

# Due Process Limits on the Jurisdiction of Courts: Issues for Congress

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## Summary

Businesses that are incorporated in foreign countries and conduct a large portion of their operations outside of the territorial jurisdiction of the United States may nevertheless cause injury to U.S. persons. For example, a foreign company might manufacture in its home country a machine that another company later distributes in the United States, ultimately resulting in an injury to a U.S. consumer. Although foreign companies may engage in actions or omissions that injure U.S. persons, such injured persons may face various procedural challenges in obtaining judicial relief from a foreign company defendant in U.S. courts.

One potential obstacle to such civil lawsuits is the doctrine of personal jurisdiction. The Supreme Court has long interpreted the Due Process Clause of the Fourteenth Amendment to limit the power of state courts to render judgments affecting the personal rights of defendants who do not reside within the state's territory. And the Federal Rules of Civil Procedure give federal district courts power to assert personal jurisdiction over a defendant to the same extent that a state court in which the federal district court is located may assert that power, meaning the same limits on personal jurisdiction generally apply to federal courts. The Court has offered several justifications for the constitutional constraints on a court's assertion of personal jurisdiction over nonresident persons and corporations, including concerns about state sovereignty and fairness to defendants.

The Supreme Court's jurisprudence addressing the doctrine of personal jurisdiction spans a period of American history that has witnessed a significant expansion of interstate and global commerce, as well as major technological advancements in transportation and communication. These changes produced a fundamental shift in the Court's views concerning the doctrine. Although the Court initially considered the defendant's physical presence within the forum state to be the touchstone of the exercise of personal jurisdiction over him or her, it later rejected strict adherence to this rule in favor of a more flexible standard that examines a nonresident defendant's contacts with the forum state to determine whether those contacts make it reasonable to require him to respond to a lawsuit there. The Supreme Court's opinions in *International Shoe Co. v. Washington* and subsequent cases have established a more flexible two-part test for determining when exercise of personal jurisdiction over each nonresident defendant sued by a plaintiff comports with due process: (1) the defendant must establish minimum contacts with the forum state that demonstrate an intent to avail itself of the benefits and protections of state law; and (2) it must be reasonable to require the defendant to defend the lawsuit in the forum.

Recent Supreme Court rulings have limited the circumstances in which U.S. courts may exercise personal jurisdiction. This report discusses the evolution of the doctrine of personal jurisdiction as elucidated by the Supreme Court in its opinions. It concludes by examining the implications of recent developments in the doctrine of personal jurisdiction for Congress, as well as options that Congress might have to address these developments.

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## Introduction

Businesses that are incorporated in foreign countries and conduct a large portion of their operations outside of the territorial jurisdiction of the United States may nevertheless cause injury to U.S. persons. For example, a foreign company might manufacture in its home country a machine that another company later distributes in the United States, ultimately resulting in an injury to a U.S. consumer.<sup>1</sup> As a further example, a foreign subsidiary of a U.S. corporation might make a product that allegedly causes the death of U.S. persons traveling in a foreign country, but that subsidiary might otherwise have no significant connection to the United States.<sup>2</sup> Although foreign companies may engage in actions or omissions that injure U.S. persons—or even foreign plaintiffs<sup>3</sup>—such injured persons may face various procedural challenges in obtaining judicial relief from a foreign company defendant in U.S. courts.

One potential obstacle to such civil lawsuits is the doctrine of personal jurisdiction. The Supreme Court has long interpreted the Due Process Clause of the Fourteenth Amendment<sup>4</sup> to limit the power of state courts to render judgments affecting the personal rights of defendants<sup>5</sup> who do not reside within the state's territory.<sup>6</sup> And the Federal Rules of Civil Procedure give federal district courts power to assert personal jurisdiction over a defendant to the same extent that a state court in which the federal district court is located may assert that power, meaning the same limits on personal jurisdiction generally apply to federal courts.<sup>7</sup> In this vein, the Court has, for instance,

<sup>1</sup> In *J. McIntyre Machinery, Ltd. v. Nicastro*, a metal-shearing machine manufactured in England by a company incorporated there allegedly caused injury to a person in New Jersey. 564 U.S. 873, 878 (2011) (plurality opinion). The company that made the machine, J. McIntyre Machinery, had relied upon an independent U.S. company to distribute the machine in the United States. *Id.*

<sup>2</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011).

<sup>3</sup> *See, e.g., Daimler AG v. Bauman*, 571 U.S. \_\_\_, No. 11-965, slip op. at 1 (2014).

<sup>4</sup> U.S. CONST. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .”).

<sup>5</sup> Although the bulk of the Supreme Court's jurisprudence concerns the constitutionality of courts' exercise of personal jurisdiction over *defendants*, the Court has addressed personal jurisdiction over *plaintiffs* in at least one case. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (upholding a Kansas trial court's assertion of personal jurisdiction over nonresident class-action plaintiffs based on the mailing of an “opt-out notice” to the plaintiffs even though their contacts with the forum might not have been sufficient to satisfy the demands of due process had they been defendants in a lawsuit).

<sup>6</sup> *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (“The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.”) (citing *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978)). “A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere.” *Id.* (citation omitted). The Fourteenth Amendment's Due Process Clause also requires that a defendant receive adequate notice that a lawsuit has been brought against him and have the opportunity to respond. *See Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 313-14 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”). In addition to complying with the requirements of the Federal Constitution, state courts must also have authority under state law in order to exercise personal jurisdiction over a nonresident defendant. Oftentimes, states have enacted “long-arm” statutes that grant their courts jurisdiction over nonresidents. *See, e.g., CAL. CIV. PROC. CODE* § 410.10 (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”); *N.C. GEN. STAT.* § 1-75.4 (specifying situations in which the exercise of jurisdiction comports with state law).

<sup>7</sup> Federal courts “ordinarily follow state law in determining the bounds of their jurisdiction over persons.” *Daimler AG*, slip op. at 6. This practice, which involves federal courts in analyzing the reach of a state's long-arm statute and the defendant's contacts with the state in which the court sits, stems from the Federal Rules of Civil Procedure. *FED. R. CIV. P.* 4(k)(1)(A) (linking federal courts' power to assert personal jurisdiction over a defendant to service of process on the defendant according to the laws of the state in which the federal district court is located). *See, e.g., Wilson v.*

held that a New York company that sells a car to a New York resident is not subject to a products-liability lawsuit in Oklahoma solely because the car was involved in an accident there.<sup>8</sup> Questions over personal jurisdiction are among the most frequent constitutional issues resolved by lower federal courts,<sup>9</sup> and are the basis for a dismissal of complaint in a considerable number of cases lodged in both federal and state court.<sup>10</sup>

This report broadly traces the evolution of the doctrine of personal jurisdiction through more than a century of Supreme Court rulings. In particular, it highlights recent developments in the doctrine, which have generally given a more limited view of when a court can exercise personal jurisdiction over a given defendant.<sup>11</sup> The report concludes with a brief discussion of the debate over the Court's most recent rulings in this area of law, and addresses one possible action Congress might take to address any concerns with the Court's recent decisions on personal jurisdiction: authorizing federal courts to exercise nationwide personal jurisdiction over foreign

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Belin, 20 F.3d 644, 646 (5<sup>th</sup> Cir. 1994) ("In a diversity suit, a federal court has personal jurisdiction over a nonresident defendant to the same extent that a state court in that forum has such jurisdiction. The reach of this jurisdiction is delimited by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment to the federal Constitution.") (citations omitted).

Although the Supreme Court has decided several cases addressing the Fourteenth Amendment's limits on state courts' exercise of personal jurisdiction, it has generally declined to resolve questions about the extent to which the Fifth Amendment, *see* U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."), may place similar jurisdictional limitations on federal courts. *See Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. \_\_\_, No. 16-466, slip op. at 12 (2017) ("In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (declining to consider whether "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits"); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 n.\* (1987) (plurality opinion) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits."). As a result, while discussion of the Fifth Amendment limits on federal court jurisdiction is addressed later in this report, *see infra* Issues for Congress, the majority of this report focus on the limits imposed by the Fourteenth Amendment on the jurisdiction of state courts (and, through the Federal Rules of Civil Procedure, federal courts, as well).

<sup>8</sup> *World-Wide Volkswagen Corp.*, 444 U.S. at 287.

<sup>9</sup> *See* Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1755 (2006) (describing the "constitutionality of exercising personal jurisdiction" as "probably the most common constitutional question that courts decide").

<sup>10</sup> *See* Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 Tul. L. Rev. 1, 23-38 (1998) (noting in a study of nearly 1,000 cases addressing the issue personal jurisdiction decided by state supreme courts and federal appeals courts between and 1970 and 1994, including 148 products liability cases, that personal jurisdiction was a successful defense in nearly 41% of the cases in which the defense was raised).

<sup>11</sup> *E.g.*, *Bristol-Myers Squibb*, slip op. at 7 (concluding that the California Supreme Court erred in employing a "relaxed" approach to personal jurisdiction by holding that a state court could exercise *specific* jurisdiction over a corporate defendant who was being sued by non-state residents for out-of-state activities solely because the defendant had "extensive forum contacts" unrelated to the claims in question); *BNSF R.R. Co. v. Tyrrell*, 581 U.S. \_\_\_, No. 16-405, slip op. at 11-12 (2017) (holding that Montana courts could not exercise general jurisdiction over a railroad company that had over 2,000 miles of track and more than 2,000 employees in the state because the company was not incorporated or headquartered in Montana and the overall activity of the company in Montana was not "so substantial" as compared to its activities throughout all of the jurisdictions in which it conducted business so as to render the corporation "at home" in the state); *Daimler AG*, slip op. at 8 (holding that Daimler Chrysler, a German public stock company, could not be subject to suit in California with respect to acts taken in Argentina by an Argentinian subsidiary of Daimler, notwithstanding the fact that Daimler Chrysler had a U.S. subsidiary that did business in California, because Daimler was not incorporated in California and did not have its principal place of business there).

companies that have minimum contacts with the United States as a whole rather than with an individual state.

## Early Doctrine

In 1877, the Supreme Court decided an important case addressing the constitutional limits on state courts' exercise of personal jurisdiction over nonresident defendants. In *Pennoyer v. Neff*, the Court indicated that, absent a defendant's consent, a state court's jurisdiction generally extends only to persons or property within its territory.<sup>12</sup> The Court grounded this "physical presence" approach in principles of federalism: each state of the union is a coequal and independent sovereign in the federal system, and thus possesses exclusive authority over persons and property within its domain.<sup>13</sup> Although the Court's decision in *Pennoyer* addressed personal jurisdiction over natural persons, the Court's early jurisprudence following the 1877 case established that state courts could potentially exercise jurisdiction over foreign corporations doing business in the state based on the legal fiction that those corporations had implicitly consented to personal jurisdiction, or could be deemed "present" within the state, based on their in-state activities.<sup>14</sup>

The *Pennoyer* Court's "physical presence" test established the constitutional foundation for strict limits on state courts' authority to exercise *in personam* jurisdiction over a nonresident defendant—that is, to render judgments concerning that defendant's personal rights and obligations.<sup>15</sup> Thus, for example, service upon a defendant by publishing notice of the lawsuit in a newspaper circulating in the forum state was insufficient to confer jurisdiction on a court to adjudicate the personal liability of a defendant who had left the state and did not intend to

<sup>12</sup> *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power, and be resisted as mere abuse."); *id.* at 722 ("[N]o State can exercise direct jurisdiction and authority over persons or property [outside of] its territory."). The *Pennoyer* Court recognized that a tribunal had authority to exercise personal jurisdiction over a nonresident served with process while in the forum. *Id.* at 724 ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him.") (internal citations and quotation marks omitted). See also *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person."); *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power . . .").

<sup>13</sup> *Pennoyer*, 95 U.S. at 722 ("[E]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. . . . [N]o tribunal established by [a state] can extend its process beyond that territory so as to subject either persons or property to its decisions.").

<sup>14</sup> *Shaffer v. Heitner*, 433 U.S. 186, 201 (1977) ("[The *Pennoyer*] opinion approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State. This basis for *in personam* jurisdiction over foreign corporations was later supplemented by the doctrine that a corporation doing business in a State could be deemed 'present' in the State, and so subject to service of process under the rule of *Pennoyer*." (internal citations omitted). See, e.g., *Int'l Harvester Co. v. Kentucky*, 234 U.S. 579, 586 (1914) ("This course of conduct of authorized agents within the State in our judgment constituted a doing of business there in such [manner] that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the State.") (citation omitted); *Lafayette Ins. Co. v. French*, 59 U.S. 404, 408 (1856) ("Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts.").

<sup>15</sup> *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 ("A judgment *in personam* imposes a personal liability or obligation on one person in favor of another.").

return.<sup>16</sup> Nevertheless, even in the absence of a nonresident defendant's physical presence or consent, courts could still attain jurisdiction over the defendant indirectly through the attachment (i.e., seizure) of the defendant's property interests within the forum and the provision of notice to the defendant.<sup>17</sup> In particular, a state court could exercise *in rem* jurisdiction<sup>18</sup> over a nonresident defendant's property interest in the state in order to adjudicate all of the rights or claims in a piece of property.<sup>19</sup> It could also exercise *quasi in rem* jurisdiction<sup>20</sup> over a nonresident defendant by adjudicating a plaintiff's claim to the property in relation to the defendant or to satisfy the claims of its own citizens against the defendant personally.<sup>21</sup> However, judgments resting upon the exercise of *in rem* or *quasi in rem* jurisdiction would not personally bind the defendant to an extent greater than the value of the property.<sup>22</sup>

## Current Doctrine

Although *Pennoyer*'s physical presence test informed the Supreme Court's jurisprudence related to jurisdiction for several decades, a significant expansion of the U.S. economy in the mid-20<sup>th</sup> century altered that focus. As commerce and travel among the states and between the states and

<sup>16</sup> *McDonald*, 243 U.S. at 92 (“[I]t appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a State intending not to return.”).

<sup>17</sup> *Pennoyer*, 95 U.S. at 723 (“But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property [outside of] it.”).

<sup>18</sup> BLACK’S LAW DICTIONARY 982 (10<sup>th</sup> ed. 2014) (defining “in rem jurisdiction” as a “court’s power to adjudicate the rights to a given piece of property, including the power to seize and hold it.”).

<sup>19</sup> *Hanson*, 357 U.S. at 246 n.12 (“A judgment *in rem* affects the interests of all persons in designated property.”).

<sup>20</sup> BLACK’S LAW DICTIONARY, *supra* note 18, at 983 (defining “quasi-in-rem jurisdiction” as jurisdiction “over a person but based on that person’s interest in property located within the court’s territory”).

<sup>21</sup> *Hanson*, 357 U.S. at 246 n.12 (“A judgment *quasi in rem* affects the interests of particular persons in designated property.”). See also *Pennoyer*, 95 U.S. at 723 (“Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens.”); *id.* at 728 (“[T]he jurisdiction of the court to inquire into and determine [the defendant’s] obligations at all is only incidental to its jurisdiction over the property.”). For example, in *Harris v. Balk*, the Supreme Court held that a Maryland court had properly exercised *quasi in rem* jurisdiction over a North Carolina resident (Balk) who owed a debt to a Maryland resident (Epstein) because Epstein could attach the debt of a third party (Harris) that was owed to Balk while Harris was physically present in Maryland. 198 U.S. 215, 223 (1905). *Harris* was eventually overruled by *Shaffer v. Heitner*. See *Shaffer*, 433 U.S. 186, 216-17 (1977) (holding that a state court could not exercise *quasi in rem* jurisdiction over a nonresident defendant by attaching the defendant’s property interests in the state without inquiring separately into whether these property interests and any other connections between the defendant, forum, and litigation established sufficient minimum contacts to satisfy the first prong of the *International Shoe* test).

<sup>22</sup> See *Pennoyer*, 95 U.S. at 723-724 (stating that a judgment resting on *in rem* or *quasi in rem* jurisdiction binds the defendant only to the extent of the property’s value). As discussed below, the Court subsequently held that a tribunal may not exercise *quasi in rem* jurisdiction over a nonresident defendant by attaching the defendant’s property interests in the state without inquiring separately into whether these property interests and any other connections establish sufficient contacts between the defendant, forum, and litigation. *Rush v. Savchuk*, 444 U.S. 320, 328 (1980) (“We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action. The ownership of property in the State is a contact between the defendant and the forum, and it may suggest the presence of other ties. Jurisdiction is lacking, however, unless there are sufficient contacts to satisfy the fairness standard of *International Shoe*.”) (citing *Shaffer*, 433 U.S. at 209). As a result, it appears that plaintiffs rely upon *quasi in rem* jurisdiction instead of *in personam* jurisdiction in some cases in which a state’s “long-arm statute” does not provide for the exercise of *in personam* jurisdiction over the defendant. See Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York’s Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1063 (1990) (“Courts have explained that the new theory of quasi in rem jurisdiction is necessary to fill gaps in the state’s long arm statute.”).



foreign countries increased,<sup>23</sup> corporations expanded the geographical scope of their activities.<sup>24</sup> A more interconnected, global economy meant that a corporation's activities had greater potential to cause harm in distant jurisdictions, but also meant that businesses could more easily defend lawsuits arising from that harm in distant fora.<sup>25</sup> Faced with these new realities, the Court reconsidered the nature of the due process limitations on the jurisdiction of state courts over nonresident individuals and corporations that conducted activities in the states.<sup>26</sup> In the 1945 case *International Shoe Co. v. Washington*, the Court explained its rejection of a strict adherence to the physical presence test, holding that a state could authorize its courts to subject an out-of-state entity to *in personam* jurisdiction, consistent with due process, and thus require it to defend a lawsuit, if that entity had "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>27</sup> The Court rested its holding in part on the notion that an entity conducting activities in a state benefits from the protections of state law, and thus should have to respond to legal complaints arising out of its actions in the forum even if it is not "physically present" in the state.<sup>28</sup>

Thus, the Supreme Court's opinions in *International Shoe* and subsequent cases have established a more flexible two-part test for determining when exercise of personal jurisdiction over each nonresident defendant sued by a plaintiff comports with due process: (1) the defendant has established minimum contacts with the forum state that demonstrate an intent to avail itself of the benefits and protections of state law; and (2) it is reasonable to require the defendant to defend the lawsuit in the forum.<sup>29</sup>

Nevertheless, as noted, the Court has confirmed that several traditional bases for the exercise of judicial power over a nonresident defendant for claims against him continue to enjoy a presumption of constitutionality without requiring an independent inquiry into the contacts among the defendant, the forum, and the litigation. Specifically, the traditional bases for

<sup>23</sup> See *Hanson*, 357 U.S. at 250-51 ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome."); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (noting a "clearly discernible" trend "toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents" that was "attributable to the fundamental transformation of our national economy over the years").

<sup>24</sup> See *supra* note 23.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations and internal quotation marks omitted). The Court deemed a corporation's "presence" in the forum state to result from those activities of the corporation or its agents in the state, "which courts will deem to satisfy the demands of due process." *Id.* at 317 (citation omitted). The Court wrote that the concept of constitutional due process did "not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.* at 319.

<sup>28</sup> *Id.* ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.")

<sup>29</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.") (citing *Int'l Shoe Co.*, 326 U.S. at 316); *id.* at 292 ("[T]he defendant's contacts with the forum State must be such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" (quoting *Int'l Shoe Co.*, 326 U.S. at 316)). See also *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.").



jurisdiction include if: (1) the defendant is domiciled in the forum state (e.g., a defendant who is a natural person intends to establish a permanent home in the forum or a corporation intends to establish a permanent headquarters);<sup>30</sup> (2) the defendant has consented to jurisdiction;<sup>31</sup> or (3) a defendant who is a natural person is served with process while he is physically present—even temporarily—within the forum.<sup>32</sup> The Court has also indicated that a state court may adjudicate the personal status of a plaintiff in relation to the defendant (e.g., marital status) without considering whether personal jurisdiction over the defendant is constitutionally valid.<sup>33</sup>

Over the years, the Supreme Court has offered three main justifications for the constitutional constraints on a court's assertion of personal jurisdiction<sup>34</sup> over nonresident persons and corporations. First, each state's status as a "co-equal sovereign" in a federal system of government implies at least some limits on the power of its courts to render judgments affecting the rights of entities outside of that state's boundaries.<sup>35</sup> Second, constitutional limits on personal jurisdiction attempt to address concerns about the unfairness of subjecting defendants to litigation in a distant or inconvenient forum.<sup>36</sup> Finally, constitutional limits on the exercise of personal

<sup>30</sup> *Milliken v. Meyer*, 311 U.S. 457, 462-63 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. . . . The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."); *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (holding that the United States retains *in personam* jurisdiction over its citizens living abroad) (citation omitted).

<sup>31</sup> "Consent" may be express or implied. *See, e.g.*, *Nat'l Equip. Rental v. Szukhent*, 375 U.S. 311, 318 (1964) (holding that defendant lessee's contractual appointment of an agent to receive service of process on the lessee's behalf amounted to consent to the personal jurisdiction of the courts of New York when the agent was served with process and notified the lessee); *Hess v. Pawloski*, 274 U.S. 352, 355-56 (1927) (upholding service of process on a nonresident defendant under a state law providing that a person who drove a vehicle on a public highway in the state implicitly consented to the appointment of a state official as agent for service of process for lawsuits arising outside of accidents attending such operation). *See also* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594-95 (1991) (holding that plaintiffs' notice and acceptance of a forum-selection clause in a contract for passage on a cruise ship constituted consent to the exercise of personal jurisdiction by Florida courts over the plaintiffs in a personal injury action); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (determining that a forum-selection clause in a contract that selected a foreign court for the resolution of disputes between the parties could not deprive a U.S. court of jurisdiction, but that the U.S. court should nonetheless enforce the clause by dismissing the case unless the clause was unreasonable, unfair, or unjust).

<sup>32</sup> *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"). Providing the fifth and deciding vote in *Burnham*, Justice White, in an opinion concurring in the judgment, argued that a particular basis for jurisdiction could not constitutionally valid merely because of its historical pedigree, and that fairness to the defendant must also be considered. *Id.* at 629 (White, J., concurring).

<sup>33</sup> *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877) ("[W]e do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident.").

<sup>34</sup> "Personal jurisdiction" or *in personam* jurisdiction refers to "a court's power to bring a person into its adjudicative process" and to render judgments concerning a defendant's "personal rights, rather than merely over property interests." BLACK'S LAW DICTIONARY, *supra* note 18, at 982.

<sup>35</sup> *See* *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. \_\_\_, No. 16-466, slip op. at 6 (2017) ("As we have put it, restrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'" (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958))); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (stating that the requirement that a defendant have minimum contacts with the forum "acts to ensure that States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *id.* at 293 ("The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

<sup>36</sup> *Id.* at 292 (stating that the requirement that a defendant have minimum contacts with the forum "protects the

jurisdiction recognize that the Due Process Clause protects defendants from being deprived of life, liberty, or property by a tribunal without lawful power.<sup>37</sup>

## What Minimum Contacts Entails

Since its 1945 decision in *International Shoe*, the Supreme Court has elaborated on the nature and quality of the minimum contacts that a defendant must have with the forum in order for a court to subject him or her to personal jurisdiction in that forum consistent with due process. When determining whether a defendant has minimum contacts with the forum, the Court has distinguished the types of contacts sufficient for a court's exercise of "general" personal jurisdiction over the defendant from those contacts sufficient for its exercise, alternatively, of "specific" jurisdiction.

A court's exercise of *specific* jurisdiction may be constitutional when the defendant has contacts with the forum that give rise to, or are related to, the plaintiff's cause of action (e.g., an act or occurrence caused by the defendant that takes place in the forum or has an impact there).<sup>38</sup> However, when there is "no such connection [between the forum and the particular claims at issue], specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."<sup>39</sup>

By contrast, a court's exercise of *general* jurisdiction over a nonresident defendant for any claim—even if all the incidents underlying the claim occurred in a different state—may be constitutional when the defendant's activities in the forum state are so substantial that it is reasonable to require it to defend a lawsuit that did not arise out of its activities in the forum state and is unrelated to those activities.<sup>40</sup> Perhaps in order to ensure greater predictability for

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defendant against the burdens of litigating in a distant or inconvenient forum"); *Hanson*, 357 U.S. at 251 (acknowledging that limits on personal jurisdiction are, in part, "a guarantee of immunity from inconvenient or distant litigation"). The Supreme Court has stated that the doctrine of personal jurisdiction makes it easier for defendants to structure their conduct in a manner that will avoid subjecting them to lawsuits in a particular forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

<sup>37</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011) (plurality opinion) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power. This is no less true with respect to the power of a sovereign to resolve disputes through judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere.") (citations omitted); *Burger King*, 471 U.S. at 471-72 ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.") (citations and internal quotation marks omitted); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (declaring that the restriction on state power to exercise personal jurisdiction over a nonresident is "ultimately a function of the individual liberty interest preserved by the Due Process Clause").

<sup>38</sup> *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.8 (1984) ("It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-1164 (1966)); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) ("Presence in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . .") (internal quotation marks omitted).

<sup>39</sup> *Bristol-Myers Squibb*, slip op. at 7 (concluding that the California Supreme Court erred in employing a "relaxed" approach to personal jurisdiction by holding that a state court could exercise *specific* jurisdiction over a corporate defendant who was being sued by non-state residents for out-of-state activities solely because the defendant had "extensive forum contacts" unrelated to the claims in question).

<sup>40</sup> See *Helicopteros*, 466 U.S. at 414 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant.") (citations omitted); see also *id.* at 416 (holding that a Texas court could not exercise

defendants attempting to discern where they may be subject to suit on claims arising anywhere in the world,<sup>41</sup> in more recent years, the Court has significantly limited the types of activities or affiliations of the defendant in the forum state sufficient for general jurisdiction, holding that those contacts must be so substantial as to render the defendant “essentially at home” in the forum state.<sup>42</sup> The Court has clarified that, absent exceptional circumstances, a corporate defendant is “at home” when it is incorporated in the forum state or maintains its principal place of business there.<sup>43</sup> Insubstantial in-state business, in and of itself, does not suffice to permit an assertion of jurisdiction over claims that are unrelated to any activity occurring in a state.<sup>44</sup>

Although the Court has rarely addressed the scope of general personal jurisdiction, it has decided several cases elaborating on the quality and nature of the defendant’s contacts with the forum and litigation necessary for a court’s exercise of specific jurisdiction over the defendant.<sup>45</sup> A common theme throughout many of these decisions is that “unilateral activity” in the forum state by a person who has some family, business, or other relationship with a nonresident defendant will not suffice to establish a defendant’s minimum contacts with the forum.<sup>46</sup> In other words, jurisdiction is not proper merely because the defendant could have foreseen that a third party with which it

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general personal jurisdiction over a foreign corporation that did not have a place of business in Texas and had only limited contacts with the state involving in-state purchases and training trips); *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 438, 445 (1952) (holding that an Ohio court could subject a Philippine mining corporation to personal jurisdiction even though the “cause of action sued upon did not arise in Ohio and [did] not relate to the corporation’s activities there” because of the corporation’s substantial activities within the state, including “directors’ meetings, business correspondence, banking, stock transfers, payment of salaries, [and] purchasing of machinery.”).

<sup>41</sup> *Daimler AG v. Bauman*, 571 U.S. \_\_\_, No. 11-965, slip op. at 21 (2014) (“If Daimler’s California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA’s sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” (quoting *Burger King*, 471 U.S. at 472)).

<sup>42</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 924 (2011) (holding that foreign subsidiaries of Goodyear USA lacked sufficient contacts with the state of North Carolina that would support the exercise of general personal jurisdiction over them because the subsidiaries were not incorporated in California and did not have their principal place of business there). *See also Daimler AG*, slip op. at 8 (holding that Daimler Chrysler, a German public stock company, could not be subject to suit in California with respect to acts taken in Argentina by an Argentinian subsidiary of Daimler, notwithstanding the fact that Daimler Chrysler had a U.S. subsidiary that did business in California, because Daimler was not incorporated in California and did not have its principal place of business there).

<sup>43</sup> *Goodyear*, 564 U.S. at 924 (noting an individual’s domicile and a corporation’s place of incorporation or principal place of business as “paradigm” bases for general jurisdiction) (citation omitted); *id.* at 930 n.6 (“[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”).

<sup>44</sup> *See BNSF R.R. Co. v. Tyrrell*, 581 U.S. \_\_\_, No. 16-405, slip op. at 11-12 (2017) (holding that Montana courts could not exercise general jurisdiction over a railroad company that had over 2,000 miles of track and more than 2,000 employees in the state because the company was not incorporated or headquartered in Montana and the overall activity of the company in Montana was not “so substantial” as compared to its activities throughout all of the jurisdictions in which it conducted business so as to render the corporation “at home” in the state).

<sup>45</sup> *Goodyear*, 564 U.S. at 924 (“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.”).

<sup>46</sup> *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 619-20 (1992) (holding that a foreign country defendant had minimum contacts with the United States when it unilaterally rescheduled the maturity dates of bonds it had issued because the bonds were denominated in U.S. dollars, the bonds were payable in New York, and the country had appointed a financial agent in that city); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980) (holding that New York residents’ car accident in Oklahoma involving car they purchased in New York was insufficient by itself to establish contacts with Oklahoma of nonresident automobile retailer and wholesale distributor in products-liability action); *Hanson v. Denckla*, 357 U.S. 235, 253-54 (1958) (holding, in a case involving the validity of a trust agreement, that the settlor of a trust’s exercise of her power of appointment in Florida was insufficient to establish nonresident trustees’ contacts with, and purposeful availment of, that forum).

has a family or business relationship (e.g., a defendant's family member or customer of a defendant corporation) would have contacts with the forum.<sup>47</sup> Rather, the defendant must "purposefully avail" itself "of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."<sup>48</sup> The defendant must have reasonably anticipated being haled into court there—a standard that potentially allows a defendant to predict where it will be subject to suit and plan the geographic scope of its activities or ensure against the risk of being sued in a distant forum accordingly.<sup>49</sup> The Court has also emphasized that the minimum contacts inquiry should not focus on the location of the resulting injury to the plaintiff; instead, the proper question is whether the defendant's conduct connects him to the forum in a meaningful way.<sup>50</sup>

Many of the Supreme Court's decisions on the minimum contacts test address specific categories of contacts between the defendant and forum, such as the alleged tortious conduct of the defendant in the forum state; a contract between the defendant and an entity in the forum state; a business relationship between the defendant and a party in the forum state; and property interests of the defendant in the forum state. For example, in cases in which the plaintiff alleged that a nonresident had committed the tort of libel causing harm in the forum state, the Court upheld the exercise of specific personal jurisdiction over a defendant that intentionally targeted the state with publication of allegedly libelous material.<sup>51</sup> The Court determined that regularly publishing a widely circulated magazine with knowledge that harm could occur to the state's residents amounted to a sufficient contact between the defendant, the forum, and the litigation.<sup>52</sup> As a result, the Court has recognized that, provided there is a sufficient connection between the defendant and the forum, states have a "significant interest" in permitting their courts to exercise jurisdiction over defendants in order to redress harm that occurs within state boundaries.<sup>53</sup>

In the past, there has been disagreement among the Supreme Court Justices, however, as to when a nonresident corporation whose product causes injury within the forum state has "purposefully availed" itself of the privilege of conducting business within the state, and should therefore be

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<sup>47</sup> *World-Wide Volkswagen Corp.*, 444 U.S. at 295 ("Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.").

<sup>48</sup> *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978) (holding that a New York resident sending his daughter to live with her mother in California, contrary to the requirements of a separation agreement, did not establish the defendant's minimum contacts with that state supporting the exercise of personal jurisdiction over him as he did not purposefully derive benefits from that activity).

<sup>49</sup> *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98 (offering the example of a state court properly asserting personal jurisdiction over a company "that delivers its products into the stream of commerce with the expectation that they will be purchased in the forum state").

<sup>50</sup> *Walden v. Fiore*, 571 U.S. \_\_\_, No. 12-574, slip op. at 6-8 (2014) (concluding that a federal court in Nevada lacked personal jurisdiction over a federal law enforcement officer in a lawsuit stemming from an incident at an airport in Atlanta involving Nevada residents).

<sup>51</sup> *Calder v. Jones*, 465 U.S. 783, 788-91 (1984) (concluding that a California court had jurisdiction over a suit involving an alleged libelous article written and edited by defendants in Florida with calls to sources in California that allegedly caused harm to plaintiff California resident's reputation in that state because of the magazine's wide circulation in that state); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984) ("Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine."). *See also* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion) ("[I]n some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws.").

<sup>52</sup> *E.g.*, *Keeton*, 465 U.S. at 773-74.

<sup>53</sup> *Id.* at 776 (noting that false publications in a state injure the subject of the false statements and mislead consumers residing in the state and declaring that "it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State").

subject to personal jurisdiction in that state in a tort action for products liability. In the 1987 case *Asahi Metal Industry v. Superior Court*, four Justices agreed that a nonresident defendant's awareness that a product it manufactured would end up in the forum state through its intentional placement of the product in the stream of commerce outside of the forum did not by itself constitute an act directed at the forum sufficient for specific personal jurisdiction.<sup>54</sup> Writing for a plurality of the Court, Justice O'Connor maintained that a tribunal lacked the authority to exercise personal jurisdiction over a defendant that had not performed additional actions in the forum state that demonstrated an intent to serve that state's market.<sup>55</sup> According to her plurality opinion, because the defendant did not have clear notice that it could be subject to suit in California, it would have been unfair to subject the defendant to suit there.<sup>56</sup> However, another four Justices would have held that the defendant's intentional placement of a product into the stream of commerce by itself was sufficient for personal jurisdiction because the defendant could foresee being sued in any state in which the product was regularly sold and marketed.<sup>57</sup> Those Justices would have grounded this result in the benefits that defendants derive from the regular retail sale of their products in the forum and the protections of state law.<sup>58</sup>

This disagreement appears to remain unresolved after a 2011 case, *J. McIntyre Machinery, Ltd. v. Nicastro*, in which a plurality of the Court indicated that a foreign manufacturer of a product cannot be subject to the jurisdiction of a state court based on its mere expectation that the products it ships to an independent U.S. distributor might be distributed in the forum state.<sup>59</sup> Instead, according to the plurality written by Justice Kennedy, the defendant must have directly targeted the individual state with its goods, thereby "purposefully availing" itself of the privilege

<sup>54</sup> *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 105 (1987) ("This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum State such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'"); *id.* at 112 (plurality opinion) ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.").

<sup>55</sup> *See id.* at 110-13 ("Assuming, *arguendo*, that respondents have established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into tire tubes sold in California, respondents have not demonstrated any action by Asahi to purposefully avail itself of the California market. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California. On the basis of these facts, the exertion of personal jurisdiction over Asahi by the Superior Court of California exceeds the limits of due process.") (internal citations omitted).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment) ("The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise."). Justice Stevens authored a concurring opinion in which he maintained that the plurality's minimum contacts analysis was unnecessary but suggested that the Court should have included in its analysis an examination of the "volume," "value," and "hazardous character" of the products at issue to determine whether the defendant had purposefully availed itself of the forum. *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment).

<sup>58</sup> *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

<sup>59</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (plurality opinion) ("The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.").



of conducting in-state business.<sup>60</sup> However, the plurality's view did not command a majority of the Court, and a narrower concurring opinion would have found jurisdiction lacking under any of the various tests for personal jurisdiction articulated in the Justices' opinions in *Asahi* because the shipment of products into, or their sale in, the forum state did not occur regularly, and there was no additional sales-related conduct (e.g., marketing) by the defendant in the forum.<sup>61</sup>

In addition to addressing cases involving a defendant's alleged tortious conduct, the Supreme Court has also addressed minimum contacts in the context of out-of-state defendants reaching out to a forum state to establish a continuing business relationship in that state. For example, the Court upheld a California court's exercise of specific personal jurisdiction over a Texas mail order insurance company that had no office or agent in California because the Texas company mailed an offer of insurance to the plaintiff's son in California.<sup>62</sup> The son accepted the offer and continued to send the company premium payments through the mail to Texas from California until the son died in California.<sup>63</sup> The Court noted that the suit arose from a contract that had a "substantial connection" with California, holding that the state had a significant interest in providing redress for its residents in cases in which insurance companies refuse to pay claims.<sup>64</sup> Similarly, when a nonresident defendant establishes an office in a state to conduct business through agents in the state, he may have to answer a lawsuit related to those business activities when an agent is served in the forum, regardless of whether he consented to service of process through his agent.<sup>65</sup>

Another context in which the Supreme Court has addressed the minimum contacts test involves contractual disputes between the parties to a lawsuit. Thus, when a franchisor headquartered in Florida brought suit in a local federal court against Michigan franchisees for the alleged breach of a franchise agreement to make required payments in Florida, the Court held that specific jurisdiction over defendants was proper based on the specific circumstances surrounding the contractual relationship.<sup>66</sup> The Court stated that a contract between an out-of-state party and an individual in the forum state is insufficient by itself to establish personal jurisdiction if the contract lacks a substantial connection to the state as established by, among other things, an (1) examination of the parties' prior negotiations (e.g., whether the defendant reached into the forum to negotiate the contract); (2) the terms of the contract (e.g., where payments were to be made and which state's law was to govern); and (3) the course of dealing (e.g., whether the defendant established a "substantial and continuing relationship" in the forum state).<sup>67</sup>

The Court has also opined on when a defendant's property interests in the forum may serve as a contact for purposes of personal jurisdiction. In *Shaffer v. Heitner*, the Supreme Court held that a state court could not exercise *quasi in rem* jurisdiction over a nonresident defendant by attaching the defendant's property interests in the state without inquiring separately into whether these property interests and any other connections between the defendant, forum, and litigation established sufficient minimum contacts to satisfy the first prong of the *International Shoe* test.<sup>68</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 889 (Breyer, J., concurring in the judgment).

<sup>62</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221-22 (1957).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 223.

<sup>65</sup> *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 625, 628 (1935).

<sup>66</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 479 (1985).

<sup>67</sup> *Id.* at 478-87.

<sup>68</sup> *Shaffer v. Heitner*, 433 U.S. 186, 189, 216-17 (1977).



Thus, a Delaware court could not subject nonresident officers and directors of a Delaware corporation to personal jurisdiction for the alleged breach of duties to the corporation based solely on the court's attachment of their stock and stock options in the corporation.<sup>69</sup> The Court noted that jurisdiction over property must in fact have a direct effect on the interests of the defendant in that property and therefore affect its personal rights.<sup>70</sup> However, the *Shaffer* Court also noted that in some cases, such as cases establishing title to real property, ownership of the property itself may establish sufficient contacts among the defendant, forum, and litigation.<sup>71</sup>

## Reasonableness Test

Even if a nonresident defendant has minimum contacts with the forum, the Supreme Court has, at times, considered whether a state court's exercise of personal jurisdiction over him would comport with due process by examining the reasonableness of the exercise of jurisdiction.<sup>72</sup> In *International Shoe* and its subsequent opinions, the Court has established a multi-factor test that seeks to ensure that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."<sup>73</sup> The Court has subsequently clarified that in applying this test to evaluate the reasonableness of the exercise of jurisdiction in light of the defendant's contacts with the forum and litigation, it will examine several factors, including: (1) "the burden on the defendant"; (2) "the forum State's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; (5) and "the shared interest of the several States in furthering fundamental substantive social policies."<sup>74</sup>

Although the Supreme Court has had few occasions to address the reasonableness prong of the *International Shoe* test for personal jurisdiction, it has provided some guidance as to when courts may deem it reasonable to subject a defendant to suit. Thus, the Justices have, for example, suggested that courts should remain cautious about exercising personal jurisdiction over corporations domiciled abroad, particularly when most of the conduct at issue occurred overseas.<sup>75</sup> Courts may therefore evaluate the risks that subjecting a foreign corporation to suit in the United States for overseas conduct would have on international relations between the United States and its trading partners.<sup>76</sup> In a case involving the exercise of personal jurisdiction over a foreign corporation, moreover, the policies of other nations are relevant and must be carefully considered.<sup>77</sup>

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<sup>69</sup> *Id.* at 189-92, 216-17.

<sup>70</sup> *Id.* at 207, 212 ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.").

<sup>71</sup> *Id.* at 207-08.

<sup>72</sup> *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 113 (1987) ("We have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors.").

<sup>73</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations and internal quotation marks omitted).

<sup>74</sup> *Burger King v. Rudzewicz*, 471 U.S. 462, 477 (1985).

<sup>75</sup> *Asahi*, 480 U.S. at 114.

<sup>76</sup> *Daimler AG v. Bauman*, 571 U.S. \_\_\_, No. 11-965, slip op. at 23 (2014) ("Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands.").

<sup>77</sup> *Asahi*, 480 U.S. at 115-16.

In addition, when considering the burden on the defendant, the Court may consider it a heavy burden for a company domiciled abroad to travel from its foreign headquarters to have a dispute with another foreign corporation litigated in U.S. courts.<sup>78</sup> This concern may stem in part from the notion that the interests of the plaintiff and forum are minimal when the claim is based on overseas transactions, the plaintiff is not a resident of the United States, and the allegedly tortious conduct could be deterred by subjecting companies over which the court has lawful judicial power to suit.<sup>79</sup>

## Issues for Congress

Recent Supreme Court rulings have limited the circumstances in which U.S. courts may exercise personal jurisdiction over certain corporate defendants.<sup>80</sup> In particular, the cases have limited the availability of U.S. courts as forums for lawsuits against foreign companies for claims arising from their conduct overseas.<sup>81</sup> These decisions have required substantial contacts between the foreign defendant, the U.S. forum, and the litigation. For example, a plurality of the Court held in a 2011 case that a foreign company that manufactures a machine in a foreign country cannot be subject to the specific jurisdiction of a state court based on its mere expectation that the products it ships to an independent U.S. distributor might be distributed in the forum state.<sup>82</sup> Instead, according to the plurality, the defendant must have directly targeted the individual state with its goods, thereby “purposefully availing” itself of the privilege of conducting in-state business.<sup>83</sup>

In addition to narrowing the scope of activities that may constitute minimum contacts between the defendant and the forum sufficient for a court’s exercise of specific jurisdiction, the Court has significantly limited the types of activities or affiliations of the defendant in the forum state sufficient for general jurisdiction, holding that those contacts must be so substantial as to render the defendant “essentially at home” in the forum state.<sup>84</sup> The Court has clarified that, absent exceptional circumstances, a corporate defendant is “at home” when it is incorporated in the forum state or maintains its principal place of business there.<sup>85</sup> For example, the Court held in *BNSF Railway Co. v. Tyrrell* that Montana courts could not exercise general jurisdiction over a railroad company that had over 2,000 miles of track and more than 2,000 employees in the state because the company was not incorporated or headquartered in Montana and the overall activity of the company in Montana was not “so substantial” as compared to its activities throughout all of the jurisdictions in which it conducted business so as to render the corporation “at home” in the state.<sup>86</sup>

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<sup>78</sup> *Id.* at 114.

<sup>79</sup> *Id.* at 114–15 (noting that the lawsuit involved an indemnification claim brought by a Taiwanese tire manufacturer against a Japanese valve assembly manufacturer).

<sup>80</sup> *Supra* note 11.

<sup>81</sup> *See id.*

<sup>82</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (plurality opinion) (“The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”).

<sup>83</sup> *Id.*

<sup>84</sup> *See supra* note 42.

<sup>85</sup> *Goodyear*, 564 U.S. at 924 (noting an individual’s domicile and a corporation’s place of incorporation or principal place of business as “paradigm” bases for general jurisdiction) (citation omitted); *id.* at 930 n.6 (“[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.”).

<sup>86</sup> *BNSF R.R. Co. v. Tyrrell*, 581 U.S. \_\_\_, No. 16-405, slip op. at 11-12 (2017).

The Supreme Court's recent expansion of the personal jurisdiction defense has led to considerable debate, with several commentators criticizing the decision as being too solicitous toward corporate defendants.<sup>87</sup> On the other hand, other commentators have defended the recent change in the Court's decisions, asserting that it will bring more clarity and cohesion to the doctrine of personal jurisdiction and reduce unfairness to defendants.<sup>88</sup> If Congress disagrees with the Court's recent jurisprudence that has generally made it more difficult for plaintiffs to sue foreign companies in U.S. courts and obtain judicial relief for their injuries, it might consider legislative options to address such concerns. One action that Congress might take to address any concerns with the Court's recent decisions on personal jurisdiction is to functionally override the Federal Rules of Civil Procedure and authorize federal courts to exercise nationwide personal jurisdiction over certain defendants, such as foreign companies, that have, in the aggregate, minimum contacts with the United States as a whole rather than with an individual state.<sup>89</sup> Congress could then amend federal statutes addressing venue (i.e., the district or county where a lawsuit may be brought) to address any concerns with fairness to foreign defendants.<sup>90</sup> Currently, the venue statute (28 U.S.C. § 1391) provides as a fallback venue "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."<sup>91</sup>

<sup>87</sup> E.g., Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 107 (2015) ("[T]he Court has moved too far, too fast towards limiting the traditional powers of states to require nonresident corporations to answer lawsuits in their courts."); Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2002 (2014) ("[T]he Court's decisions in these two cases leave a large gap in the appropriate scope of state adjudicatory jurisdiction, putting some plaintiffs at risk of being unable to bring a defendant to justice in an American court.").

<sup>88</sup> E.g., William Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 MARQ. L. REV. 375, 378 (2016) ("Contrary to the weight of this body of scholarship on the 'at home' rule of *Goodyear* and *Daimler AG*, I argue that this new rule is a welcome change to general personal jurisdiction for two reasons. First, the 'at home' rule is clear. It provides an easy-to-apply rule that will minimize resources expended litigating an issue other than the merits of a case. Second, the 'at home' rule is more logically coherent because it promotes internal consistency in personal jurisdiction decisions. No matter which justification of personal jurisdiction one adopts from among the myriad justifications that the Supreme Court has offered, the 'at home' rule fits neatly within that framework."); Case Comment, *The Supreme Court, 2013 Term: Leading Case: Daimler AG v. Bauman*, 128 HARV. L. REV. 291, 316 (2014) ("Closer examination of *Daimler*, however, reveals that Justice Ginsburg is not operating from formalist or ideological conceptions of when jurisdiction ought to be exercised. Rather, she has adopted a different philosophical framework, drawn from the pioneering work of von Mehren and Trautman that focuses fundamentally on fairness to both parties. Starting with her opinions in *Goodyear* and *Nicastro*, Justice Ginsburg has consistently applied this framework.").

<sup>89</sup> See Symposium, *Walden v. Fiore and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and Stafford v. Briggs*, 19 LEWIS & CLARK L. REV. 713, 713-17 (2015); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1303, 1318 (2014); A. Benjamin Spencer, *Nationwide Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 329-30 (2010). As noted, Federal Rule of Civil Procedure 4 generally gives federal district courts' power to assert personal jurisdiction over a defendant to the extent that a state court in which the federal district court is located may assert that power. FED. R. CIV. P. 4(k)(1)(A). However, Congress could alter these rules by enacting a statute, provided that it did not violate the Constitution.

<sup>90</sup> See Sachs, *supra* note 89, at 1303, 1318.

<sup>91</sup> The venue statute provides, in general, that

A civil action may be brought in—

- (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
- (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
- (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with

Presumably, Congress would need to amend this provision if it wanted to authorize nationwide personal jurisdiction; otherwise, venue would lie in any federal judicial district.<sup>92</sup>

Of course, any legislation authorizing nationwide personal jurisdiction would still have to comport with the demands of constitutional due process. The Supreme Court has specifically declined to address whether the Due Process Clause of the Fifth Amendment may limit the *federal* courts' exercise of personal jurisdiction.<sup>93</sup> Authorizing federal courts to exercise nationwide personal jurisdiction over foreign defendants who have, in the aggregate, substantial contacts with the United States might satisfy the Court's due process-related concern that a U.S. tribunal possess lawful power over a defendant.<sup>94</sup> However, such a proposal may still raise concerns about unfairness to foreign defendants that may result from requiring them to defend a lawsuit in a distant forum, particularly when the lawsuit does not arise out of the defendant's activity in the United States.<sup>95</sup> Such fairness concerns may be particularly important in light of suggestions from the Supreme Court that the courts should consider several specific factors when evaluating the reasonableness of subjecting a foreign defendant to suit, including the burden on the foreign defendant, the policies of other nations, and the potential effect of such lawsuits on international relations between the United States and its trading partners.<sup>96</sup> In this regard, the Court's personal jurisdiction jurisprudence that generally limits the powers of states may provide insight into the limits on Congress's power to expand the personal jurisdiction of federal courts.

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respect to such action.

28 U.S.C. § 1391(b).

<sup>92</sup> Sachs, *supra* note 89, at 1334.

<sup>93</sup> *Supra* note 27.

<sup>94</sup> *Supra* note 37 and accompanying text.

<sup>95</sup> *Supra* note 36 and accompanying text.

<sup>96</sup> *Supra* notes 75-79 and accompanying text.

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