at 765-67.

69 *Id.* at 768 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

70 *See id.* at 770-71.

71 *Id.* at 772.

72 *Id.*

a single in-state factory would be subject to general jurisdiction because it operates only in the one state, and is necessarily therefore "at home" in the state.[73] Third, the decision also means that multinational corporations may evade general jurisdiction more easily than individuals since individuals would still be subject to general jurisdiction based on in-state service of process.[74] Fourth, Justice Sotomayor concludes that the decision will "shift the risk of loss from multinational corporations to the individuals harmed by their actions."[75] The decision, she believes, will make it more difficult for injured plaintiffs to sue in a convenient and accessible forum.[76] If plaintiffs are injured outside their home state, they must sue in the defendant's home state or in the location where they suffered the injury, even if the defendant has substantial operations in the plaintiff's home state.[77] This added inconvenience and expense may make it more difficult for individual plaintiffs to enforce their legal rights, allowing defendants to avoid liability in cases where the plaintiffs cannot afford to sue out of state or, in some cases, out of the country.[78]

C. Limiting Specific Jurisdiction Based on In-State "Effects": Walden v. Fiore

In *Walden v. Fiore*, the Supreme Court turned its attention to specific jurisdiction, and, in particular, the subset of specific jurisdiction based on the in-state effects of out-of-state conduct. Gina Fiore and Keith Gipson, the plaintiffs in *Walden v. Fiore*, were two professional poker players returning home after winning a substantial amount of money at a tournament in Puerto Rico.[79] The pair carried approximately $97,000 in cash in their carry-on luggage, which aroused the suspicions of Drug Enforcement Agency ("DEA") officials.[80] While the couple was changing planes in Atlanta, agents carried out a "dog sniff test," which was "at best, inconclusive."[81] The dogs did not alert on Fiore's luggage

[73] *Id.*

[74] *Id.* at 772-73.

[75] *Id.* at 773.

[76] *See id.*

[77] *See id.*

[78] *Cf. id.* ("[T]he ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by their actions.").

[79] Walden v. Fiore, 134 S. Ct. 1115, 1118 (2014); *see also* Logan Hronis, *Poker Question and Answer: Gina Fiore*, CARD PLAYER (Apr. 14, 2013), http://www.cardplayer.com/poker-news/15375-poker-question-and-answer-gina-fiore.

[80] *See Walden*, 134 S. Ct. at 1118-19.

[81] *Id.* at 1119 & n.1.

at all, at most reacting to Gipson's luggage.[82] Additional testing failed to find any sign of drug residue.[83] The plaintiffs were not arrested nor were they questioned further about alleged drug activity.[84]

In spite of the fact that the agents found no sign of drug residue on the cash, the plaintiffs' funds were seized and delivered to the DEA.[85] Police officer Anthony Walden, who was assisting the DEA with the questioning of the plaintiffs and had participated in the seizure of the funds, was alleged to have subsequently drafted an affidavit of probable cause.[86] The plaintiffs alleged, and the Supreme Court accepted as true for purposes of determining jurisdiction,[87] that Walden's affidavit contained intentional falsehoods: "that Gipson had been uncooperative and had refused to respond to questions" and "that Fiore and Gipson had given inconsistent answers during questioning."[88] The affidavit also allegedly excluded exculpatory information, such as the fact that Fiore and Gipson had no history of drug involvement and had been carrying documentation of their gambling activity.[89]

Once the DEA determined that there was no evidence to suggest the funds constituted drug proceeds, the plaintiffs were offered their money back in exchange for signing a document releasing the government from liability.[90] Fiore and Gipson refused to execute the release, but the DEA nevertheless returned the funds to them without further condition.[91] After their funds had been returned, Fiore and Gipson brought a *Bivens* claim in federal court against Walden and three unnamed officials,[92] alleging that the search and seizure violated their Fourth Amendment rights.[93] Because the plaintiffs sued in their home state of Nevada, Walden moved to dismiss the case for lack of personal jurisdiction.[94]

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[82] Fiore v. Walden, 657 F.3d 838, 843 (9th Cir. 2011), *superseded by*, 688 F.3d 558 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1115.

[83] *See Walden*, 134 S. Ct. at 1119 n.1.

[84] *See id.* at 1119.

[85] *Id.*

[86] *See id.* at 1119-20.

[87] *See id.* at 1119 n.2.

[88] Fiore v. Walden, 657 F.3d 838, 844 (9th Cir. 2011).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] These officials were never identified or served with process, and thus were not parties to the jurisdictional challenge. *Id.* at 844 & n.8.

[93] *Id.* at 844-45. *See generally* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (creating a cause of action to redress federal officials' violation of constitutional rights).

[94] *Fiore*, 657 F.3d at 845.

It was undisputed that all of Walden's activities had taken place in Georgia — where the search and seizure occurred, where he allegedly drafted a false affidavit, and where the U.S. Attorney's office to which he allegedly sent the affidavit was located.[95] Furthermore, there was no question that Walden could not be subject to general jurisdiction in Nevada. If the court was to exercise jurisdiction over him, it would have to be specific jurisdiction, requiring the suit to arise from or relate to his contacts with the forum.[96] Because he had never physically entered the forum, the dispositive question for jurisdiction was whether Walden's activity was "directed" or "aimed" at the state of Nevada.[97]

The Ninth Circuit had followed the so-called "*Calder* effects test" (named for the leading case of *Calder v. Jones*[98]) to conclude that Walden had indeed aimed a tortious act at the state of Nevada.[99] The *Calder* effects test generally applies when the defendant does not have any of the traditional contacts demonstrating purposeful availment, but has allegedly committed a tort or engaged in other conduct that has an effect within the forum.[100] The *Restatement (Second) of Conflict of Laws* suggests that jurisdiction is appropriate in these cases:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any claim arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.[101]

In *Calder*, the Supreme Court adopted the *Restatement*'s approach, holding that a writer and editor located in Florida could be subject to jurisdiction for a defamation claim in California, even though they had never entered the state and even though they did not publish the article themselves (their employer, the *National Enquirer*, did not contest

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95 *See id.* at 843-44.

96 *Cf. id.* at 845 (discussing personal jurisdiction test used in the Ninth Circuit).

97 *See* Walden v. Fiore, 134 S. Ct. 1115, 1126 (2014) ("Petitioner's relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction.").

98 Calder v. Jones, 465 U.S. 783 (1984).

99 *See Fiore*, 657 F.3d at 848.

100 *See* Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 UC DAVIS L. REV. 1301, 1309 (2012) (noting that the effects test may apply only when the "defendant does not have any of the traditional contacts demonstrating purposeful availment, but has allegedly committed a tort or engaged in other conduct that that [sic] has an effect within the forum").

101 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1988).

jurisdiction in California, where it sold numerous copies of the magazine).[102] The Supreme Court concluded that it was sufficient that the writer and editor had "directed" their tortious activity at the location where the plaintiff lived and worked, and where the plaintiff would therefore feel the effects of the defamatory article.[103]

In the years following, courts have applied the test to examine whether the defendant "purposefully directed" tortious conduct at the target forum, rather than whether it "purposefully availed" itself of the forum's benefits and protections.[104] In the three decades since *Calder* was decided, the Supreme Court had never returned to the question of effects-test jurisdiction, and courts began to disagree about what kind of conduct would support effects-test jurisdiction and how expressly that conduct needed to be targeted at a particular state.[105]

In *Walden v. Fiore*, the Ninth Circuit applied a broad version of the effects test. The court stated that although the original search and seizure were not directed at Nevada, the alleged false affidavit was.[106] By the time Walden executed the affidavit, the circuit court reasoned, he knew that the plaintiffs had a significant connection to Nevada and that

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[102] *See Calder*, 465 U.S. at 789-90.

[103] *Id.*

[104] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (stating that jurisdiction is appropriate "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities" (citations omitted)); Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006) (stating that "[i]n tort cases, we typically inquire whether a defendant 'purposefully direct[s] his activities' at the forum state, applying an 'effects' test that focuses on the forum in which the defendant's actions were felt" but that "in contract cases, we typically inquire whether a defendant 'purposefully avails itself of the privilege of conducting activities' . . . focusing on activities such as delivering goods or executing a contract" (alteration in original) (citations omitted)).

[105] *See* Robertson, *supra* note 100, at 1310 ("[D]ecisions applying the effects test are often conflicting and contradictory, and efforts to smooth the inconsistent doctrine have been largely ineffective.").

[106] The alleged affidavit itself was not a part of the court record, and Walden's brief to the Supreme Court stated that he "disputes drafting any affidavit at all — let alone a false one." *See* Brief for Petitioner at 35, Walden v. Fiore, 134 S. Ct. 1115 (2014) (No. 12-574), 2013 WL 2390244 at *35. For purposes of the jurisdictional question, the Ninth Circuit accepted the plaintiffs' allegations as true. Fiore v. Walden, 657 F.3d 838, 847 (9th Cir. 2011), *superseded by*, 688 F.3d 558 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1115 ("We will draw reasonable inferences from the complaint in favor of the plaintiff where personal jurisdiction is at stake, and will assume credibility."). However, it was likely error for the court to have assumed a fact critical to the jurisdictional inquiry; to allow otherwise would be to allow the plaintiff to create jurisdiction through aggressive pleading of controverted facts. *See infra* Part II.

they had requested that the funds be returned to them there.[107] Thus, Ninth Circuit concluded, Walden knew that retention of the funds would give rise to "consequences felt in Las Vegas" and that "attempting to keep their 'bank' and their earnings would disrupt their business activities in Nevada."[108] The circuit court therefore concluded that Walden's "fraudulent execution of the probable cause affidavit" had a sufficient connection with Nevada to support personal jurisdiction.[109]

The Supreme Court unanimously reversed the Ninth Circuit's judgment.[110] In a relatively brief opinion, the Court concluded that Walden's alleged actions had an effect in Nevada only "because Nevada is where respondents chose to be at a time when they desired to use the funds," and not because "the defendant's conduct connects him to the forum in a meaningful way."[111] Thus, because the defendant had not purposefully "create[d] contacts with the forum State," jurisdiction was improper.[112]

The Court's most difficult challenge was to distinguish *Walden* from *Calder*. In both cases, an out-of-state defendant made statements that were allegedly untrue and harmful to the plaintiffs' interests.[113] In both cases, it would be expected that the plaintiffs would bear the brunt of the harm in the location where they lived and worked.[114] Nonetheless, the Court distinguished libel claims from claims for misappropriation of funds.[115] The Court relied heavily on the idea "'[t]he tort of libel is generally held to occur wherever the offending material is circulated,'" so that "the 'effects' caused by the defendants' article — i.e., the injury to the plaintiff's reputation in the estimation of the California public — connected the defendants' conduct to *California*, not just to a plaintiff who lived there."[116] The effect of the missing funds, on the other hand, would have been felt "in California, Mississippi, or wherever else [the plaintiffs] might have traveled and found themselves wanting more

[107] *Fiore*, 657 F.3d at 852 ("[T]he allegations in the complaint, taken as true for these purposes, establish that Walden necessarily recognized, at least by the time he wrote the probable cause affidavit, that the plaintiffs had a connection to Nevada . . . .").

[108] *Id.* at 853.

[109] *See id.*

[110] *See Walden*, 134 S. Ct. at 1126.

[111] *Id.* at 1125.

[112] *Id.* at 1126.

[113] *See id.* at 1125 ("Relying on *Calder*, respondents emphasize that they suffered the 'injury' caused by petitioner's allegedly tortious conduct (*i.e.*, the delayed return of their gambling funds) while they were residing in the forum.").

[114] *See id.*

[115] *See id.*

[116] *Id.* at 1124 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984)).

money than they had."[117] Thus, the Court implied that effects-test jurisdiction would require the defendant's conduct be more explicitly directed into the forum state, as when false statements are communicated to in-state residents.[118] Because the defendant's actions in *Walden* had no connection to Nevada, the Court concluded it would be improper for a Nevada court to exercise jurisdiction over the case.[119] The mere fact the plaintiffs might suffer harm in Nevada from losing access to their funds was not enough of a connection to support personal jurisdiction over the defendants.[120]

II. THE DIRECTION OF FUTURE LITIGATION

The Supreme Court in *Bauman* clarified the contours of general jurisdiction, and in *Walden* limited the exercise of effects-test jurisdiction. Nonetheless, the Court's rulings probably raised more questions than they settled, and the opinions certainly raised new grounds for fights over personal jurisdiction. This section predicts the disputes that are likely to arise in the wake of the Supreme Court's new case law, and it offers recommendations for resolving those disputes.

Although both cases will have an impact of the direction of future litigation, *Walden* is likely to be more limited in its impact. This is not to say that *Walden* will not be influential — it almost certainly will be. The number of effects-test cases has more than tripled in the last decade and there are roughly twice as many effects-test cases as there are stream-of-commerce cases now.[121] The growth in effects-test cases has corresponded with the growth of the internet and the expansion of communications technology more generally.[122] It is now much easier for individuals to engage in actions that have an effect outside their home forum. Many of the cases, for example, involve accusations of libel in online forums, with negative product reviews being a perennial favorite, as a bad review can have a marked effect on sales and revenue.[123] *Walden* will therefore be an influential case, providing

[117] *Id.* at 1125.

[118] *See id.*

[119] *Id.*

[120] *Id.*

[121] *See* Robertson, *supra* note 100, at 1304 n.9.

[122] *See id.* at 1304.

[123] *Id.* at 1349 ("Recent defamation suits over online consumer reviews evidence just such an attempt to crack down on allegedly wrongful speech."); *see, e.g.*, BroadVoice, Inc. v. TP Innovations LLC, 733 F. Supp. 2d 219 (D. Mass. 2010) (involving a dissatisfied customer who created a website to post complaints and derogatory remarks about an internet telephone service); Kauffman Racing Equip., LLC v. Roberts, 930

ammunition for defendants who seek to avoid being haled into a distant forum based on out-of-state communications alone.

Bauman is likely to be the more disruptive case, however.[124] After *Bauman*, the "connectedness" or "relatedness" requirement is likely to emerge as the central battleground in personal jurisdiction litigation. This is especially true in cases brought against large multinational corporations outside of their home state.[125] Given their extensive business activities, such corporations would not have previously contested personal jurisdiction in any state (and indeed, MBUSA did not contest general jurisdiction in the *Bauman* case itself; although it was not domiciled in California, it had multiple facilities and billions of dollars in annual sales in the state, and until now that would have appeared sufficient to support general jurisdiction). *Bauman* now gives such corporations a ground to contest jurisdiction outside of their home states, but in doing so it creates a fertile ground for jurisdictional litigation.

Plaintiffs who want to litigate outside of the defendant's home states will look for a jurisdictional hook, and they will be highly incentivized to do so; nationwide class actions, for example, often depend on the existence of general jurisdiction since the cases typically involve multiple defendants with different home states.[126] Now, plaintiffs will be searching for new jurisdictional grounds, and, at least when the defendant is a multinational corporation, there are several likely possibilities on which to base jurisdiction: first, that the case in some way arises from or relates to the defendant's in-state contacts; second, that a claim arising out of state relates to another claim that arises from

N.E.2d 784 (Ohio 2010) (involving a dissatisfied customer who posted numerous criticisms on various websites devoted to automobile racing).

[124] *See* Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction after* Daimler AG v. Bauman, 75 OHIO ST. L.J. (forthcoming 2014) (manuscript at 4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2432216 ("*Daimler AG* is a game changer."); Tanya J. Monestier, *Where is Home Depot "At Home"?* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. (forthcoming 2014) (manuscript at 48), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423438 (predicting that "[d]efendants will applaud the case; plaintiffs will try to find ways around it"); *see also* Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, SMU L. REV. (forthcoming 2015) (manuscript at 3), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2420573 ("The Court's restriction of general jurisdiction, though long recommended by commentators, raises real concerns. A limited scope for general jurisdiction was supposed to have followed, rather than preceded, an expansion of specific jurisdiction.").

[125] *See infra* Part II.A.

[126] *See infra* Part II.D.

the defendant's in-state contacts; or third, that the defendant has consented to suit within the jurisdiction by appointing an agent for service of process.[127] At the current time, there is a circuit split on each of these issues, and substantial disagreement from academic commentators about whether such claims should be allowed to go forward.[128] In the past, there was less pressure to resolve the splits, because general jurisdiction provided a safety valve: if the defendant's activities in a forum were substantial enough, then it didn't matter whether jurisdiction could be gained on other grounds. Now, however, mere activity in a forum, no matter how extensive, will not alone give rise to general jurisdiction. As a result, plaintiffs will work harder to establish another ground for personal jurisdiction, forcing courts to clarify and resolve some of the remaining questions about the scope of adjudicative jurisdiction.

Justice Sotomayor is thus almost certainly correct that *Bauman* will not improve predictability. Although her grounds for that conclusion — that courts will simply shift their focus to determining where a defendant is most "at home"[129] — will likely not come to pass as the Court in *Bauman* did not look beyond the defendant's state of incorporation and its principal place of business (a relatively simple determination after *Hertz Corp. v. Friend*),[130] jurisdictional disputes won't go away but will simply move to a new playing field.[131] In cases

[127] *See infra* Part II. Another issue that may arise — albeit less frequently in light of the severe constriction of general jurisdiction — is whether the contacts of a subsidiary corporation that is "at home" in a forum state can be imputed to its parent corporation. The likely impact of this issue, which was the primary basis of the petition for certiorari in *Bauman*, is discussed in Lonny Hoffman, *Further Thinking About Vicarious Jurisdiction: Reflecting on* Goodyear v. Brown *and Looking Ahead to* Daimler AG v. Bauman, 34 U. PA. J. INT'L L. 765 (2013) and Monestier, *supra* note 124.

[128] *See infra* Part II.

[129] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 770 (2014) (Sotomayor, J., concurring).

[130] *See* Hertz Corp. v. Friend, 559 U.S. 77, 92-93 (2010). *But see* Cornett & Hoffheimer, *supra* note 124 (manuscript at 31) (arguing that the same approach to ascertaining a principal place of business for subject matter jurisdiction purposes is not appropriate for personal jurisdiction).

[131] In fact, this is beginning to happen. A California appellate court recently expanded its conception of specific jurisdiction to include claims brought by out-of-state plaintiffs in a nationwide class action, concluding that the defendant had substantial activity in California and that the claims brought by out-of-state plaintiffs were similar enough to the claims of California residents to support jurisdiction. *See* Bristol-Myers Squibb Co. v. Superior Court, 228 Cal. App. 4th 605, 637 (2014) ("[G]iven BMS's substantial, continual contacts with California, including its extensive sales . . . the presence of dozens (not one or two) of resident plaintiffs who allege precisely the same wrongdoing . . . as well as the interstate nature of BMS's business and

where the parties previously would have argued about whether defendant's contacts were "systematic and continuous" for general jurisdiction, the parties will now argue about whether those contacts may give rise to specific jurisdiction or to pendent jurisdiction.[132] Furthermore, there will be some cases in which the defendant's contacts are so substantial that, in the past, the defendant (such as MBUSA) would not even have thought to contest jurisdiction, but now will.

This section analyzes the most likely areas for future jurisdictional disputes after *Bauman* and *Walden*: the "connectedness" requirement of specific jurisdiction, the propriety of pendent jurisdiction for related claims, the scope of the effects test (especially over internet activity), and the possibility of establishing consent to personal jurisdiction through the appointment of an agent for service of process. All of these areas have given rise to conflicting precedent in lower courts even before these two pivotal decisions,[133] and these conflicts will only grow in number and play an increasingly important role in personal jurisdiction jurisprudence in the years to come.

A. The Connectedness Requirement

Now that general jurisdiction is only appropriate in the very limited fora in which a corporation is "at home," future jurisdictional disputes will almost exclusively focus on the contours of the specific jurisdiction relationship between the defendant, the forum, and the litigation. But while such "case-linked" jurisdiction requires "an affiliatio[n] between the forum and the underlying controversy,'"[134] the Court has never detailed the reach of the necessary relationship, rendering this requirement jurisdiction's "least developed prong."[135] While the Court has pronounced that the defendant's contacts must "arise from," be "related to," or "connected with" the plaintiff's cause of action,[136] these

its nationwide sales of Plavix are even more significant in determining whether the RPI's claims are sufficiently connected to BMS's California activity . . . .").

132 *See infra* Parts III.A–B.

133 *See infra* Parts III.A–D.

134 Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

135 Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994).

136 *See* Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (noting that specific jurisdiction concerns suits "aris[ing] out of or relat[ing] to the defendant's contacts with the forum" (quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984))); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (stating that specific jurisdiction is proper if the "litigation results from alleged injuries that 'arise out of or relate to' [defendants'] activities" in the forum); Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (applying to obligations that "arise out of or are connected with the activities within the state").

alternative formulations (as Professor Patrick Borchers noted) are not "interchangeable," but rather hint at very different linkages.[137]

The Court's most recent formulations of the connectedness standard have added even more alternatives to the traditional "arise from or relate to" standard. In *Goodyear*, the Court referred to an "affiliation between the forum and the underlying controversy" and connected the idea of such affiliation to the state's regulatory power, suggesting that the affiliation would be "principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."[138] Likewise, in *Walden*, the Court reiterated the "affiliation" language.[139] But even to the extent that such dicta might hint at a broader standard, the Court has not disavowed the traditional formulations.[140] Thus, nothing has been done explicitly to settle the question. Without the Supreme Court's guidance, a bewildering array of approaches to this problem have developed, which has led to deep inter-circuit (and sometimes even intra-circuit) splits[141] — splits that will now be the linchpin of most jurisdictional challenges.

One relatedness approach is the "substantive relevance" test outlined by Professor Lea Brilmayer, under which the requisite relationship exists if the defendant's forum contact "is the geographical qualification of a fact relevant to the merits."[142] Specific jurisdiction under this approach is supported by the defendant's forum contacts that bear on the substantive legal dispute between the parties: connected contacts are those forum occurrences "which would ordinarily be alleged as part

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[137] Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 126.

[138] *Goodyear*, 131 S. Ct. at 2851 (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966)).

[139] Walden v. Fiore, 134 S. Ct. 1115, 1121 n.6 (2014) (stating that "'[s]pecific' or 'case-linked' jurisdiction 'depends on an 'affiliatio[n] between the forum and the underlying controversy'" (quoting *Goodyear*, 131 S. Ct. at 2851)).

[140] *See Bauman*, 134 S. Ct. at 754 (reiterating traditional "arises out of or relates to" standard).

[141] For descriptions and critiques of various approaches, see, for example, Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1026-48 (2012), Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 201-07 (2005) [hereinafter *Predictability Principle*], and Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 348-73 (2005) [hereinafter *Meeting Expectations*].

[142] Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82.

of a comparable domestic complaint."[143] This standard focuses on the causes of action asserted, not necessarily the situs of the alleged injury.[144] Under the substantive relevance test, our Michigan family could bring their claim against the hotel owners only if elements of their alleged cause of action require proof of the defendants' actions in Michigan — such as a deceptive Michigan advertisement or a breach of a contract formed in part in Michigan — but not for a negligence claim without any claim elements depending on defendants' Michigan activities.

Other courts borrow tort law causation standards to evaluate the nexus required for specific jurisdiction. These approaches hinge upon a causal relationship between the defendant's purposeful forum contacts and plaintiff's alleged injury. The more restrictive technique emphasizes proximate or legal cause as the jurisdictional linchpin, which requires that a reasonably prudent person should have foreseen the injury as a result of the defendant's forum activities.[145] This foreseeability element typically bars claims like those of our Michigan family — most courts would hold that no reasonably foreseeable expectation of danger arose in Michigan.[146] As a result, some courts have loosened the connection to prevent perceived unjust results, overlaying "but for" causation on proximate causation to adjudge the requisite relationship.[147] Still other courts employ this broader "but for" causality standard as a stand-alone test to ascertain whether the defendant's forum contacts are sufficiently connected to the litigation.[148] The requisite connection here flows from

[143] *Id.*

[144] *See id.*

[145] For examples of cases discussing the proximate cause standard, see Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 715 (1st Cir. 1996); Luna v. Compania Panamena de Aviacion, S.A., 851 F. Supp. 826, 832 (S.D. Tex. 1994); Russo v. Sea World of Fla., Inc., 709 F. Supp. 39, 42 (D.R.I. 1989).

[146] *See, e.g.*, *Luna*, 851 F. Supp. at 832 (holding forum ticket purchase was not the proximate cause of Panama plane crash); *Russo*, 709 F. Supp. at 42 (holding plaintiff's forum purchase of an admission ticket and defendant's forum advertising was not proximate cause of injury at Sea World); *cf. Nowak*, 94 F.3d at 716 (recognizing that a Hong Kong hotel's forum solicitation was not the proximate cause of hotel drowning).

[147] *See, e.g.*, *Nowak*, 94 F.3d at 715-16 (holding a Hong Kong hotel's forum solicitation was "meaningful link" for specific jurisdiction over drowning at hotel pool); Sigros v. Walt Disney World Co., 129 F. Supp. 2d 56, 67 (D. Mass. 2001) (holding forum solicitation efforts and communications sufficed for specific jurisdiction over resort injury claim).

[148] *E.g.*, Mattel, Inc. v. Greiner & Hausser GmbH, 354 F.3d 857, 864 (9th Cir. 2003); Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995); Shute v. Carnival Cruise Lines, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 111 S. Ct. 1522 (1991); Tatro v. Manor Care, Inc., 625 N.E.2d 549, 553-55 (Mass. 1994). The Third Circuit, while

a causal syllogism evaluating whether plaintiff's cause of action would have occurred in the absence of the defendant's forum activities: if our Michigan family would not have made its visit without the hotel's Michigan activities (such as forum advertising and soliciting), the family can sue in its home state.[149]

Instead of pronouncing a precise relatedness standard, many courts merely require a "substantial," "causal," or "sufficient" connection between the forum contact and the cause of action.[150] Because these terms merely substitute one indeterminate standard for another (as no more guidance is provided than following the Supreme Court's articulation that the defendant's forum contacts must be related or give rise to the lawsuit),[151] some courts supplement this approach with a "sliding scale," under which the strength of the required connection is inversely proportional to the extent and quality of the defendant's forum contacts.[152] With or without the sliding scale, though, this approach basically evaluates whether jurisdiction is fair and reasonable in light of the ties between the defendant's forum contacts and the plaintiff's claim. The necessary connection thus becomes subsumed in an "amorphous

employing "but for" causation as the initial step for the connectedness requirement, then evaluates the relationship of the defendant's forum contacts to the substantive obligations arising in the suit. *See* O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 322 (3d Cir. 2007).

149 *See, e.g.*, Alexander v. Circus Circus Enters., Inc., 939 F.2d 847, 853 (9th Cir. 1991) (accepting California residents' argument that, "but for" the advertisement in the paper, they would not have traveled to the hotel where the injury occurred), *withdrawn on other grounds*, 972 F.2d 261 (9th Cir. 1992); *Shute*, 897 F.2d at 386-87 (holding Florida cruise line amenable in Washington for injury to Washington plaintiffs occurring in international waters).

150 *See, e.g.*, Third Nat'l Bank in Nashville v. WEDGE Grp. Inc., 882 F.2d 1087, 1091 (6th Cir. 1989) ("substantial connection"); Shoppers Food Warehouse v. Moreno, 746 A.2d 320, 335 (D.C. Cir. 2000) ("substantial connection"); Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 268-69 (E.D. Pa. 1991) ("causal link"); Williams v. Lakeview Co., 13 P.3d 280, 284 (Ariz. 2000) ("causal nexus"); Cornelison v. Chaney, 545 P.2d 264, 268 (Cal. 1976) ("substantial nexus"); Dunham v. Hunt Midwest Entm't, Inc., 520 N.W.2d 216, 227 (Neb. Ct. App. 1994) ("sufficient connection"); Moki Mac River Expeditions v. Drugg, 221 S.W.3d 569, 584 (Tex. 2007) ("substantial connection").

151 *Cf.* Myers v. Casino Queen, Inc., 689 F.3d 904, 913 (8th Cir. 2012) (holding defendant's forum marketing campaign was, as the Supreme Court required, "related to" suit brought by forum resident injured after responding to advertising).

152 *E.g.*, *Shoppers Food Warehouse*, 746 A.2d at 335-36; Vons Cos., v. Seabest Foods, Inc., 926 P.2d 1085, 1096-97 (Cal. 1996). This sliding scale was championed by Professor William M. Richman. *See* William M. Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction* 72 CALIF. L. REV. 1328, 1340-41 (1984) (reviewing ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS (1983)) (using a sliding scale approach to evaluate personal jurisdiction).

'goal of fairness,'"[153] precluding ex ante predictions of the outcome; indeed, courts employing this approach have reached irreconcilable holdings on whether our Michigan family could sue at home.[154]

Each approach has its drawbacks, which have been well-catalogued by prior commentary and case law.[155] Briefly stated, the substantive relevance test is considered too narrow and dependent upon formal pleading requirements.[156] The proximate cause test likely suffers from an even more extensive scope limitation and infuses a "foreseeability" element that the Court has held is not a "sufficient benchmark" for personal jurisdiction.[157] "But for" causation is too broad and is difficult to reconcile with the Supreme Court's limited guidance on the connection requirement.[158] The "substantial connection" model, which offers no meaningful tutelage, engenders conflicting holdings,[159] and

[153] Cassiar Mining Corp. v. Superior Court, 66 Cal. App. 4th 550, 558-59 (1998) (citing *Vons Cos.*, 926 P.2d at 1096).

[154] *Compare, e.g.*, *Wims*, 759 F. Supp. at 269 (holding defendant's forum promotional mailings not sufficiently connected to out-of-state injury), *Dunham*, 520 N.W.2d at 227 (concluding that the Nebraska plaintiffs' injuries were not sufficiently connected to the defendant amusement park's advertising so as to support Nebraska's exercise of personal jurisdiction), *and Moki Mac*, 221 S.W.3d at 585-88 (denying specific jurisdiction because nonresident expedition company's promotional activities in Texas were not substantially connected with the operative facts of the litigation), *with Myers*, 689 F.3d at 913-14 (holding forum advertising activities sufficiently related to injuries suffered after visiting out-of-state casino), *and Shoppers Food Warehouse*, 746 A.2d at 335-36 (upholding the trial court's jurisdiction based on defendant's extensive advertising activity in a major newspaper).

[155] *See, e.g.*, Andrews, *supra* note 141, at 1026-48 (detailing the difficulties of each approach); Simard, *Meeting Expectations*, *supra* note 141, at 348-73 (same).

[156] *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 657 (1988). The pleading objection, however, may not be well taken, as jurisdiction in other contexts is often conditioned on pleading and proof, such as federal question jurisdiction or the justiciability doctrines applicable in all federal and (with some variations) state courts. *See, e.g.*, RICHARD D. FREER, CIVIL PROCEDURE 211-16 (3d ed. 2012) (discussing the need to appropriately plead a federal claim to establish arising under subject matter jurisdiction); CHARLES W. "ROCKY" RHODES, THE TEXAS CONSTITUTION IN STATE AND NATION: COMPARATIVE STATE CONSTITUTIONAL LAW IN THE FEDERAL SYSTEM 90-91, 95-97 (2014) (comparing justiciability principles in state and federal courts).

[157] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (noting the Court has "consistently held" that the "foreseeability of causing *injury* in another State" does not establish a "'sufficient benchmark'" for personal jurisdiction (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980))).

[158] *Cf.* Hanson v. Denckla, 357 U.S. 235, 254 (1958) (holding that requisite relationship did not exist between the Florida execution of the powers of appointment for a trust and the validity of the trust despite the fact that, without the appointment, plaintiffs would not have suffered any injury).

[159] *See supra* note 154 and accompanying text.

the "sliding scale" elides the distinction between general and specific jurisdiction without offering predictive guidance.[160]

A new approach is sorely needed — and a heretofore unnoticed cipher for unraveling this dilemma can be found in the fountainhead of modern personal jurisdiction doctrine, *International Shoe Co. v. Washington*.[161] An underappreciated aspect of *International Shoe* is that, in discussing the circumstances now known as "general jurisdiction" and "specific jurisdiction,"[162] the Court described three (rather than two) situations supporting a nonresident defendant's amenability. Jurisdiction over an out-of-state defendant, according to *International Shoe*, would be appropriate in a forum: (1) "when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on"; (2) when "the continuous corporate operations within a state were thought so substantial and of such a nature to justify suit against it on causes of action entirely distinct from those activities"; and (3) when "the commission . . . of such [single or occasional] acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient."[163] The second listed scenario — predicating jurisdiction on activities "entirely distinct" from the asserted cause of action — is general jurisdiction.[164] But the first and third scenarios are different species of specific jurisdiction, as Justice Ginsburg highlighted in the opinions she penned for the Court in both *Bauman* and *Goodyear*.[165]

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[160] *See* Richman, *supra* note 152, at 1340-46 (acknowledging sliding scale blurs divide between general and specific jurisdiction). Although Professor Richman makes a forceful case that the distinct categorization between general and specific jurisdiction is unwarranted, the Supreme Court has continued to abide by such a distinction. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 2857 (2011). In any event, the sliding scale still provides minimal predictive assistance: the relevant factors — the defendant's benefit from the forum, the foreseeability of forum litigation, the defendant's litigation burdens, and the defendant's initiation of forum contacts — subsume almost all the typical steps in the minimum contacts analysis. *Cf.* Davis v. Baylor Univ., 976 S.W.2d 5, 9 (Mo. Ct. App. 1998) (adopting "balancing approach akin to the 'sliding scale' approach," which encompassed the court's entire jurisdictional analysis).

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

[162] The Supreme Court first employed the terminology "general jurisdiction" and "specific jurisdiction" in 1984, borrowing them from an influential law review article. *See* Calder v. Jones, 465 U.S. 783, 787 (1984) (mentioning general jurisdiction); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 nn.8-9 (1984) (discussing both terms); von Mehren & Trautman, *supra* note 138, at 1136 (defining different types of jurisdiction).

[163] *Int'l Shoe*, 326 U.S. at 317-18.

[164] *E.g.*, *Goodyear*, 131 S. Ct. at 2853.

[165] *See, e.g.*, Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (explaining specific

Most of the Supreme Court's post-*Shoe* decisions have explored the outermost limits of specific jurisdiction premised upon a defendant's isolated forum activity, i.e., *International Shoe*'s third category.[166] With respect to such "single or occasional acts," *International Shoe* indicated that jurisdiction would sometimes be warranted and other times not, depending on the nature, quality, and circumstances of the activity.[167] In its post-*Shoe* cases addressing such limited forum activities, the Court frequently has disclaimed jurisdiction, viewing the defendant's amenability as an undue burden in light of the de minimis state regulatory interests implicated by that defendant's specific activities.[168] But in other cases, the Court has viewed the nature, quality, and circumstances of the defendant's isolated activities undertaken within or directed at the forum as sufficient to support adjudicative jurisdiction.[169]

The Court's caution in exercising jurisdiction over "single or occasional acts" is appropriate (even if all its holdings may not be). The Due Process Clause, at its core, attempts to achieve fairness through balancing individual interests, government interests, and due regard for justice, whether the context is procedural due process, substantive due process, or a unique due process strand.[170] Because the Court has continued, without mentioning the intractable academic debate on the matter,[171] to emphasize the Due Process Clause as personal

jurisdiction exists both when the defendant's continuous and systematic in-state activities give rise to the suit and for certain "single or occasional" forum acts when the suit relates to that in-state activity); *Goodyear*, 131 S. Ct. at 2853 (highlighting that specific jurisdiction encompasses both of "these two *International Shoe* categories").

166 *See Goodyear*, 131 S. Ct. at 2854 ("Since *International Shoe*, this Court's decisions have elaborated primarily on circumstances that warrant the exercise of specific jurisdiction, particularly in cases involving 'single or occasional acts' occurring or having their impact within the forum State."). The Court continued to cite several prior decisions as examples. *See id.*

167 *See Int'l Shoe*, 326 U.S. at 318.

168 *E.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1124-25 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (plurality opinion); *id.* at 2791-92 (Breyer, J., concurring); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

169 *E.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985); Calder v. Jones, 465 U.S. 783, 788-90 (1984); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957).

170 *See* Rhodes, *Predictability Principle*, *supra* note 141, at 162-63; Cassandra Burke Robertson, *Due Process in the American Identity*, 64 ALA. L. REV. 255, 260-67 (2012).

171 For discussions of the debate on this matter, see Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 569 (2007) and James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 231 & n.239 (2004).

jurisdiction's source, the Court has unsurprisingly announced the doctrine's function is to ensure the "fairness" of subjecting the defendant to the adjudicatory power of the state in light of such factors as the defendant's litigation burdens, the expected risks of forum litigation, and the state's various sovereign interests supporting the regulation of defendant's activities under the circumstances of the case.[172] With respect to isolated or sporadic forum activities, a nonresident typically will have less reason to anticipate litigation in the forum and will suffer greater hardship through in-state litigation than a nonresident operating on a "continuous and systematic" basis within the state. This means that the "fairness" of the jurisdictional assertion in such cases will necessitate both: (1) a closer correlation between the risk of litigation and the benefits obtained from the forum state; and (2) a stronger state warrant for regulating the defendant's conduct at issue through adjudication.

As a result, only a relatively tight connection can likely support specific jurisdiction based on a single or occasional purposeful forum act of a nonresident defendant, one closely linking the defendant's act and the ensuing litigation to implicate state regulatory interests and minimize the scope of the defendant's obligation. Professor Brilmayer's substantive relevance test, at least her intended version rather than the erroneous conflation of it with the proximate cause approach adopted by some lower courts and commentators, is probably the best candidate. This test examines whether any of the factual occurrences that are conditions for the claim (such as the duty owed, the right violation, individual reliance, the injury, etc.) arose from the defendant's actions within or directed at the forum.[173]

Under the substantive relevance test, state adjudicative jurisdiction extends only to those activities within the state that undoubtedly

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[172] *See, e.g.*, *Burger King*, 471 U.S. at 473-74 (discussing reasons for a state to legitimately exercise personal jurisdiction over nonresidents, including state interest); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775-76 (1984) (stating fairness in determining assertion of personal jurisdiction depends on state interest in defendant's activities); *World-Wide Volkswagen*, 444 U.S. at 291-92 (stating fairness in asserting personal jurisdiction depends on various factors, including burden on defendant, state's interest, and convenience on plaintiff).

[173] *See* Brilmayer, *supra* note 142, at 82 & n.37. Professor Brilmayer distinguished between her substantive relevance test for the connectedness requirement and what she termed "substantive causation principles" that governed the attribution of contacts through intermediaries (such as distributors, etc.) to the named defendant. *See id.* at 112-13. Her substantive relevance approach considers whether any of the defendant's forum contacts are aspects of the plaintiff's claim, not whether the contacts are the proximate cause of the plaintiff's injury. *Cf.* O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 318-19 (3d Cir. 2007) (describing various articulations of both tests).

implicate its sovereign regulatory interests.[174] States in our federal system must have the authority to regulate conduct occurring within or purposefully seeking the benefits and advantages of the state's law, authorizing the judiciary to ascertain the consequences of such conduct.[175] The defendant's related forum contacts, to satisfy the substantive relevance test, must be "exactly those already defined as a proper subject for regulation under the applicable substantive law" — a precisely tailored match between the defendant's isolated or sporadic forum contacts and the state's regulatory interests.[176] The Supreme Court, in its earlier decisions in *Hanson v. Denckla* and *Rush v. Savchuk*, appeared to search for just such a nexus between the defendant's forum activities and the operative facts or substantive issues involved in the lawsuit, preventing the state from attempting to regulate via adjudication out-of-state enterprises in favor of its own citizens unless the nonresident's forum conduct implicates the controlling law.[177] On the other side of the balance, in most instances, the defendant's burden can hardly be said to be undue via litigation in a forum in which it purposefully conducted activities that are components of the lawsuit.

The substantive relevance test accordingly appears to match all the various underlying jurisdictional policies for those defendants falling within the third *Shoe* category (limited to "single or occasional" forum acts), but the calculus changes when the defendant is within the first *Shoe* category (for "continuous and systematic" forum activities), where the substantive relevance test falls somewhat short (at least now in light of *Bauman*'s limited view of general jurisdiction).[178] Consider again our Michigan family, staying at a Florida luxury resort owned and operated by a national hotel corporation with multiple properties in Michigan.

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[174] *See* RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1278 (7th Cir. 1997) (highlighting that the substantive relevance test ties due process constraints to the "state's proper interest in regulating conduct and adjudicating disputes").

[175] *See id.*

[176] *See* Brilmayer, *supra* note 142, at 86.

[177] *See Rush v. Savchuk*, 444 U.S. 320, 329 (1980) (holding insurance policy pertained "only to the conduct, not the substance of the litigation" as it was neither "the subject matter of the case" nor "related to the operative facts of the negligence action"); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (examining in part whether forum execution of powers of appointment was "at issue" in lawsuit).

[178] Professor Brilmayer proposed a more expansive view of general jurisdiction than accepted by *Bauman*, authorizing general jurisdiction over those corporations that engaged in a large quantum of interstate activity that rose "to the level . . . of an insider" such that "relegating the defendant to the political processes is fair." Brilmayer et al., *supra* note 22, at 742. As she envisioned jurisdictional doctrine, then, the relatedness issue would not arise for those corporations conducting substantial intrastate business in the forum similar in quantity and quality to in-state corporations.

Since the defendant is conducting substantial "systematic and continuous" activities in Michigan — the quantity and quality of activities that before *Bauman* sufficed (according to the lower courts) for general jurisdiction[179] — would the exercise of jurisdiction in Michigan be "fair," even if the claims were not dependent on the corporation's Michigan activities? Or should the family instead be limited to bringing any non-substantively-relevant-to-Michigan claim in Florida (accident locale), Delaware (defendant's state of incorporation), or New Jersey (defendant's principal place of business)?

Intuitively, exercising jurisdiction in Michigan appears "fair" — indeed, until *Bauman*, the defendant would not have even bothered to challenge personal jurisdiction with respect to such a claim. But now that general jurisdiction is not available, Michigan's adjudicatory jurisdiction depends upon the connectedness requirement, which, in order to comport with fundamental notions of fair play and substantial justice, demands a broader expanse for those cases falling within *International Shoe*'s first category.

When the nonresident defendant is conducting "continuous and systematic" activities within the state, the "estimate of the inconveniences" of litigation in the forum in which the plaintiffs reside is practically nonexistent.[180] Evidence exists in the forum (i.e., the plaintiff witnesses and any of their documentary evidence, such as medical, income, or employment records).[181] The defendant undoubtedly maintains in-state counsel and insurance coverage to defend itself from forum suits, and many jurors may even view the company as a state "insider" due to its local presence. The only true disadvantage from the defendant's perspective is the added forum shopping potential,[182] but forum shopping can be limited by restricting the available fora to those with some additional state interest.

State regulatory power over the occurrence giving rise to the suit — while the most important government adjudicative interest — is not the

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[179] *See generally* Rhodes, *Clarifying General Jurisdiction*, *supra* note 22, at 862-67 (discussing cases).

[180] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945); *cf.* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985) (recognizing forum cannot be "'so gravely difficult and inconvenient'" that a party is at a severe litigation disadvantage (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972))).

[181] *See* Shaffer v. Heitner, 433 U.S. 186, 208 (1977) (noting relevance of records and witnesses in the state to the due process inquiry); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (noting that the crucial witness will be found in the forum state).

[182] *Cf.* Daimler AG v. Bauman, 134 S. Ct. 746, 762 (2014) (discussing concerns with forum shopping and defendant's control of the jurisdictional consequences of its actions).

only one. The state also has interests in providing a procedure for resolving disputes between its citizens and those conducting activities within the state, protecting its citizens and visitors from harms suffered within the state, and providing a convenient forum for its citizens injured by nonresidents.[183] Although the Supreme Court has held that the plaintiff's forum contacts cannot standing alone be decisive,[184] in those cases in which the defendant is engaging in "continuous and systematic" forum conduct that is substantially similar to the occurrence that is the basis of the lawsuit, such additional state interests should allow the state to adjudicate the controversy, even if none of the defendant's forum contacts caused or will be aspects of plaintiff's claims.[185]

Clues from the Supreme Court's opinions support this view. Consider *World-Wide Volkswagen Corp. v. Woodson*, which held that a New York automobile detailer and its regional distributor were not amenable to jurisdiction in Oklahoma based on selling an automobile in New York that later crashed in the forum when they conducted no other business activity in Oklahoma.[186] The Court indicated, however, that while these particular defendants were not amenable, jurisdiction was appropriate over Audi, the manufacturer of the automobile, and Volkswagen, the importer.[187] The Court explained that, if the sale of a product "is not simply an isolated occurrence," but results from the manufacturer's or distributor's efforts to serve the market in other states, "it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."[188] Notice, though, that Audi and Volkswagen did not sell

[183] *E.g.*, *Burger King*, 471 U.S. at 473 ("A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (noting the state's "especial interest in exercising judicial jurisdiction over those who commit torts within its territory" and stating "[t]his is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection" (internal quotation marks omitted)); *Shaffer*, 433 U.S. at 207-08, 214 (recognizing the state's strong interest in "providing a procedure for peaceful resolution of disputes" arising from property within the forum).

[184] *E.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1119 (2014); Rush v. Savchuk, 444 U.S. 320, 331-32 (1980).

[185] *See generally* Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, 7 FED. CTS. L. REV. 118, 125-26 (2013) ("We believe that the personal jurisdiction formula should merely focus on *meaningful connections* with the forum state and the *reasonable expectations* to which those connections give rise.").

[186] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980).

[187] *See id.* at 297.

[188] *See id.*

this automobile in Oklahoma (so there is no substantively relevant or causal contact of either defendant in Oklahoma), yet the Court still indicated that jurisdiction would be warranted based on their continuous efforts to serve the Oklahoma market.[189] Likewise, in *Asahi Metal Industry Co. v. Superior Court*, Justice O'Connor's restrictive approach to purposeful availment still acknowledged that a foreign component manufacturer placing its goods in the stream of commerce could be amenable to specific jurisdiction based on associated (but not necessarily substantively or causally relevant) forum conduct, such as establishing distribution networks within the state.[190] These conclusions could be supported under the rationale that, while such defendants do not have a substantively or causally relevant purposeful contact within the state, their "continuous and systematic" forum activity is sufficiently similar to their actions giving rise to the suit to implicate the state's interests in protecting from harms suffered within the state.[191]

Additional support is provided by a pre-*Shoe* case, *Louisville & Nashville Railroad Co. v. Chatters*, which found a sufficient relationship with the forum state for an out-of-state injury based entirely on the plaintiff's in-state purchase of his railroad ticket from another entity.[192] The plaintiff had been injured in Virginia while the train was being operated by a Virginia railroad company; he purchased his ticket in New Orleans from a separate Kentucky railroad which operated the train from New Orleans to Alabama.[193] Although the Virginia railroad's substantial Louisiana business activities arguably had no substantively relevant connection to the claim, the Court upheld jurisdiction in Louisiana, reasoning that the subsequent injury in Virginia was sufficiently connected to the defendant's Louisiana business since the defendant accepted a transportation obligation incurred by another entity in the state.[194]

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189 *See id.*

190 *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987).

191 At least one court has applied a similar analysis in a stream-of-commerce case. *See* Russell v. SNFA, 987 N.E.2d 778, 797 (Ill. 2013) (upholding specific personal jurisdiction based on the defendant's in-state aerospace activities, in spite of the fact that the component at issue in the suit had been manufactured elsewhere).

192 *See* Louisville & Nashville R.R. Co. v. Chatters, 279 U.S. 320, 327-29 (1929). Although the defendant had a registered agent in the forum, its appointment of an agent, under state law, constituted a jurisdictional basis only for causes of action arising out of its business within the state, requiring the Court to examine whether an adequate connection existed. *Id.* at 325-26.

193 *Id.* at 323.

194 *See id.* at 327-29.

These decisions do not, however, extend to support specific jurisdiction in every forum in which the defendant conducts continuous and systematic forum activities that are sufficiently similar to the occurrence in dispute — such reasoning would give the plaintiff the choice of essentially every state for proceeding against a national corporation. Nor do they support jurisdiction merely based on the plaintiff's residence or an in-forum injury if the defendant is conducting "single or occasional" forum acts. But if the defendant is conducting extensive forum activities similar to the episode in dispute, and the suit implicates another sovereign state interest (such as providing a convenient forum for state citizens or protecting against harms suffered in the state), the relevant state interests will typically outweigh the minimal litigation burdens on the defendant, which should authorize suit within the forum, unless the defendant can establish that the exercise of jurisdiction is otherwise unreasonable.

The courts have extensive precedents to draw upon in determining whether the defendant's forum activities are continuous and systematic: the pre-*Bauman* decisions purporting to find general jurisdiction based solely or predominantly on the continuity of the defendant's forum activities.[195] A more difficult issue will be the appropriate level of abstraction or generality for ascertaining similarity. For instance, in the case of a product manufacturer, does the product causing an in-state injury have to be precisely the same model as other products that the manufacturer is selling to the forum on a systematic and continuous basis, or is it enough to be within the same line of products, or even the same basic industry? Although precedent here is not as extensive, courts have grappled previously with this problem, recognizing that higher levels of generality will expand the state's jurisdictional reach.[196]

Returning again to our hypothetical, Michigan's jurisdictional reach likely should encompass the vacation disaster suit, assuming the corporation is operating sufficiently similar properties in Michigan on a "continuous and systematic" basis. Michigan has a manifest interest in ensuring that a company operating resorts in its state is providing a

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[195] *See* Rhodes, *Clarifying General Jurisdiction*, *supra* note 22, at 828-86 (cataloguing prior decisions). Although many of these decisions ignored the need for the defendant's forum activities to be of a substantial nature, as should have been necessary for general jurisdiction even before *Bauman*, *see id.* at 887, their holdings could nonetheless assist with the appropriate characterization of the defendant's forum contacts as either isolated or continuous and systematic.

[196] *See, e.g.*, *Russell*, 987 N.E.2d at 797 ("In our view, defendant's proposed distinction between subcategories of its primary product, custom-made aerospace bearings, is too restrictive and narrow for purposes of our jurisdictional inquiry.").

safe environment for both its citizens and those visiting the state. While this interest is diminished to some extent because the particular injury did not occur within the state, Michigan still has an interest in protecting state citizens and providing them a convenient forum for suit. Jurisdiction in the state can hardly be said to be an undue burden to the corporate hotel when it is engaging in intentional conduct on a continuous and systematic basis providing similar services to the Michigan market — the mere fortuity, from its perspective, that this particular injury occurred in Florida should not preclude jurisdiction.

At the very least, going forward, litigants and courts need to be cognizant of the need to exercise specific jurisdiction over tenuously related contacts of those corporations conducting the quantity and quality of substantial in-state business that before *Bauman* sufficed for general jurisdiction. In order to achieve the ultimate due process goal of "fairness," courts must be prepared to expand their jurisdictional reach in such cases. Even before *Bauman*, some courts[197] and commentators[198] had urged that specific jurisdiction sub-categories should be recognized as a basic matter of policy and fairness. The need for this approach is only heightened now. By highlighting *International Shoe*'s two specific jurisdiction categories in both *Goodyear* and *Bauman*, the Supreme Court hinted at a future path to serve this need.

B. Pendent Personal Jurisdiction

The previous section argues that, after *Bauman*, courts should and likely will interpret the "arising from or relating to" standard more leniently, at least when the defendant's forum contacts are substantial, continuous, and systematic. Such an expansion of "connectedness" analysis in certain contexts will give rise to another issue: what should the court do when the case involves multiple claims that share a common nucleus of operative fact, but not all of the claims satisfy the

197 *See, e.g.*, Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 128-29 (2d Cir. 2002) (examining entirety of law firm's forum activities to ascertain whether the firm was subject to personal jurisdiction); Chew v. Dietrich, 143 F.3d 24, 29 (2d Cir. 1998) (contending that the relatedness inquiry should depend on whether defendant's forum contacts are limited or substantial).

198 *See, e.g.*, John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90 WASH. U. L. REV. 1707, 1724 n.70 (2013) (proposing more limited definition of specific jurisdiction with additional categories beneath general jurisdiction based on the extent of the forum activities and connection between those activities and the claim); Simard, *Meeting Expectations*, *supra* note 141, at 374 (distinguishing, for relatedness purposes, "episodic contacts" from "systematic contacts").

connectedness requirement? If one claim arises from in-state contacts (perhaps a false advertising claim attributable to a brochure mailed to the plaintiff's home that induced the plaintiff to travel to a resort that conducted no other business within the state other than advertising), can the court also exercise jurisdiction over the defendant for additional claims that, though related, do not arise from the defendant's in-state contacts (for example, a premises liability claim arising when the family's child is injured at the resort)?

The issue is described as one of pendent personal jurisdiction, as the court possesses personal jurisdiction over the defendant for one claim, but, standing alone, would lack personal jurisdiction over the defendant for the second claim, unless it can tag along as a "pendent" claim. For the subset of federal-question cases in which Congress has authorized nationwide service of process, the nearly unanimous view is that a court may lawfully exercise pendent personal jurisdiction to hear related state-law claims.[199] At the other end of the spectrum, and regardless of

[199] 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069.7 (3d ed. West 2014) (explaining that most federal courts have held that "a defendant who already is before the court to defend a federal claim is unlikely to be severely inconvenienced by being forced to defend a state claim whose issues are nearly identical or substantially overlap the federal claim. Notions of fairness to the defendant simply are not offended in this circumstance"); *accord* Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1626 (2001) [hereinafter *Exploring the Limits*] ("Federal courts are far more willing to adjudicate pendent counts where personal jurisdiction over the anchor count is based upon a federal nationwide service of process provision . . . ."); *see also* Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180-81 (9th Cir. 2004) ("Pendent personal jurisdiction is typically found where one or more federal claims for which there is nationwide personal jurisdiction are combined in the same suit with one or more state or federal claims for which there is not nationwide personal jurisdiction."); IUE AFL–CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1056 (2d Cir. 1993) ("[W]here a federal statute authorizes nationwide service of process, and the federal and state claims 'derive from a common nucleus of operative fact', the district court may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available." (citation omitted) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966))); Peterson v. Islamic Republic of Iran, No. 10 CIV. 4518 (KBF), 2013 WL 2246790, at *9 (S.D.N.Y. May 20, 2013) ("Rule 4(k)(2) provides a statutory basis for jurisdiction over the claims here because the turnover action (1) arises under federal law, (2) UBAE is not subject to the general jurisdiction of any state's courts, and (3) exercising jurisdiction comports with due process . . . ."); Jon Heller, Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113, 114 (1989); Steven Michael Witzel, Note, *Removing the Cloak of Personal Jurisdiction from Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process*, 51 FORDHAM L. REV. 127, 147 (1982). *But see* Jason A. Yonan, *An End to Judicial Overreaching in Nationwide Service of Process Cases: Statutory Authorization to Bring Supplemental Personal Jurisdiction Within Federal Courts' Powers*, 2002 U. ILL. L. REV. 557, 579 (2002) ("In maintaining personal jurisdiction over transactionally related

whether the claims are founded on state or federal law, most courts will not exercise pendent personal jurisdiction over the defendant when the two claims do not arise out of a common nucleus of operative fact.[200] In such a case, the defendant could not have foreseen being called to defend the unrelated claim in the forum and considerations of federalism and comity would weigh against the exercise of jurisdiction over the defendant for an unrelated claim.[201]

In between these two focal points, however, are cases involving two distinct claims that do share a common nucleus of operative fact, but only one of which arises out of forum contacts, and here there is a deep circuit split. Assuming that the state's long-arm statute extends to the constitutional limit, and further assuming that one claim falls within that constitutional limit and the other falls outside of it, would it violate the Constitution for a court to hear both claims together? There is considerable disagreement over this point: some courts have allowed the extension of pendent personal jurisdiction over the related claim,[202] while others have not.[203]

The controversy goes back to the traditional struggle between sovereign power and litigant fairness in personal jurisdiction, requiring an analysis of what interests personal jurisdiction is intended to protect, an issue often debated, but always a moving target.[204] Under a

state-law claims where personal jurisdiction could not otherwise be obtained . . . courts have acted without congressional guidance and have overstepped their bounds.").

200 *See* WRIGHT ET AL., *supra* note 199, § 1069.7 (noting that "a claim that is not part of the same constitutional case is much more likely to involve different litigational strategies and may require very different resources to defend against").

201 *Id.*

202 *See, e.g.*, Inspirus, LLC v. Egan, No. 4:11-CV-417-A, 2011 WL 4439603, at *5 (N.D. Tex. Sept. 20, 2011) ("The court is satisfied that if a claim for breach of the confidentiality agreement has been properly alleged, the forum-selection clause in question would be sufficient to authorize this court to exercise *in personam* jurisdiction over Egan as to that claim. . . . [T]he court is inclined to think that if the breach of contract claim has been adequately alleged, the pendent personal jurisdiction doctrine would apply and that, under that doctrine, the court would be authorized to exercise jurisdiction over Egan's person as to all of the claims asserted against him in the complaint, as amended."); *see also* Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 289 (1st Cir. 1999) (allowing jurisdiction over some, but not all, claims).

203 *See, e.g.*, Resnick v. Rowe, 283 F. Supp. 2d 1128, 1132 (D. Haw. 2003) ("[A] plaintiff must establish personal jurisdiction over a defendant with respect to each claim."); *see also* Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266, 275 (5th Cir. 2006) (denying personal jurisdiction).

204 Andrews, *supra* note 141, at 1014 (explaining that the historical "philosophical divide" between power and fairness as the relevant policy concern underlying limitations on personal jurisdiction "remains among current members of the Court"); Megan M. La Belle, *Patent Litigation, Personal Jurisdiction, and the Public Good*, 18 GEO.

traditional power analysis, there should be no impediment to exercise pendent personal jurisdiction over related claims. Indeed, the Supreme Court in *Burnham* allowed in-state service of process ("tag" jurisdiction) to support personal jurisdiction over a defendant even for claims entirely unrelated to the defendant's forum contacts.[205] If in-state service can give rise to such power, then surely sovereign authority should likewise extend to the adjudication of additional claims once the court has properly established personal jurisdiction over the defendant in a case. These additional claims, after all, would be part of the same case or controversy as the claim for which the court already has jurisdiction. Allowing the court to consider them would therefore require a much narrower extension of authority than was required in *Burnham*, where the Court extended jurisdiction to cover even unrelated claims.

Likewise, under an *International Shoe* "fairness" analysis, there should be no absolute bar to the exercise of pendent jurisdiction. Instead, the court would be required to analyze the fairness factors holistically, examining the interests of the plaintiff, defendant, and forum. In some cases (as in *Asahi*, with its foreign locus, foreign plaintiff, and minimal state interest),[206] these factors will weigh heavily against jurisdiction.

MASON L. REV. 43, 83 n.227 (2010) (noting that the Court has at times called "into question" the claim that personal jurisdiction implicates state sovereignty). Classic articles on both sides of the debate include John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983), Martin Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981), and Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987).

205 *See* Burnham v. Superior Court, 495 U.S. 604, 628 (1990). While *Burnham* failed to garner a majority rationale, every member of the Court upheld jurisdiction based solely on "tag jurisdiction" without considering the potential relationship of the defendant's forum presence to the events at issue in the lawsuit, even though, as some commentators have argued, that might have been a better basis for the decision. *See generally* Stanley E. Cox, *Would That* Burnham *Had Not Come to Be Done Insane?: A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of Why Transient Presence Jurisdiction is Unconstitutional, and Some Thoughts About Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497, 555-71 (1991) (arguing that the result in *Burnham* comported with due process given the case's particularized factual context, but that the overbroad language of the case created more problems than it solved).

206 *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) ("Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.").

More typically, however, the fairness factors will permit jurisdiction.[207] If the injured plaintiff resides in the forum and the defendant is a multinational corporation with substantial in-state contacts, the fairness factors would suggest that jurisdiction over pendent claims is appropriate.

Thus, neither limits on state power nor respect for defendant fairness, standing alone, should prohibit the exercise of pendent personal jurisdiction. Nevertheless, the combination of the two might create a stronger barrier against pendent jurisdiction than either factor would do on its own.[208] In particular, the Supreme Court has at times applied a conception of jurisdiction that combines elements of territorial federalism with defendant-oriented liberty protections. The Court articulated this view in *Burger King v. Rudzewicz*, where it stated that due process "requir[es] that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,'"[209] so that they can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[210] Accordingly, a court would have to examine whether the defendant's in-state activities would put it on notice that it could be haled into court to defend a claim. If so, the defendant could be subject to in-state jurisdiction; if not, it would not be. The defendant, therefore, could structure its business activities to weigh whether engaging in particular business activities would be worth the risk of being called on to defend in an inconvenient or unfavorable forum.[211]

Under the pre-*Bauman* rubric for general and specific jurisdiction, this predictability principle might reasonably have limited courts' exercise of pendent personal jurisdiction. By definition, the issue of pendent personal jurisdiction would arise only when the defendant's in-state contacts were relatively minor. After all, if the defendant had

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[207] *Cf. id.* at 114 (acknowledging the unusual posture of the *Asahi* case and noting that "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant").

[208] *See* Andrews, *supra* note 141, at 1017 ("The defendant has a due process right to have states act only within the limits of their sovereignty. Otherwise, the process would not be fair or reasonable."); Brilmayer, *supra* note 142, at 85 ("[T]he sovereignty concept inherent in the Due Process Clause is not the reasonableness of the burden but the reasonableness of the particular State's imposing it.").

[209] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

[210] *See id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

[211] *See id.*

engaged in continuous and systematic contacts within the forum, then the court would simply have exercised general jurisdiction over all claims, whether or not they related to forum contacts.[212] Thus, in pre-*Bauman* cases, pendent personal jurisdiction would have rested on fairly tenuous grounds, with the court hearing one claim that related to in-state (but limited) contacts, and a second related claim that neither arose from nor related to the defendant's in-state contacts at all. Given the tenuous connection between the forum and the defendant, it is not surprising that commentators might conclude that a court could not constitutionally exercise jurisdiction over the pendent claims.[213] In those cases, the defendant's contacts with the forum would likely have been too limited to put the defendant on notice that it might be called on to defend in the forum.[214] As a result, a number of pre-*Bauman* cases concluded that the exercise of pendent personal jurisdiction would violate constitutional safeguards if the "anchor claim" rested only on a state's long-arm statute and not on a federal provision allowing nationwide service of process.[215] Because the defendant's connection to the forum was likely to be relatively tenuous, the defendant might expect to be subject to jurisdiction only if something went unusually awry with its activities in the forum, and not in the usual course of

[212] *See supra* Part I.

[213] *See* WRIGHT ET AL., *supra* note 199, § 1069.7 ("[I]t would be unconstitutional for a state pendent personal jurisdiction policy to capture claims that fall outside of the Fourteenth Amendment's due process limits on the state's long-arm statute itself."); *see also* GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 23, at 228-29.

[214] *See, e.g.*, Evergreen Int'l Airlines, Inc. v. Anchorage Advisors, LLC, No. 3:11-CV-1416-PK, 2012 WL 3637551, at *9 (D. Or. July 9, 2012), *findings and recommendation adopted by* No. 11-CV-01416-PK, 2012 WL 3637161 (D. Or. Aug. 20, 2012) ("[T]o permit the exercise of any form of supplemental specific personal jurisdiction would effectively swallow the distinction between general and specific personal jurisdiction . . . .").

[215] *Cf.* Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266, 274-75 (5th Cir. 2006) ("If a defendant does not have enough contacts to justify the exercise of general jurisdiction, the Due Process Clause prohibits the exercise of jurisdiction over any claim that does not arise out of or result from the defendant's forum contacts."); Phillips Exeter Acad. v. Howard Phillips Fund, Inc., 196 F.3d 284, 289 (1st Cir. 1999) ("We commend the lower court's decision to analyze the contract and tort claims discretely. Questions of specific jurisdiction are always tied to the particular claims asserted."); Gehling v. St. George's Sch. of Med., Ltd., 773 F.2d 539 (3d Cir. 1985) (holding that the district court could properly exercise personal jurisdiction over the defendant for fraudulent misrepresentation and emotional distress claims but not the related negligence and breach of contract claims, as these claims lacked a sufficient nexus to the defendant's contacts with the forum); Moncrief Oil Int'l Inc. v. OAO Gazprom, 414 S.W.3d 142, 150 (Tex. 2013) ("[S]pecific jurisdiction requires us to analyze jurisdictional contacts on a claim-by-claim basis.").

business. In ordinary circumstances, the defendant would not expect to defend in the forum and would certainly not expect to defend an unrelated claim there. Thus, courts were understandably reluctant to subject defendants to personal jurisdiction for pendent claims.[216]

Even before *Bauman*, however, this reluctance was not universal. A number of leading scholars and courts concluded that there was no constitutional barrier to exercising pendent personal jurisdiction.[217] Their analyses typically concluded that once the defendant was properly before the court for one claim (the "anchor" count), the court could then legitimately hear related claims against the same defendant.[218] Of course, the reasonableness factors would still limit the court's authority, if particular facts made the exertion of jurisdiction unreasonable, and prudential considerations could also circumscribe the trial court's discretion, but constitutional concerns would be satisfied by the presence of a single claim supporting personal jurisdiction.[219]

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[216] *See, e.g.*, *Evergreen Int'l Airlines*, 2012 WL 3637551, at *9 ("[W]here a defendant lacks continuous and systematic contacts . . . a court may only exercise personal jurisdiction over that defendant as to a claim arising out of conduct of the defendant that is either purposefully directed at the forum or calculated purposefully to avail the defendant of the privilege of conducting activities in the forum.").

[217] *See, e.g.*, Salpoglou v. Widder, 899 F. Supp. 835, 838 (D. Mass. 1995) ("[W]here a Court has subject matter jurisdiction over both the malpractice and the breach of contract claims, it may obtain personal jurisdiction based on either of the claims pursuant to the doctrine of pendent personal jurisdiction."); Simard, *Exploring the Limits*, *supra* note 199, at 1660 ("The Due Process Clause of the Fourteenth Amendment should not be interpreted to limit the scope of specific jurisdiction to particular legal theories when the basis for jurisdiction over the anchor count is minimum contacts rather than consent.").

[218] *See, e.g.*, Miller v. SMS Schloemann–Siemag, Inc., 203 F. Supp. 2d 633, 642-43 (S.D. W. Va. 2002) (applying West Virginia's long-arm statute to exercise personal jurisdiction over a breach-of-contract claim arising from a document signed in Korea purporting to limit the defendant's potential liability and concluding that the court could hear a workplace-injury claim arising from the Korean accident after finding that defendant was properly before the court on the contract claim); Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1345 (D. Mass. 1988) ("The law is settled that, in a multi-count complaint, if a court has personal jurisdiction over the defendant with respect to one count, it has personal jurisdiction over the defendant with respect to all counts.").

[219] *See, e.g.*, United States v. Botefuhr, 309 F.3d 1263, 1273-74 (10th Cir. 2002) (stating that most federal courts "have upheld the application of pendent personal jurisdiction, and we see no reason why . . . the assertion of pendent personal jurisdiction would be inappropriate," but nonetheless concluding that once anchor claims are dismissed, district courts should not retain additional claims that lack an independent basis for personal jurisdiction); J4 Promotions, Inc. v. Splash Dogs, LLC, No. 08 CV 977, 2009 WL 385611, at *21-22 (N.D. Ohio Feb. 13, 2009) (allowing pendent personal jurisdiction over related claims against the same defendant who was properly before the

After *Bauman*, the constitutional case for allowing the exercise of pendent personal jurisdiction becomes even stronger. Now, general jurisdiction is no longer assumed when a corporation carries on substantial business in the state, not even when it operates a chain of discount stores or a number of hotels in the forum.[220] Such a corporation certainly derives benefits from its in-state activity, however, and it easily foresees being called on to defend against claims of wrongdoing that arise from those substantial activities — it expects that claims will arise as part of the ordinary course of business, and likely purchases insurance to cover just this risk.[221] A defendant that already expects to defend some claims within the state would not be blindsided if the court also agreed to hear intertwined claims that arose out-of-state. Such a defendant has not structured its business to avoid in-state jurisdiction. To the contrary, it has engaged in extensive business within the state and is prepared to defend there. After *Bauman*, the defendant still will not be subject to general jurisdiction in the state, of course. Thus, completely unrelated cases must still be brought elsewhere, either in the defendant's home forum or in the jurisdiction where the claim arose. But a case that contains multiple claims, some related to the forum and others not, should have enough of a forum nexus that the court could reasonably hear all related claims.

The ability to hear these intertwined claims becomes especially important once the scope of general jurisdiction is reduced. Without the availability of pendent personal jurisdiction as a safety valve, limiting general jurisdiction means limiting the number of fora that could hear the case as a whole, and therefore potentially requiring that different courts hear different claims within a larger case. As Professor Linda Simard has noted, "splitting [a] dispute between forums raises issues concerning additional inconvenience, potential for inconsistent verdicts, and systemic inefficiency."[222] These same considerations have led the federal courts to expand federal subject matter jurisdiction to encompass pendent claims, and Congress has formalized this procedure in its supplemental jurisdiction statute.[223] If pendent personal

court pursuant to Ohio's long-arm statute, but denying pendent personal jurisdiction against a defendant who was not a party to the anchor claim).

[220] *See supra* Part I.

[221] *See, e.g.*, Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 134 (2012) ("[T]o the extent that manufacturers are risk averse, they likely have (or can easily obtain) insurance." (citing KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 3 (2008))).

[222] Simard, *Exploring the Limits*, *supra* note 199, at 1624.

[223] *See* 28 U.S.C. § 1367(a) (2012) (authorizing supplemental subject matter

jurisdiction is not allowed, then the same concerns animating the extension of supplemental subject matter jurisdiction will come into play, as plaintiffs would have to file suit in more than one forum to seek relief for injuries that arise from a single constitutional case or controversy. In addition to the added costs and inconvenience, it is entirely plausible that the different courts would reach inconsistent conclusions regarding liability — a possibility that raises significant due process concerns for both the plaintiff and the defendant.[224] In some cases, the claims may be so intertwined that they cannot reasonably be split at all, as when the same conduct that constitutes a breach of contract also constitutes a tort.[225] These risks have led to a federal rule generally prohibiting claim-splitting (and using the preclusion doctrines to enforce this prohibition).[226] When the defendant's settled expectations are not upended by the extension of pendent personal jurisdiction, there is no reason to recreate the risks and inefficiencies that arise from claim-splitting, and there is no constitutional requirement to do so, as the defendants will have "fair warning" that they will be subject to jurisdiction in the forum state.[227]

The relevant unit of analysis, then, ought to be "cases" and not "claims," a formulation supported, at least implicitly, by the Court's recent choice of language in jurisdictional cases which refer to jurisdiction over an "episode-in-suit" rather than a particular claim.[228] A court should continue to examine whether the defendant has sought to exploit the state's benefits and protections and should ascertain

jurisdiction); *see also* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (stating the justification over pendent subject matter "lies in considerations of judicial economy, convenience and fairness to litigants"); Simard, *Exploring the Limits*, *supra* note 199, at 1657 (making an analogy between pendent personal jurisdiction and supplemental subject matter jurisdiction).

[224] *See* Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1260 (1986) ("Claim splitting is unfair to the party opposing the claim in the succeeding case, because it is likely to prolong conflict and increase the expense of litigation.").

[225] *See, e.g.*, Anderson v. Century Prods. Co., 943 F. Supp. 137, 147 (D.N.H. 1996) (asserting pendant jurisdiction over breach of contract claims when the specific conduct constituting the breach is also tortious).

[226] *See* Shreve, *supra* note 224, at 1260-61.

[227] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

[228] Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) (stating that "a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction"); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) ("Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy.").

whether the defendant's in-state contacts are such that it could reasonably expect being called to defend within the state. If so, then the court need only examine whether the case as a whole has a sufficient nexus to the defendant's in-state contacts to make the exercise of jurisdiction reasonable. If the defendant's in-state contacts are deliberate enough and broad enough to offer it fair warning that it could be subject to jurisdiction in the forum, and if at least one claim in the suit arises from or relates to those deliberate contacts, then there is no constitutional ground to preclude the court from exercising jurisdiction over the entire case or controversy.[229]

Thus, returning to the hypothetical Michigan family, if the family chooses to sue the Florida hotel company in Michigan, the court would have to analyze the defendant hotel's actions in Michigan. If the company made a deliberate attempt to exploit the Michigan market, for example, by advertising extensively in the state to encourage travel, then it is entirely possible that the defendant could reasonably expect to be haled into court for actions arising from those contacts.[230] The addition of other transactionally related claims should not change that expectation. Analyzing the entire case (and not just a single claim) allows the court to consider the scope of the defendant's total contacts with the forum state.

C. Measuring Effects

Walden follows the same pattern as *Bauman*: it restricts one of the primary bases for the exercise of personal jurisdiction (the "aiming" of intentional conduct to cause effects within a forum), but it leaves a significant number of issues unsettled. Just as parties are now more likely to litigate about the "arising from or related to" requirement and the possibility of pendent jurisdiction after *Bauman*, the *Walden* decision is likely to increase litigation over the effects test.

Because the Court's opinion in *Walden* is both short and unanimous, its impact is not immediately apparent. However, the opinion will likely be highly influential. The number of effects-test cases is both large and growing, having more than tripled in recent years. Now, there are more

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229 *See* Simard, *Exploring the Limits*, *supra* note 199, at 1624.

230 *See* Simard, *Meeting Expectations*, *supra* note 141, at 378 (describing *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708 (1st Cir. 1996), and noting that "[w]hen Hotel sent its direct mail solicitation to companies all over the United States, it sought to create an ongoing relationship with the states where these companies were located. Once these relationships were established, Hotel intended to derive an ongoing flow of business from each forum").

effects-test cases filed each year than there are stream-of-commerce cases.[231] Furthermore, internet-based contacts are one of the most common sources (if not *the* most common source) of disputes where out-of-forum actions can have in-forum effects.[232] The typical effects-test case involves defamation and internet publication.[233]

Given the importance of the effects test, it is unfortunate that the Court's decision in *Walden* leaves so much unsettled and unclear. This uncertainty is not visible on the face of the opinion: at first glance, the opinion seems only to be a counterpoint to *Calder*, distinguishable based on the defendant's lack of intentional interaction with Nevada. The facts that the Court excludes from its discussion of *Calder*, however, suggest that the Court is going much further, such that *Walden* is a "stealth overruling" of *Calder*[234] — if a new case were to arise today with the exact same fact pattern as *Calder*, it is unlikely that the Court would sustain jurisdiction.

The Court's predominant thrust — distinguishing *Walden* factually from *Calder* — is not persuasive. First, although the *Walden* Court notes the importance of the California readership of the defamatory article in *Calder*, making it sound as if liability in *Calder* was predicated on the idea that the defendant had sought to circulate the defamatory content in California, that distinction misleadingly conflates the magazine (which published in California and did not contest jurisdiction) with the writer and editor (who had no control over circulation and no other contacts with California).[235] In *Calder*, the writer and editor were not the ones to communicate the defamatory content in California.[236] They communicated the allegedly false statements only to their employer in Florida, who then published those statements in a magazine circulated

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[231] Robertson, *supra* note 100, at 1304 n.9.

[232] *See id.* at 1312-13; *see also* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and "Teh Interwebs,"* 100 CORNELL L. REV. (forthcoming 2015) (manuscript at 11-12), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494969 (explaining that the "intangible harm" at issue in *Calder* was relatively unusual in the pre-internet era, but is much more common now that the internet provides a forum for the type of "intangible harm" found in defamation and trademark infringement cases, and arguing that "*Calder* set the stage for courts to flub their lines when it came time to declaim on personal jurisdiction and the Internet").

[233] *See id.*

[234] *See generally* Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. OF BOOKS (Sept. 27, 2007), http://www.nybooks.com/articles/archives/2007/sep/27/the-supreme-court-phalanx/ (discussing, in other contexts, the practice of stealthily overruling precedent in the U.S. Supreme Court).

[235] Robertson, *supra* note 100, at 1312.

[236] Calder v. Jones, 465 U.S. 783, 784-89 (1984); *see* Robertson, *supra* note 100, at 1312.

in California.[237] In *Calder*, the Supreme Court was careful to note that it was not imputing the magazine's California circulation to the writer and editor, "so the Enquirer's California sales were not counted as minimum contacts in the case against the individual defendants."[238] Thus, the California readership would certainly have been relevant to the damages suffered, but it would not have been relevant to the threshold jurisdictional question of whether the writer and editor "targeted" the state of California.[239] The full import of the *Calder* holding was therefore that the writer and the editor could be subject to jurisdiction in California even for statements made in Florida to their employer located in Florida — it was the foreseeable effects of that communication on the plaintiff's reputation in California, rather than the publication in California, that gave rise to jurisdiction.[240] As a result, the *Walden* Court's attempt to distinguish *Calder* (relying on the idea that the *Calder* defendants had deliberately targeted an in-state readership) ignores the Court's earlier holding that the defendants in *Calder* could not be held responsible for where the publication was marketed.

Thus, *Calder* and *Walden* are rather more squarely at odds than the Court's opinions suggest. Perhaps the deprivation of funds is not activity that is "targeted" at a plaintiff's forum, whereas defamation, even if not communicated into the forum, necessarily affects the plaintiff in his or her home state. If that is the major distinction between the cases, then the Court has left much unresolved: the vast majority of effects-test cases are defamation and other speech cases, not property seizure cases.[241] What the Court did not address is when a false statement is considered to be "targeted" at a jurisdiction; certainly, there can be little doubt that such a statement made *to* someone in the forum is targeted at that forum, but if so, the effects test is largely unnecessary; the communication to people in the forum is itself a forum contact. The

[237] *See Calder*, 465 U.S. at 784-89.

[238] Robertson, *supra* note 100, at 1313.

[239] *See id.*

[240] *Id.*; *see also* Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 477-78 (2004) ("Had Jones been attempting only to assert jurisdiction over a corporation responsible for publishing the magazine, it would have been an easy case. . . . But the complicating factor in *Calder* was that the defendants were individual defendants, not the publishing corporation itself.").

[241] Robertson, *supra* note 100, at 1349 ("By their nature, effects-test cases often involve potentially wrongful speech. When there are other types of contacts — physical presence, contractual relationships, or in-state marketing or sales — plaintiffs generally will not need to rely on effects-test jurisdiction.").

more difficult and still unresolved question is when a statement made *about* someone in that forum is itself a forum contact. In *Calder*, the Court was willing to accept that a false statement made *to* a person in Florida *about* a person in California was a California contact;[242] in *Walden*, the Court concluded that a false statement made *to* a person in Georgia about a person in Nevada was not a Nevada contact.[243] Out-of-state allegations of defamation are common, however, and the Court will have to address when allegedly defamatory statements "target" a state.[244]

What makes the speech cases so hard to reconcile, however, is their varying factual context. When speech is indisputably wrongful (whether fraudulent or defamatory), it is easy to see how that speech "targets" its victim.[245] Especially in the case of defamation, it is also easy to see how the conduct targets the victim's location in the area where she lives and works; a defamatory comment is calculated to cause reputational harm, and will necessarily do so where the victim is best known, even if the statement is made in a different forum altogether.[246] Likewise, when the underlying speech is indisputably privileged — as when the defendant has made unflattering, but true, statements about an individual — then it is much more difficult to say that the speech "targets" the subject's home forum, and the circuits are therefore divided about whether such speech should count for effects-test purposes.[247] The stronger view is that only wrongful speech should count, after all, any harm to the subject's reputation is not attributable to the speech; it is (at least legally) attributable to the underlying unflattering facts.[248] Nonetheless, the conflict persists. There is a great

[242] *See Calder*, 465 U.S. at 790.

[243] Walden v. Fiore, 134 S. Ct. 1115, 1126 (2014).

[244] The Court has already denied certiorari in at least two cases raising these allegations in the last five years: *Clemens v. McNamee*, 615 F.3d 374 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 3091 (2011), and *Kauffman Racing Equipment, LLC v. Roberts*, 930 N.E.2d 784 (Ohio 2010), *cert. denied*, 131 S. Ct. 3089 (2011).

[245] *See* Robertson, *supra* note 100, at 1343.

[246] *See* Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1075 (10th Cir. 2008) (likening the defendant's conduct to "a bank shot in basketball" in which "[a] player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket").

[247] Tamburo v. Dworkin, 601 F.3d 693, 704 (7th Cir. 2010) ("The circuits are divided over whether *Calder*'s 'express aiming' inquiry includes all jurisdictionally relevant intentional acts of the defendant or only those acts that are intentional and alleged to be tortious or otherwise wrongful.").

[248] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.").

deal of variation and inconsistency in how courts are deciding effects-test cases.[249] Often, though not always, the ultimate outcome can be predicted by "previewing" the underlying merits of the case — where the underlying merits of the claim are strong, the court is likely to assert jurisdiction based on in-state effects.[250] Where the underlying merits are weak, the court is much less likely to find that the defendant intentionally "targeted" the forum state.[251]

Thus, context matters. Unfortunately, however, the context may not be known before trial: the statement that the plaintiff is suing about may be a defamatory statement, or it may be a true but unflattering one.[252] Before a trial on the merits has been conducted, there is simply no way to know which one is true. Some courts have attempted to solve this problem by assuming the truth of the plaintiff's allegations.[253] The Supreme Court itself appeared to do so in *Walden*, noting that "[b]ecause this case comes to us at the motion-to-dismiss stage, we take respondents' factual allegations as true, including their allegations regarding the existence and content of the affidavit."[254]

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[249] *See* Sarah H. Ludington, *Aiming at the Wrong Target: The "Audience Targeting" Test for Personal Jurisdiction in Internet Defamation Cases*, 73 OHIO ST. L.J. 541, 557 (2012) ("[T]o fully appreciate how the *Young* test varies from the analysis in *Calder*, consider how differently the two cases came out, despite remarkably similar facts."); Robertson, *supra* note 100, at 1318 ("Two cases illustrate opposite poles of the effects test: *Calder*, in which the Supreme Court first adopted the effects test and found jurisdiction, and *Young v. New Haven Advocate*, in which the Court of Appeals for the Fourth Circuit distinguished *Calder* and denied jurisdiction."). *Compare* Calder v. Jones, 465 U.S. 783, 790 (1984) (involving unsupported allegations that an actress drank so much on set that she could not perform her job), *with* Young v. New Haven Advocate, 315 F.3d 256, 259-60 (4th Cir. 2002) (involving a claim from a prison official who kept Confederate memorabilia in his office and then complained that publications criticizing this practice "impl[ied] that he 'is a racist who advocates racism'").

[250] *See* Robertson, *supra* note 100, at 1320 ("While the courts' assumptions of the merits of those cases may have unwittingly influenced the jurisdictional outcome, those assumptions were probably correct.").

[251] *See id.*

[252] *See id.* at 1349.

[253] *See, e.g.*, Mercantile Capital, LP v. Fed. Transtel, Inc., 193 F. Supp. 2d 1243, 1247 (N.D. Ala. 2002) ("[A]llegations in the complaint . . . must be taken as true to the extent they are uncontroverted by the defendant's affidavits. And if the parties present conflicting evidence, all factual disputes are resolved in the plaintiff's favor . . . ." (citation omitted)); Kauffman Racing Equip., LLC v. Roberts, 930 N.E.2d 784 (Ohio 2010), *cert. denied*, 131 S. Ct. 3089 (2011) ("When viewed in a light most favorable to [Kauffman Racing], the evidence shows that Roberts intentionally and tortiously sought to harm [Kauffman Racing's] reputation and negatively affect its contracts and business relationships.").

[254] Walden v. Fiore, 134 S. Ct. 1115, 1121 n.2 (2014). In fact, Walden had denied executing an affidavit at all — much less one that was false or fraudulent — and there

Not all motions to dismiss are evaluated by the same standard, however. For purposes of jurisdiction, in particular, it is error to accept the plaintiff's allegations as true.[255] This is different from a 12(b)(6) motion to dismiss for failure to state a claim or a non-evidentiary motion for summary judgment where the truth of the plaintiff's allegations must be assumed before deciding whether to send the case to a jury.[256] Actually deciding jurisdictional questions, by contrast, is necessary to determine whether the court has the power to render judgment at all (in the case of subject matter jurisdiction) or whether the court may lawfully exercise power over the defendant (in the case of personal jurisdiction).[257] In either situation, the truth or falsity of the plaintiff's allegations determines whether the court has the power to act. Thus, the court would be usurping a power it might not possess if it were merely to assume the truth of the alleged facts supporting jurisdiction.[258] As a result, the Supreme Court has required that jurisdictional facts must be supported by adequate proof, and it historically has not allowed them to be merely assumed.[259]

To the extent that the Court might have suggested that it credited the truth of the plaintiffs' allegations in *Walden*, that statement was

was no affidavit in the court's record. *Id.* at 1121 n.2; *see also* Brief for Petitioner at 35, Walden v. Fiore, 134 S. Ct. 1115 (2014) (No. 12-574), 2013 WL 2390244 at *35.

255 Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 978 (2006) (acknowledging that jurisdictional facts cannot be simply assumed, and arguing that when jurisdictional facts are intertwined with substantive merits questions, the court should require no more than a prima facie showing of jurisdiction); *see* Robertson, *supra* note 100, at 1332 ("If the court automatically accepts the plaintiff's allegations as true, it will be assuming the existence of facts giving rise to jurisdiction — and it will thereby assume the existence of jurisdiction even in cases where it lacks the power to act.").

256 *See, e.g.*, City of Moundridge v. Exxon Mobil Corp., 471 F. Supp. 2d 20, 36 n.6 (D.D.C. 2007) ("Plaintiffs rightfully carry a heavier burden in answering a jurisdictional challenge under Rule 12(b)(2) than a 12(b)(6) challenge to the sufficiency of pled claim."); Kopff v. Battaglia, 425 F. Supp. 2d 76, 80-81 (D.D.C. 2006) (distinguishing the 12(b)(6) context in which a court defers to the plaintiff's well-pleaded allegations and holding that "[w]hen considering challenges to personal jurisdiction, the Court need not treat all of plaintiffs allegations as true and may receive and weigh affidavits and any other relevant matter to assist it in determining the jurisdictional facts" (citation omitted)).

257 Robertson, *supra* note 100, at 1329.

258 *Id.* at 1330.

259 *See, e.g.*, McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936) (stating that a plaintiff "must allege in his pleading the facts essential to show jurisdiction"); Smithers v. Smith, 204 U.S. 632, 644-45 (1907) (holding that a judge's discretion to dismiss a case apparently without jurisdiction should be subject to certain limits, "lest, under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial").

ultimately dicta that did not affect the result in the case. Ultimately, the Court concluded that the defendant's conduct had not been aimed at Nevada.[260] Nevertheless, the statement is likely to lead to confusion among courts attempting to apply *Walden* in other contexts, especially those that are dealing with defamation claims. In future cases, if a court is unwilling to accept the plaintiff's allegations of tortious conduct as true, it will be less likely to find jurisdiction appropriate: because there is no finding of tortious conduct, there can be no finding of express aiming. And ultimately, this appears to be where the Court is headed. After *Walden*, the Supreme Court seems to be moving toward a severely constrained version of the effects test — one that essentially requires such a direct connection with the forum that traditional contacts are likely to exist in any event.

Such a narrowed scope for the effects test becomes even more significant after *Bauman*. As discussed above, the elimination of the "continuous and systematic" contacts test for general jurisdiction will create significant pressure to enlarge the sphere of specific jurisdiction. Effects-test jurisdiction has, in the past, provided a way for plaintiffs to demonstrate the connection between the defendant's activities and the forum state. If effects-test jurisdiction also becomes more difficult to establish, then another avenue for plaintiffs to establish personal jurisdiction outside the defendant's home forum has also been curtailed. This limitation may sometimes be warranted; it may be unfair to allow an attenuated in-state "effect" to support jurisdiction in a case where the main impact of the defendant's conduct was felt elsewhere, and this is especially true when pendent claims are considered.[261] Nonetheless, it is important to recognize that restricting plaintiffs' forum choice will have a significant effect on access to justice.[262]

D. Registration Statutes and Consent

In the face of a significantly narrowed test for contacts-based general jurisdiction, courts will be faced with new requests for consent-based general jurisdiction. General jurisdiction is an important part of modern litigation, and especially important to nationwide class actions that

[260] Walden v. Fiore, 134 S. Ct. 1115, 1126 (2014).

[261] *See supra* Part II.B.

[262] *See* Robertson, *supra* note 100, at 1345 ("[T]he access-to-justice problem is primarily practical rather than legal. Even though there is a forum with the legal power to hear the dispute, the plaintiff may not have the practical means to access the available forum.").

involve multiple defendants.[263] In a products liability case involving multiple manufacturers, for example, it is unlikely all defendants would have the same "home" jurisdiction.[264] Assuming the case involves plaintiffs from all over the United States, it is also unlikely that there would be a single jurisdiction in which the harm arose.[265] In the past, the defendant's "continuous and systematic" contacts with the forum would have been sufficient to give rise to personal jurisdiction. Now, however, plaintiffs will be searching for another basis on which the court can exercise general jurisdiction, and if the plaintiffs cannot find one, then nationwide class actions are likely to be severely limited.[266]

Thus, plaintiffs will push for a broad interpretation of what constitutes a defendant's consent to personal jurisdiction.[267] Unlike subject matter jurisdiction, which can never be waived, a court may gain personal jurisdiction over a defendant who either fails to timely object to jurisdiction or who affirmatively consents to the court's exercise of jurisdiction.[268] Thus, consent is a powerful tool to expand personal jurisdiction, especially because consent can be granted even in circumstances when the underlying claim is wholly unrelated to the defendant's forum contacts.[269] Given the constriction of general

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[263] *See* Rich Samp, *With* Bauman v. DaimlerChrysler*, High Court May Have Put Brakes on Forum Shopping*, FORBES (Feb. 4, 2014, 9:00 AM), http://www.forbes.com/sites/wlf/2014/02/04/with-bauman-v-daimlerchrysler-high-court-may-have-put-brakes-on-forum-shopping.

[264] *See id.* ("*Daimler* may even spell the end of nationwide class actions against multiple defendants filed anywhere other than the states (if any) in which all corporate defendants are 'at home.' . . . [S]uch claims cannot be heard . . . regardless of whether the defendant's contacts with the forum state are extensive or whether consolidating all claims would be efficient.").

[265] *See id.* ("In the vast majority of nationwide class actions, the claims of most class members did not arise in the forum state.").

[266] *See id.* ("*Daimler* does not rule out all nationwide class actions, but hereafter such lawsuits can only be heard in a forum in which all defendants are 'at home,' not in any forum of the plaintiffs' bar's choosing.").

[267] *See* von Mehren & Trautman, *supra* note 138, at 1138 ("[C]onsent is an easily administered and relatively precise test which in the overwhelming majority of situations is associated in practice with other relationships supporting the taking of jurisdiction to adjudicate.").

[268] *See* Ins. Corp. of Ir., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

[269] *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 44 cmt. a (1971) ("By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action to which the authority of the agent or official extends. This consent is effective even though no other basis exists for the exercise of jurisdiction

jurisdiction in *Bauman*, the natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look for such consent is in a state registration filing that designates a corporate agent for service of process.[270]

As with each of the other contested jurisdictional issues discussed above, courts have differed sharply in their willingness to assert jurisdiction based on state registration statutes.[271] First, although some states explicitly provide that appointment of a registered agent will give rise to general jurisdiction, most state statutes are less clear (or, in some cases, explicitly provide that such registration does *not* give rise to general jurisdiction).[272] Second, even when the state authorizes general jurisdiction based on consent, courts have differed in their willingness to enforce such terms.[273] The U.S. Court of Appeals for the Fifth Circuit, for example, has rejected the idea of basing general jurisdiction on registration alone, stating that basing general jurisdiction on "mere service upon a corporate agent" demonstrates "a fundamental misconception of corporate jurisdictional principles" and "is directly contrary to the historical rationale of *International Shoe* and subsequent Supreme Court decisions."[274] The U.S. Court of Appeals for the Eighth Circuit, by contrast, has allowed states to exert general jurisdiction based on agent-registration statutes as an alternate basis to minimum

over the corporation."); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 391-95, 408 (2012) [hereinafter *Nineteenth Century Personal Jurisdiction*] (recognizing that consent can provide a global adjudicatory power over the defendant under the appropriate circumstances); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (stating that a minimum contacts analysis would apply "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant *who has not consented to suit there*" (emphasis added)).

[270] *See* Kevin N. Rolando, *Express Consent by Registration: A Personal Jurisdiction Reminder*, 60 R.I. B.J., Sept.-Oct. 2011, 11, 11 ("[T]he question of express consent by registration, if it can be answered in the affirmative, obviates at least the need to travel down the more complicated avenue of a minimum-contacts analysis.").

[271] For collections of conflicting authorities, see ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 3-2[2][a] (3d ed. 1998) and Rhodes, *Nineteenth Century Personal Jurisdiction*, *supra* note 269, at 441 n.328.

[272] *See* Andrews, *supra* note 141, at 1070-71 ("[M]ost registration statutes require merely that the corporation name an in-state agent for service of process and do not mention 'jurisdiction.'"); Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 2, 44 (1990) (concluding "most statutes fail to discuss the effects of appointment on the state's jurisdiction over the foreign corporation," with "only a few states . . . expressly provid[ing] for the assertion of general jurisdiction").

[273] Rolando, *supra* note 270, at 11-13.

[274] Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992).

contacts.[275] It concluded that registration can provide "a valid basis of personal jurisdiction," and it therefore held that "resort to minimum-contacts or due-process analysis to justify the jurisdiction is unnecessary."[276]

The rationale for accepting jurisdiction is simple: by registering to do business in-state, the defendant has consented to general jurisdiction (at least where either the state registration statute or its case-law interpretation so provides).[277] Since consent is a proper basis for jurisdiction, outside the parameters of the minimum contacts analysis,[278] the registration alone suffices for jurisdiction over any claim asserted against the corporation in the forum.

The objections to jurisdiction, on the other hand, are more nuanced, depending primarily on whether exacted consent by the state as a condition for conducting intrastate business is constitutional. First, most commentators agree that implied consent, such as statutes that designate a state official as the agent for service of process, cannot give rise to jurisdiction for conduct unrelated to forum activity.[279] Even when consent is explicitly given, however, some courts are reluctant to enforce an agreement for unrelated causes of action.[280] Some have suggested that

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[275] *See* Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1200 (8th Cir. 1990).

[276] *Id.*; *see also* Sondergard v. Miles, Inc., 985 F.2d 1389, 1397 (8th Cir. 1993).

[277] *See* Rolando, *supra* note 270, at 11-12.

[278] *See* Ins. Corp. of Ir., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (noting a "variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court," irrespective of the court's adjudicative reach under the minimum contacts test of *International Shoe*).

[279] *See, e.g.*, Brilmayer et al., *supra* note 22, at 757 ("The most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment."); Stanley E. Cox, *The Missing "Why" of General Jurisdiction*, U. PITT. L. REV. (forthcoming 2014) (manuscript at 23), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418495 ("[A] corporation cannot be forced to consent to all-purpose jurisdiction as a condition of doing limited business within a state."); Rhodes, *Clarifying General Jurisdiction*, *supra* note 22, at 861 ("[C]ourts routinely opine that the mere appointment of an agent does not establish the requisite minimum contacts for adjudicatory jurisdiction."). *But see* Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. ILL. L. REV. 1171, 1185-86 (acknowledging that "[w]ith few exceptions . . . the implied consent statutes have been used without challenge as the basis for jurisdiction in most of Delaware's corporate governance cases ever since Delaware declared them constitutional in 1980" and arguing in favor of moving away from an implied-consent jurisdictional framework for Delaware corporate law cases (citing *Armstrong v. Pomerance*, 423 A.2d 174 (Del. 1980))).

[280] *E.g.*, Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1293 (11th Cir. 2000) (declining to find the defendant subject to general personal jurisdiction based on its appointment of an agent for service of process in connection with its bond and

states overreach by attempting to subject the corporation to any and all causes of action, regardless of whether the claims arise from or relate to the forum in any way.[281] In addition, some have suggested that requiring a corporation to subject itself to general jurisdiction may violate the dormant commerce clause by imposing unconstitutional burdens on out-of-state businesses.[282] The basic concern, whether analyzed as a matter of due process or under the dormant commerce clause, is that the state cannot extract the corporation's consent to all-purpose adjudicative authority without exchanging anything in return. While the state has undoubted power to require the nonresident corporation, as a condition for the privilege of conducting business operations within the state and accessing its courts, to guarantee its amenability for claims related to its forum business,[283] and even likely has the power to require the corporation to consent to any suit involving a state citizen as a condition to do business, the additional guarantee of all-purpose adjudicative authority for a nonresident to "do business" in the state may exceed constitutional limits.

Courts have not had to resolve their disagreement regarding the effect of registration statutes primarily because the idea that registration

debenture offerings in the forum state); Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) (holding that the defendant's registering an agent in the forum state pursuant to the state's registration statute is insufficient to establish general personal jurisdiction); Freeman v. Second Judicial District Court, 1 P.3d 963, 968 (Nev. 2000) (concluding that "the appointment of an agent to receive service of legal process . . . does not in itself subject a non-resident insurance company to the personal jurisdiction of Nevada courts").

[281] *E.g.*, Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 29 (1989) (highlighting that any right the state has to regulate the corporation's local conduct "does not necessarily entitle the state to regulate [its] activities elsewhere."); Rhodes, *Nineteenth Century Personal Jurisdiction*, *supra* note 269, at 443 ("The state therefore attempts to extract the corporation's consent to all-purpose adjudicative authority, but without relinquishing anything additional in return, as it has no authorization to demand the regulation of the corporation's extraterritorial activities based on some quantum of in-state business.").

[282] *See* Andrews, *supra* note 141, at 1073; T. Griffin Vincent, *Toward a Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461, 493 (1989) ("[A] state statute authorizing the exercise of jurisdiction should be scrutinized under the Commerce Clause, balancing the resulting economic burden with the state interest in adjudicating such a dispute . . . .").

[283] *See* Rhodes, *Nineteenth Century Personal Jurisdiction*, *supra* note 269, at 442 ("A longstanding American jurisdictional tradition authorizes a state to require a nonresident corporation to appoint an in-state agent for service of process and to consent to jurisdiction for claims related to its forum business in return for the privilege of conducting in-state business. The Court first upheld such consent in 1856, and the judiciary has never questioned its constitutionality.").

statutes were needed for jurisdiction was viewed as largely obsolete, superseded by the modern jurisdictional scheme focused on contacts.[284] Now, however, the issue will become much more salient to modern practice. Many of the cases dealing with the limits of express and implied consent to jurisdiction go back to the nineteenth century.[285] Suddenly, these older cases are again relevant and are likely to be hotly debated in high-stakes lawsuits that the parties and judges in the nineteenth-century cases would never have even imagined. Again, however, the retraction of "continuous and systematic" contact as a basis for general jurisdiction might actually give rise to a stronger case for jurisdiction as an extracted concession under a state registration statute. After all, the calculation of state interest necessarily changes when the defendant's in-state contacts are continuous, systematic, and substantial. Even if those contacts alone cannot give rise to general jurisdiction, such extensive contacts may nevertheless provide a basis to support the state's decision to extract an agreement for jurisdiction, especially if that agreement operates as a two-way street, offering the corporation the right to sue as a plaintiff in state courts in exchange for the obligation to defend if sued by an in-state resident.

III. REBALANCING THE JURISDICTIONAL FRAMEWORK

Ever since the Supreme Court first applied constitutional limits to the states' exercise of personal jurisdiction, lawyers and scholars have been expressing confusion and frustration regarding the lack of a coherent theory to guide predictable outcomes.[286] That is not likely to change now. Despite the near-unanimity of *Bauman* and the unanimity of *Walden*, neither case assisted with the deeper theoretical dilemmas plaguing jurisdictional doctrine; rather, both holdings are best

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[284] *See* Kipp, *supra* note 272, at 7 ("After *International Shoe*, the focus shifted from whether the defendant had been served within the state to whether the defendant's contacts with the state, in light of the locus of the cause of action, justified the state's assertion of jurisdiction.").

[285] *See* Rhodes, *Nineteenth Century Personal Jurisdiction*, *supra* note 269, at 448 (noting that "the legislative solutions created in the nineteenth century requiring the appointment of an agent for claims related to the nonresident defendant's forum activities may resolve some of the uncertainty" regarding current jurisdictional doctrine).

[286] *See, e.g.*, Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 241 (2011) ("After 21 years without hearing a personal jurisdiction case, the Supreme Court had the opportunity this past term to use the *Goodyear* and *McIntyre* cases to answer questions about the minimum contacts requirement that have remained unaddressed for 144 years. . . . Unfortunately, the Supreme Court did not accomplish even the least of these goals.").

understood as "incompletely theorized agreements"[287] that have resulted in new jurisdictional rules without alleviating the underlying conceptual schisms apparent between the justices in their separate opinions three terms ago in *J. McIntyre Machines, Ltd. v. Nicastro*.[288] The Court has severely curtailed the availability of both general jurisdiction and effects-test jurisdiction, evincing concern that the defendant's ability to control the jurisdictional consequences of its actions would otherwise be impaired. This has shifted the pre-existing balance of power to defendants, but there are enough unresolved issues in the doctrine of personal jurisdiction to allow a re-calibration of the jurisdictional framework in a way that better balances the underlying interests of the parties and states without infringing on fundamental liberty interests.

This framework must give due regard to the state's regulatory and adjudicatory interests. The Roberts Court frequently highlights the need to protect state sovereign regulatory authority from federal intrusions, allowing states to conduct elections without federal preclearance,[289] to define marriage,[290] and to decide whether to implement a federal program.[291] But state sovereign regulatory authority does not only become imperative when threatened by Congress.

The state must have the authority to regulate both conduct occurring within its borders and conduct intended to obtain the benefits and advantages of its laws. Otherwise, the essential element of its sovereignty would have been lost to a greater extent than possible from any potential federal incursion. As the core attribute of internal sovereignty is power over those within the sovereign's boundaries, a state without such regulatory authority is not truly sovereign. The state's adjudicative authority should thus encompass those

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[287] Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1733 (1995).

[288] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011). For a sampling of the commentary on *Nicastro*'s conceptual incoherence, see Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245 (2011), Drobak, *supra* note 198, John T. Parry, *Due Process, Borders, and the Qualities of Sovereignty — Some Thoughts on* J. McIntyre Machinery v. Nicastro, 16 LEWIS & CLARK L. REV. 827 (2012), 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), Peterson, *supra* note 286, and Rhodes, *Nineteenth Century Personal Jurisdiction*, *supra* note 269.

[289] *See* Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2623, 2631 (2013).

[290] *See* United States v. Windsor, 133 S. Ct. 2675, 2681 (2013).

[291] *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602-04 (2012).

circumstances in which it has legislative jurisdiction to prescribe rules of conduct for nonresidents affiliating with the forum. For many years, the Supreme Court has resisted combining the analyses for personal jurisdiction and choice of law, preferring instead to maintain separate doctrines to be evaluated independently.[292] In reality, however, these doctrines are closely connected.[293] The state's interest in protecting its citizens lies at the heart of the adjudicatory system; jurisdictional limits that counteract the state's ability to enforce its legislative priorities necessarily erode the judicial safeguards within our federal system.[294] Of course, conflicts may arise that make it unreasonable for a forum to apply its own law; those conflicts, although analytically complex, should be at least considered before the personal jurisdiction determination is made.[295] If the "application of forum law pose[s] an unjustified threat to the regulatory scheme of another jurisdiction" as well as "a concomitant danger to defendants who assumed that their actions would be governed by that regulatory scheme," then there is little state interest.[296] On the other hand, for defendants establishing those state affiliations that should be expected to implicate the state's regulatory power, the state's interest in applying its own law should be sufficient for adjudicative jurisdiction.[297]

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[292] *See, e.g.*, *Nicastro*, 131 S. Ct. at 2790 ("A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts."); Shaffer v. Heitner, 433 U.S. 186, 215 (1977) ("[W]e have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute."); Hanson v. Denckla, 357 U.S. 235, 254 (1958) ("The issue is personal jurisdiction, not choice of law.").

[293] Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1544 (2013) ("[A] close relationship exists between personal jurisdiction and choice of law."); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1119 (2009) (arguing for "a recognition that state courts and state legislatures embody state power in similar ways and that the fundamental concerns about allowing either to regulate across state boundaries are similar").

[294] *See* Miller, *supra* note 5, at 360 (arguing that "the erecting of procedural stop signs . . . has produced collateral systemic and societal costs that are far too high").

[295] *See* Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1206 (2013) ("A focus on choice of law explains the importance of state lines. If limits on personal jurisdiction reflect concern about intrusion on state sovereignty, the concern is that the result achieved in the forum will upset the ability of another jurisdiction to regulate local activity.").

[296] *Id.* at 1167.

[297] *Cf.* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481-82 (1985) (concluding that a contractual choice-of-law provision reinforced the propriety of personal

The state interest, though, should not be defined merely in terms of its legislative adjudicative power, but must also encompass the broader predominant duty of a sovereign — to protect its citizens and other inhabitants. Under the social contract theory that infused early American political thought, the very *raison d'être* for states was to protect the life, liberty, and property rights of its citizens.[298] Even though in past jurisdictional decisions the Supreme Court has acknowledged non-regulatory state interests, including protecting citizens and visitors from harms suffered within the state and providing a convenient forum for its citizens injured by nonresidents,[299] the Court must now, with the severe constriction of general jurisdiction, truly give effect to these interests when balancing liberty and state adjudicative authority. While these non-regulatory state interests, standing alone, cannot trump the liberty interest of a defendant conducting only a "single or occasional" forum act, as the plaintiff's contacts alone cannot be decisive,[300] the calculus changes for those defendants conducting systematic, continuous, and substantial forum activities. As such an extensive in-state affiliation by the defendant diminishes its reasonable expectation of avoiding a lawsuit there, the countervailing non-regulatory state and individual interests should weigh more heavily in the balance.

Explicit evaluation of all the various state interests would lead to a more cohesive doctrine overall. A strong state regulatory interest, for example, might counter a dormant commerce clause objection jurisdiction based on the appointment of a registered agent for service of process. Conversely, a weak or nonexistent state interest would make the assertion of jurisdiction based on that same appointment unreasonable, and would provide a ground for contesting the assertion of jurisdiction. The state's interest, of course, could very well include class action and aggregation policies that make litigation possible for low-value individual claims.[301] The Supreme Court has acknowledged

jurisdiction over a defendant creating a "deliberate affiliation with the forum State").

298 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT: THE SECOND TREATISE OF CIVIL GOVERNMENT 184-86 (Thomas I. Cook ed., Hafner Publ'g Co. 1947) (1689).

299 *E.g.*, *Burger King*, 471 U.S. at 473; Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984).

300 *E.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1119 (2014); Rush v. Savchuk, 444 U.S. 320, 332 (1980).

301 *See generally* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 415 (2010) (discussing the substantive and procedural issues bound up in the question of class certification, and concluding that "[a]t the end of the day, one must come face to face with the decision whether or not the state policy (with which a putatively procedural state rule may be 'bound up') pertains to a 'substantive right or

that a state may, in some instances, have a strong enough interest to apply its own law to a nationwide class action.[302] If the state possesses such an interest and if the defendant's in-state contacts have caused harm to some (though perhaps not all) of the plaintiffs, then the court should be able to exercise jurisdiction over the case.

Pendent claims would be subject to the same limitation. Thus, when related claims form part of the same constitutional case or controversy, the court would generally be empowered to hear the whole case as long as personal jurisdiction over the defendant was proper for one of the claims.[303] However, if the case as a whole and the defendant's activities are connected only tenuously to the forum, such that the state had only a minimal interest in the case, then the court would likely abuse its discretion if it chose to retain jurisdiction.[304] Likewise, when the jurisdictional justification for the "anchor claim" is itself weak — as when it depends on a marginal claim of "effect" in the jurisdiction — then the case for pendent jurisdiction would be even weaker, and the court should dismiss the case.[305]

The strength of the state's regulatory and non-regulatory interests should also be considered in determining the level of "connectedness" or "relatedness" needed to sustain specific jurisdiction. If the state has a regulatory interest in the case because an element of the plaintiff's claim depends upon the defendant's purposeful forum activities, the cause of action is sufficiently related to the defendant's forum contacts for specific jurisdiction. But the state's regulatory interest should not define the outermost limits of specific jurisdiction over those defendants conducting continuous and systematic activities within the state; here, the state's other interests in protecting its inhabitants from injury and providing a forum to its citizens should allow a greater

remedy,' that is, whether it is substance or procedure").

[302] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (requiring "'that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair'" (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981))).

[303] *See supra* Part II.B.

[304] *See, e.g.*, United States v. Botefuhr, 309 F.3d 1263, 1274 (10th Cir. 2002) (concluding that once anchor claims were dismissed, the district court abused its discretion by retaining the additional claims that lacked an independent basis for specific personal jurisdiction).

[305] *See* Fiore v. Walden, 657 F.3d 838, 853, 858 (9th Cir. 2011), *superseded by* 688 F.3d 558 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1115 (applying the effects test to gain jurisdiction over a false-affidavit claim).

expanse of relatedness that encompasses claims sufficiently similar to the defendant's in-state activities.

Finally, any consideration of the state's interest will also have to consider the context in which the claim arises, and, as the internet takes on an even greater role in commerce and communications, the defendant's alleged state contacts will include internet contacts.[306] In spite of the Supreme Court's reluctance to extend its effects-test ruling to internet contacts, there is no reasoned basis to exclude it. Internet activity has been thoroughly integrated into daily life in both the personal and the professional sphere, greatly facilitating commerce but also increasing the likelihood that defamatory or otherwise wrongful speech would cross state boundaries.[307] Importantly, when internet-based activity gives rise to a suit, we cannot predict whether either the plaintiff or the defendant will be a corporate entity, a small business, or an individual.[308] It is increasingly common, for example, that corporations will sue individuals for their negative online reviews; we cannot assume that any defendant will easily have the ability to cross state lines to defend a case or that the plaintiff cannot easily sue in the defendant's home forum.[309] Jurisdictional rules therefore must not presuppose that either party will have substantial litigation resources or that either party will necessarily be in a more powerful position than the other.[310]

Bauman and *Walden*'s limitations on adjudicative jurisdiction will thus be the impetus for new directions in jurisdictional doctrine. But for these new directions to accord with the roles of states in our federalist system, the Supreme Court must expand its defendant-centric focus to incorporate a more thorough analysis of the countervailing state regulatory and non-regulatory sovereign interests at issue. The suit involving our Michigan family should be able to proceed in Michigan in light of the minimal burdens on the national resort chain and the

306 Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1844 (2003) (stating that it is "increasingly difficult to separate Internet activities from activities unrelated to the Internet," and "the problems the Internet presents for personal jurisdiction doctrine [therefore] become the problems of personal jurisdiction doctrine generally").

307 *See* Robertson, *supra* note 100, at 1353.

308 *See id.*

309 *Cf.* Kauffman Racing Equip., LLC v. Roberts, 930 N.E.2d 784, 799 (Ohio 2010) (O'Donnell, J., dissenting) ("Subjecting all individuals to suit in Ohio who post Internet reviews — no matter how scathing — of purchases made from Ohio companies does not comport with the due process notions of 'fair play and substantial justice.'" (quoting Int'l Shoe v. Washington, 326 U.S. 310, 320 (1945))).

310 *See* Robertson, *supra* note 100, at 1354.

state sovereign interests at stake. Future judicial decisions must find the doctrinal and normative paths to a result so intuitively fair that the company would not have even challenged jurisdiction before *Bauman*.

CONCLUSION

This term's decisions in *Bauman* and *Walden* will significantly disrupt personal jurisdiction doctrine as practiced in state and federal courts all over the country. Multistate and multinational corporations conducting significant in-state business will now bring jurisdictional challenges that have not been thought appropriate since before the minimum contacts standard. This doctrinal shift will require courts to confront and resolve the most challenging issues in personal jurisdiction, such as the connectedness requirement for specific personal jurisdiction, pendent personal jurisdiction, the appropriate scope of the effects test, and exacted consent to do business in the state, all without meaningful guidance from the Supreme Court. *Bauman* may therefore become one of the most significant jurisdictional decisions — if not *the* most significant decision — since *International Shoe*.

But perhaps the initial chaos will stabilize into a new equilibrium, with courts re-calibrating specific jurisdictional doctrine to account for the demise of general contacts jurisdiction and the limitation on effects-test jurisdiction. One method to accomplish this new balance is to recognize that *International Shoe* described two categories of specific jurisdiction, not just one. The balance of individual and state interests should tilt toward authorizing jurisdiction in those situations in which the defendant's forum activities fall within *Shoe*'s "continuous and systematic" category. In contrast, for adjudicatory jurisdiction in the "single or occasional" acts scenario, the state must have a tighter link to its sovereign regulatory interests. This guidepost preserves defendants' liberty interests while accommodating countervailing state interests and can assist lower courts in resolving the myriad of new jurisdictional challenges that will arise in the years to come.