

GETTING “ARISING OUT OF” RIGHT: *FORD MOTOR COMPANY* AND THE PURPOSE OF THE “ARISING OUT OF” PRONG IN THE MINIMUM CONTACTS ANALYSIS

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In Ford Motor Co. v. Montana Eighth Judicial District Court, the Supreme Court heard a challenge to specific personal jurisdiction brought under the “arising out of or relating to” prong (also referred to as the “arising out of” prong) of the minimum contacts test for only the second time. In attempting to evade jurisdiction for injuries caused by defective cars in Montana and Minnesota, Ford argued that because the specific cars at issue were not originally sold in those fora, its purposeful contacts with the state did not proximately cause the injury at issue, and therefore the injuries did not “arise out of” those contacts. Ford’s argument is based on a misreading of Bristol-Myers Squibb Co. v. Superior Court, the only case in which the Court analyzed that prong of the minimum contacts test. This Note seeks to explore the development and purposes underlying the “arising out of” prong, concluding that its purpose is to ensure a sufficient connection between the forum and the underlying claim such that the state has a legitimate regulatory interest and that litigation in the forum is convenient. After describing the development and purpose of the “arising out of” prong and contrasting it with the purpose underlying the “purposeful availment” prong, this Note addresses the ways in which challenges to jurisdiction are brought when it is unclear if the claim arises in a particular forum. This Note then takes on the Ford case and discusses how the Supreme Court’s decision fits into the framework describing what work the “arising out of” prong is doing in the jurisdictional analysis.

INTRODUCTION	316
I. PERSONAL JURISDICTION: A BRIEF HISTORY	320
A. International Shoe: <i>The Rise of Minimum Contacts Analysis</i>	321
B. <i>Developments Since International Shoe</i>	322
C. <i>Why Bristol-Myers Matters</i>	325
II. DISSECTING THE ARISING OUT OF/RELATING TO PRONG	327

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A.	<i>The Development and Purpose of the Arising out of/ Relating to Prong</i>	328
1.	<i>Territorialism and the Federalist Roots of Jurisdiction</i>	329
2.	<i>“Arising out of” as a Proxy for a State’s Regulatory Interest</i>	330
3.	<i>The Supreme Court’s Rejection of California’s Sliding Scale Confirms the Purpose of the “Arising out of” Prong</i>	335
4.	<i>“Arising out of” as an Indicator of Litigational Convenience</i>	339
B.	<i>Distinguishing the Purposes of “Arising out of” and “Purposeful Availment”</i>	341
III.	THE PECULIARITY OF THE <i>FORD</i> CASE AND THE SUPREME COURT’S DECISION	342
A.	<i>Categorizing the “Arising out of” Cases</i>	343
1.	<i>Relevant Conduct or Acts Cases</i>	343
2.	<i>Parallel Claims</i>	345
B.	<i>Place of Injury Cases and the Ford Controversy</i>	348
C.	<i>The Supreme Court Gets Ford Right, but Questions Remain</i>	350
	CONCLUSION	356

INTRODUCTION

Markkaya Gullett was a twenty-three-year-old mother of two when, in May of 2015, a tire on her 1996 Ford Explorer suffered a “catastrophic failure” as she traveled on a highway near her home in Superior, Montana.¹ The event sent Gullett’s car careening into a ditch, where she later died on the scene.² The representative of Gullett’s estate filed suit in Montana state court, raising products liability claims against Ford Motor Company (Ford) and the tire manufacturer.³ On March 25, 2021, the Supreme Court unanimously upheld specific personal jurisdiction over Ford.⁴

¹ Brief of Respondents at 7, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) (No. 19-368).

² *Id.*

³ *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 443 P.3d 407, 411 (Mont. 2019), *aff’d*, 141 S. Ct. 1017 (2021).

⁴ *Ford Motor Co.*, 141 S. Ct. at 1032, 1034. The majority opinion garnered five votes, with Justices Alito and Gorsuch writing concurring opinions (the latter joined by Justice Thomas). Justice Barrett was not yet on the Court when the case was argued and did not take part in the decision. *Id.* This case was consolidated with a Minnesota case where Ford challenged personal jurisdiction on similar facts. In *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744, 748 (Minn. 2019), Adam Bandemer, a Minnesota resident, was a passenger in

Under the minimum “contacts inquiry that has been taught to generations of first-year law students,”⁵ this case seems clear-cut. The minimum contacts test requires that a defendant must have “purposefully availed” itself of the forum state and that the claim “arises out of or relates to” the activities there.⁶ Ford long served the Montana market, including through sales, marketing, and distribution of the product at issue.⁷ Gullett, a Montana resident, was killed while driving Ford’s product in Montana, where the vehicle was owned and maintained, as the result of an alleged defect.⁸ Finally, Ford, a multinational corporation with offices and operations in Montana, suffered no undue burden by litigating in the forum.⁹ As Justice Kavanaugh pointed out at oral argument, the Court had long ago stated in dicta that

if the sale of a product of a manufacturer or distributor . . . arises from the efforts of the manufacturer or distributor to serve directly or indirectly[] the market for its product in other States, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others.¹⁰

a Ford vehicle that collided with a snowplow while driving in that state. Bandemer suffered injuries in part due to the failure of an allegedly defective airbag. Although Ford has sold thousands of the type of car in which Bandemer was driving in the forum, and maintains significant sales and advertising operations there, it challenged jurisdiction on the grounds that the specific vehicle at issue was not originally sold or manufactured in that state. *Id.* For ease of simplicity, I refer to the facts as stated in the Montana Supreme Court’s opinion throughout my discussion of the Court’s decision.

⁵ *Daimler AG v. Bauman*, 571 U.S. 117, 153–54 (2014) (Sotomayor, J., concurring in the judgment) (questioning the displacement of the “continuous and systematic” contacts inquiry that until then had been a basis for asserting general personal jurisdiction).

⁶ See *infra* Section I.B (discussing the modern requirements of the minimum contacts inquiry). The inquiry is subject to a subsequent reasonableness test, which is beyond the subject of this Note. See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987) (discussing the reasonableness factors).

⁷ See *Mont. Eighth Jud. Dist. Ct.*, 443 P.3d at 414 (describing Ford’s contacts with Montana). This would fulfill the “purposeful availment” prong, as Ford understood it would be subject to the state’s power. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (“The principal inquiry . . . is whether the defendant’s activities manifest an intention to submit to the power of a sovereign.”).

⁸ Brief of Respondents, *supra* note 1, at 7–8. Respondent alleges this should satisfy the “arising out of” prong. See *infra* Part II (discussing the “arising out of” prong of the minimum contacts inquiry).

⁹ See *Asahi*, 480 U.S. at 113 (discussing reasonableness factors relevant to the specific personal jurisdictional analysis, which include considering the burden on the defendant).

¹⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); Transcript of Oral Argument at 32, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) (No. 19-368).

After quoting the case, Justice Kavanaugh pressed Ford's counsel: "[I]f we just follow that sentence, you lose, correct?"¹¹

Ford, of course, did not agree. It argued that because the particular Ford Explorer driven by Gullett was not manufactured or originally sold in Montana, the company was not subject to jurisdiction in the forum.¹² The vehicle was assembled in Louisville, Kentucky and initially purchased in Spokane, Washington by a resident of Oregon. Only later did Gullett's mother, a citizen of Montana, buy and register the vehicle in that forum.¹³ Ford maintained that because the vehicle was originally sold elsewhere and was then resold by a third party, the injury did not "arise out of" its contacts with the state. Therefore, Ford argued, because its contacts with the state did not proximately cause the injury, minimum contacts were not met.¹⁴

Ford's argument rested on a misreading of the Supreme Court's seminal—and only¹⁵—case decided under the "arising out of" prong of the personal jurisdiction analysis: *Bristol-Myers Squibb Co. v. Superior Court*.¹⁶ That case capped nearly a decade in which the Court repeatedly addressed and refined its personal jurisdiction doctrine.¹⁷ The basic holding of *Bristol-Myers* is that the "arising out of or related to" prong requires that there be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State."¹⁸ Although the Court

¹¹ Transcript of Oral Argument, *supra* note 10, at 32.

¹² Brief for Petitioner at 5, *Ford Motor Co.*, 141 S. Ct. 1017 (No. 19-368).

¹³ Brief of Respondents, *supra* note 1, at 8.

¹⁴ Brief for Petitioner, *supra* note 12, at 5, 13–15. Similarly, the vehicle at issue in *Bandemer* was manufactured and sold elsewhere before being sold in Minnesota. See *supra* note 4 and accompanying text.

¹⁵ See Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 684–85 (2015) [hereinafter Silberman, *The End of Another Era*] (noting the Supreme Court had not yet interpreted the "arising out of" requirement but recognizing that the requirement was being analyzed in the *Bristol-Myers* case, at that time before the California Supreme Court); Linda J. Silberman, *Judicial Jurisdiction and Forum Access: The Search for Predictable Rules* [hereinafter Silberman, *Judicial Jurisdiction*] ("The Supreme Court had little to say about the 'arising out of' requirement until the recent decision in *Bristol-Myers Squibb v. Superior Court*."), in PRIVATE INTERNATIONAL LAW 332, 340 (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019).

¹⁶ 137 S. Ct. 1773 (2017).

¹⁷ See Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 YALE L.J.F. 205, 209 (2019) (explaining how the Supreme Court "dramatically narrowed" the scope of personal jurisdiction doctrine in several cases in the decade before *Bristol-Myers Squibb* was decided).

¹⁸ *Bristol-Myers*, 137 S. Ct. at 1780 (alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

was somewhat careful to limit its holding,¹⁹ the *Bristol-Myers* decision has sparked robust debate, as well as uncertainty, as to whether and how it will limit plaintiffs’ abilities to bring suit in various fora.²⁰

This Note seeks to address some of the confusion surrounding the “arising out of” prong of the minimum contacts analysis as raised by *Ford* by exploring the purposes underlying that prong, as well as its development.²¹ The Note proceeds in three Parts. Part I will briefly recount the development of the Supreme Court’s modern personal jurisdiction doctrine. Part II will delve into the purposes underlying the “arising out of” prong: ensuring the state has a sufficient regulatory interest in the claim,²² and promoting litigational convenience. In doing so, this Part will discuss the territorialist and federalist principles that gave rise to these concerns and will show how the prong developed in tandem with analogous concerns that arise in choice of law analysis and the general jurisdiction context. Finally, Part II will illustrate how these considerations were reflected in the Supreme Court’s analysis in *Bristol-Myers* and will demonstrate that while the “arising out of” requirement seeks to confirm a connection between the forum and the controversy, “purposeful availment” ensures a sufficient connection between the forum and the defendant.²³

Part III will then analyze the Supreme Court’s opinion in *Ford*. First, it will categorize and explore the types of cases in which a defendant might challenge personal jurisdiction under the “arising out of”

¹⁹ See, e.g., *id.* at 1783–84 (limiting the Court’s holding and explicitly leaving open other questions); *id.* at 1789 & n.4 (Sotomayor, J., dissenting) (noting the questions the Court’s opinion left open and possible attendant consequences).

²⁰ Much, if not all, of this debate outside of the *Ford* case pertains to aggregate litigation and, in particular, questions surrounding whether plaintiffs in multistate class actions can get personal jurisdiction over defendants, even though the claims of many unnamed plaintiffs arise in other states. The growing consensus among lower courts appears to be that so long as the named plaintiffs have satisfied minimum contacts, the court can exercise personal jurisdiction. See *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443, 447 (7th Cir. 2020) (holding that the Supreme Court’s holding in *Bristol-Myers* does not apply to nationwide class actions filed in federal court asserting injuries resulting from the violation of federal law), *cert. denied*, 141 S. Ct. 1126 (2021); see also *Cruson v. Jackson Nat’l Life Ins. Co.*, 954 F.3d 240, 247, 249 n.7 (5th Cir. 2020) (refusing to take up the question of whether *Bristol-Myers* affects absent class action plaintiffs because they are not yet parties to the litigation prior to class certification); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 295 (D.C. Cir. 2020) (same).

²¹ While much has been written about the minimum contacts analysis and the ways in which the Supreme Court has refined that analysis in recent years, the novel contribution of this Note is to explore the “arising out of” prong and its development in isolation.

²² See Brief for Petitioner, *supra* note 12, at 24–25 (arguing that a causal requirement is most consistent with the regulatory interest central to the “arising out of” prong).

²³ Although this Note fleshes out the differences between the “arising out of” and “purposeful availment” prongs in greater detail, it does so in part by expanding upon some of the arguments made in *Ford*’s brief. See Brief for Petitioner, *supra* note 12.

prong. Specifically, these categories are: (1) when parallel claims of multiple plaintiffs injured in various states are aggregated in a single forum;²⁴ (2) when conduct or acts relevant to the claim occurred in the forum, but the injury itself occurred elsewhere;²⁵ and (3) where the injury occurred in the forum. It will then note the peculiarity of the *Ford* appeal falling under this third category and analyze how the Court's decision dealt with the case in light of the purposes of the "arising out of" prong.

I

PERSONAL JURISDICTION: A BRIEF HISTORY

Personal jurisdiction refers to a court's authority to adjudicate a person's rights or to enter judgment for or against a party before it. The Supreme Court firmly established the outer limits of a state's exercise of personal jurisdiction within the Fourteenth Amendment's Due Process Clause soon after its adoption.²⁶ In *Pennoyer v. Neff*, the Court defined "due process of law" as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."²⁷ It went on to explain that this process mandates two elements necessary to give *in personam* "proceedings any validity": (1) a court's statutory and/or constitutional power to "pass upon the subject-matter of the suit," and (2) the defendant's service of process within the state or a voluntary appearance.²⁸

Notably, *Pennoyer* explicitly approved of other bases of jurisdiction, such as in rem and quasi in rem, so long as the property at issue was attached prior to the action such that "its seizure will inform [the defendant] . . . that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."²⁹ The Court thus

²⁴ As was the case in *Bristol-Myers*, 137 S. Ct. 1773.

²⁵ See, e.g., *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 165–66 (2d Cir. 2013) (concerning an attempt to exercise personal jurisdiction over a foreign defendant where the actual injury occurred abroad, but funds at issue were transferred through accounts in New York).

²⁶ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

²⁷ *Id.*

²⁸ *Id.* The statutory element is embodied in state long-arm statutes, through which states vest their courts with jurisdiction for various acts or conduct that occur in their borders. Often, these laws simply allow for jurisdiction up and to the limits that due process allows. This Note deals solely with the constitutional limitations.

²⁹ *Id.* at 727. In rem jurisdiction is a court's ability to adjudicate the rights of all persons related to property found within a state's borders. Quasi in rem jurisdiction refers to a court's ability to adjudicate the rights of particular persons in property located within a state's borders. LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLFF, *CIVIL PROCEDURE: THEORY AND PRACTICE* 68 (5th ed. 2017).

embraced a territory-based power theory of jurisdiction, in which all persons and property located within the state were swept under the authority of its courts, while persons and property located across state lines could not be reached.³⁰ This Part will explore how the Court developed the personal jurisdiction doctrine in the modern era, as changes in technology and transportation challenged the traditional territorial underpinnings of the *Pennoyer* decision and ultimately resulted in the creation of the minimum contacts analysis as a stand-in for physical presence. Finally, this Part will explain that the *Bristol-Myers* case, while important for a number of reasons, did not actually work any major change in the law.

A. International Shoe: *The Rise of Minimum Contacts Analysis*

*International Shoe Co. v. Washington*³¹ expanded the constitutional bases for asserting jurisdiction over litigants located in other states.³² The appellant, a Delaware corporation with its principal place of business in Missouri, sold its products in various states but had no offices or property in Washington.³³ However, it did employ a number of salesmen residing in Washington who were compensated by commission based on their sales in the state.³⁴ Washington sued the corporation for failure to pay into the state’s unemployment fund.³⁵

³⁰ Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 45 (1978) [hereinafter Silberman, *The End of an Era*]; see also *Pennoyer*, 92 U.S. at 722 (“One of [the] principles [of jurisdiction] is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.”).

³¹ 326 U.S. 310 (1945).

³² The Supreme Court has been particularly transparent that this expansion was due to technological advances which made interstate transportation, communication, and commerce much easier and more accessible to the general population. *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958). This progress increased the need to expand state courts’ jurisdiction to nonresidents who passed through or conducted business activities within states’ territories but also eased the burden on those defendants located outside the state to be able to fairly and reasonably participate in the litigation. *Id.* More recently, Justice Breyer acknowledged that advances in international commerce might eventually warrant a “new approach to personal jurisdiction” but seemed to suggest that such changes might actually demand limiting states’ abilities to exercise jurisdiction over foreign defendants. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 892 (2011) (Breyer, J., concurring) (noting that it may be unwise to subject all foreign defendants to the same expansive rules of personal jurisdiction given the differences between large businesses’ and small foreign artisans’ abilities to respond to suits in each state of the United States). This concern was again raised by a number of justices throughout the *Ford* oral argument and in the Justices’ opinions. See *infra* Section III.B.

³³ *Int’l Shoe*, 326 U.S. at 313.

³⁴ *Id.*

³⁵ *Id.* at 311.

In upholding the Washington court's jurisdiction over the corporation, the Supreme Court famously held that courts have personal jurisdiction over those not present within a state's territory if the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"³⁶ Chief Justice Stone's opinion noted that the "fiction" of the corporate personality made discerning its presence for purposes of jurisdiction more difficult than for an individual.³⁷ However, he found that due process is satisfied when a corporation's contacts with the forum make it reasonable to subject the corporation to suit in that forum.³⁸ He concluded that because the appellant's activities in the forum through its sales agents had been systematic and continuous and the salesmen's claims were based on "obligations aris[ing] out of or . . . connected with" those activities, jurisdiction over the corporation was proper.³⁹

B. *Developments Since International Shoe*

Since *International Shoe*, the doctrine of personal jurisdiction has developed in two major respects. First, the Court has recognized that two types of personal jurisdiction exist: general and specific.⁴⁰ The origins of general jurisdiction are often attributed to dicta in *International Shoe* explaining that a corporation's activities within a state may be so "continuous" and "substantial" that they "justify suit against it on causes of action arising from dealings entirely distinct from those activities."⁴¹ For years, continuous and substantial business contacts were considered sufficient presence for general jurisdiction.⁴² However, the Supreme Court recently confined general jurisdiction to

³⁶ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

³⁷ *Id.*

³⁸ *Id.* at 316–17.

³⁹ *Id.* at 319–21.

⁴⁰ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). General jurisdiction refers to a court's ability to exercise personal jurisdiction over a party regardless of whether or not the cause of action has any relationship to the forum, because the plaintiff is a citizen of that forum. Specific jurisdiction, on the other hand, requires a connection to the forum in order for the court to adjudicate a person's rights, because that party is not a citizen of that forum. SILBERMAN ET AL., *supra* note 29, at 81.

⁴¹ *Int'l Shoe*, 326 U.S. at 318. Most recently, the Court reiterated this *International Shoe* language in *Goodyear*, 564 U.S. at 916, as well as in *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014).

⁴² See *Daimler*, 571 U.S. at 153–54 (Sotomayor, J., concurring) (noting the "continuous and systemic" contacts inquiry had been a basis for asserting general personal jurisdiction).

places where a corporation is “essentially at home,”⁴³ which it defined as its place of incorporation or principal place of business.⁴⁴

Second, the Supreme Court has not only expanded the scenarios in which specific jurisdiction is the applicable personal jurisdiction analysis,⁴⁵ but also has more tightly defined and constricted a court’s ability to exercise it.⁴⁶ Although the language of *International Shoe* was vague, and the concept of “minimum contacts” ill-defined,⁴⁷ within two decades the Court made clear that, at the very least, “it is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State.”⁴⁸ That connection must be of the defendant’s own making,⁴⁹ and the mere fact that a defendant might foresee the likelihood that its product may cause injury in a forum is insufficient to constitute a deliberate contact should injury arise there.⁵⁰ By the mid-1980s, the Court had further clarified that minimum contacts requires

⁴³ *Goodyear*, 564 U.S. at 919.

⁴⁴ *Daimler*, 571 U.S. at 137; see also Silberman, *Judicial Jurisdiction*, *supra* note 15, at 335–38 (explaining how *Goodyear* and *Daimler* brought about a new era of general jurisdiction by introducing and defining the “at home” inquiry).

⁴⁵ The Supreme Court extended the minimum contacts inquiry to quasi in rem actions in *Shaffer v. Heitner*, 433 U.S. 186, 208–09, 212 (1977); see also *Daimler*, 571 U.S. at 128 (“[S]pecific jurisdiction has become the centerpiece of modern jurisdictional theory” (quoting *Goodyear*, 564 U.S. at 925)).

⁴⁶ See Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1612 (2018) (arguing the Court has constricted state power to assert jurisdiction); Silberman, *Judicial Jurisdiction*, *supra* note 15, at 338–39 (discussing the role of specific jurisdiction post-*Daimler*).

⁴⁷ Justice Black called minimum contacts a “vague [c]onstitutional criteria” that would curtail state power to a greater extent than justified by the Constitution. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 323 (1945) (Black, J., concurring). He preferred finding that minimum contacts are met when the forum has a “substantial connection” to the controversy, a standard more workable given its connection to a court’s ability to apply its own law in such cases. See *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 221–23 (1957) (Black, J.) (finding jurisdiction proper even where a nonresident company had only one contract with a resident because the forum state had a “substantial connection” to the contract); see also Silberman, *The End of an Era*, *supra* note 30, at 88 (discussing Justice Black’s dissent in *International Shoe* and his belief that if a state may apply its own law it should be able to exert jurisdiction).

⁴⁸ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (emphasis added).

⁴⁹ See *id.* at 253–54 (holding that the unilateral movement of a plaintiff into a forum may not constitute purposeful availment on the part of a defendant).

⁵⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not exercise personal jurisdiction over a car dealership and distributor, both located in New York, for an accident that occurred in Oklahoma. The plaintiffs had purchased their car in New York and suffered injuries due to an alleged design defect during an accident in Oklahoma while driving to Arizona. *Id.* at 287–88, 291. The Court found that even if it was foreseeable that the defendants’ products could end up in any state, given the mobile nature of vehicles, a mere likelihood that something could occur is insufficient to constitute “purposeful availment.” Instead, the conduct must be that which creates a “connection with the forum

the “controversy [be] *related to or ‘arise[] out of’* a defendant’s contacts with the forum”⁵¹ and that regardless of whether minimum contacts are met, the assertion of jurisdiction must be reasonable.⁵²

Over the years, the Supreme Court further refined the “purposeful availment” prong based on the perceived fairness of whether a defendant’s actions would or would not create the expectation of amenability to suit. The Court has held that simply placing a product into the stream of commerce cannot constitute “purposeful availment” of a forum unless the defendant has clearly directed the product towards that forum.⁵³ As such, a defendant acting in Florida with the knowledge and intent that her actions would have an effect in California, as well as cause injury there, could anticipate being haled into court there, and thus had purposefully availed herself of California.⁵⁴ However, mere knowledge that an act will have an effect in a distant forum is not sufficient to constitute “purposeful availment,”⁵⁵ and intentionally sending a single product into a forum is similarly inadequate

State . . . such that [a defendant] should reasonably anticipate being haled into court there.” *Id.* at 297.

⁵¹ *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (emphasis added); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). *Helicopteros* seems to be the first time the Court used the specific “arising out of or related to” language, as the Court cites to several cases that do not mention it as a requirement. See, e.g., *Helicopteros*, 466 U.S. at 414 & n.9 (first citing *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); and then citing *Calder v. Jones*, 465 U.S. 783, 786 (1984)). It is possible the Court took this element from a law review article. See *Helicopteros*, 466 U.S. at 414 nn. 8–9 (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966)).

⁵² See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987) (discussing the reasonableness factors).

⁵³ See *id.* at 112. *Asahi* was a strange case that produced a particularly fractured opinion. A foreign tire manufacturer’s faulty product caused an accident in California, and the claims of the injured California resident settled. The defendant then sought to indemnify another foreign corporation, which produced the faulty valve that caused the accident. A three-vote plurality found that placing an item into the stream of commerce, “without more,” does not constitute purposeful availment. *Id.* at 112. The opinion noted such additional conduct might include designing the product for a specific forum, or marketing in a particular forum, but provided no definitive list. *Id.* In an opinion that garnered four votes, Justice Brennan concurred in the judgment due to the finding that an assertion of jurisdiction would be “unreasonable.” *Id.* at 116 (Brennan, J., concurring).

⁵⁴ *Calder v. Jones*, 465 U.S. at 791. In *Calder*, an actress who lived and worked in California brought a libel suit against a Florida reporter and publisher for an article published in a national magazine. *Id.* at 783. Because the defendants knew the article would be distributed in California, and thus could cause injury to the plaintiff mainly in her home state, the “purposeful availment” prong was satisfied. See *id.* at 791.

⁵⁵ *Walden v. Fiore*, 571 U.S. 277, 289 (2014) (holding that a defendant’s mere knowledge that his interactions with the plaintiffs in Georgia could cause injury in Nevada upon their return home was not sufficient to say he had purposefully availed himself of the Nevada forum).

absent more evidence the product is tailored to that jurisdiction in some way.⁵⁶

In contrast, the “arising out of” prong of the analysis has received a more straightforward treatment until recently. *International Shoe* suggested that to the extent a corporation’s activities within a forum “give rise to obligations” there, it will be accountable to suits that “arise out of or are connected with the activities within the state.”⁵⁷ Determining whether this prong is satisfied is often a simple task because suits are often brought where the relevant acts or injuries occurred.⁵⁸ Therefore, whether the suit arises out of a defendant’s contacts with the forum is often less a question of where the claim arose than whether the defendant “purposefully availed” itself of the forum. To the extent the Court has expounded upon the “arising out of” prong’s outer limits, it has made one thing abundantly clear: The plaintiff’s claims must be sufficiently related to the defendant’s activities in the forum such that the forum has an interest in regulating the conduct at issue and that litigation is convenient.⁵⁹

C. Why Bristol-Myers Matters

The *Bristol-Myers* decision was the first major decision that turned on the “arising out of” prong.⁶⁰ The case involved hundreds of personal injury claims brought in California state court by both California and nonresident plaintiffs against Bristol-Myers, a

⁵⁶ *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885–87 (2011). In *McIntyre*, a UK manufacturer sold a single machine through an Ohio distributor to a company in New Jersey, which caused injury to the plaintiff, an employee of that company. *Id.* at 878. As in *Asahi*, the Court fractured, with a three-justice plurality finding that although manufacturer had carried on activities in the United States generally and had sold about four machines in New Jersey, it was not subject to personal jurisdiction in New Jersey because its activities had not sufficiently been directed there. *Id.* at 885–87. In a concurring opinion, Justice Breyer voiced concern that companies who “target the world” through the internet would be able to evade state courts’ jurisdiction under the standard adopted by the plurality but also worried that small businesses would be unreasonably subject to burdensome litigation should a single sale subject it to a faraway court’s jurisdiction. *Id.* at 890–92 (Breyer, J., concurring). For more on the development of these rules in the specific jurisdiction context, see Silberman, *Judicial Jurisdiction*, *supra* note 15, at 332–35.

⁵⁷ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

⁵⁸ *Cf. Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (noting that specific jurisdiction generally requires “activity or an occurrence that takes place in the forum state”).

⁵⁹ *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017) (quoting *Goodyear*, 564 U.S. at 919) (noting there must be an affiliation between the forum and the controversy such that the conduct in the forum is subject to the state’s regulation); *see also* *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984) (finding that states have a “[s]pecial interest” in regulating and redressing injuries that occur within their borders (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974))).

⁶⁰ *See* Silberman, *The End of Another Era*, *supra* note 15, at 686.

Delaware corporation, for injuries suffered while taking the drug Plavix.⁶¹ The Supreme Court held that although the California courts had personal jurisdiction over Bristol-Myers for purposes of the California plaintiffs' claims, the nonresident plaintiffs, who purchased and consumed the drug in their home states, did not allege an injury arising out of the company's contacts with California and therefore could not bring their claims in that forum.⁶²

Although *Bristol-Myers* effectively put an end to the mass joinder of claims in fora where the defendant is not "essentially at home,"⁶³ it did not bring about a major change in the law. Until recently, Bristol-Myers would have been subject to general jurisdiction in California due to its high volume of business in the state.⁶⁴ However, the *Daimler* decision explicitly limited general jurisdiction to a defendant's principal place of business and place of incorporation.⁶⁵ In reality, the ruling in *Bristol-Myers* did not so much reflect a contraction of the "arising out of" prong as it reflected the Court's refusal to expand specific jurisdiction to accommodate the new *Daimler* rule.⁶⁶

In maintaining the pre-*Daimler* rigidity of specific jurisdiction, *Bristol-Myers* raised and carefully left open a number of interesting questions. Notably, the Court explicitly left open the decision's applicability to federal courts under the Fifth Amendment's Due Process Clause.⁶⁷ Additionally, as the dissent noted, the Court called into question but did not address the viability of multistate or nationwide class actions in fora outside of the defendant's principal place of busi-

⁶¹ *Bristol-Myers*, 137 S. Ct. at 1777.

⁶² *See id.* at 1781–82.

⁶³ *Id.* at 1789 (Sotomayor, J., dissenting) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)).

⁶⁴ In fact, the lower court upheld jurisdiction over Bristol-Myers for that reason. *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 879 (Cal. 2016).

⁶⁵ *See supra* note 44 and accompanying text.

⁶⁶ Justice Ginsburg's opinion in *Daimler* briefly alluded to the idea that where general jurisdiction was not applicable, specific jurisdiction would suffice to prevent the "deep injustice" that Justice Sotomayor predicted in her concurrence. *Daimler AG v. Bauman*, 571 U.S. 117, 133 n.10 (2014). Given that she joined the majority in *Bristol-Myers*, it is unlikely that she expected the Court to expand access under specific jurisdiction in cases such as this.

⁶⁷ *Bristol-Myers*, 137 S. Ct. at 1783–84. The possibility that the contacts necessary for a federal court to assert jurisdiction under the Fifth Amendment's Due Process Clause might differ than that of the Fourteenth Amendment's Due Process Clause was also implied in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) ("For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State."). However, at least in diversity cases, lower courts generally hold that the Fourteenth and Fifth Amendments' Due Process Clauses are coextensive. *See, e.g., Helmer v. Doletskaya*, 393 F.3d 201, 205 (D.C. Cir. 2004); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 624 (2d Cir. 2016).

ness or incorporation.⁶⁸ These issues are only now being decided in federal courts of appeals.⁶⁹

Other than Ford, it would seem that few defendants—if any—have argued that *Bristol-Myers* raises the question of whether the occurrence satisfying the “arising out of” prong must be proximately caused by defendant’s specific in-state conduct. Indeed, that *Bristol-Myers* had “purposefully availed” itself of California was not disputed, and the Court noted that the company had conceded it was amenable to suit wherever the nonresident plaintiffs were actually injured because the company had clearly acted in those states.⁷⁰ Nonetheless, Ford insisted that *Bristol-Myers* established a causation requirement that, given the presence of an intermediary, was not satisfied in the instant case.⁷¹

II

DISSECTING THE ARISING OUT OF/RELATING TO PRONG

The “central concern of the inquiry into personal jurisdiction” is “the relationship among the defendant, the forum, and the litigation.”⁷² Pursuant to that goal, each prong of the minimum contacts analysis was developed to ensure various aspects of that relationship were sufficiently robust so as to justify an assertion of jurisdiction over a defendant in a particular forum.⁷³ As the primary components of that framework, the “purposeful availment” and “arising out of” prongs ensure that distinct interests are protected.

This Part will discuss the development of the “arising out of” prong of the minimum contacts analysis, with an emphasis on the purpose for which it was developed. That purpose can be summarized as ensuring a sufficient connection between the *claim* and the forum, such that the state’s regulatory interest in the controversy and litigational convenience make the forum in question fair. It will then contrast these purposes with those underlying the “purposeful availment” prong, namely, that a sufficient connection between the *defendant* and

⁶⁸ *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting). This will be discussed in more detail ahead. See *infra* Section III.A.1.

⁶⁹ See *supra* note 20 and accompanying text.

⁷⁰ *Bristol-Myers*, 137 S. Ct. at 1783.

⁷¹ See Brief for Petitioner, *supra* note 12, at 13–14 (arguing that anything less than a causal relationship would not suffice to assert specific jurisdiction).

⁷² *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

⁷³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) (noting that the “concept of minimum contacts” is meant to perform “two related, but distinguishable, functions”). *Volkswagen* went on to list those functions as protecting the defendant from “the burdens of litigating in a distant or inconvenient forum” and ensuring states do not overstep their bounds in the federal system. *Id.* at 292.

the forum exists, creating a reasonable expectation she might be haled into court in that jurisdiction.

A. *The Development and Purpose of the Arising out of/Relating to Prong*

In *Bristol-Myers*, the Supreme Court reiterated the point that the “arising out of” requirement is meant to assure “an affiliation between the forum and the underlying controversy.”⁷⁴ While the Court recognized that a “primary concern” of the personal jurisdiction analysis is the “burden on the defendant,”⁷⁵ it noted that an “activity or an occurrence that takes place in the forum State” that creates an interest in the litigation is necessary regardless of how convenient the forum might be.⁷⁶ Justice Alito’s opinion noted that while practical issues are clearly a concern, the “territorial limitations on the power of the respective States” inherent in the federalist system were of equal importance.⁷⁷ Ostensibly, it is those latter interests that the “arising out of” prong protects.⁷⁸

This Section will discuss how the “arising out of” prong developed to ensure territorial and federalist limitations on state power are sufficiently enforced. Perhaps most obviously, the prong enforces these limitations by requiring an “activity or an occurrence” in the forum creating a territorial nexus between the issues to be adjudicated and “the very controversy that establishes jurisdiction.”⁷⁹ What this means is that, on a broader scale, this prong ensures that the state’s regulatory interest in adjudicating a controversy involving a citizen of another state is strong enough that it warrants extending the former state’s power into the latter state’s jurisdiction. Finally, the “arising out of” prong adds weight to the likelihood that adjudication in the forum is most practical for reasons of litigational convenience.⁸⁰

⁷⁴ *Bristol-Myers*, 137 S. Ct. at 1781 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

⁷⁵ *Id.* at 1780 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

⁷⁶ *Id.* at 1781 (citing *Goodyear*, 564 U.S. at 919).

⁷⁷ *Id.* at 1780.

⁷⁸ *See id.* at 1781 (holding that even if a defendant has a significant number of contacts with a state or is subject to litigation by other plaintiffs in that forum on parallel claims, it does not mean jurisdiction exists when a different plaintiff’s claim does not arise in that forum).

⁷⁹ *Goodyear*, 564 U.S. at 919 (quoting *von Mehren & Trautman*, *supra* note 51, at 1136).

⁸⁰ In this Note, I use the term litigational convenience to mean the likelihood that evidence, witnesses, compulsory parties, or other factors necessary to successful prosecution of the claims may be conveniently and cheaply located and brought in for trial. *See Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007) (discussing litigational convenience in the context of the doctrine of *forum non conveniens* (citing 14D

1. Territorialism and the Federalist Roots of Jurisdiction

Although the *Pennoyer* line of cases was essentially overturned in *Shaffer v. Heitner*,⁸¹ the Supreme Court has held that the “traditional notions of fair play and substantial justice” standard of *International Shoe* left intact a court’s power to exercise personal jurisdiction over defendants based on physical presence alone.⁸² According to the Court in *Burnham v. Superior Court of California*, the thrust of *International Shoe* was to supplant the notion that due process requires strict adherence to territorial limitations on that jurisdiction but not to displace the underlying territorial and federalist bases of jurisdiction entirely.⁸³ Instead, the *International Shoe* Court instituted minimum contacts as a proxy—rather than a substitute—for physical presence.⁸⁴ Therefore, mere physical presence in a forum is still sufficient to confer jurisdiction over an individual even if that defendant carried out no litigation-related activity there.⁸⁵ Consequently, to understand the function of the “arising out of” prong it is critical to understand why presence within a state is a decisive factor in conferring jurisdiction.⁸⁶

The *Pennoyer* opinion stated that a state’s exclusive jurisdiction over persons and property found within its boundaries was a principal of public law, predating the Constitution and incorporated into it through the Fourteenth Amendment.⁸⁷ But this notion was not based solely on an assertion of territorial power: “The several States are of

CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2007)).

⁸¹ 433 U.S. 186, 212 n.39 (1977) (holding that jurisdiction now falls completely under the minimum contacts analysis of *International Shoe* and that to the extent any cases were decided under the logic of *Pennoyer* they are now overruled).

⁸² *Burnham v. Super. Ct.*, 495 U.S. 604, 619 (1990). In *Burnham*, the defendant, a New Jersey resident, was in California on a business trip when he was served with a divorce petition by his estranged wife as he visited his child. *Id.* at 607–08; see also Silberman, *Judicial Jurisdiction*, *supra* note 15, at 333 (“[A] defendant’s temporary physical presence in the forum state was sufficient for jurisdiction . . .”).

⁸³ See *Burnham*, 495 U.S. at 618–19 (stating that *International Shoe* still required minimum contacts within the territory of the forum).

⁸⁴ See *id.* at 604–05, 618 (describing the *International Shoe* standard as developed “by analogy” to “physical presence”).

⁸⁵ *Id.* at 618–19.

⁸⁶ As Jesse Cross has argued, both *Pennoyer* and *International Shoe* articulated a “sovereignty thesis” through which they “derived a jurisdictional test.” Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 MINN. L. REV. 679, 696 (2020). For more of an analysis on the theoretical underpinnings of the sovereignty theses in both cases, as well as a thorough survey of the general scholarship on sovereignty, see *id.* at 699–718 (arguing that courts and scholars have misunderstood *International Shoe* as having displaced a sovereignty theory of jurisdiction).

⁸⁷ *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878); see also John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1027, 1028 & n.63 (1983) (noting

equal dignity and authority, and the independence of one implies the exclusion of power from all others.”⁸⁸ As a further point, Justice Field quoted Joseph Story’s famous treatise on Conflict of Laws for the proposition that no state’s laws may “operat[e] outside of its territory,” tying the federal limits on jurisdiction to the analysis governing choice of law.⁸⁹ In other words, the Court found that federalist principles confined the exertion of a state’s power to enforce its laws to people and property found within state lines.⁹⁰ At a time when people and commerce crossed state lines at a much slower pace and lower rate, it must have seemed that a state’s interests logically end at its borders. Eventually, a new test would have to arise in order to accommodate for a more fast-paced economy.

2. “Arising out of” as a Proxy for a State’s Regulatory Interest

When the Supreme Court in *International Shoe* laid out the minimum contacts analysis, federalism was a driving factor.⁹¹ Although the Court made this point clear,⁹² it was not readily apparent how its minimum contacts test would be applied, let alone how it would protect those federalist principles.⁹³ But Justice Field’s reference to conflict of laws in *Pennoyer* may indicate what exactly the Court was thinking. This Section illustrates the tandem development and subsequent split between personal jurisdiction and conflict of laws, showing that although the two doctrines are distinct, similar rationales animate constitutional choice of law analysis and the “arising out of” prong.

The *International Shoe* Court framed the jurisdictional inquiry as follows: Minimum contacts are met to the extent that a corporation (1) conducts an activity within a state; through which it (2) “enjoys the benefits and protection” of that state’s laws; and from which (3) an

that *Pennoyer* is “the case best representing” a concept of personal jurisdiction rooted in sovereignty and state power).

⁸⁸ *Pennoyer*, 95 U.S. at 722.

⁸⁹ *Id.*

⁹⁰ *Id.* at 723 (explaining that an attempt to exert jurisdiction over people or property located elsewhere would be “an encroachment upon the independence of the State in which the persons are domiciled or the property is situated”).

⁹¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (stating that one of the two main functions of the minimum contacts analysis was to ensure states do not reach beyond the limits imposed on them as coequals in the federal system).

⁹² *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (noting that minimum contacts “make it reasonable, in the context of our federal system” to subject the defendant to personal jurisdiction in the forum).

⁹³ See *supra* note 47 and accompanying text (discussing Justice Black’s criticisms of the minimum contacts test).

“obligation” arises (4) out of or connected to in-state activity.⁹⁴ This means that when an activity in a state creates a cause of action there, that state’s courts may reach outside of its territory to exert sovereign power over a nonresident defendant. A local injury might create local jurisdiction.

This analysis was not so distant from the contemporaneous rules governing choice of law. Under those rules, territorial limitations often played a decisive role in discerning what law applied to a given controversy.⁹⁵ In tort, this meant the law of the place where the injury occurred would apply regardless of where a suit was brought.⁹⁶ Similarly, in contract cases, the law of the place of formation governed a contract’s validity,⁹⁷ while the law of the place of performance would govern issues arising out of that performance.⁹⁸ Other rules embodied in the First Restatement comparably linked an underlying act or occurrence to the law governing a controversy.⁹⁹ Perhaps most importantly, the law governing the “effect of an act” of a foreign corporation was “the law of the state where it is done.”¹⁰⁰ Simply put, formative notions of personal jurisdiction and conflict of laws hinged on place: *Where* an act occurred bore on a state’s authority to exert its coercive power and substantive law over a litigant.

Justice Black, unimpressed by the standard articulated in *International Shoe*, would have preferred a more concrete connection between jurisdiction and conflict of laws. He believed that the Fourteenth Amendment could not prevent a state from taxing activities within its borders simply because the entity conducting those activities was foreign. Doing so would defeat a state’s ability to protect its citizens within its own borders and thus undermine the “federative system of government.”¹⁰¹ Unwilling to subjugate a state’s power to enforce its laws within its own territory to the murky standard of

⁹⁴ *Int’l Shoe*, 326 U.S. at 319. Jesse Cross has called this a “protective sovereignty” theory rooted in “(i) Enlightenment-era social contract theory; (ii) nineteenth-century nationalist theory in Europe; and (iii) legal process theory.” See Cross, *supra* note 86, at 703.

⁹⁵ See generally RESTATEMENT (FIRST) OF CONFLICT OF L. (AM. L. INST. 1934).

⁹⁶ The First Restatement adopted the rule that the law of the “place of the wrong” governed controversies in tort, which it defined as the place where the last wrongful act occurred. See *id.* §§ 377–78. Generally, the place where the last wrongful act occurred was considered the place of injury. See, e.g., Ala. G.S.R. Co. v. Carroll, 11 So. 803, 805–06 (Ala. 1892) (holding that the law of the place where the injury was suffered controls over the law of the place where the negligence which produced the injury transpired).

⁹⁷ RESTATEMENT (FIRST) OF CONFLICT OF L., *supra* note 95, § 332.

⁹⁸ *Id.* § 358.

⁹⁹ For example, the law governing the administrator of a will was governed by the law of the state of appointment. *Id.* § 468.

¹⁰⁰ *Id.* § 166.

¹⁰¹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 323 (1945) (Black, J., concurring).

“reasonableness,” Justice Black argued that the Constitution vests each state with the power to tax and “open the doors of its courts” for its citizens to sue foreign corporations acting within state lines.¹⁰²

It is possible that Justice Black’s insistence on connecting these doctrines was due to evolving thought regarding choice of law rules. By the mid-1950s, the “conflicts revolution” had begun to free choice of law from the rigidity of the First Restatement.¹⁰³ This movement, which urged courts to instead consider the interests of the forum—as well as the domiciles of the plaintiff and defendant—in deciding which law applied, began to replace the old rules. What emerged was a looser, standards-based system for determining what law applied, to which a number of academics and judges contributed various insights as to how courts should weigh the various interests and laws at play.¹⁰⁴

Justice Black seems to have attempted to apply this shift to the jurisdictional framework when writing for the Court in *McGee v. International Life Insurance Co.*¹⁰⁵ That suit involved the beneficiary of a deceased insured party in California who brought a claim in that state against a Texas insurer.¹⁰⁶ In upholding personal jurisdiction over the defendant, Justice Black made an interesting claim: “It is sufficient for purposes of due process that the suit was based on a contract which had *substantial connection* with that State.”¹⁰⁷ This language is strikingly similar to that used by proponents of a new

¹⁰² *Id.* at 324; see also Silberman, *The End of an Era*, *supra* note 30, at 88 (discussing Justice Black’s view on choice of law and personal jurisdiction).

¹⁰³ See, e.g., *Auten v. Auten*, 124 N.E.2d 99, 101–02 (N.Y. 1954) (holding that even though a contract was negotiated and signed in New York, the “center of gravity” of the contract was in England, which thus had a greater interest in having its law apply). Scholars disagree as to exactly when the “conflicts revolution” in fact began. See Cross, *supra* note 86, at 681 n.11 (surveying scholarship attempting to pinpoint the beginning of the “conflicts revolution”).

¹⁰⁴ See, e.g., DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965) (developing Professor Cavers’s “principles of preference” method); BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) (collecting Professor Currie’s essays espousing interest analysis); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) (summarizing and applying five major considerations influencing choice-of-law analysis); Aaron D. Twerski, *Neumeier v. Kuehner: Where Are the Emperor’s Clothes?*, 1 HOFSTRA L. REV. 104 (1973) (providing a critical take on interest analysis in cases where no significant domiciliary interests exist); see also Linda J. Silberman, *Sources of Private International Law in the USA* (discussing the conflicts revolution’s move from black letter rules to standards), in 3 *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW* 2637, 2642 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017).

¹⁰⁵ 355 U.S. 220 (1957).

¹⁰⁶ *Id.* at 221–22.

¹⁰⁷ *Id.* at 223 (emphasis added).

choice of law standard, the “center of gravity” test, in contracts.¹⁰⁸ Indeed, the Court conducted what can only be described as a form of interest analysis, noting that “[i]t cannot be denied that California has a *manifest interest* in providing effective means of redress for its residents when their insurers refuse to pay claims.”¹⁰⁹

Justice Black thus framed the jurisdictional analysis as at least similar to that of conflict of laws. In treating these analyses as analogous, he connected the location of the plaintiff’s injury—the failure of the insurer to perform on its contract, which occurred in California—to that state’s strong regulatory interests.¹¹⁰ While the other factors he considered would likely figure into the modern “purposeful availment” prong of the minimum contacts inquiry,¹¹¹ or would not figure in to the jurisdictional analysis at all,¹¹² the injury clearly constituted an “occurrence” creating a jurisdictional nexus with the forum.¹¹³ As Justice Black saw it, what would become known as the “arising out of” prong served to prove the forum’s strong interest in adjudicating the controversy, as much as it would in discerning the strength of the forum’s interest in applying its own law.

The Court officially rejected any connection between the conflict of laws and personal jurisdiction analyses the next year in *Hanson v. Denckla*.¹¹⁴ In holding that the unilateral movement of a related party from one forum to another cannot constitute purposeful availment on the part of a defendant,¹¹⁵ the Court distinguished the issues of jurisdiction and choice of law. It ruled that simply being the “center of

¹⁰⁸ See *Auten*, 124 N.E.2d at 101–02 (finding that the “center of gravity” or “grouping of contacts” test places emphasis on the law of the place with the “most significant contacts” to the dispute).

¹⁰⁹ *McGee*, 355 U.S. at 223 (emphasis added).

¹¹⁰ See *id.*

¹¹¹ The Court considered factors such as the contract being delivered in California and the premiums being mailed from California. *Id.* Today, these would be swept into a “purposeful availment” analysis. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (stating that a defendant may purposefully avail itself of a forum if its commercial “efforts” are “purposefully directed” toward residents of another state).

¹¹² For example, the Court determined that it would be a greater burden on claimants seeking to vindicate small insurance claims to force them to litigate in faraway forums than for insurance companies to be haled into court in jurisdictions where their claimants reside. See *id.* Today, this factor would likely be insignificant. See *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017) (stating that the “primary concern” of the Due Process Clause is “the burden on the defendant” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980))).

¹¹³ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (noting specific jurisdiction requires an “activity or an occurrence” in the forum).

¹¹⁴ 357 U.S. 235 (1958).

¹¹⁵ *Id.* at 253.

gravity” of a controversy does not vest a court with jurisdiction.¹¹⁶ Instead, the Court found that the jurisdictional inquiry—as opposed to choice of law—must focus on the acts of the defendant herself.¹¹⁷ The Court has reiterated that distinction on multiple occasions.¹¹⁸

The Supreme Court has since taken a mostly hands-off approach to placing constitutional constraints on choice of law determinations, allowing a forum to apply its own law so long as there is “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”¹¹⁹ This standard highlights that the underpinnings of the “arising out of” prong of the minimum contacts analysis remain rooted in the same purposes as modern choice of law analysis. Indeed, the latter historically had essentially the same function as the “arising out of” prong in the general jurisdiction context. Before *Daimler* significantly limited the ability to assert general jurisdiction over corporate defendants,¹²⁰ it was not always certain that, when a forum could assert jurisdiction, it also had a sufficient regulatory interest in applying its law.¹²¹ Any corporation doing regular and substantial bus-

¹¹⁶ *Id.* at 254. In dissent, Justice Black agreed that choice of law and personal jurisdiction are separate inquiries but argued that they were related and that to the extent the facts showed the controversy centered on Florida, the forum at issue, they were sufficient to make subjecting the Delaware defendant to that court’s jurisdiction fair and reasonable. *Id.* at 258–59; see also Silberman, *The End of an Era*, *supra* note 30, at 81 n.262 (discussing the debate over the relationship between personal jurisdiction and choice of law in the *Hanson* decision).

¹¹⁷ *Hanson*, 357 U.S. at 254.

¹¹⁸ In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court noted that while the contacts in that case might be sufficient to warrant the application of Delaware law, an assertion of quasi in rem type II jurisdiction (based on the holding of shares in a Delaware corporation) was insufficient to meet minimum contacts. *Id.* at 187; see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984) (finding that questions of choice of law should not be allowed to “complicate or distort” the requisite prior jurisdictional inquiry); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 n.3 (1981) (Stevens, J., concurring) (noting that although the choice of law and personal jurisdiction inquiries are separate, they embody similar functions).

¹¹⁹ *Allstate*, 449 U.S. at 313.

¹²⁰ See *Daimler AG v. Bauman*, 571 U.S. 117, 153–54 (2014) (Sotomayor, J., concurring); see also *supra* note 5 and accompanying text (discussing *Daimler*’s disruption of the existing minimum contacts inquiry).

¹²¹ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 843 & n.25 (1985) (Stevens, J., concurring in part and dissenting in part) (noting that a court’s jurisdiction over the defendant presumptively, but not necessarily, means it may constitutionally apply its own law). For example, in *Allstate*, the defendant was a corporation doing significant business in Wisconsin. *Allstate*, 449 U.S. at 316. The insurance contract in question was signed in Wisconsin, all payments were made from Wisconsin, the automobiles in question were garaged in Wisconsin, and the accident that gave rise to a duty to perform on the contract occurred in Wisconsin. *Id.* at 305, 315 n.21. After the insured party died in the accident at issue, his widow moved to Minnesota, where she instituted an action to collect on the insurance policy. *Id.* at 305. Minnesota’s jurisdiction over the defendant was not

ness in a state was subject to that state’s general jurisdiction, meaning it could be sued there on any claim no matter where it arose. Therefore, the check that the “arising out of” prong played regarding a state’s regulatory interest in specific jurisdiction cases was otherwise absent in many general jurisdiction cases. Although the contacts between the forum and the defendant were clear, such that the corporation was on notice that it might be haled into court in the forum, the state’s regulatory interest in adjudicating the litigation was more case-dependent, confined mainly to its interest in regulating the actual activities of the defendant within its territory. The choice of law analysis filled the gap, intentionally or otherwise, ensuring that the rights of the defendant would at least not be arbitrarily determined based on the law of any forum in which it was simply doing business. The strong connection between jurisdictional and choice of law jurisprudence, although ultimately severed, suggests that an overarching purpose of the “arising out of” inquiry is to ensure a regulatory interest in the claims at issue.

3. *The Supreme Court’s Rejection of California’s Sliding Scale Confirms the Purpose of the “Arising out of” Prong*

The California trial court in *Bristol-Myers* initially found it had general jurisdiction based on the defendant’s significant in-state activities.¹²² However, *Daimler* was decided while the case was up on appeal, and the intermediate court vacated the trial court’s ruling but found specific jurisdiction existed.¹²³ The California Supreme Court affirmed and, under its “sliding scale” approach, held that the corporation’s extensive contacts with California justified extending jurisdiction to out-of-state plaintiffs as well.¹²⁴

Importantly, the rationale behind the sliding scale approach and the fact that the Supreme Court denied its constitutionality emphasizes the purpose underlying the “arising out of” prong in the specific personal jurisdiction analysis. Under the sliding scale approach, the defendant’s purposeful availing of the forum and the connection of the forum to the litigation were “inversely related.”¹²⁵ Although the nonresident plaintiffs did not claim that *Bristol-Myers*’s activities in

questioned because the defendant was “doing business” in Minnesota. *Id.* at 317. However, just because there was jurisdiction did not mean the state’s interest in regulation was sufficiently strong for its law to apply. *Id.* at 317 n.23. Ultimately, however, the Court found Minnesota’s contacts with the litigation sufficient to apply forum law. *Id.* at 320.

¹²² *Bristol-Myers Squibb Co. v. Super. Ct.*, 175 Cal. Rptr. 3d 412, 424 (Ct. App. 2014).

¹²³ *Id.* at 424–25.

¹²⁴ See *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 889, 894 (Cal. 2016).

¹²⁵ *Id.* at 887 (*Vons Co. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1096 (Cal. 1996)).

California contributed in any way to their injuries, the state court found that the volume of those activities within the context of a nationwide distribution and marketing network vested California with an interest in adjudicating all of the claims.¹²⁶ Essentially, the sliding scale approach simply repackaged pre-*Daimler* general jurisdiction and attempted to fit it into a specific jurisdiction box.¹²⁷

California's sliding scale approach demonstrates a crucial difference between specific and general jurisdiction. The reason post-*Daimler* general jurisdiction does not need an "arising out of" requirement is because the territorialist and federalist interests protected by the Due Process Clause are already satisfied. The designation of a corporation's "home" serves as a proxy for its domicile.¹²⁸ The *Daimler* Court limited where a corporation is "at home" to its place of incorporation and principal place of business, in part because those places are "unique" in that they each tend to be found in a single, easily ascertainable location.¹²⁹ Therefore, the traditional territorial and federalist principles allowing a court to assert jurisdiction over a defendant in any suit so long as she is found within the state's borders are satisfied when domicile is clearly established.¹³⁰

However, a corporation's presence in another forum cannot be taken for granted. Prior to *Daimler*, a strong case might have been made that significant "brick and mortar" operation in a forum should suffice to show a corporation's literal presence there.¹³¹ But *Daimler* decisively rules out that possibility. It is for this reason that the

¹²⁶ *Id.* at 888.

¹²⁷ Justice Alito derided the approach as a "loose and spurious form of general jurisdiction." *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1781 (2017). The dissent in the California Supreme Court decision made a similar claim. *See Bristol-Myers*, 377 P.3d at 898 (Werdegar, J., dissenting) (arguing the sliding scale approach was "so overly broad as to 'reintroduce general jurisdiction by another name'" (quoting Silberman, *The End of Another Era*, *supra* note 15, at 687)).

¹²⁸ *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (comparing an individual's domicile and the place where a "corporation is fairly regarded as at home" as paradigmatic forums for general jurisdiction).

¹²⁹ *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). The Court seemed to leave open the possibility that, in exceptional circumstances, there may be other places where a corporation's contacts are so extensive that the place may be considered the corporation's true domicile. *See id.* at 129–30 & n.8 (finding that *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), in which a Philippine corporation operating mines abroad was held subject to general jurisdiction in Ohio, constituted such an exception).

¹³⁰ *See Burnham v. Super. Ct.*, 495 U.S. 604, 619 (1990) (holding that jurisdiction based on presence alone satisfies due process as a traditional part of the legal system); Silberman, *Judicial Jurisdiction*, *supra* note 15, at 333 (discussing the roots of general jurisdiction in territoriality and sovereignty theories).

¹³¹ *See Silberman, The End of Another Era*, *supra* note 15, at 681 (suggesting this to be one plausible implication of *Goodyear*). Indeed, Justice Gorsuch's concurrence in *Ford* suggests he would prefer to institute such a standard. *See Ford Motor Co. v. Mont.* Eighth

California court’s sliding scale approach was untenable. Simply “doing business” in a forum, without more, did not suffice to assure the court that the state was sufficiently connected to the claims. No matter how many contacts the defendant had with the forum, and even if other plaintiffs could bring suit against Bristol-Myers in California, the state had no regulatory interest in adjudicating the claims of the nonresidents. While those claims were similar, or even the same, as those of the California plaintiffs,¹³² the state had no interest in regulating the company’s conduct in relation to the claims arising elsewhere. Had Bristol-Myers, for example, manufactured Plavix, the drug at issue, in California, the nonresident plaintiffs could potentially have asserted that their injuries arose from the company’s in-state conduct—and thus California’s interest in regulating that conduct would be sufficient.¹³³ However, according to the *Bristol-Myers* Court, simply having a large volume of contacts, thus making it fair to hale the defendant into court, does not vest the state with a regulatory interest in injuries that occurred elsewhere. In other words, the “purposeful availment” and “arising out of” inquiries are truly distinct, for they serve distinct purposes.

The Supreme Court’s decision in *Bristol-Myers* brought to the fore the previously underexamined purposes of the “arising out of” prong of the minimum contacts analysis. In setting up the rationale for its decision, the Court reiterated that the “arising out of” prong requires “an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”¹³⁴ In other words, something must occur to invoke the state’s regulatory interest, such that the controversy itself confers jurisdiction.

Justice Alito’s *Bristol-Myers* opinion noted that the burden on the defendant is often a decisive factor in analyzing whether a court has jurisdiction, but that convenience is not the only consideration. Indeed, the “more abstract matter of submitting to the coercive power of a State that may have *little legitimate interest in the claims*” is

Jud. Dist. Ct., 141 S. Ct. 1017, 1035, 1038 (2021) (Gorsuch, J., concurring) (arguing that Ford had purposefully availed itself of markets in North Dakota and Washington).

¹³² See *infra* Section III.A.2 (discussing jurisdictional challenges to parallel claims).

¹³³ Cf. Silberman, *The End of Another Era*, *supra* note 15, at 687 (noting that a more plausible forum for specific personal jurisdiction in this case might have been the place where the drugs were manufactured). Notably, this would be as clear-cut of a case as Ford, and was actually a forum suggested by Ford in its brief. *Ford Motor Co.*, 141 S. Ct. at 1022.

¹³⁴ *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017) (alteration in original) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

equally important.¹³⁵ Even if no inconvenience would result, federalist principals prevent a state from exercising jurisdiction when its regulatory interest is insufficient.¹³⁶ Therefore, regardless of the company's substantial activities in California, whether other plaintiffs might be able to sue there, and whether litigating the claims together would be convenient and efficient, the nonresident plaintiffs still lacked a "connection between the forum and the[ir] specific claims."¹³⁷ California simply did not have a strong enough regulatory interest in the nonresidents' injuries.

A particular point of confusion was Justice Alito's invocation of *Walden v. Fiore*,¹³⁸ which he cited for the proposition that "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction."¹³⁹ That case involved two plaintiffs from Nevada who claimed they were illegally searched by a Drug Enforcement Administration agent at an airport in Georgia after returning from a trip abroad.¹⁴⁰ After the agent confiscated \$97,000 in cash that the plaintiffs contended they had won while abroad, the plaintiffs sued the agent in their home state of Nevada.¹⁴¹ On appeal, the Supreme Court found that the agent's contacts with the plaintiffs were insufficient to render him amenable to suit in Nevada, in part because all of the relevant activity occurred in Georgia.¹⁴² Similarly, Justice Alito argued, all of Bristol-Myers's activities with respect to the nonresident plaintiffs occurred in other fora, and therefore the corporation's contacts with the resident plaintiffs in California were irrelevant for purposes of personal jurisdiction.¹⁴³

In dissent, Justice Sotomayor correctly pointed out that *Walden* was decided on the "purposeful availment" prong, not "arising out of."¹⁴⁴ Indeed, *Walden* stands for the proposition that contact with a plaintiff alone is insufficient to establish purposeful availment of a particular forum,¹⁴⁵ even if the defendant knows that her interactions

¹³⁵ *Id.* (emphasis added).

¹³⁶ *Id.* at 1781 (noting that even when litigation is very convenient, the "Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State [of jurisdiction]").

¹³⁷ *Id.*

¹³⁸ 571 U.S. 277 (2014).

¹³⁹ *Bristol-Myers*, 137 S. Ct. at 1781 (alteration in original) (quoting *Walden*, 571 U.S. at 286).

¹⁴⁰ *Walden*, 571 U.S. at 280.

¹⁴¹ *Id.* at 280–81.

¹⁴² *Id.* at 291.

¹⁴³ *Bristol-Myers*, 137 S. Ct. at 1781–82.

¹⁴⁴ *Id.* at 1787 (Sotomayor, J., dissenting).

¹⁴⁵ *Id.*

with a plaintiff would cause injury there.¹⁴⁶ But *Walden* said nothing about whether an injury arises out of or relates to a defendant’s forum contacts, which was the actual issue in *Bristol-Myers*.¹⁴⁷

Notably, the *Bristol-Myers* majority had a better argument in distinguishing *Keeton v. Hustler Magazine, Inc.*,¹⁴⁸ which the dissent and nonresident plaintiffs raised as support for upholding jurisdiction in one forum even though the court would also consider injuries that occurred in others.¹⁴⁹ Justice Alito noted that the plaintiff in *Keeton* had suffered an in-state injury, whereas the nonresident plaintiffs suffered no injury in California.¹⁵⁰ The *Keeton* plaintiff’s in-state injury vested the court with jurisdiction to “consider the full measure of [her] claim,” regardless of whether that meant considering damages incurred elsewhere.¹⁵¹ In other words, *Keeton* was, at its core, about the extent of a court’s ability to consider damages once personal jurisdiction has been established. In contrast, the lack of in-state injury in *Bristol-Myers* could not be cured by the fact that others with *similar claims* had been injured there.¹⁵² Therefore, the decisive factor in *Keeton* was that the forum was inextricably linked to the plaintiff’s claim, allowing the state court to examine the full scope of that claim, while the same could not be said of the nonresident plaintiffs in *Bristol-Myers*.

4. “Arising out of” as an Indicator of Litigational Convenience

The “arising out of” prong also serves as an indicator of a more practical concern: litigational convenience. This consideration, while not necessarily derived from the federalist principles that gave rise to the necessity of establishing the forum’s regulatory interest in the litigation, is a stand-in for factors once taken for granted in the tradi-

¹⁴⁶ *Walden*, 571 U.S. at 289.

¹⁴⁷ *Bristol-Myers*, 137 S. Ct. at 1787 (Sotomayor, J., dissenting).

¹⁴⁸ 465 U.S. 770 (1984). *Keeton* involved a libel suit in New Hampshire brought by a New York resident against an Ohio corporation operating from California. *Id.* at 772. The plaintiff’s only contact with the forum was the circulation of ten to fifteen thousand copies of the defendant’s allegedly libelous publication there, even though the vast majority of the magazine’s distribution occurred elsewhere. *Id.* at 772–73. The Supreme Court held that the circulation of the defendant’s magazine in New Hampshire was sufficient to vest the forum with jurisdiction. *Id.* at 773–74.

¹⁴⁹ See *Bristol-Myers*, 137 S. Ct. at 1782 (distinguishing *Keeton*, 465 U.S. 770). Part of the challenge in *Keeton* surrounded the state’s “single publication rule,” which allowed a libel victim to recover damages for publications of the libel throughout the country. *Keeton*, 465 U.S. at 774.

¹⁵⁰ *Bristol-Myers*, 137 S. Ct. at 1782.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1781. For more of a discussion on parallel claims issues, see *infra* Section III.A.2.

tional territorialist jurisdictional regime. Additionally, it helps the court gauge the burdens placed on all parties, as well as the proper weight that should be placed on the plaintiff's forum choice, when considering the reasonableness of asserting specific personal jurisdiction.

The expansion of jurisdictional bases beyond state lines was predicated not only on the realities of an increasingly mobile populace and interstate economy, but also on how technological progress decreased the burden on defendants litigating in distant fora.¹⁵³ Therefore, while the Supreme Court has repeatedly emphasized that the primary concern of the jurisdictional analysis is the burden on the defendant,¹⁵⁴ courts must weigh that against the plaintiff's interest in the chosen forum.¹⁵⁵ In part, that interest may include the availability of evidence and witnesses that are critical to the claim, making litigation in the forum more convenient for all parties, including the defendant.¹⁵⁶

Bristol-Myers underscores this point. None of the corporation's in-state activity could be linked to the development, marketing, distribution, or sale of Plavix to the nonresident claimants,¹⁵⁷ meaning that the documents and officials located in California would not be particularly relevant as evidence of their claims. In contrast, evidence crucial to the support or defense of individual claims, such as a personal physician's testimony regarding her role in recommending the drug¹⁵⁸ or as to the health of her patient prior to taking the drug, would likely be found in each plaintiff's home state where their claims arose.¹⁵⁹

¹⁵³ See *supra* note 30 and accompanying text (discussing the historically territory-based power theory that cabined jurisdiction based on state lines).

¹⁵⁴ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (emphasizing the importance of "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum"); *Bristol-Myers*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen*, 444 U.S. at 292) (same).

¹⁵⁵ *Bristol-Myers*, 137 S. Ct. at 1780 (quoting *Kulko v. Super. Ct.*, 436 U.S. 84, 92 (1978)).

¹⁵⁶ See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (noting as a factor that "crucial witnesses" for the company's defense are most likely available at the "insured's locality").

¹⁵⁷ *Bristol-Myers*, 137 S. Ct. at 1781.

¹⁵⁸ For example, the "learned-intermediary doctrine" allows pharmaceutical manufacturers to shield themselves from certain liabilities if the doctor who prescribed a product's use was sufficiently warned of the dangers. See generally Diane Schmauder Kane, Annotation, *Construction and Application of Learned-Intermediary Doctrine*, 57 A.L.R.5TH Art. 1 (1998).

¹⁵⁹ At least, plaintiffs did not allege circumstances indicating that such information was available in California. See *Bristol-Myers*, 137 S. Ct. at 1781 ("The nonresident plaintiffs did not allege that they obtained Plavix through California physicians . . . nor . . . were [they] treated for their injuries in California.").

The “arising out of” prong thus helps ensure the forum is the most convenient as to the litigation of each claim.

B. Distinguishing the Purposes of “Arising out of” and “Purposeful Availment”

The distinction between the “arising out of” prong and its sister, “purposeful availment,” becomes evident when viewed in light of the latter’s purpose. Perhaps due to a plaintiff’s natural inclination to bring suit in the place of residence or injury, making clear that the injury arose there, a defendant is more likely to challenge whether their conduct in the forum was purposeful than whether the injury arose out of their conduct. The Supreme Court has repeatedly explained that the point of examining whether a defendant has purposefully availed herself of a forum is to ensure the assertion of jurisdiction is fair based on the connection between the defendant and the forum, such that the defendant might expect being “haled into court” there.¹⁶⁰

The purpose underlying the purposeful availment analysis is twofold. First, it harkens back to the territorial and federalist principles for which minimum contacts is a proxy.¹⁶¹ Moreover, if a state can exert its power over someone who has never acted within it or directed acts towards it, what is to stop it from passing laws attempting to govern the actions of citizens of other states? Basic federalist principles seem to require at least some level of actual contact with the forum.

Second, the requirement that this activity be purposeful gets to the heart of the fairness aspects of the minimum contacts inquiry. The question courts repeatedly ask is not simply whether the defendant’s contacts with the forum create an expectation that the defendant might be haled into court there but whether it is in fact reasonable to hale them into that court at all.¹⁶² The crux is to ensure that the defen-

¹⁶⁰ See *supra* notes 53–56 and accompanying text (describing cases in which the satisfaction of the “purposeful availment” prong turned on whether the defendants expected they would be amenable to suit in the forum).

¹⁶¹ See *supra* Section II.A.1.

¹⁶² See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (finding that foreseeability and the likelihood of suit are insufficient and that the conduct should create a reasonable anticipation of being haled into court); see also *Calder v. Jones*, 465 U.S. 783, 790 (1984) (holding that a Florida publisher with its largest circulation in California could reasonably anticipate being haled into California court). The Supreme Court has repeatedly rejected the idea that knowledge, expectations, or foreseeability alone are sufficient to satisfy “purposeful availment.” See, e.g., *Walden v. Fiore*, 571 U.S. 277, 289 (2014) (finding that a focus on defendant’s knowledge of the plaintiff’s connection with a forum “impermissibly allows a plaintiff’s contacts . . . to drive the jurisdictional analysis”); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882–83 (2011) (noting that

dant “has clear notice that it is subject to suit there, *and can act to alleviate the risk of burdensome litigation.*”¹⁶³ Therefore, the “purposeful availment” prong ensures that expecting the defendant to litigate in the forum is fair to the extent that she may purchase insurance, set prices at a level that would offset litigation costs, and apprise herself of the risks and benefits of conducting business there.¹⁶⁴

The “purposeful availment” and “arising out of” prongs clearly protect distinct interests. While the “arising out of” requirement seeks to confirm a connection between the forum and the controversy, “purposeful availment” ensures a sufficient connection between forum and the defendant. In using both prongs as a proxy for presence (and the subsequent reasonableness test), the minimum contacts analysis scrutinizes a state’s regulatory interest in adjudicating a claim and the fairness of subjecting the defendant to litigation in that forum.

III

THE PECULIARITY OF THE *FORD* CASE AND THE SUPREME COURT’S DECISION

*Ford Motor Co. v. Montana Eighth Judicial District Court*¹⁶⁵ highlighted the relationship between the “purposeful availment” and “arising out of” prongs in a way that no other case had. This was unique in large part because it was a challenge under the “arising out of” prong to a claim brought in the forum where the injury occurred. In *Ford*, the plaintiffs maintained, drove, insured, and were injured by the defendant’s allegedly defective vehicles in the forum state. Prior to this case, objections to a court’s jurisdiction under the “arising out of” prong were typically brought in a forum where some relevant conduct or activity occurred but not where the actual injury was suffered.¹⁶⁶ In such cases, either the purposes underlying the “arising out of” prong prove decisive or the fact that the injury occurred elsewhere may indicate the defendant does not have sufficient forum contacts to constitute “purposeful availment.” Moreover, the fact that the injury in *Ford* did occur in the forum and that Ford had unquestionably pur-

expectations may indicate “purposeful availment” but are not decisive); *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987) (holding that placing an item into the stream of commerce with the knowledge that it might end up in a forum is insufficient on its own).

¹⁶³ *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added).

¹⁶⁴ *See id.* (commenting that when defendants “purposefully avail” themselves of the forum, they may take steps to minimize the cost of potential litigation in said forum).

¹⁶⁵ *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021).

¹⁶⁶ *See Silberman, Judicial Jurisdiction*, *supra* note 15, at 341 (deeming the “more traditional” type of case to address an “arising out of” challenge to be that in which the defendant’s contacts with the forum are connected to plaintiff’s injuries outside the forum).

posefully availed itself of that forum—and would face little burden litigating there—forced the Court to scrutinize to what degree of particularity the injury must arise out of the defendant’s contacts with the forum state in a way it never had before.¹⁶⁷

This Part will discuss the types of cases in which “arising out of” challenges to personal jurisdiction are brought and show how courts usually resolve the issue when it is presented in accordance with the purposes underlying the “arising out of” prong. It will then take on the Supreme Court’s decision in *Ford* and note why it was necessary for Ford to connect the two prongs to successfully challenge a claim in a forum where the injury occurred. Finally, this Part will discuss how the *Ford* Court seemingly instituted a “relatedness” requirement that may leave open more questions than it answers, emphasizing how the purposes of the “arising out of” prong are nonetheless reflected in Justice Kagan’s opinion.

A. Categorizing the “Arising out of” Cases

1. Relevant Conduct or Acts Cases

The classic category of cases leading to jurisdictional challenges under the “arising out of” prong is those in which conduct or acts relevant to the claim occurred in the forum state but the injury itself occurred elsewhere.¹⁶⁸ The Supreme Court has had the opportunity to scrutinize such cases but has sidestepped doing so. In *Carnival Cruise Lines, Inc. v. Shute*,¹⁶⁹ plaintiffs brought suit in Washington for injuries that occurred on a cruise off the coast of Mexico.¹⁷⁰ When the defendant, a foreign corporation, moved for summary judgment in part for lack of personal jurisdiction,¹⁷¹ the Ninth Circuit held that because the corporation solicited business in the forum, without which the plaintiff would not have purchased a ticket and been injured, the “arising out of” prong had been satisfied.¹⁷² The Supreme Court avoided the question by instead upholding a forum selection clause on the back of the ticket.¹⁷³

¹⁶⁷ See Transcript of Oral Argument, *supra* note 10, at 35–36 (“This Court has never read the Due Process Clause to deprive the states of their sovereign powers to try cases in their own courts and protect people injured within their own borders on anything like the facts presented here.”).

¹⁶⁸ See *supra* note 166 and accompanying text.

¹⁶⁹ 499 U.S. 585 (1991).

¹⁷⁰ *Id.* at 588.

¹⁷¹ *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 379 (9th Cir. 1990).

¹⁷² *Id.* at 386.

¹⁷³ See *Carnival Cruise Lines v. Shute*, 499 U.S. at 595.

Accordingly, lower courts have been left to analyze the “arising out of” prong in this category of cases. In *Licci v. Lebanese Canadian Bank, SAL*¹⁷⁴ the Second Circuit considered whether American, Canadian, and Israeli citizens injured by Hizballah rocket attacks in Israel could assert personal jurisdiction in New York over a foreign bank accused of transferring funds to the militant organization.¹⁷⁵ The bank’s single contact with the forum was the maintenance of a “correspondent account” in New York, which was used to facilitate the transfers.¹⁷⁶ The *Licci* court held that because the New York account “is alleged to have been used as an instrument to achieve the very wrong alleged,” the “arising out of” prong was satisfied.¹⁷⁷ In contrast, the Second Circuit dismissed a different case, *DeLorenzo v. Viceroy Hotel Group*, in which a plaintiff sued multiple foreign hotels after an employee of one hotel sexually assaulted her at another in Anguilla.¹⁷⁸ The court found that the defendants’ alleged contacts with the forum, via a New York-based company to create and maintain websites and booking programs that she used to book her trip,¹⁷⁹ were too remote from the claim to satisfy the “arising out of” prong.¹⁸⁰ Comparing the two, it makes sense that New York had a regulatory interest in adjudicating the *Licci* claims, because it had a regulatory interest in ensuring that its banking system, one central to global finance, was not abused and delegitimized by those funding terrorist activities. Moreover, it was this specific account that was allegedly used to fund the very activities that resulted in the plaintiffs’ claims.¹⁸¹ In contrast, purchasing a ticket to visit a hotel was not the instrument through which the sexual assault in *DeLorenzo* was accomplished, nor were any witnesses or evidence located in New York as a result of that transaction.

A prime example of a more clear-cut relevant conduct or acts case is *Lawson v. Simmons Sporting Goods, Inc.*¹⁸² The plaintiff, a

¹⁷⁴ 732 F.3d 161 (2d Cir. 2013).

¹⁷⁵ *Id.* at 165–66.

¹⁷⁶ *Id.* at 166.

¹⁷⁷ *Id.* at 171.

¹⁷⁸ *DeLorenzo v. Viceroy Hotel Grp., LLC*, 757 F. App’x 6, 7–8 (2d Cir. 2018).

¹⁷⁹ *Id.* at 9.

¹⁸⁰ *Id.* at 9–10.

¹⁸¹ *Licci*, 732 F.3d at 171.

¹⁸² 569 S.W.3d 865 (Ark. 2019). The defendant had previously been denied review by the Arkansas Supreme Court after the intermediate court ruled there was jurisdiction. *Id.* at 868. However, the defendant filed for certiorari at the Supreme Court and, after the decision in *Bristol-Myers*, the Court vacated and remanded “for further consideration in light” of *Bristol-Myers*. *Id.* The intermediate court then changed its position and affirmed the trial court’s original dismissal based on *Bristol-Myers*. *Id.* The Arkansas Supreme Court subsequently granted review.

resident of Arkansas, tripped on a rug at a sporting goods store in Louisiana and broke her arm.¹⁸³ She later sued the store in her local Arkansas court.¹⁸⁴ While the store had no operations in Arkansas, it often advertised there.¹⁸⁵ The Arkansas Supreme Court held that the plaintiff could not assert specific jurisdiction over the defendant in Arkansas, because a “trip and fall” did not arise out of or relate to the defendant’s contacts with the state, namely, its advertising.¹⁸⁶

The *Lawson* decision underscores precisely the work the “arising out of” prong is doing in these cases: It ensures “a connection between the forum and the specific claims at issue.”¹⁸⁷ As the Arkansas Court noted, “any alleged negligence related to this [trip and fall tort claim]” arose wholly in Louisiana.¹⁸⁸ Therefore, unlike in *Licci*, where New York had a sovereign interest in not allowing its banking system to be “used as an instrument in support of terrorism”¹⁸⁹ and where the evidence related to the correspondent account was located, advertising alone was insufficiently connected to the negligence at issue to create any interest or litigational convenience based on the store’s conduct.

Notably, the Arkansas court did not address whether it would make a difference if the plaintiff alleged that she saw the defendant’s advertisements.¹⁹⁰ But if one considers the scenario in light of the purposes of the “arising out of” prong, it is hard to see how this case would vest Arkansas with any more of an interest in regulating negligent conduct occurring entirely in another state. Moreover, all of the evidence surrounding that conduct, including eyewitnesses, are likely to be located in the other forum. Alternatively, if the advertising played a role in the claim itself, for example a false advertising claim, the result might be different.

2. *Parallel Claims*

Bristol-Myers is the quintessential example of a parallel claims case, in which plaintiffs injured in multiple states bring parallel claims together in a single forum. At the time that the *Bristol-Myers* plaintiffs filed suit in California, such a challenge to personal jurisdiction

¹⁸³ *Id.* at 867.

¹⁸⁴ *Id.* at 868.

¹⁸⁵ *Id.* at 867.

¹⁸⁶ *Id.* at 871.

¹⁸⁷ *Id.* (quoting *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1781 (2017)).

¹⁸⁸ *Id.*

¹⁸⁹ *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013).

¹⁹⁰ Although the Arkansas Supreme Court did not address the issue, the intermediate court noted the plaintiff had traveled to the store that day because her daughter had learned of the defendant’s “tent sale” by “word of mouth.” *Lawson v. Simmons Sporting Goods, Inc.*, 553 S.W.3d 190, 192 (Ark. 2019).

under the “arising out of” prong was exceedingly rare. This was because in the pre-*Daimler* era, general jurisdiction was often available due to a defendant’s continuous activities in the chosen forum.¹⁹¹ However, once *Daimler* limited the use of general jurisdiction, there was a question whether each claim joined in a suit would have to individually satisfy minimum contacts.¹⁹² *Bristol-Myers* answered that question emphatically in the affirmative.

In *Bristol-Myers*, 678 plaintiffs from thirty-three states brought eight different mass actions,¹⁹³ which were consolidated in the California trial court.¹⁹⁴ Each plaintiff was allegedly harmed by defendant’s drug,¹⁹⁵ and no one questioned whether the defendant had sufficient contacts with the forum to satisfy the purposeful availment prong.¹⁹⁶ However, only the California plaintiffs alleged that they were injured in California,¹⁹⁷ and it was unclear to what extent the defendant’s in-state activity was related to injuries in other states.¹⁹⁸ For that reason, the nonresidents’ claims were “merely parallel.”¹⁹⁹ As Justice Alito put it, “[t]he mere fact that [the California] plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents’ claims.”²⁰⁰

Considering the purposes underlying the “arising out of” prong, this holding makes sense. California has little interest in adjudicating a personal injury claim brought, for example, by a Texan who sustained injuries in Texas,²⁰¹ when all relevant conduct associated with the

¹⁹¹ See *supra* note 64 and accompanying text; see also Silberman, *Judicial Jurisdiction*, *supra* note 15, at 336 (describing the Court’s requirement in *Goodyear* that the defendant must have continuous and systemic contacts with the forum to be subject to general jurisdiction).

¹⁹² Indeed, the lower court in *Bristol-Myers* first found general jurisdiction existed, and *Daimler* was decided while the case was up on appeal. See *supra* notes 122–24 and accompanying text.

¹⁹³ *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1778 (2017).

¹⁹⁴ *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 878 (2016).

¹⁹⁵ *Bristol-Myers*, 137 S. Ct. at 1778.

¹⁹⁶ See *id.* at 1786 (Sotomayor, J., dissenting) (emphasizing that whether *Bristol-Myers* had purposefully availed itself of California was not in dispute).

¹⁹⁷ *Id.* at 1778.

¹⁹⁸ The plaintiffs had attempted unsuccessfully to peg the nonresidents’ claims to the defendant’s in-state marketing, which was a part of a broader nationwide advertising and distribution strategy. The Court apparently did not find that connection convincing. *Id.* at 1786 (Sotomayor, J., dissenting).

¹⁹⁹ Silberman, *The End of Another Era*, *supra* note 15, at 687.

²⁰⁰ *Bristol-Myers*, 137 S. Ct. at 1781.

²⁰¹ The largest group of plaintiffs in the case was from Texas. *Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874, 878 (Cal. 2016).

injury took place outside of California. To extend a California court’s reach to claims that occurred wholly in other states would infringe on the sovereignty of those other states,²⁰² and thus the convenience of mass joinder is outweighed by the principles of federalism.²⁰³

As for litigational convenience, the fact that the “arising out of” prong divests a court of jurisdiction over parallel claims similarly makes sense. It is likely that the most important evidence and critical witnesses, such as medical records or doctors, are found in the place of residence or injury. Where each claimant is a party to the action, particularly in a personal injury or products liability action, a defendant’s ability to access that information may be crucial.²⁰⁴ If forced to litigate hundreds of individual claims in California, which houses no such evidence, the weak connection between the forum and the claim would heavily burden the defendant.

While this rationale makes sense for parallel claims in the mass action context, it is less clear that it should extend to other forms of aggregate litigation. Justice Sotomayor’s *Bristol-Myers* dissent raised the question of whether that decision would stymie those other mechanisms.²⁰⁵ Most presciently, she noted that the majority’s opinion said nothing about the holding’s applicability to class actions.²⁰⁶ That comment has spawned myriad challenges to personal jurisdiction in such cases.²⁰⁷ While it is clear that *Bristol-Myers* does apply to named plaintiffs,²⁰⁸ its application to absent class members is an open question. Only two federal courts of appeals have decided the issue: the Seventh and Sixth Circuits. These courts have held that *Bristol-Myers* does not raise a jurisdictional barrier to class actions when the named plaintiffs have personal jurisdiction over a defendant, even where absent class members would not, because absent class members are

²⁰² See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (“The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all [other] States.”).

²⁰³ Cf. *id.* at 294 (“[E]ven if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the state of its power to render a valid judgment.”).

²⁰⁴ See *supra* notes 156–59 and accompanying text (discussing the availability of witnesses, particularly in personal injury or products liability cases, and how many may be crucial to a claim or defense).

²⁰⁵ *Bristol-Myers*, 137 S. Ct. at 1788–89 (Sotomayor, J., dissenting).

²⁰⁶ *Id.* at 1789 n.4 (“The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”).

²⁰⁷ See *supra* note 20 and accompanying text.

²⁰⁸ See, e.g., *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1126 (2021) (“[T]he named representatives must be able to demonstrate . . . personal jurisdiction.”).

not considered parties for the purposes of personal jurisdiction.²⁰⁹ At least two others have narrowly avoided answering the question,²¹⁰ while another is considering it.²¹¹ Most lower courts, with a few exceptions, have adopted the Seventh Circuit's position.²¹² Regardless, the purposes of the "arising out of" prong seem satisfied in the class context when the named plaintiff's injury arises in the forum. This, however, is not because the "arising out of" prong is satisfied with respect to those absent class members. Rather, the procedural formalities of the class certification process ensure that the interests of those unnamed plaintiffs are "adequately protect[ed]," and therefore the defendant will not have to litigate the individual claims of each class member—only those of the named plaintiffs.²¹³

B. *Place of Injury Cases and the Ford Controversy*

Ford may be categorized as a place of injury case. Generally, if a defendant is haled into a forum in which the plaintiff suffered injury, challenges to personal jurisdiction will almost always be rooted in the "purposeful availment" or reasonableness prongs of the minimum contacts analysis. For example, in *J. McIntyre Machinery, Ltd. v. Nicastro*,²¹⁴ none of the parties questioned whether the plaintiff, who was injured by one of the defendant's allegedly faulty machines in New Jersey,²¹⁵ had a claim arising out of the defendant's apparent contacts with the forum. However, the defendant successfully chal-

²⁰⁹ *Id.*; *Lyngaas v. Curaden AG*, 992 F.3d 412, 433 (6th Cir. 2021) (quoting *Mussat*, 953 F.3d at 45).

²¹⁰ See *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020) (refusing to take up the question of whether *Bristol-Myers* affects absent class action plaintiffs because they are not yet parties to the litigation prior to class certification); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 295 (D.C. Cir. 2020) (same).

²¹¹ See *Moser v. Benefytt, Inc.*, 8 F.4th 872, 879 (9th Cir. 2021) (remanding to district court the question of whether *Bristol-Myers* would prevent the certification of a class with absent plaintiffs that lack personal jurisdiction over the defendant).

²¹² See, e.g., *Munsell v. Colgate-Palmolive Co.*, 463 F. Supp. 3d 43, 55 (D. Mass. 2020) (noting the numerous courts that have found *Bristol-Myers* does not extend to class actions); *King v. Bumble Trading, Inc.*, No. 18-cv-06868-NC, 2020 WL 663741, at *6–7 (N.D. Cal. Feb. 11, 2020) (declining to certify the defendants' request for an interlocutory appeal under *Bristol-Myers*). *Contra* *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020) ("This court agrees with these latter cases finding that *Bristol-Meyers Squibb* applies in the nationwide class action context."). The Supreme Court in fact declined to do so in *Mussat*. See *supra* notes 207–09 and accompanying text.

²¹³ 23 FED. R. CIV. P. 23(a)(4) (laying out the requirements for certifying a class and naming a class representative); see also *Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008) (noting Rule 23 implements procedural safeguards to ensure adequate representation of absent class members); *Mussat*, 953 F.3d at 446 (noting how both Rule 23 and *Taylor v. Sturgell* support the court's holding); *Lyngaas*, 992 F.3d at 435 (same).

²¹⁴ 564 U.S. 873 (2011).

²¹⁵ *Id.* at 878.

lenged the New Jersey court’s assertion of personal jurisdiction under the “purposeful availment” prong because it had only sold four machines in the state.²¹⁶

Confusion in these place of injury cases arises when judges and litigants attempt to understand or challenge the facts under the “arising out of” prong by fitting the case into the more classic “relevant conducts or acts” category.²¹⁷ This often manifests as a concern for small businesses or the average person in the age of the internet. For example, during oral argument in *Ford*, the Justices probed hypotheticals such as haling a retired carver in Maine into court for online sales of carvings²¹⁸ or whether the sale of a used car in one state, after it was advertised online, could subject the seller to suit in a different state in which the car causes injury.²¹⁹ At least one Justice questioned whether a doctrine of personal jurisdiction developed in 1945 is workable in 2020.²²⁰

Of course, *Ford* is not a case that raises such a concern.²²¹ Many of the hypotheticals put forward by the Justices can be resolved under the “purposeful availment” prong²²² or the various reasonableness factors.²²³ *Ford*, having clearly purposefully availed itself of the fora in question and having no claim that the burden to litigate would be unreasonable, simply chose to put forward a novel “proximate causation” argument in an attempt to avoid jurisdiction in the forum.²²⁴

Some of the Justices also seemed interested in at least finding a degree to which courts could apply a relatedness test to determine whether purposeful contacts with a forum and an injury that occurred there should be sufficient to subject a defendant to jurisdiction.²²⁵

²¹⁶ *Id.* at 886.

²¹⁷ See *supra* Section III.A.1 (discussing several “relevant conduct or acts” cases).

²¹⁸ Transcript of Oral Argument, *supra* note 10, at 39.

²¹⁹ *Id.* at 11–12.

²²⁰ *Id.* at 49.

²²¹ Justice Alito acknowledged as much in his questioning. See *id.* (“[W]e could perhaps decide this case within the contours of our existing cases because there’s nothing particularly 21st century about what happened here.”). Other Justices seemed to think the same, wanting to explore “first principles” of what due process requires. See, e.g., *id.* at 19, 28.

²²² See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987) (rejecting the proposition that placing a product into the stream of commerce, without more, establishes purposeful availment).

²²³ See *id.* at 113–14 (discussing which factors are relevant to the determination of the reasonableness of the exercise of jurisdiction and applying those factors to the *Asahi* case).

²²⁴ See Transcript of Oral Argument, *supra* note 10, at 4–5.

²²⁵ See, e.g., *id.* at 50–51 (questioning by Justice Sotomayor regarding a “same product rule” of relatedness); *id.* at 25 (questioning by Justice Kagan as to how related a claim needs to be to the activity in the forum, addressing the respondent’s proposed “first sale” rule).

Respondent's counsel, as well as some commentators,²²⁶ also argued for a "relatedness" test that the state's interest in the controversy relates to the legal obligations created by the defendant's contacts with the forum.²²⁷

C. *The Supreme Court Gets Ford Right, but Questions Remain*

The Supreme Court in *Ford* effectively closed the door to challenges to personal jurisdiction under the "arising out of" prong in place of injury cases and unanimously rejected the corporation's causation argument, finding that "Ford's causation-only approach finds no support in th[e] Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities."²²⁸ Justice Kagan, writing for a five member majority,²²⁹ reiterated that specific jurisdiction is meant to "ensure that States with 'little legitimate interest' in the suit do not encroach" on the sovereignty of those more affected by the underlying claim.²³⁰ Pointing to the same language from *World-Wide Volkswagen* that Justice Kavanaugh raised at oral argument, the Court noted that *Ford* presented an identical case, but not in the way the corporation would have wanted.²³¹ While the Supreme Court in that case held that the New York defendants could not be haled into an Oklahoma court because they had not *purposefully availed* themselves of the forum,²³² the larger corporate defendants did not even challenge jurisdiction.²³³ As Justice Kagan noted, the *World-Wide Volkswagen* Court specifically distinguished the two types of defen-

²²⁶ See Brittany Day, *Ford Motor Company v. Montana Eighth Judicial District Court: Redefining the Nexus Requirement for Specific Jurisdiction*, 16 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 11 (2021) (arguing that the Supreme Court should adopt a relatedness test for specific jurisdiction that would deem specific jurisdiction over Ford proper).

²²⁷ Transcript of Oral Argument, *supra* note 10, at 42.

²²⁸ *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021) (quoting *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1776 (2017)); see also *id.* ("[W]e have never framed the specific jurisdiction inquiry as always requiring proof of causation.").

²²⁹ While the judgment was unanimous, Justice Kagan's opinion was joined by only four other justices. *Id.* at 1022.

²³⁰ *Id.* at 1025 (quoting *Bristol-Myers*, 137 S. Ct. at 1780). Of course, this is entirely in line with one of the developments of personal jurisdiction doctrine, particularly as it pertains to the purposes underlying the "arising out of" prong of the minimum contacts analysis. See *supra* Sections II.A.1–2 (discussing the territorialist and federalist principles underlying the "arising out of" prong and its purpose as a proxy for the forum's regulatory interest in the litigation).

²³¹ See *id.* at 1027–28 (analogizing to *World-Wide Volkswagen* and explaining that Ford is subject to jurisdiction, just as Audi and Volkswagen were in *World-Wide Volkswagen*). For a discussion of the facts of that case, see *supra* note 50.

²³² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

²³³ *Id.* at 288 n.3. Of course, this was likely in part due to the fact that at the time, pre-*Daimler* general jurisdiction would have attached.

dants and noted that because the nationwide corporations had clearly and purposefully conducted activities in the forum, “it is not unreasonable” to subject the corporations to jurisdiction if one of their defective products causes injury there.²³⁴

Justice Kagan then turned to Ford’s conduct. The Court ran through all of the business Ford does in the fora in question,²³⁵ pointing out that these activities make it fair and reasonable to subject the corporation to jurisdiction. The Court then stated that because the injuries arose in those fora, asserting jurisdiction served the principles of interstate federalism by allowing the states with the most “significant interests at stake” to enforce their laws and provide their citizens a “convenient forum for redressing injuries.”²³⁶

The Supreme Court also reaffirmed that it views the “arising out of” and “purposeful availment” prongs as distinct. In distinguishing *Bristol-Myers*, Justice Kagan explained that the point of that decision was that the forum could not assert jurisdiction because it lacked any connection with the nonresident plaintiffs’ claims.²³⁷ Here, however, such a connection clearly existed. Justice Kagan emphasized that the *Ford* plaintiffs brought suit in “the most natural State—based on an ‘affiliation between the forum and the underlying controversy.’”²³⁸ Moreover, the Court distinguished *Walden*, stating that it had “precious little” to do with *Ford* because it was a challenge to jurisdiction under the purposeful availment prong.²³⁹ Justice Kagan clarified that *Walden*’s holding that a *plaintiff*’s contacts with a forum cannot create a *defendant*’s contacts with that forum does not mean that the former’s contacts are meaningless in assessing the relationship between the defendant, the forum, and the litigation.²⁴⁰ The plaintiff’s injury is still relevant for assessing the forum’s connection to the claims, regardless of the defendant’s contacts.

The Court’s opinion was certainly correct on these points. Had it stopped there, the opinion would have provided a clear roadmap for grappling with application of the minimum contacts analysis and challenges to personal jurisdiction under the “arising out of” prong, even in the classic “relevant conduct or acts” cases.²⁴¹ In the first part of the

²³⁴ *Ford*, 141 S. Ct. at 1027 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

²³⁵ *Id.* at 1028–29.

²³⁶ *Id.* at 1030 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)); see also *supra* Section II.A.2 (discussing a state’s regulatory interest as an overarching purpose of the “arising out of” prong).

²³⁷ *Ford*, 141 S. Ct. at 1031.

²³⁸ *Id.* (quoting *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1780 (2017)).

²³⁹ *Id.*

²⁴⁰ See *id.* at 1031–32.

²⁴¹ See *supra* Section III.A.1 (discussing several “relevant conduct or acts” cases).

opinion, Justice Kagan made clear that the purpose of this part of the minimum contacts analysis was to ensure an “affiliation between the forum and the underlying controversy,”²⁴² such that the state adjudicating the claim has a sovereign interest in the dispute.²⁴³ Indeed, the Court reaffirmed later in the opinion that when an injury occurs in a state, that state’s courts have an interest in providing a “convenient forum for redressing injuries inflicted by out-of-state actors.”²⁴⁴

But it is in the middle of the opinion that the Supreme Court muddles the analysis, and that the decision in *Ford* raises and leaves open several questions. Most glaringly, the majority may have gone too far in instituting a version of the amorphous relatedness test raised by commentators and at oral argument.²⁴⁵ Noting that the “most common formulation of the rule demands that the suit ‘arise out of *or relate to* the defendant’s contacts with the forum,’”²⁴⁶ the Court held that the connection between Ford’s forum activities and the claims was sufficiently related to uphold jurisdiction.²⁴⁷ Although Justice Kagan insisted “the phrase ‘relate to’ incorporates real limits,”²⁴⁸ Justice Alito concurred to argue that the term is too broad.²⁴⁹ Indeed, because the connection between Ford’s activities and the claims at issue was particularly commonsensical,²⁵⁰ the decision leaves lower courts without any real guidance as to how related the activities and the claims must be.²⁵¹ It is likely future cases, particularly in the relevant acts or conduct category, will test the boundaries of relatedness.

Indeed, within a month after the Supreme Court came down with its opinion in *Ford*, the case had been cited over thirty times, often by

²⁴² *Ford*, 141 S. Ct. at 1025 (quoting *Bristol-Myers*, 137 S. Ct. at 1780); see also *supra* Section II.A (explaining that the “arising out of” prong was developed for the purpose of ensuring a sufficient connection between the claim and the forum).

²⁴³ See *Ford*, 141 S. Ct. at 1025 (explaining that the law of specific jurisdiction seeks to ensure that the state adjudicating the claim has a legitimate interest in the suit).

²⁴⁴ *Id.* at 1030 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)).

²⁴⁵ See *supra* Section III.B (discussing the relatedness test raised by Respondent’s counsel at oral argument and later by some commentators).

²⁴⁶ *Ford*, 141 S. Ct. at 1026 (quoting *Bristol-Myers*, 137 S. Ct. at 1780).

²⁴⁷ *Id.* at 1032. In part, this rationale depended on the extensive contacts between Ford and the forum and the inability to prove or disprove that it led each plaintiff to seek out and purchase their vehicle. See *id.* at 1029 (discussing Ford’s contacts with the forum state).

²⁴⁸ *Id.* at 1026.

²⁴⁹ See *id.* at 1033–34 (Alito, J., concurring) (raising the concern that the reach of “relate to” is “potentially boundless”).

²⁵⁰ See *id.* at 1033 (describing the relationship between Ford’s activities in Minnesota and Montana and the suits as being “common-sense”).

²⁵¹ See *id.* at 1033–34 (“[T]he Court assures us that ‘relate to,’ as it now uses the concept, ‘incorporates real limits.’ [But it leaves no] indication what those limits might be” (internal citation omitted)).

litigants attempting to test the relatedness standard.²⁵² Indeed, plaintiffs whose cases had been dismissed for lack of personal jurisdiction in a multidistrict litigation concerning the drug Zantac petitioned the court to reverse its decision, which had apparently hinged on the Eleventh Circuit’s “but for” causation standard for determining whether the “arising out of” prong was sufficiently related to the defendant’s in-state contacts.²⁵³ The plaintiffs argued that *Ford* “entirely overruled” that old law.²⁵⁴ However, the MDL court denied that assertion, quoting Justice Kagan in *Ford* and stating that “[t]he phrase ‘relate to’ incorporates real limits, as it must to adequately protect defendants foreign to a forum.”²⁵⁵ It is unclear whether the court was simply recasting its “but for” standard, or making a genuinely new finding under a “relatedness” test. Either way, it highlights just how many questions the *Ford* decision may raise.

The relatedness issue is also likely to be tested through another question expressly left open: the internet. Picking up on the questioning regarding individual internet sales that was raised at oral argument,²⁵⁶ Justice Kagan clarified that because *Ford* raised no such issue, the Court’s holding said nothing about such cases.²⁵⁷ Justice Alito, after restating his opinion that *International Shoe* may not be fit for the twenty-first century, agreed that this case would not decide the internet issue.²⁵⁸

These questions miss the point and could be resolved more simply. The discussion of relatedness unnecessarily muddles the conversation. The “arising out of” prong’s purpose is simply to ensure the state has a sufficient regulatory interest in the controversy and litigational convenience, and an injury that occurs within a state’s boundaries is naturally sufficient to satisfy those interests.²⁵⁹ Whether or not jurisdiction is fair or reasonable is another question. It is possible that

²⁵² See Alison Frankel, *Zantac Generics Plaintiffs Hope SCOTUS Ford Decision Rescues Claims Against Brand-Name Makers*, REUTERS (Apr. 27, 2021, 4:57 PM), <https://www.reuters.com/article/us-otc-zantac-idUSKBN2CE2NX> [<https://perma.cc/VQ4W-TSJH>].

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *In re Zantac (Ranitidine) Prods. Liab. Litig.*, No. 20-MD-2924, 2021 WL 2682602, at *8 (S.D. Fla. June 30, 2021) (quoting *Ford*, 141 S. Ct. at 1026).

²⁵⁶ See *supra* Section III.B. The opinion explicitly recalls Chief Justice Roberts’s hypothetical regarding a Maine retiree who sells carved decoys. See *Ford*, 141 S. Ct. at 1029 n.4.

²⁵⁷ See *Ford*, 141 S. Ct. at 1029 n.4.

²⁵⁸ See *id.* at 1032 (Alito, J., concurring) (arguing that *Ford* raises no distinctively twenty-first century issue and can be decided based on existing case law).

²⁵⁹ See *supra* Section II.A (discussing the development and purpose of the “arising out of” prong).

the defendant would not have sufficient contacts with the forum to constitute “purposeful availment”²⁶⁰ or that exerting jurisdiction would be unreasonable. The “arising out of” prong, however, would be satisfied.

In other words, the Supreme Court’s opinion goes too far without saying enough. Had Justice Kagan stuck to the first part of her opinion alone, the directive to lower courts would be clear: When an injury occurs in a forum, or an “activity or an occurrence that takes place in the forum” gives rise to a claim,²⁶¹ that state’s interest in the controversy is sufficient to satisfy the “arising out of” prong. Moreover, when an act in the forum vests the state with a regulatory interest in the controversy or makes litigation in the forum particularly convenient, the “arising out of” prong is satisfied. However, while the opinion puts to rest the idea that a defendant’s in-state conduct might have to proximately cause the in-state injury and seems to reaffirm the distinction between the “arising out of” and “purposeful availment” prongs, it goes on to blur the lines between these prongs without providing a blueprint for how to interpret the level of “relatedness” required for jurisdiction to attach. For example, if the plaintiff in *Lawson*²⁶² had alleged that she had visited the nonresident defendant’s store in Louisiana due to the defendant’s advertising in the forum state (Arkansas) and was subsequently injured upon arrival at the store, would the claim be sufficiently related under *Ford* to warrant jurisdiction? This question is left open by the Court’s opinion, but the answer is more easily discernable by looking to the purpose of the “arising out of” prong.²⁶³ The forum’s interest in adjudicating negligent conduct in another forum and the resulting injury in that latter forum is minimal if the only in-state activity was advertising. Litigational convenience, such as the presence of witnesses, suggests Louisiana is a more appropriate forum.

However, given the way in which Justice Kagan distinguished *Walden* and *Bristol-Myers*, it is unlikely that she meant to suggest that the two prongs of the minimum contacts analysis overlap. Indeed, the majority argued that the phrase “relate to” incorporates real limits . . . to adequately protect defendants.”²⁶⁴ Those limits, however, are not a proximate causation requirement.²⁶⁵ Nor are they necessarily meant

²⁶⁰ See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 886 (2011).

²⁶¹ *Ford*, 141 S. Ct. at 1025 (quoting *Bristol-Myers*, 137 S. Ct. at 1780).

²⁶² See *supra* Section III.A.1 (discussing the facts and holding of *Lawson*).

²⁶³ See *supra* Section II.A (discussing the purpose of the “arising out of” prong).

²⁶⁴ *Ford*, 141 S. Ct. at 1026.

²⁶⁵ See *id.* (“[W]e have never framed the specific jurisdiction inquiry as always requiring proof of causation.”).

to ensure the claim may only be brought in a limited number of fora.²⁶⁶ Notably, it is at this point in the opinion that the Supreme Court makes its comparison to *World-Wide Volkswagen*, expounding upon all of Ford’s contacts with the fora in question.²⁶⁷ In reality, then, the Court is not creating a Frankenstein’s monster out of the prongs of the minimum contacts analysis. Instead, the Court is simply noting that even when the state’s regulatory interest and litigational convenience are clear due to an in-state injury, and even when a defendant has extensive contacts with a forum, the *type* of contacts with the forum matter. For example, if Ford sold computers, and *only* computers, in Montana, it would either not have sufficient purposeful contacts with the forum to litigate an injury caused by an automobile, or the reasonableness factors listed in *Asahi* would prevent the court from exercising jurisdiction.²⁶⁸ That said, using a relatedness test instead of simply looking to the purposes underlying each prong of the analysis may still create problems. If Ford had carried out all of the listed activities in the forum for some car models but not for either of the models of car at issue, it is unclear whether a relatedness test would allow for jurisdiction.

Finally, Justice Gorsuch’s concurrence, joined by Justice Thomas, is worth noting for its call to overhaul *International Shoe* altogether. After agreeing with Justice Alito that the minimum contacts standard may no longer be workable in the twenty-first century, Justice Gorsuch argued that displacing the territorial power theory of jurisdiction for big businesses while allowing individuals to be sued wherever they are “tag[ged]” simply provides corporations with “special jurisdictional protections.”²⁶⁹ In his view, a corporation should also be amenable to suit anywhere in which it has a physical presence.²⁷⁰ While the majority rejected this idea out of hand,²⁷¹ Justice Gorsuch argued that the increasing confusion regarding the application of min-

²⁶⁶ *See id.* (“So the case is not over even if, as Ford argues, a causal test would put jurisdiction in only the States of first sale, manufacture, and design.”).

²⁶⁷ *Id.* at 1027–28.

²⁶⁸ *See supra* Part II (arguing that, while the “arising out of” prong focuses on the state’s regulatory interest and litigational convenience, the “purposeful availment” prong serves a different purpose of ensuring that a sufficient connection between the defendant and the forum exists, creating a reasonable expectation that she might be haled into court in that forum, and therefore entails a different analysis); *see also Ford*, 141 S. Ct. at 1029–30 (noting that jurisdiction is fair in relation to the corporation’s in-state activities).

²⁶⁹ *Ford*, 141 S. Ct. at 1038 (Gorsuch, J., concurring).

²⁷⁰ *See id.* at 1039 n.5 (pointing out that “the majority seems to recoil at even entertaining the possibility the Constitution might” allow a corporation to be amenable to suit anywhere where it has a physical presence).

²⁷¹ *Id.*

imum contacts in the modern age should force the court to reexamine it.²⁷²

Of course, confusion only arises if one just considers *how* each prong of the minimum contacts analysis applies and not *why*. Justice Gorsuch is only correct that this case may cause more confusion because the Supreme Court stopped short of explicitly engaging with the purpose of the “arising out of” prong and relied instead on a relatedness requirement that was unnecessary to reach the decision. The Court could have easily resolved the confusion in these and many other cases by clarifying two points: The forum has a sufficient interest in the litigation when the injury occurs in that forum, and the fact the injury occurred in the forum indicates a level of litigational convenience.

CONCLUSION

While the decision in *Ford* emphatically closes the door to challenges of personal jurisdiction under the “arising out of” prong in most place of injury suits, many questions remain. The Supreme Court’s reliance on relatedness invites suits that will test the boundaries of that requirement. Further, the Court fails to resolve when the “arising out of” prong is satisfied in the most likely category of cases to be challenged under that prong: when relevant conduct or acts alone occur in the forum. In the future, courts should look to the underlying purpose of the “arising out of” prong to resolve such questions, while relying on the “purposeful availment” and reasonableness prongs of the minimum contacts analysis to ensure fairness and check the burden on defendants.

²⁷² *Id.* at 1039.