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## Personal Jurisdiction and Aliens

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# PERSONAL JURISDICTION AND ALIENS

William S. Dodge\* & Scott Dodson\*\*

*The increasing prevalence of noncitizens in U.S. civil litigation raises a fundamental question for the doctrine of personal jurisdiction: How should the alienage status of a defendant affect personal jurisdiction? This fundamental question comes at a time of increasing Supreme Court focus on personal jurisdiction, in cases like Bristol-Myers Squibb Co. v. Superior Court, Daimler AG v. Bauman, and J. McIntyre Machinery, Ltd. v. Nicastro. We aim to answer that question by offering a theory of personal jurisdiction over aliens. Under this theory, alienage status broadens the geographic range for minimum contacts from a single state to the whole nation. This national-contacts test applies to personal jurisdiction over an alien defendant whether the cause of action arises under federal or state law and whether the case is heard in federal or state court. We show that the test is both consistent with the Constitution and consonant with the practical realities of modern transnational litigation. We also explore the moderating influence of other doctrines, such as reasonableness, venue transfer, and forum non conveniens, on the expanded reach of our national-contacts test. In the end, we hope to articulate a more sensible and coherent doctrine of personal jurisdiction over alien defendants that will resonate with the Supreme Court.*

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## INTRODUCTION

Litigation in the United States is increasingly international. Of the five significant personal jurisdiction cases that the U.S. Supreme Court has decided since 2011, three have involved alien defendants.<sup>1</sup> In *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>2</sup> and *Daimler AG v. Bauman*,<sup>3</sup> the Court used cases against alien defendants to limit general jurisdiction to those forums in which the defendant is essentially “at home”—for a corporation, its place of incorporation and its principal place of business. In *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>4</sup> the Court used a case against an alien defendant to try to resolve the question whether putting goods into the “stream of commerce” could establish the minimum contacts necessary for specific jurisdiction, although the Court failed to produce a majority opinion.<sup>5</sup> The presence of alien defendants in so many of these cases raises the question whether the due process limitations that the Fifth and Fourteenth Amendments impose on the exercise of personal jurisdiction should be the same for alien defendants as they are for domestic defendants.

Existing personal jurisdiction doctrine under the Due Process Clauses already differentiates alien defendants and domestic defendants in two ways.

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1. Recognizing their propensity to be pejorative, we use the terms “alien” and “alienage” solely for the convenience of shorthand. *E.g.*, Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 *YALE J. INT’L L.* 1, 2 n.4 (1996) (“[B]ecause this shorthand has long been the rule in the federal courts literature, I feel compelled to employ it in this Article.”). For purposes of personal jurisdiction, however, the critical factor is not citizenship but domicile. *E.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.”). We therefore use the term “alien” to refer to foreign individuals without a domicile in the United States and corporations without a principal place of business or place of incorporation in the United States. We use the term “domestic” to refer to individuals (including foreign citizens) domiciled in the United States and corporations that either are incorporated in the United States or have a principal place of business in the United States. While this differs from the definition of alien for purposes of Article III alienage jurisdiction, it is consistent with the treatment of alienage jurisdiction in the diversity statute, which treats foreign citizens lawfully admitted for permanent residence as citizens of the state in which they are domiciled. 28 U.S.C. § 1332(a)(2) (2012). For purposes of this Article, we do not address U.S. citizens domiciled abroad.

2. 564 U.S. 915.

3. 134 S. Ct. 746 (2014).

4. 564 U.S. 873 (2011).

5. The two cases not involving alien defendants are *Walden v. Fiore*, 134 S. Ct. 1115 (2014), and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

First, with respect to specific jurisdiction, *Asahi Metal Industry Co. v. Superior Court*<sup>6</sup> held that the exercise of personal jurisdiction over an alien defendant might be unreasonable despite the existence of minimum contacts: “The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.”<sup>7</sup> A recent survey of post-*Asahi* cases concludes “that courts in practice only dismiss on reasonableness grounds where the defendant is foreign, whereas they effectively never dismiss domestic defendants on grounds of reasonableness.”<sup>8</sup> Second, with respect to general jurisdiction, *Goodyear* and *Daimler*’s “at home” test affects alien and domestic defendants differently: while domestic defendants will be subject to general jurisdiction in at least one U.S. state,<sup>9</sup> alien defendants will almost never be subject to general jurisdiction in any U.S. state.<sup>10</sup> Supreme Court case law therefore leaves specific jurisdiction as the only alternative for personal jurisdiction over aliens in U.S. courts.

Despite these differences in the treatment of alien and domestic defendants, the conventional approach to the minimum-contacts requirement of personal jurisdiction is that state courts, and federal courts exercising personal jurisdiction under Rule 4(k)(1)(A),<sup>11</sup> apply the same standard to both alien and domestic defendants.<sup>12</sup> Specifically, to satisfy the minimum-contacts requirement, a court may rely only on contacts with the specific state in which the court sits.<sup>13</sup>

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6. 480 U.S. 102 (1987).

7. *Asahi*, 480 U.S. at 114.

8. Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE J. COMP. & INT’L L. 405, 408 (2017).

9. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

10. See *id.* at 760–61. We exclude opportunities for “tag” jurisdiction—personal jurisdiction based on service while temporarily present in the forum. *E.g.*, *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Kadic v. Karadzija*, 70 F.3d 232, 247 (2d Cir. 1995). This possibility does not exist with respect to alien corporations. *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067–69 (9th Cir. 2014).

11. FED. R. CIV. P. 4(k)(1)(A) (stating that proper service establishes personal jurisdiction if the defendant “is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located”).

12. Most courts and commentators agree that a national-contacts approach applies when a federal statute authorizes nationwide service. See, e.g., Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769, 776 (2015); Daniel Klerman, *Walden v. Fiore and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and Stafford v. Briggs*, 19 LEWIS & CLARK L. REV. 713, 716 (2015); see also Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1601 & n.65 (1992) (citing cases). In this context, the national-contacts approach does not depend upon the alienage status of the defendant.

13. See, e.g., Edward B. “Teddy” Adams, Jr., *Personal Jurisdiction over Foreign Parties, in INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL*

The Supreme Court's recent decision in *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>14</sup> provides an illustration. The defendant, a British manufacturer, sold metal-shearing machines throughout the United States through an Ohio distributor.<sup>15</sup> One machine ended up in New Jersey, where it injured the plaintiff.<sup>16</sup> The Court held that New Jersey state courts could not exercise personal jurisdiction because the defendant lacked minimum contacts with New Jersey.<sup>17</sup> Reflecting the conventional approach, Justice Kennedy wrote for a plurality of four justices: "[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis."<sup>18</sup> Writing for three justices in dissent, Justice Ginsburg challenged the conventional approach by pointing out that the defendant, by engaging a U.S. distributor, " 'purposefully availed itself' of the United States market nationwide, not a market in a single State or a discrete collection of States."<sup>19</sup> Justice Breyer, joined by Justice Alito, wrote a narrow concurring opinion. While he seemed to agree with the plurality that existing precedents required minimum contacts with New Jersey,<sup>20</sup> he also suggested that different rules might properly apply to different kinds of defendants and, specifically, that the alienage of the defendant might make a difference.<sup>21</sup>

We urge reconsideration of the conventional approach for alien defendants. We argue that the relevant forum for determining an alien's minimum contacts should be the United States as a whole rather than the particular state in which the court sits. As we explain, both the fairness component and the interstate-federalism component of personal jurisdiction support a national-contacts approach for alien defendants.

Under the fairness component, the critical question from the alien defendant's perspective is whether it must defend in the courts of the United States, not whether it must defend in any particular state.<sup>22</sup> As the Court recognized in *Asahi*, there are "unique burdens placed upon one who must

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COURTS 113, 113–31 (David J. Levy ed., 2003); 1 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS §§ 1:2–22 (2003).

14. 564 U.S. 873 (2011).

15. *McIntyre*, 564 U.S. at 878 (plurality opinion).

16. *Id.*

17. *See id.* at 886–87.

18. *Id.* at 884. Justice Kennedy also noted that "a litigant may have the requisite relationship with the United States Government but not with the government of any individual State." *Id.*

19. *Id.* at 905 (Ginsburg, J., dissenting).

20. *Id.* at 888 (Breyer, J., concurring) ("In my view, these facts do not provide contacts between the British firm and the State of New Jersey constitutionally sufficient to support New Jersey's assertion of jurisdiction in this case.").

21. *Id.* at 892 ("Further, the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain.").

22. *Id.* at 904 (Ginsburg, J., dissenting) ("Like most foreign manufacturers, [McIntyre UK] was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States.").

defend oneself in a foreign legal system.”<sup>23</sup> But from the alien defendant’s point of view, the courts of New Jersey and Ohio are equally foreign.

Under the interstate-federalism component, whether the defendant is domestic or alien makes a great difference. A domestic defendant’s home state enjoys general jurisdiction over it, and having another state assert jurisdiction without minimum contacts “would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”<sup>24</sup> By contrast, because no state enjoys general jurisdiction over an alien defendant absent exceptionally unusual circumstances, one state’s assertion of specific jurisdiction on the basis of national contacts “does not tread on the domain, or diminish the sovereignty, of any other State.”<sup>25</sup>

Separating the due process analyses for alien and domestic defendants would not only recognize these fundamental differences but would also relieve the Court from the concern that a national-contacts approach to alien-defendant cases would have unintended consequences in domestic-defendant cases. In *McIntyre*, Justice Breyer worried that permitting specific jurisdiction over the alien defendant would equally subject an Appalachian potter to suit in Hawaii.<sup>26</sup> But our theory acknowledges that due process permits different treatment of differently situated defendants. A U.S. plaintiff could sue the Appalachian potter only where the potter’s contacts with a specific state satisfy either specific or general jurisdiction. That venue may not be Hawaii, but at least one U.S. court would be available and relatively familiar to the plaintiff. At the same time, a New Jersey plaintiff injured in New Jersey by a British manufacturer’s product would not be barred from U.S. courts when the manufacturer’s claim-related contacts with the United States as a whole satisfy due process.

Of course, fairness issues will still exist for some alien defendants, like Justice Breyer’s “small Egyptian shirtmaker,” or “Kenyan coffee farmer.”<sup>27</sup> The point, however, is that the fairness issues in these cases are *different* from the fairness issues raised by the case of the Appalachian potter, and they ought to be treated differently. Some alien defendants will be protected as a practical matter by their lack of assets in the United States against which a judgment may be enforced, which will discourage many plaintiffs from bringing suit against them in the United States in the first place.<sup>28</sup> In cases

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23. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987).

24. *McIntyre*, 564 U.S. at 884 (plurality opinion).

25. *Id.* at 899 (Ginsburg, J., dissenting). As we explain below, this is true even if one state exercises personal jurisdiction over an alien defendant based entirely on another state’s contacts with an alien defendant. See *infra* Section II.B.2.

26. *McIntyre*, 564 U.S. at 891–92 (Breyer, J., concurring).

27. *Id.* at 892.

28. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (“A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.”).

where suit in the United States is still attractive, we show how the possibilities of venue transfer within the federal system and state dismissal under forum non conveniens help to mitigate Justice Breyer's concerns.<sup>29</sup>

Other authors have advocated a national-contacts approach in various contexts, including in federal but not state courts,<sup>30</sup> for federal but not state claims,<sup>31</sup> and under the Fifth but not the Fourteenth Amendment.<sup>32</sup> Our contribution to this literature is the claim that the critical distinction is not between federal and state courts or between federal and state claims or between the Fifth Amendment and the Fourteenth Amendment, but rather between alien and domestic defendants. Only a few scholars—writing in the 1980s—have attempted to defend this distinction, and they have emphasized

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29. See *infra* Part III.

30. See Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 *IND. L.J.* 1, 1–3 (1982) (arguing for the elimination of state-based personal jurisdiction in federal courts); Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 *CREIGHTON L. REV.* 1245, 1274–75 (2011) (suggesting that federal courts be authorized to exercise personal jurisdiction over both nonfederal and federal claims when no state can exercise personal jurisdiction over the defendant); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 *VA. L. REV.* 85, 86, 127–30 (1983) (arguing that federal courts should “apply the minimum contacts test to the alien’s contacts with the nation as a whole rather than with the particular forum state”); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 *Nw. U. L. REV.* 1301, 1303–04 (2014) (arguing for nationwide service for federal courts through legislative action); A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 *DENV. U. L. REV.* 325 (2010) (arguing for nationwide personal jurisdiction in federal courts). *But see* Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 *Nw. U. L. REV.* 1, 1–5, 11, 38–61 (1984) (exploring the constitutionality of a national-contacts approach to personal jurisdiction in federal courts but finding heightened fairness concerns).

31. See Casad, *supra* note 12, at 1592, 1596 (arguing for a national-contacts approach in federal-question cases based on a lack of interstate-federalism concerns); Peter Hay, *Judicial Jurisdiction over Foreign-Country Corporate Defendants—Comments on Recent Case Law*, 63 *OR. L. REV.* 431, 435 & n.23 (1984) (arguing that federal courts should apply a national-contacts test to personal jurisdiction over aliens in federal-question cases); Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 *N.Y.U. L. REV.* 1117, 1149, 1163–64 (1989).

32. See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 *AM. J. COMP. L.* 121, 155 (1992) (asserting that personal jurisdiction in the federal courts under the Fifth Amendment is controlled by “minimum contacts with the nation as a whole, as opposed to minimum contacts with a single state”); Wendy Perdue, *Aliens, the Internet, and “Purposeful Availment”: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 *Nw. U. L. REV.* 455, 456 (2004) (“[J]urisdiction should be constitutional [under the Fifth Amendment] on the basis of effects in the United States.”); Recent Case, *Waldman v. Palestine Liberation Organization*, 835 *F.3d* 317 (2d Cir. 2016), 130 *HARV. L. REV.* 1488, 1492–93 (2017) (“[F]ederalism justifications do not apply to cases governed by the Fifth Amendment, where federal law applies uniformly and it is the authority of the United States government itself that matters.”).

either foreign relations,<sup>33</sup> general jurisdiction,<sup>34</sup> or federalism principles.<sup>35</sup> We defend a national-contacts approach for specific jurisdiction over alien defendants on fairness and federalism grounds and in light of the Supreme Court's recent personal jurisdiction decisions in *Daimler*,<sup>36</sup> *Bristol-Myers Squibb*,<sup>37</sup> and *McIntyre*.<sup>38</sup> Our proposal is supported by the twin principles animating personal jurisdiction, is unaffected by foreign relations, is consistent with the Court's recent majority opinions, and offers an answer to the Court's inability to muster a majority opinion in *McIntyre*.

Other scholars have also suggested that a national-contacts approach to personal jurisdiction over aliens should be implemented by statute.<sup>39</sup> Congress can authorize a national-contacts approach in federal court for federal claims, even under existing constitutional law,<sup>40</sup> but whether Congress may do so for state courts and state claims presents issues that deserve more sustained analysis of the proper scope of the Due Process Clauses.<sup>41</sup> It is on those issues that our Article focuses.

Part I provides an overview of the limits that due process places on personal jurisdiction, particularly with respect to alien defendants. It notes that while the Supreme Court already distinguishes between alien and domestic defendants with respect to general jurisdiction and reasonableness, the Court has not yet made the same distinction with respect to minimum contacts. Part II argues that in cases against alien defendants, minimum contacts should be evaluated by looking at the defendant's contacts with the United States as a whole, not its contacts with the state in which the court

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33. See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 36–37 (1987) (using international norms to argue that aliens should be subject to a national-contacts approach to personal jurisdiction). For state-law claims, Born argues for a “modified national contacts test” requiring at least “some minimal link between the defendant and the forum state,” *id.* at 40–42, giving his proposal some affinity with those who distinguish between federal and state law, *see supra* note 31.

34. See Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 820 (1988) (“In effect, then, the adoption of a national contacts approach may make it easier to establish general jurisdiction, but should have little impact on specific jurisdiction.”).

35. See Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 770–88 (1984) (urging a national-contacts approach for personal jurisdiction over aliens based primarily on the lack of interstate-federalism implications); *see also* Degnan & Kane, *supra* note 34, at 812–13 (focusing on federalism).

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

37. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

38. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

39. *See, e.g.*, Sachs, *supra* note 30, at 1303–04.

40. *See infra* notes 198–200 and accompanying text (discussing various nationwide-service statutes).

41. Congress has, in the past, proposed bills to extend nationwide personal jurisdiction over foreign manufacturers in product-liability cases, but those bills were predicated on extracting consent rather than on national contacts, presumably because of the latter's uncertain constitutionality. *See* Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 604–06 (2012) (discussing these bills).



sits. From the defendant's perspective, the critical question is whether it is subject to suit in the United States rather than in any particular state; from the plaintiff's perspective, the fact that no U.S. state will have general jurisdiction over an alien defendant makes the ability to establish specific jurisdiction significantly more important; and from an interstate-federalism perspective, using national contacts to establish personal jurisdiction does not raise the same state-sovereignty concerns for alien defendants as for domestic defendants. Part III explains how our proposal would work in practice by showing how the reasonableness factors, federal venue transfer, and state doctrines of *forum non conveniens* serve to mitigate many of the concerns about a national-contacts approach.

### I. ALIENAGE STATUS'S INFLUENCE ON PERSONAL JURISDICTION

This Part surveys the current law of personal jurisdiction under the Due Process Clauses and pays special attention to whether and how the alienage status of a defendant influences doctrine. The survey shows that alienage does influence the reasonableness component of specific jurisdiction, may influence the "minimum contacts" component of specific jurisdiction, and does determine the practical effects of general jurisdiction.

#### A. *Specific Jurisdiction*

Personal jurisdiction—the authority of a court to adjudicate a matter involving a particular party—began as a product of territorial sovereignty: a court's authority was restricted to parties and property within its borders.<sup>42</sup> For state-court litigation in the United States, this principle helped moderate interstate friction, and, in an era when most litigation involved natural persons, the location of an individual could readily be determined.

That model became unstable with the rise of artificial entities and the decline in importance of state borders.<sup>43</sup> *International Shoe Co. v. Washington*,<sup>44</sup> the seminal opinion establishing the modern personal jurisdiction doctrine, departed from a rigidly territorial approach and adopted one based on the defendant's contacts with a particular forum. The test became whether a defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>45</sup> The goal was to protect defendants from the

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42. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."); *id.* at 722 ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory."). For the claim that *Pennoyer's* holding was not dependent upon the Due Process Clause, see Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1254–55, 1288 (2017).

43. See *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (tracing the evolution of personal jurisdiction). For early complaints, see Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 290–91 (1956).

44. 326 U.S. 310 (1945).

45. *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

burdens of litigating in “a distant or inconvenient forum” and to maintain interstate harmony.<sup>46</sup>

As Section I.B details, certain close ties between a defendant and a particular jurisdiction—such as an individual domiciled in the state or a corporation incorporated in the state—automatically satisfy this test.<sup>47</sup> *International Shoe*, however, addressed a company that neither was incorporated in the forum state nor had its headquarters there.<sup>48</sup> The question for *International Shoe*, then, was whether the defendant satisfied the “minimum contacts” test through other means.

The Court explained that the test was founded on whether the defendant’s contacts with a state made it “reasonable” for the corporation to defend there, in light of any burdens on the defendant to do so.<sup>49</sup> The Court recognized that personal jurisdiction would be appropriate “when the activities of the corporation [in the forum] have not only been continuous and systematic, but also give rise to the liabilities sued on.”<sup>50</sup> By contrast, personal jurisdiction would not be appropriate when “the casual presence of the corporate agent or even his conduct of single or isolated items of activities [are unrelated to the] causes of action.”<sup>51</sup>

Within these bookends, the Court focused on the quality of the contacts: when “a corporation exercises the privilege of conducting activities within a state” and thereby “enjoys the benefits and protection of the laws of that state,” the state may exercise jurisdiction over the defendant on claims “connected with the activities within the state.”<sup>52</sup>

Later cases elaborated on this standard. The defendant’s connection to the forum state must not be solely because of unilateral action by the plaintiff or third parties; rather, the defendant must have “purposefully avail[ed]” itself of the state’s benefits and protections.<sup>53</sup> The most recent opinions from the Supreme Court on this proposition make clear that the focus is on the

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46. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

47. See *infra* Section I.B.

48. *Int’l Shoe*, 326 U.S. at 312.

49. *Id.* at 317 (“Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.” (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930))). As we explain below, later cases explicitly bifurcated minimum contacts and reasonableness. See *infra* text accompanying notes 56–67.

50. *Int’l Shoe*, 326 U.S. at 317.

51. *Id.*

52. *Id.* at 319.

53. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 479–80 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–96 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

defendant's actions, not the plaintiff's or third parties' actions,<sup>54</sup> and that the specific claims at issue must have a connection to the forum state.<sup>55</sup>

This much is settled law. But the Court has splintered badly in two cases involving alien defendants. These cases train the inquiry on how alienage influences personal jurisdiction under the Due Process Clauses.

In *Asahi Metal Industry Co. v. Superior Court*, the Court confronted a case filed in California state court involving a motorcycle accident in California.<sup>56</sup> All the claims settled except for an indemnification cross-claim between the defendants—the Taiwanese manufacturer of the tire tube and the Japanese manufacturer of the valve assembly used in the tube.<sup>57</sup> The Japanese manufacturer of the valve assembly, Asahi Metal Industry, moved to dismiss the cross-claim for lack of personal jurisdiction in California.<sup>58</sup>

The Court split over whether Asahi had met the “minimum contacts” test of *International Shoe*. The facts were not in dispute: Asahi placed a substantial number of valve assemblies into the global “stream of commerce” with the knowledge that many would end up in tires for motorcycles in California.<sup>59</sup> For the plurality, these facts were not enough to meet the minimum-contacts standard; some additional “intent or purpose to serve the market in the forum State” was required.<sup>60</sup> The principal concurrence, by contrast, would have held that Asahi's sales, made with the knowledge that the stream of commerce would direct a substantial number to California, were sufficient to establish the requisite minimum contacts with California.<sup>61</sup> Importantly, although they disagreed about the proper test for minimum contacts, none of the opinions treated Asahi's alienage status as relevant to the minimum-contacts analysis under the Fourteenth Amendment.<sup>62</sup>

However, all justices agreed that, regardless of minimum contacts, the exercise of personal jurisdiction in this case would violate “traditional notions of fair play and substantial justice.”<sup>63</sup> *Asahi* thus established reasonableness as a separate check on the exercise of personal jurisdiction, even when minimum contacts may otherwise exist. The reasonableness test turns

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54. *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014).

55. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017) (“What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”).

56. 480 U.S. 102, 105–06 (1987).

57. *Asahi*, 480 U.S. at 106.

58. *Id.* at 105–06.

59. *Id.* at 106–08.

60. *Id.* at 112 (plurality opinion).

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

62. The Court noted, but found it unnecessary to decide, whether the Fifth Amendment might allow Congress to “authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.” *Id.* at 113 n.\* (plurality opinion).

63. *Id.* at 113–14 (opinion of the unanimous court) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); see also *id.* at 116 (Brennan, J., concurring); *id.* at 121 (Stevens, J., concurring).

upon several factors, including “the burden on the defendant, the interests of the forum State, . . . the plaintiff’s interest in obtaining relief[,] . . . ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies.’”<sup>64</sup>

The Court held that exercising jurisdiction over *Asahi* would be unreasonable in large part because of “[t]he unique burdens placed upon one who must defend oneself in a foreign legal system.”<sup>65</sup> The Court further noted that when the defendant is an alien, the “shared interests of the several states” factor transforms into the shared interests of different nations, as well as the United States’ foreign-relations policies.<sup>66</sup>

*Asahi* was a disappointment to many who hoped a Court majority would clarify specific jurisdiction. But the Court did clarify that the alienage status of the defendant is highly relevant to the “reasonableness” requirement of personal jurisdiction. A recent survey of post-*Asahi* cases concludes “that courts in practice only dismiss on reasonableness grounds where the defendant is foreign, whereas they effectively never dismiss domestic defendants on grounds of reasonableness.”<sup>67</sup>

Besides reasonableness, the other requirement of specific jurisdiction is minimum contacts. In the most recent specific jurisdiction case featuring an alien defendant, *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>68</sup> the justices could not agree on the relevance of alienage status to the minimum-contacts test. There, a New Jersey resident who was injured by a metal-shearing machine in New Jersey sued for products liability in New Jersey state court against the British manufacturer, J. McIntyre Machinery, Ltd., that manufactured the device in England.<sup>69</sup> McIntyre did not sell the machines directly to the United States but instead sold them to its Ohio distributor.<sup>70</sup> No more than four machines, and possibly only one, ended up in New Jersey.<sup>71</sup> McIntyre knew that its machines would end up in the United States and probably in New Jersey, which is one of the largest U.S. markets for scrap-metal machines.<sup>72</sup> But it cared only about total U.S. sales rather than sales in the particular state, and it did not have any direct connection to New Jersey,

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64. *Id.* at 113 (opinion of the unanimous court) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

65. *Id.* at 114.

66. *Id.* at 115.

67. Silberman & Yaffe, *supra* note 8, at 408.

68. 564 U.S. 873 (2011).

69. *McIntyre*, 564 U.S. at 877–78 (plurality opinion).

70. *Id.* at 878; *id.* at 896 (Ginsburg, J., dissenting).

71. *Id.* at 878 (plurality opinion).

72. *Id.* at 905 (Ginsburg, J., dissenting) (stating that New Jersey was “the fourth-largest destination for imports among all States of the United States and the largest scrap metal market”).

though representatives had made direct efforts in Ohio and other states to develop business in the United States.<sup>73</sup>

The Court held that New Jersey lacked personal jurisdiction over *McIntyre*, but the justices could not agree on a rationale. There were two distinct issues: (1) what constitutes purposeful availment, and (2) the proper forum for assessing minimum contacts. With respect to purposeful availment, a plurality (Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas) would have adopted the *Asahi* plurality's view that specific jurisdiction requires a purposeful and direct connection with the forum state beyond knowledge that the defendant's products would end up in that state.<sup>74</sup> The dissent (Justices Ginsburg, Sotomayor, and Kagan) would have adopted the alternate view in *Asahi* that purposeful placement of products into a stream of commerce with knowledge that they would end up in the forum state establishes minimum contacts.<sup>75</sup> And the concurrence (Justices Breyer and Alito) refused to adopt either principle and instead found no personal jurisdiction on the facts of the case—concluding that knowledge plus *one* shipment to the state, without more, is not enough.<sup>76</sup>

With respect to the proper forum for assessing minimum contacts, the justices in *McIntyre* appeared willing to recognize the unique influences of a defendant's alienage status, but no position commanded a majority. The plurality recognized that a foreign corporation "may have the requisite relationship with the United States Government but not with the government of any individual State" but nevertheless adhered to an alienage-independent, state-focused analysis for purposes of the Fourteenth Amendment.<sup>77</sup> Indeed, the plurality worried that importing special considerations for alien defendants could adversely affect domestic defendants.<sup>78</sup>

The dissent, by contrast, would have taken the defendant's alienage status into account in determining whether its conduct had met the minimum-contacts test. Specifically, the dissent noted that, as a foreign entity, *McIntyre* viewed its American market as the whole United States rather than state

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73. *Id.* at 878, 885 (plurality opinion); *id.* at 895–97 (Ginsburg, J., dissenting).

74. *Id.* at 882–85 (plurality opinion).

75. *Id.* at 905 (Ginsburg, J., dissenting).

76. *Id.* at 888 (Breyer, J., concurring) ("None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court's previous holdings suggest the contrary."); *id.* at 888–89 ("[T]he Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.").

77. *Id.* at 884 (plurality opinion).

78. *Id.* at 885 ("[A]lthough this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town.").

by state.<sup>79</sup> Further, the dissent recognized that New Jersey's attempt to exercise personal jurisdiction over McIntyre—a citizen of no U.S. state—for injuries sustained in New Jersey by a New Jersey resident did not offend the sovereign prerogatives of any other U.S. state.<sup>80</sup> Finally, the dissent understood that the plurality's rule would allow alien corporations to use common commercial arrangements, like appointing a distributor, to avoid minimum contacts with (and therefore personal jurisdiction in) any state.<sup>81</sup> Accordingly, the dissent would have considered the alien defendant's contacts with the United States as a whole in applying the minimum-contacts test.<sup>82</sup>

For its part, the concurrence expressed general concern with the difficulty of crafting a general rule in light of the uncertainties of specific applications.<sup>83</sup> The alienage status of the defendant added to its uncertainty and caution:

[T]he fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain. I am again less certain than is the New Jersey Supreme Court that the nature of international commerce has changed so significantly as to require a new approach to personal jurisdiction.

. . . It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.<sup>84</sup>

The end result of *McIntyre* is that whether and how the alienage status of a defendant affects the minimum-contacts prong of specific jurisdiction remains unsettled. By contrast, *Asahi* makes clear that alienage is directly relevant to the “reasonableness” prong of specific jurisdiction.

### B. General Jurisdiction

*International Shoe* also identified a class of cases that would automatically meet the requirements of personal jurisdiction without resort to the

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79. *Id.* at 904–05 (Ginsburg, J., dissenting) (“McIntyre UK dealt with the United States as a single market. Like most foreign manufacturers, it was concerned not with the prospect of suit in State X as opposed to State Y, but rather with its subjection to suit anywhere in the United States.”).

80. *Id.* at 899 (“New Jersey’s exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any other State. Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim.”).

81. *Id.* at 902–06.

82. *Id.* at 905.

83. *Id.* at 890 (Breyer, J., concurring).

84. *Id.* at 892.

tests of specific jurisdiction: when the defendant's contacts with a state are so substantial that it can be sued there for all causes of action, even those arising outside of the state.<sup>85</sup> The exercise of personal jurisdiction in these cases is known as "all-purpose" or "general" jurisdiction.<sup>86</sup>

Four of the five general jurisdiction cases decided by the Supreme Court since *International Shoe* have involved alien defendants,<sup>87</sup> offering a key lens through which to analyze the influence of alienage status. On its face, general jurisdiction doctrine treats alienage status as irrelevant, but, as we show in more detail below, the practical effect of general jurisdiction doctrine is dramatically different for alien defendants.

The Court's first general jurisdiction case after *International Shoe* was *Perkins v. Benguet Consolidated Mining Co.*<sup>88</sup> The defendant in *Perkins*, a company incorporated under the law of the Philippines and engaged in mining operations there, had temporarily ceased its mining operations and temporarily moved its headquarters to Ohio during the Second World War.<sup>89</sup> The Court found that the defendant had "been carrying on in Ohio a continuous and systematic, but limited, part of its general business" and so could be sued there even on a cause of action unrelated to the forum.<sup>90</sup> In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, by contrast, the Supreme Court found that a Colombian company's activities in Texas—negotiating contracts, receiving payments, purchasing equipment, and sending personnel for training—did not "constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*."<sup>91</sup> The test distilled from these two cases (and "taught to generations of first-year law

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85. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (acknowledging that personal jurisdiction can attach when "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities"). See generally Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 749 (1988) ("Before the advent of modern transportation, when traveling was difficult and ties between jurisdictions were attenuated, courts justifiably were concerned that defendants could evade suit by avoiding forums in which potential plaintiffs resided."); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 622 (1988) (arguing that general jurisdiction arose to allow suit in a state other than place of incorporation).

86. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 924 (2011); see also Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (developing the concepts).

87. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear*, 564 U.S. 915; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). The exception is *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558–59 (2017).

88. 342 U.S. 437.

89. *Id.* at 447–48.

90. *Id.* at 438. Although the defendant in *Perkins* had sufficient contacts with Ohio to be subject to general jurisdiction there, the defendant was still an alien because its place of incorporation and principal place of business remained in the Philippines. See *Daimler*, 134 S. Ct. at 761 n.19.

91. 466 U.S. 408, 416, 418 (1984).

students”<sup>92</sup>) was that general jurisdiction could be based on “continuous and systematic general business contacts.”<sup>93</sup>

The Court’s most recent general jurisdiction cases have substantially narrowed that test. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court considered whether general jurisdiction was appropriate over three foreign Goodyear subsidiaries in North Carolina state court for a bus accident in France arising from allegedly defective tires manufactured in Turkey.<sup>94</sup> The Court set out the test for a forum eligible to exercise general jurisdiction: where a corporation’s contacts are so substantial that it “is fairly regarded as at home” in that forum, with “paradigm” examples being the corporation’s place of incorporation and principal place of business.<sup>95</sup> *Goodyear* explicitly treated alien defendants and domestic defendants equivalently under this test.<sup>96</sup>

In *Daimler AG v. Bauman*, residents of Argentina sued Daimler, a German company, in California federal district court for claims under federal, state, and foreign law for events occurring entirely outside the United States.<sup>97</sup> Daimler’s subsidiary, MBUSA, was incorporated in Delaware and had its principal place of business in New Jersey but distributed Daimler vehicles to all U.S. states, including California.<sup>98</sup> The Court reaffirmed *Goodyear*’s test that “a court may assert [general] jurisdiction over a foreign corporation . . . only when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State,’ ”<sup>99</sup> and it reiterated *Goodyear*’s “paradigm” forums as domicile (for an individual) or principal place of business and place of incorporation (for a corporation).<sup>100</sup> The Court left open the possibility that, in an exceptional case, a defendant’s activities could render it “at home” somewhere other than the paradigm forums and cited, as an example, the unusual facts of *Perkins*, in which the alien defendant’s temporary wartime relocation of its headquarters to Ohio rendered it “essentially at home” there even though the corporation’s permanent home was in the Philippines.<sup>101</sup>

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92. *Daimler*, 134 S. Ct. at 770 (Sotomayor, J., concurring).

93. *Helicopteros*, 466 U.S. at 416.

94. 564 U.S. 915, 918 (2011).

95. *Goodyear*, 564 U.S. at 924.

96. *Id.* at 919 (referring to “foreign” defendants as “sister-state or foreign-country” defendants and not distinguishing between them).

97. 134 S. Ct. 746, 750–51 (2014).

98. *Daimler*, 134 S. Ct. at 751.

99. *Id.* (quoting *Goodyear*, 564 U.S. at 919).

100. *Id.* at 760–61.

101. *Id.* at 756 n.8 (discussing the exceptional facts of *Perkins*); *id.* at 761 n.19 (leaving open “the possibility that in an exceptional case [like *Perkins*] a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State”).



The Court also suggested, in a footnote responding to Justice Sotomayor's concurring opinion, that a reasonableness analysis "would be superfluous" in general jurisdiction cases.<sup>102</sup> One might read the Court as saying either that reasonableness is a component only of specific jurisdiction or that reasonableness will always be satisfied in cases of general jurisdiction.<sup>103</sup> But in either case, as a practical matter, general jurisdiction under *Daimler* is a one-step inquiry.

The Court's new test for general jurisdiction is facially neutral with respect to alienage: the "at home" test applies to domestic and alien defendants alike.<sup>104</sup> The effect of the Court's test, however, differs dramatically between domestic and alien defendants. For domestic defendants, at least one U.S. state will be able to exercise general jurisdiction for all claims against the defendant. For alien defendants, by contrast, the likelihood is that no U.S. state will be able to exercise general jurisdiction.<sup>105</sup> As Justice Sotomayor pointed out in *Daimler*, absent exceptional circumstances a foreign corporation will be immune from general jurisdiction in U.S. states even if the corporation does substantial business in all of them.<sup>106</sup>

The Court's development of both general and specific jurisdiction demonstrates that the alienage status of a defendant influences both the practical effect of general jurisdiction and the reasonableness component of specific jurisdiction. With those influences in mind, we turn to our approach to minimum contacts.

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102. *Id.* at 762 n.20.

103. The American Law Institute has adopted the latter view. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 302 cmt. d (AM. LAW INST., Tentative Draft No. 2, 2016) ("Both general and specific jurisdiction are subject to the reasonableness requirements of the Due Process Clauses. Because the contacts required for general jurisdiction tend to satisfy these requirements, however, reasonableness typically functions as an independent check on personal jurisdiction only in specific jurisdiction cases."). Professor Dodge serves as co-reporter for the *Restatement (Fourth)* but writes here in his individual capacity.

104. The Court did state that "the transnational context of this dispute bears attention" because of "the risks to international comity," in that "[o]ther nations do not share the uninhibited approach to personal jurisdiction" and have resisted international agreements on reciprocal recognition and enforcement of judgments as a result. *Daimler*, 134 S. Ct. at 762–63. But that observation served only to reinforce the limited nature of general jurisdiction.

105. *Id.* at 773 (Sotomayor, J., concurring). As noted above, an alien individual (but not a corporation) may be subject to "tag" jurisdiction based on service of process in the forum. See *supra* note 10.

106. *Daimler*, 134 S. Ct. at 773 (Sotomayor, J., concurring) ("Under the majority's rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States."); see also *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., concurring in part and dissenting in part) ("Foreign businesses with principal places of business outside the United States may never be subject to general jurisdiction in this country even though they have continuous and systematic contacts within the United States.").

## II. THE CASE FOR NATIONAL CONTACTS

In this Part, we make the case for a national-contacts approach to personal jurisdiction over aliens in both state and federal courts and for both state and federal claims. Our analysis proceeds in several steps. First, we dispense with the claim—argued by a few scholars—that aliens may not challenge a court’s exercise of personal jurisdiction under the Constitution. Second, we turn to our central claim that a national-contacts approach to minimum contacts for alien defendants makes sense from the perspectives of both fairness and interstate federalism. Third, we note the benefits of a separate rule for alien defendants that need not be extended to domestic defendants. Fourth, we address some ancillary implications of a national-contacts approach on transnational litigation, including foreign-relations and enforcement concerns. Fifth, we demonstrate that a national-contacts approach to personal jurisdiction over aliens is constitutional under both the Fifth and the Fourteenth Amendments.

### A. Due Process Rights of Alien Defendants

At least one commentator has argued that aliens may not challenge a U.S. court’s exercise of personal jurisdiction because if they lack minimum contacts, then they also lack due process rights under the Constitution.<sup>107</sup> This commentator relies on *United States v. Verdugo-Urquidez*, which refused to apply the Fourth Amendment to a warrantless search of an alien’s property outside of the United States.<sup>108</sup> But *Verdugo-Urquidez* speaks only to the Fourth Amendment and says nothing about personal jurisdiction, as the commentator admits.<sup>109</sup> Indeed, the Court acknowledged that the Fourth Amendment “operates in a different manner than the Fifth Amendment, which is not at issue in this case.”<sup>110</sup> And Justice Kennedy, who provided the crucial fifth vote for the controlling opinion, emphasized in a separate concurring opinion that “the dictates of the Due Process Clause of the Fifth Amendment protect the defendant” at a criminal trial.<sup>111</sup>

Further, the reason the Court declined to apply the Fourth Amendment in *Verdugo-Urquidez* is that the search took place entirely outside the United

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107. See Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT’L L.J. 109, 115 (1993) (“Under the principles reiterated in *Verdugo-Urquidez*, it is difficult to see why . . . an alien corporation outside the territory of the United States that had never developed substantial connections within the country[ ] could make any claim to the protection of the Due Process Clause of the Fifth Amendment.”); cf. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 4, 7, 54–59 (2006) (acknowledging that current law treats alien defendants as having the same due process rights as domestic defendants but arguing normatively that untying personal jurisdiction over aliens would have benefits).

108. 494 U.S. 259, 274–75 (1990).

109. Haugen, *supra* note 107, at 114 (conceding that “the Court did not intend [to affect personal jurisdiction], for it clearly had nothing about personal jurisdiction in mind”).

110. *Verdugo-Urquidez*, 494 U.S. at 264.

111. *Id.* at 275 (Kennedy, J., concurring).

States.<sup>112</sup> By contrast, an American court exercising adjudicatory authority over an alien in violation of one of the Constitution's Due Process Clauses is by definition violating the Constitution within the United States.<sup>113</sup> *Vergudo-Urquidez's* reasoning thus *supports* the applicability of constitutional due process to personal jurisdiction over aliens.<sup>114</sup>

Finally, the argument that *Vergudo-Urquidez* denies aliens the ability to challenge personal jurisdiction on due process grounds ignores the fact that the Supreme Court has repeatedly heard and upheld such challenges by aliens, even crediting the due process-based fairness concerns they have raised.<sup>115</sup> It is for good reason, then, that courts and commentators have overwhelmingly concluded that "the full protection of the Due Process Clause should be available to foreign citizens summoned to defend themselves in United States courts."<sup>116</sup>

### B. *Minimum Contacts in Alien-Defendant Cases*

We recognize that there are different jurisprudential justifications for a due process challenge to personal jurisdiction.<sup>117</sup> Some commentators, for

112. See *id.* at 264 (majority opinion). The Court explained that, for trial rights under the Fifth Amendment, for example, "a constitutional violation occurs only at trial," but "[t]he Fourth Amendment functions differently" and "is 'fully accomplished' at the time of an unreasonable governmental intrusion." *Id.* (first quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974); then quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)).

113. Whether the Due Process Clause applies to aliens outside the United States is more contested. Compare J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 521 (2007) ("Globalists have not presented any Founding era evidence that 'due process' was thought to protect aliens abroad."), with Nathan S. Chapman, *Due Process Abroad*, 112 Nw. U. L. REV. 377 (2017) (presenting such evidence).

114. In the context of notice, the Court has explicitly said that "there has been no question in this country of excepting foreign nationals from the protection of our Due Process Clause." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988).

115. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) ("The strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi under circumstances that would [be unreasonable]."); cf. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 892 (2011) (Breyer, J., concurring) (articulating fairness-based, personal jurisdiction concerns for "a small Egyptian shirtmaker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer").

116. Born, *supra* note 33, at 21–22; see also Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1220 (1992) (concluding that aliens are entitled to raise due process challenges to personal jurisdiction); Lilly, *supra* note 30, at 116 (same); Karen Nelson Moore, Madison Lecture, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 846 (2013) (same); Toran, *supra* note 35, at 770–71 (same).

117. Some commentators have argued that the limits of a court's adjudicatory authority stem from sources other than the Due Process Clauses. See Sachs, *supra* note 42, at 1254–55, 1288 (identifying "general law" as the source of limits on adjudicatory authority); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 171–72 (2004) (locating personal jurisdiction in the Full Faith and Credit Clause); cf. George Rutherglen, *Personal Jurisdiction and Political Authority*, 32 J.L. & POL. 1, 6–7 (2016) (noting that before the Fourteenth Amendment's adoption, the Full Faith and Credit Clause policed state judicial overreaching). Whatever the merits of this position, the Court's precedent since *Pennoyer* has solidified the centrality of the Due Process Clauses.

example, have focused on “interstate federalism” as the root justification for personal jurisdiction.<sup>118</sup> Others have focused on fairness to the defendant.<sup>119</sup> For many years, the Court prioritized the two justifications inconsistently,<sup>120</sup> but in a case decided just last Term, *Bristol–Myers Squibb Co. v. Superior Court*,<sup>121</sup> the Court tied the two justifications together. Noting that “the primary concern” of the Fourteenth Amendment’s limits on personal jurisdiction is “the burden on the defendant,”<sup>122</sup> the Court explained that determining the magnitude of this burden requires consideration of both “the practical problems resulting from litigating in the forum” and “the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question.”<sup>123</sup> And the coercive power of the forum state, the Court continued, is itself informed by principles of interstate federalism.<sup>124</sup>

*Bristol–Myers Squibb* is not entirely clear on how fairness and federalism relate to each other doctrinally, but it does make clear that both have roles to play. This Section thus analyzes both the fairness concerns and the implications for interstate federalism of exercising personal jurisdiction in alien-defendant cases. We tie those concerns and implications to the proper scope of minimum contacts in light of recent case law developments.

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See *Bristol–Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779 (2017) (“It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts.”).

118. See *Casad*, *supra* note 12, at 1591 (“The limits on . . . personal jurisdiction are probably better viewed as manifestations of interstate federalism.”); *Degnan & Kane*, *supra* note 34, at 813–14 (asserting a “consistent theme” in the case law that the Fourteenth Amendment’s Due Process Clause “protects the concerns of sister states of this Union from transgressions by each other”); *Lilly*, *supra* note 30, at 109–10 (noting that interstate-federalism principles trump fairness principles); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 *TEX. L. REV.* 689, 689–90 (1987) (arguing that personal jurisdiction is a product of sovereign limits and interstate federalism rather than notions of fairness).

119. Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 *Nw. U. L. REV.* 1112, 1120–33 (1981) (arguing that state sovereignty and federalism have no bearing on due process limits on personal jurisdiction).

120. Compare *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93 (1980) (focusing on interstate federalism), with *Ins. Corp. of Ir. v. Compagnie des Bauxite de Guinee*, 456 U.S. 694, 702 (1982) (“The personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”). The fractured opinions in *McIntyre* illustrate the continuing nature of the divide among the justices. Compare *McIntyre*, 564 U.S. at 883 (plurality opinion) (stating that “jurisdiction is in the first instance a question of authority rather than fairness”), with *id.* at 899 (Ginsburg, J., dissenting) (“[T]he constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty.”).

121. 137 S. Ct. 1773.

122. *Bristol–Myers Squibb*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

123. *Id.*

124. *Id.* at 1780–81.

### 1. Fairness to Alien Defendants

For a domestic defendant, the particular state forum matters. Domestic defendants are subject to general jurisdiction in the state where they are at home.<sup>125</sup> They choose to reside in that state, with its familiar laws and procedures, knowing that they can be sued there for any and all claims. Correspondingly, domestic residents may be sensitive to defending in other states because the burdens of litigating in other states, with the potential costs of travel and relatively unfamiliar laws, procedures, and jurors, may be severe compared to litigating in their home state. Given those sensitivities, domestic defendants may even try to structure their business affairs to avoid certain states.<sup>126</sup> Fairness is a key issue for personal jurisdiction over domestic defendants, but it is an issue of relative fairness *among domestic forums*—specifically, whether a domestic defendant may be sued in a state other than its home state.

For alien defendants, by contrast, the particular state forum is largely irrelevant. After *Daimler*, nonresident aliens are not “at home” in any state (absent exceptional circumstances) and should not expect to be subject to general jurisdiction anywhere in the United States.<sup>127</sup> Aliens have no U.S. home state with familiar procedures; all U.S. courts are foreign to them. Whatever interstate differences exist among U.S. courts is of little concern to alien defendants in light of the stark differences between litigation in the United States and litigation outside the United States—including the availability of broad discovery, the prevalence of juries, the possibility of punitive and other noneconomic damages, the requirement that each side bear its own litigation costs and fees regardless of who prevails, and the propensity of U.S. plaintiffs’ attorneys to use contingency-fee agreements—dwarf the relatively more modest differences in litigation among the states.<sup>128</sup> The same argument applies to travel burdens; for the most part, aliens are far more concerned about the travel costs and burdens of litigating in America generally than in a particular state.<sup>129</sup> Finally, many aliens engaged in commercial enterprises treat the United States as a single market rather than a state-

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125. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 761–62 (2014).

126. We address this possibility of defendants structuring their business affairs to avoid general jurisdiction in more detail below. See *infra* text accompanying notes 149–152.

127. See *supra* notes 104–106 and accompanying text.

128. See Born, *supra* note 33, at 24 (“In general, litigation by a foreign defendant in international cases involves comparatively greater hardships than litigation by a United States resident in another state or region of the United States.”); see also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981) (listing strict liability, malleable choice-of-law rules, jury trials, contingent attorneys’ fees, and broad discovery as differences between U.S. and foreign courts). Of course, some aliens will be far less burdened in these ways, such as those from a nearby, English-speaking, common-law country like Canada. See *Aristech Chem. Int’l Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628 (6th Cir. 1998) (“[W]e think that a Canadian defendant such as AFL bears a substantially lighter burden than does a Japanese defendant—or for that matter, most other foreign defendants.”).

129. See Born, *supra* note 33, at 38.

specific market.<sup>130</sup> Their concern is not to target specific states but rather to deal in as many states as possible, regardless of which ones those are. Of course, aliens may care a great deal about avoiding suit anywhere in the United States. But once their contacts justify suit somewhere in the United States, they ought not care exactly where.<sup>131</sup>

From the perspective of the defendant, therefore, it seems fairest to think of minimum contacts as contacts with the United States as a whole.<sup>132</sup> And if the alien defendant has sufficient minimum contacts with the United States, then it must be fair in an absolute sense to hale the defendant into the United States to be held accountable for harms related to those contacts.<sup>133</sup> Of course, the current doctrine of specific jurisdiction requires contacts with the forum to be related to the cause of action,<sup>134</sup> but if the forum is national, there should be no barrier to counting related contacts that occur in other states.<sup>135</sup> And whatever level of “purposeful availment” is required to satisfy

130. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 898 (2011) (Ginsburg, J., dissenting) (focusing on the defendant’s “endeavors to reach and profit from the United States market as a whole”); Hay, *supra* note 31, at 434 (“[T]he foreign-country manufacturer deals with the United States as a single market. Its concern is presumably less with whether the defendant is subject to suit in state X or state Y, but rather whether it is subject to suit in the United States at all.”).

131. See *McIntyre*, 564 U.S. at 904 (Ginsburg, J., dissenting) (noting that the critical question is whether an alien must defend itself in the courts of the United States, not whether it must defend itself in any particular state); Born, *supra* note 33, at 39 (“Once it is clear that litigation will be required in *some* United States forum, however, it often will be relatively unimportant *which* United States forum is selected.”); Lilly, *supra* note 30, at 125 (“[T]he alien defendant will often be indifferent to whether the suit against him is filed in State A or State B.”); Toran, *supra* note 35, at 773–74 (“[F]rom an alien defendant’s point of view, any unfairness in an assertion of jurisdiction is likely not to be the result of a suit in one state rather than in another but the result of a suit anywhere in the United States.”).

132. Here, we have couched fairness as focused on fairness to the defendant, which is the “primary concern” of personal jurisdiction. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). We discuss concerns of fairness to the plaintiff below. See *infra* text accompanying notes 155–156.

133. See Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 418 (2017) (arguing for an amendment to Rule 4(k)(2) to “cure the perverse result that some foreign defendants can benefit commercially from the U.S. market yet avoid suit in any U.S. court”).

134. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (limiting specific jurisdiction to those claims “arising out of or related to the defendant’s contacts with the forum”); see also 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 (2015) (“Critical to the determination of specific jurisdiction is whether a plaintiff’s claim can be said to ‘arise from or relate to’ defendant’s contacts with the forum state.”).

135. The situation is different for a domestic defendant, who is subject to the specific jurisdiction in state court only on claims that relate to that state. See *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (“What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.”). In that case, the relevant forum is a particular state rather than the nation.

specific jurisdiction<sup>136</sup> (a point on which we take no position) should be based on availment of the United States rather than any particular state or locality.

It is possible that unusual burdens associated with one state, as opposed to another, could exist. Perhaps one state has a locality particularly hostile to aliens or to the particular defendant.<sup>137</sup> Or perhaps the state would apply a substantive law particularly favorable to the plaintiff while another would not.<sup>138</sup> Or perhaps the win rate for a particular kind of claim is significantly higher in a particular state.<sup>139</sup> Or perhaps an especially isolated court would impose significant inconveniences on an alien defendant.<sup>140</sup> And perhaps these possibilities would drive the plaintiff to choose such a court over a more convenient forum.<sup>141</sup> We address these concerns in more detail in Part III, but suffice it to say for now that there is a difference between burdens and inconveniences like these and fairness for purposes of personal jurisdiction. Not every inconvenience is constitutionally significant. Indeed, similar disparities in burdens likely exist *among a single state's courts* too, yet the minimum-contacts component of personal jurisdiction has nothing to say about them. The burdens and inconveniences of a particular location are appropriately considered *after* minimum contacts have been established with the relevant forum, in accordance with the reasonableness factors of personal jurisdiction and with subconstitutional doctrines like venue.<sup>142</sup>

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136. Compare *McIntyre*, 564 U.S. at 882–85 (plurality opinion) (requiring specific targeting of the forum), with *id.* at 907–08 (Ginsburg, J., dissenting) (focusing more on reasonable foreseeability). For an alternate view, see Rutherglen, *supra* note 117, at 3–4, arguing that the focus should be on whether the defendant had reasonable opportunities to avoid personal jurisdiction in the particular forum.

137. See Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 247–48 (2014) (exploring the relationship between local bias and personal jurisdiction); Sachs, *supra* note 30, at 1324 (acknowledging the concern of “judicial hellholes” in some states). But see Kevin M. Clermont & Theodore Eisenberg, Commentary, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122 (1996) (finding no empirical support for the claim that American courts are biased against aliens).

138. See Sachs, *supra* note 30, at 1340 (“With the expanded options created by nationwide jurisdiction, plaintiffs could easily shop for a venue with friendly choice-of-law rules . . .”).

139. See THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 206240, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 11 (2004) <https://www.bjs.gov/content/pub/pdf/tvtlc01.pdf> [<https://perma.cc/8783-B5GY>] (reporting percentages of plaintiffs winning tort cases in state courts).

140. See Degnan & Kane, *supra* note 34, at 815–16 (“It is true that in a country as large as the United States, it may matter which American court can act, and that determination embraces some important notions of fairness.”). But see Klerman, *supra* note 137, at 246 (suggesting that litigation costs based on inconvenience may be fairly minimal in today’s age of electronic communication and ease of travel).

141. See Sachs, *supra* note 30, at 1306–07 (asserting that “[s]tate courts are very different from one another” in terms of likely outcome and that those differences drive forum shopping).

142. Cf. Degnan & Kane, *supra* note 34, at 815 (supporting nationwide jurisdiction in the federal courts and arguing that locality-based fairness concerns should be dealt with through venue doctrine); Sachs, *supra* note 30, at 1321–22 (focusing on venue and choice-of-law rules). The Eastern District of Texas, for example, has recently been a magnet for patent-infringement

The rejoinder of most defendants is to focus on the burdens of being subjected to a lawsuit anywhere in the United States as opposed to in some other country. Those burdens include differences in procedural and substantive laws, unfamiliar legal structures and norms, language barriers and cultural differences, and logistical issues, such as time differences, mail delays, and transportation hassles.<sup>143</sup> These burdens might affect Justice Breyer's "small Egyptian shirtmaker" and "Kenyan coffee farmer"<sup>144</sup> acutely, assuming they had sufficient assets in the United States to make a suit worth bringing in the first place.

But there are three reasons why these burdens do not undermine a national-contacts approach to personal jurisdiction. First, these burdens are national in scope. They confirm that fairness to alien defendants turns not on differences among states but on differences between the United States and a different country. In short, the national scope of the burdens on alien defendants supports, rather than undermines, a national-contacts approach to personal jurisdiction.

Second, the reasonableness component of personal jurisdiction doctrine already accounts for these burdens on alien defendants.<sup>145</sup> *Asahi* directs courts to consider "the burden on the defendant" in evaluating the reasonableness of the exercise of personal jurisdiction.<sup>146</sup> It recognizes that in alien-defendant cases the "unique burdens placed upon one who must defend

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claims. Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 250–70 (2016). Notably, the Supreme Court addressed such intrasystem forum shopping through venue rather than personal jurisdiction. See *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

143. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 104 (5th ed. 2011) ("The inconvenience that results from requiring a defendant (or plaintiff) to litigate in a foreign country is often greater than that resulting from requiring an American to litigate in another part of the United States. Major differences in procedural and substantive rules—such as the scope of discovery, the existence of fee-shifting provisions or contingent fee arrangements, and the right to a jury trial—are also more likely in the international context."); Born, *supra* note 33, at 24–25 (identifying legal, cultural, and language differences, time zones and travel, and potential biases against aliens); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 502 (1993) (reporting American advantages of the existence of juries, broad discovery, contingent-fee arrangements, the American Rule of fee-and-cost payment, convenience, and often more favorable substantive law); cf. Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 141 (2008) (reviewing OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* (2007)) (discussing the procedural exceptionalism of the United States).

144. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 892 (2011) (Breyer, J., concurring). As we discuss below, small foreign defendants are unlikely to have assets in the United States against which a U.S. judgment may be enforced. The prospect of having to enforce any U.S. judgment in the defendant's home country may discourage some plaintiffs from bringing suit in the first place. See *infra* Section III.D.

145. We note, too, that some of the defense-side burdens can be lessened through application of the subconstitutional doctrines of venue, which are specifically designed to address them. See *infra* Sections III.B, III.C.

146. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).



oneself in a foreign legal system” will command significant weight.<sup>147</sup> Importantly, the reasonableness factors are assessed independently of the minimum-contacts analysis<sup>148</sup> and thus have no bearing on the propriety of a national-contacts approach.

Third, it cannot be unfair to apply a national-contacts approach when alien defendants structure their dealings to avoid minimum contacts in any one state and thereby avoid personal jurisdiction anywhere in the United States. Both courts and commentators have surmised that alien businesses may attempt to arrange their business dealings in this way. Alien businesses could diffuse their operations across states so that they lack minimum contacts with any one state even though they may have minimum contacts with the American market as a whole<sup>149</sup> or purposefully target the American market but avoid purposefully targeting specific states.<sup>150</sup> The Court’s narrowing of general jurisdiction only to the place where the defendant is “at home”<sup>151</sup> essentially takes general jurisdiction in the United States off the table for such alien defendants,<sup>152</sup> and the current doctrine of state-specific minimum contacts would allow such aliens to avoid specific jurisdiction anywhere in the United States. A national-contacts approach to specific jurisdiction would solve this problem in most cases<sup>153</sup> and restore the basic fairness of

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147. *Id.* at 113–14.

148. *See id.* at 114; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (“Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945))).

149. *See, e.g.*, Casad, *supra* note 12, at 1596 (“[A] foreign defendant having ample contacts with the United States will be held immune from personal jurisdiction in federal question cases arising from those contacts if the defendant lacks sufficient contact with any one state.”); Hay, *supra* note 31, at 433 (worrying that “a foreign-country corporation [could] limit its exposure to the exercise of jurisdiction in this country” by structuring its commercial arrangements strategically); Toran, *supra* note 35, at 773 (surmising “a fear that alien businesses may be able to structure their commercial dealings in the United States to avoid establishing sufficient contacts with any one state and thus to avoid jurisdiction in this country”).

150. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 901 (2011) (Ginsburg, J., dissenting) (calling such arrangements “common in today’s commercial world”).

151. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

152. Before *Daimler*, some writers predicted that the main impact of a national-contacts approach would be on general jurisdiction. *See* Degnan & Kane, *supra* note 34, at 820 (“In effect, then, the adoption of a national contacts approach may make it easier to establish general jurisdiction, but should have little impact on specific jurisdiction.”). Obviously, that is no longer the case.

153. *See* Born, *supra* note 33, at 38 (making this observation); Lilly, *supra* note 30, at 116–17 (same); *cf.* Sachs, *supra* note 30, at 1318 (“While some foreign defendants lack adequate contacts even with the United States as a whole, those foreign defendants are the exception, not the rule. Most suits involve conduct that itself establishes U.S. jurisdiction, if not the jurisdiction of any particular state.”).

holding an alien accountable in the United States when the alien's own conduct establishes minimum contacts with the United States.<sup>154</sup>

Finally, the plaintiff's interests also support a national-contacts approach to personal jurisdiction over alien defendants. These interests have become more pressing as general jurisdiction has narrowed to preclude suits against alien defendants on that basis anywhere in the United States. The "plaintiff's interest in obtaining relief" is an express component of the reasonableness factors,<sup>155</sup> and thus, the burdens on the plaintiff of being forced to bring suit in a foreign country counterbalance any assertions of unfairness by an alien in having to defend in the United States.<sup>156</sup> Our argument for a national-contacts approach does not depend on the interests of the plaintiff. For the reasons already given, we believe a national-contacts approach is fair to alien defendants. But a consideration of the plaintiff's interests adds weight to our argument, particularly for those who believe fairness should be evaluated comparatively.

## 2. Interstate Federalism and Alien Defendants

Fairness is not the only component of personal jurisdiction. Interstate federalism has recently made a resurgence in the Supreme Court's analysis of personal jurisdiction. "The sovereignty of each State," the Court wrote in *Bristol-Myers Squibb*, "imply[s] a limitation on the sovereignty of all its sister States."<sup>157</sup> This state-sovereignty rationale echoed Justice Kennedy's plurality opinion in *McIntyre*:

If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to

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154. See *McIntyre*, 564 U.S. at 898 (Ginsburg, J., dissenting) ("On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States . . . ?").

155. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

156. See *McIntyre*, 564 U.S. at 904 (Ginsburg, J., dissenting) ("Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey?"); Born, *supra* note 33, at 25 ("In virtually all international cases, an increased litigation burden will exist for the parties regardless of the forum. As a result, resolving personal jurisdiction disputes usually will not involve avoiding litigation burdens, but instead, deciding which party will bear the unavoidable inconvenience of litigating abroad."); Hay, *supra* note 31, at 433 ("The plaintiff who is required to litigate abroad obviously will be more inconvenienced than a plaintiff who must litigate in a sister state."); Toran, *supra* note 35, at 788 ("The plaintiff suing an alien defendant is likely to face a considerable burden if jurisdiction is not asserted. . . . The burden of litigating in a foreign country consists not only of the expense and inconvenience of travel abroad but also of the more significant detriment of a possibly inhospitable forum applying unfavorable laws.").

157. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.<sup>158</sup>

Although the Court has not clearly stated this point, we submit that these interstate-federalism concerns arise only if the defendant is subject to general jurisdiction in a U.S. state. That was true in *Bristol-Myers Squibb*, which involved a domestic defendant.<sup>159</sup> And although it was not true in *McIntyre*, which involved an alien defendant, Justice Kennedy's invocation of interstate federalism still seemed to turn on it.<sup>160</sup>

A domestic defendant's domicile in a particular state gives that state substantial authority over it, authority substantial enough for the home state to exercise personal jurisdiction over any and all claims against the defendant. For another state to assert personal jurisdiction over a domestic defendant is an intrusion on this authority of the home state and might be an inappropriate intrusion unless justified by the kind of contacts with the second state that would give rise to specific jurisdiction.<sup>161</sup> But unlike a domestic defendant, an alien defendant is not "at home" in any U.S. state, and thus a state's assertion of specific jurisdiction over the alien cannot intrude on any home state's authority.

It is possible that more than one state might try to claim specific jurisdiction over the same alien defendant with respect to the same claim. For example, a product sold to a distributor in one state might cause foreseeable injury in another; in such a case, both states might have legitimate claims to adjudicative authority over the manufacturer. The Supreme Court, however, has never analyzed competing claims of specific jurisdiction over aliens in a comparative way. To the contrary, it has assumed that multiple states might constitutionally assert specific jurisdiction over the same defendant for the same claim.<sup>162</sup> Indeed, in *McIntyre*, the defendant had more substantial contacts with the state of Ohio than with New Jersey, including a long-term

158. *McIntyre*, 564 U.S. at 884 (plurality opinion).

159. *Bristol-Myers Squibb*, 137 S. Ct. at 1777-78.

160. See *McIntyre*, 564 U.S. at 884-85 (plurality opinion) (stating that inappropriate assertions of jurisdiction would upset the federal balance "[i]f the defendant is a domestic domiciliary").

161. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 95 (1978) (rejecting specific jurisdiction in California while acknowledging general jurisdiction in New York); cf. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (focusing on the requirements for forcing a party to defend "away from its 'home' or principal place of business" (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930))).

162. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-78 (1984) (allowing New Hampshire to assert personal jurisdiction over a claim involving harm suffered by a New York resident in other states). We note that *Bristol-Myers Squibb's* requirement that the claim be connected to the forum, 137 S. Ct. at 1780, seems to limit the range of states that can assert personal jurisdiction over a domestic defendant.

distribution contract with its American distributor, which had its headquarters in Ohio.<sup>163</sup> Yet, as Justice Ginsburg pointed out, “New Jersey’s exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any other State.”<sup>164</sup>

We recognize that a national-contacts approach does enlarge the number of courts that could assert personal jurisdiction over an alien defendant. Under our approach, if the defendant establishes minimum contacts with the United States, then the minimum-contacts test is met for courts in *all* states, including courts in a state that has *no* connection to the defendant.<sup>165</sup> But, to repeat, such a scenario both is constitutionally fair and poses no interstate-federalism problems.<sup>166</sup>

To illustrate, say Nicastro had sued in Illinois, which had no contacts at all with the alien defendant, and the Illinois court exercised personal jurisdiction based solely on the defendant’s contacts with other states. The Illinois court’s exercise of personal jurisdiction would not unconstitutionally intrude on the sovereignty of other states, like New Jersey, for several reasons. First, the Illinois court would be exercising personal jurisdiction based on *national* contacts, not just those in New Jersey. The particular location of the host forum—be it in Illinois or New Jersey—is irrelevant for personal jurisdiction under these circumstances because the forum is exercising personal jurisdiction based on contacts that do not depend upon state boundaries in the first place.<sup>167</sup> Second, if Illinois had no contacts, then the Illinois court would be constitutionally prohibited from applying Illinois substantive law.<sup>168</sup> In fact, the Illinois court would almost certainly apply New Jersey’s substantive law in this situation.<sup>169</sup> Accordingly, New Jersey could not complain of any infringement of its sovereign regulatory authority. Third, if the Illinois court did exercise personal jurisdiction and apply New Jersey’s law, then this should not count as an intrusion on New Jersey’s sovereignty but

163. See *McIntyre*, 564 U.S. at 896 (Ginsburg, J., dissenting). This fact has led at least one commentator to suggest that Nicastro may have been able to sue McIntyre in Ohio. See Rutherglen, *supra* note 117, at 36.

164. *McIntyre*, 564 U.S. at 899 (Ginsburg, J., dissenting).

165. See Born, *supra* note 33, at 41–42 (recognizing this effect).

166. Nationwide personal jurisdiction over aliens in federal court has never been a constitutional problem. See, e.g., FED. R. CIV. P. 4(k); cf. *infra* text accompanying notes 198–200 (discussing various nationwide-service statutes). We address state claims in state court below. See *infra* Section II.E.

167. Even if the alien defendant’s contacts with the United States were *all* in New Jersey, Illinois’s exercise of personal jurisdiction would still be constitutionally fair and would not raise interstate-federalism problems for the reasons that follow.

168. See *Allstate Ins. v. Hague*, 449 U.S. 302, 310–11 (1981) (plurality opinion) (“[I]f a State has only an insignificant contact with the parties and occurrence or transaction, application of its law is unconstitutional.”).

169. Illinois has adopted the approach of the *Restatement (Second) of Conflicts* for tort cases, under which “the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the

as an instance of interstate cooperation.<sup>170</sup> This is particularly true given that the Illinois court's exercise of personal jurisdiction would not bar New Jersey courts from taking jurisdiction if any party wanted to file suit in New Jersey. Fourth, the Illinois court would almost certainly not adjudicate the dispute in the end but would instead dismiss the suit under Illinois's doctrine of *forum non conveniens*.<sup>171</sup>

In sum, alien defendants present not just different fairness concerns but also different interstate-federalism concerns. It may not be entirely clear what role interstate federalism should play in personal jurisdiction analysis going forward. But it is clear that a national-contacts approach for alien defendants is consistent with interstate federalism, whatever role it might play.

### C. *The Benefits of a Special Rule for Aliens*

We urge a national-contacts approach to specific jurisdiction only over alien defendants. By contrast, we would leave intact a state-by-state approach to specific jurisdiction over domestic defendants, at least in state courts. We thus part company with those who have argued for a uniform national-contacts approach for all defendants in federal courts or in certain classes of cases.<sup>172</sup>

The basic reason for the distinction is that the considerations of fairness and interstate federalism for alien defendants are different from those for domestic defendants. As explained above, being sued in the United States imposes substantial burdens on alien defendants, but those burdens do not

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parties, in which event the local law of the other state will be applied." RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 146 (AM. LAW INST. 1971); see *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 903–04 (Ill. 2007) (adopting this approach for tort conflicts).

170. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777–78 (1984) (characterizing New Hampshire's exercise of jurisdiction over out-of-state libel claims under the "single publication rule" as a permissible instance of New Hampshire's "interest in cooperating with other States").

171. See *Vinson v. Allstate*, 579 N.E.2d 857, 859 (Ill. 1991) (noting that Illinois doctrine of *forum non conveniens* "is applicable on an interstate basis and a case can be dismissed where the 'case . . . has no practical connection to the forum'" (quoting *Torres v. Walsh*, 456 N.E.2d 601, 606 (Ill. 1983))). For further discussion of state doctrines of *forum non conveniens* as a means of mitigating inconveniences under a national-contacts approach, see *infra* text accompanying notes 254–255. To be clear, the constitutionality of the national-contacts approach does not depend on a state's willingness to dismiss on *forum non conveniens* grounds. But the probability of such a dismissal illustrates unlikelihood of cases like this arising.

172. See, e.g., *Abrams*, *supra* note 30, at 1–3 (arguing for the elimination of state-based personal jurisdiction in federal courts); *Casad*, *supra* note 12, at 1615 (urging national contacts for all defendants in federal-question cases); *Fullerton*, *supra* note 30, at 11, 38–61 (exploring the constitutionality of a national-contacts approach to personal jurisdiction in federal courts); Israel Packel, Guest Commentary, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 TEMP. L.Q. 919, 920 (1986) (arguing for statutorily imposed nationwide personal jurisdiction for all federal and state courts in cases involving interstate or foreign commerce); *Sachs*, *supra* note 30, at 1303–04 (arguing for nationwide service for federal courts based on political legitimacy).

turn in any constitutionally significant way on the particular state in which the defendant is sued.<sup>173</sup> Nor does one state's exercise of personal jurisdiction over an alien defendant compete in a constitutionally significant way with any other state's exercise of personal jurisdiction over that defendant.<sup>174</sup> For domestic defendants, by contrast, the distinction among states is constitutionally significant, primarily because the domestic defendant has a home state in the United States.<sup>175</sup>

An additional advantage of our alien-specific approach is that it assuages any concerns about unintended consequences for domestic defendants. In *McIntyre*, both Justice Kennedy and Justice Breyer assumed that any rule of personal jurisdiction adopted for alien defendants would have to be applied to domestic defendants as well. Justice Kennedy worried that a rule adopted for foreign manufacturers might have "undesirable consequences" for domestic producers, subjecting "[t]he owner of a small Florida farm" to suit in Alaska.<sup>176</sup> Justice Breyer expressed concern that a small "Appalachian potter" selling cups and saucers through a large national distributor would be subject to suit in Hawaii based on national contacts.<sup>177</sup>

Under our proposal, the Supreme Court need not worry about these scenarios. By distinguishing between alien and domestic defendants, the Court can continue to require that the Florida farmer and the Appalachian potter be sued only in their home states if they lack minimum contacts with other states. At the same time, the Court can allow New Jersey to exercise personal jurisdiction based on national contacts over a foreign manufacturer who has no home state in the United States.

By recognizing that the fairness and federalism concerns are fundamentally different for these two groups of defendants, the Court can avoid imposing on either group a personal jurisdiction rule framed for the other. The Court already distinguishes between alien and domestic defendants with respect to general jurisdiction and reasonableness.<sup>178</sup> We simply suggest that a similar distinction makes sense with respect to minimum contacts.

#### D. *Foreign-Affairs Implications*

Although personal jurisdiction over alien defendants does not implicate the sovereignty interests of individual states, it does implicate the sovereignty interests of other countries. Some commentators have argued for more restrictive personal jurisdiction over aliens because of the foreign-relations ramifications of questionable exercises of U.S. jurisdiction.<sup>179</sup> Gary Born, in particular, has expressed concern that some exercises of judicial jurisdiction

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173. See *supra* Section II.B.1.

174. See *supra* Section II.B.2.

175. See *supra* text accompanying notes 125–126, 161.

176. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality opinion).

177. See *id.* at 891–92 (Breyer, J., concurring).

178. See *supra* text accompanying notes 6–10.

179. See Born, *supra* note 33, at 34; Parrish, *supra* note 107, at 5.

might violate international law<sup>180</sup> and that “exorbitant jurisdictional claims . . . can interfere with United States efforts to conclude international agreements providing for mutual recognition and enforcement of judgments or restricting exorbitant jurisdictional claims by foreign states.”<sup>181</sup> Although Born ultimately favors a national-contacts approach, at least in federal-question cases,<sup>182</sup> these concerns are worth taking seriously.

The first concern about violating international law is easily dismissed. As the new *Fourth Restatement of Foreign Relations Law* notes, “[w]ith the significant exception of sovereign immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate.”<sup>183</sup> Some countries do exercise personal jurisdiction on bases that other countries consider exorbitant.<sup>184</sup> But the fact that a basis of personal jurisdiction is considered exorbitant does not mean that it violates customary international law.<sup>185</sup> The accepted way for countries to police an exorbitant exercise of personal jurisdiction is to refuse to enforce the resulting judgment.<sup>186</sup> Far from being a sign of a broken system, the nonrecognition of judgments based on exorbitant jurisdiction is a sign that the system is working as it should.

Born’s second concern is that exorbitant bases of personal jurisdiction might interfere with the negotiation of international agreements. The Supreme Court also expressed this concern in *Daimler* as a reason to limit general jurisdiction.<sup>187</sup> The short answer to this concern is that specific jurisdiction based on national contacts is not considered exorbitant.<sup>188</sup> In the

180. Born, *supra* note 33, at 28–29.

181. *Id.* at 29.

182. *Id.* at 36–40. For state courts, Born advocates a “modified national contacts test” requiring at least “some minimal link between the defendant and the forum state.” *Id.* at 42.

183. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION pt. 3, intro. note (AM. LAW INST., Tentative Draft No. 2, 2016). In fairness to Born, at the time he was writing, the *Third Restatement of Foreign Relations Law* did suggest international-law limits on personal jurisdiction. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (AM. LAW INST. 1987) (stating reasonableness requirement); see also *id.* pt. 4, ch. 2, intro. note (“In the United States, and perhaps elsewhere, it is not always clear whether the principles governing jurisdiction to adjudicate are applied as requirements of public international law or as principles of national law.”).

184. Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474 (2006).

185. Perhaps the best evidence is found in the Brussels Regulation (Recast) governing jurisdiction and judgments among the members of the European Union. Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1 (EU). Although this regulation prohibits the use of exorbitant bases of personal jurisdiction with respect to defendants domiciled in other EU member states, *id.* art. 5(2), it expressly permits the use of these bases with respect to other defendants, *id.* art. 6(2).

186. See Clermont & Palmer, *supra* note 184, at 475 n.4.

187. *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014).

188. The only U.S. bases of jurisdiction considered exorbitant are transient jurisdiction, attachment jurisdiction, and doing-business jurisdiction. See Clermont & Palmer, *supra* note 184, at 477–82. The second was substantially limited in *Shaffer v. Heitner*. 433 U.S. 186 (1977).

international order, state boundaries are invisible; it is the United States as a whole that matters.<sup>189</sup> As the Supreme Court has long noted, “in respect of our foreign relations generally, state lines disappear.”<sup>190</sup> Whatever impact foreign-relations concerns might have on other questions of personal jurisdiction,<sup>191</sup> they offer no basis for rejecting a national-contacts approach to minimum contacts.

### E. National Contacts for State Law and State Courts

We argue for a rule dependent upon the alienage status of the defendant, not upon the source of law or the nature of the forum. Thus, our rule would apply a national-contacts test for personal jurisdiction to aliens for all claims, state or federal, and in all courts, state or federal. A national-contacts approach to state-law claims in state courts is somewhat exceptional among commentators,<sup>192</sup> so this Section defends the scope of our rule.<sup>193</sup> Our case

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The third was eliminated in *Daimler*. 134 S. Ct. 746. This leaves transient jurisdiction—personal jurisdiction based on service while an individual is temporarily present in the forum, see *Burnham v. Superior Court*, 495 U.S. 604 (1990)—as the only remaining U.S. basis considered exorbitant abroad. Transient jurisdiction does not apply to corporations. *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067–69 (9th Cir. 2014). For discussion of whether transient jurisdiction over individuals survives *Daimler*, see John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607, 614–15 (2015).

189. See Born, *supra* note 33, at 36 (“For purposes of international law and foreign relations, the separate identities of individual states of the Union are generally irrelevant.”); Degnan & Kane, *supra* note 34, at 813 (“In the international order, there is no such thing as Oklahoma. Oklahoma is an address, not a state.”).

190. *United States v. Belmont*, 301 U.S. 324, 331 (1937); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 171 cmt. g (AM. LAW INST. 1987) (“A State of the United States is not a state under international law since under the Constitution of the United States foreign relations are the exclusive responsibility of the Federal Government.”).

191. Born argues that due process “should require closer connections between the forum and the defendant than are necessary in domestic cases.” Born, *supra* note 33, at 34. We take no position on whether the level of minimum contacts or the standard for purposeful availment should be different for alien defendants, although we think fairness is more relevant to that question than foreign relations.

192. See *supra* notes 30–35 and accompanying text. Some commentators have referenced extending a national-contacts approach as far as we do, but they gloss over the legal implications necessary to extend it. See Born, *supra* note 33, at 37 (using international norms); Degnan & Kane, *supra* note 34, at 812–17 (focusing on the lack of interstate-federalism concerns); Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT’L L. 121, 140 & n.84 (1997) (referencing constitutionality); Silberman, *supra* note 134, at 683 (advocating national-contacts approach through federal legislation); Toran, *supra* note 35, at 770–88 (focusing primarily on the lack of interstate-federalism implications).

193. States would, of course, be free to require state-specific contacts for alien defendants in their long-arm statutes in the absence of preemption by federal law. Currently, about half the state long-arm statutes extend to the full reach the Constitution allows. See Laura Beck Knoll, *Personal Jurisdiction over Maritime Defendants: Daimler, Walden, and Rule 4(k)(2)*, 40 TUL. MAR. L.J. 103, 121 (2015); see also *id.* app. (compiling state statutes). Under Rule 4(k)(1)(A), such state requirements would also bind federal courts sitting in those states. We



for the constitutionality of a national-contacts approach to personal jurisdiction over aliens in state court under state law begins with an easy proposition: the Fifth Amendment demands only a national-contacts approach to federal-question cases in federal court.<sup>194</sup> Although the Court has never expressly so held,<sup>195</sup> it has strongly hinted its approval.<sup>196</sup> At least one commentator has concluded that the constitutionality of nationwide jurisdiction in federal court “is about as settled by precedent as it could be.”<sup>197</sup> Congress has passed nationwide-service statutes on that assumption.<sup>198</sup> The Supreme Court has promulgated nationwide-service rules,<sup>199</sup> and lower courts and commentators have recognized that nationwide service triggers a national-contacts analysis for personal jurisdiction.<sup>200</sup> The Fifth Amendment, not the

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would maintain this structure, which reflects the important principle that the outcome of a case—particularly a case brought under state law—should not vary depending on whether the suit is brought in federal or state court. See *infra* text accompanying notes 217–225. Rule 4(k) creates exceptions for federal claims under some circumstances. See FED. R. CIV. P. 4(k)(1)(C) (jurisdiction established when service authorized by federal statute); *id.* 4(k)(2) (jurisdiction established for claims that arise under federal law if the defendant is not subject to jurisdiction in any state).

194. See Born, *supra* note 33, at 39–40; RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 302 reporters’ note 2 (AM. LAW INST., Tentative Draft No. 2, 2016) (“When a federal court exercises personal jurisdiction, the Due Process Clause of the Fifth Amendment may allow the exercise of personal jurisdiction based on sufficient contacts with the United States as a whole.”); *cf.* 28 U.S.C. § 1605 (2012) (granting federal courts jurisdiction over foreign sovereign defendants using national contacts); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619–20 (1992) (applying a national-contacts approach to FSIA).

195. See Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783–84 (2017); Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 & n.5 (1987); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 n.\* (1987).

196. See, e.g., J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (“Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”); *Omni Capital*, 484 U.S. at 111 (“A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes.”).

197. Sachs, *supra* note 30, at 1319–20.

198. See, e.g., Clayton Act, 15 U.S.C. § 22 (2012); Securities Act, *id.* § 77v; Securities Exchange Act, *id.* § 78aa; Antiterrorism Act, 18 U.S.C. § 2334(a) (2012). The Multidistrict Litigation Act, 28 U.S.C. § 1407 (2012), though lacking a nationwide-service rule, has been construed as allowing nationwide personal jurisdiction for pretrial purposes. See Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. (forthcoming 2018) (manuscript at 3–7), <https://scholarship.law.berkeley.edu/facpubs/2792/> [<https://perma.cc/5XS5-NCBK>] (summarizing cases).

199. See FED. R. CIV. P. 4(k).

200. *E.g.*, Holland Am. Line Inc. v. Wärtsilä N. Am., Inc., 485 F.3d 450, 462 (9th Cir. 2007) (permitting personal jurisdiction under Rule 4(k)(2) to be based on national contacts); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002) (“Where Congress has spoken by authorizing nationwide service of process . . . the jurisdiction of a federal court need not be confined by the defendant’s contacts with the state in which the federal court sits.”); Erbsen, *supra* note 12, at 776; Klerman, *supra* note 12, at 716; Perdue, *supra* note 32, at 456. For discussion of cases under former Federal Rule of Civil Procedure 4(d)(3), which authorized in-

Fourteenth Amendment, applies to federal courts directly.<sup>201</sup> And, under the Fifth Amendment, Congress could establish a single nationwide federal district exercising personal jurisdiction based on national contacts.<sup>202</sup>

With respect to state-law cases in federal courts, Rule 4(k) generally incorporates the Fourteenth Amendment limitations on state courts.<sup>203</sup> But it does so as matter of policy, not constitutional obligation. This is evidenced by Rule 4(k)'s so-called bulge rule, which permits jurisdiction over joined parties who are served within 100 miles of the federal courthouse,<sup>204</sup> a rule that would be unconstitutional if federal courts were required to follow state lines when hearing state-law cases. Again, only the Fifth Amendment applies to federal courts directly, and commentators have overwhelmingly concluded that whatever limits apply to state courts under the Fourteenth Amendment do not bind federal courts even when they are deciding cases under state law.<sup>205</sup>

The question, then, becomes, Why should the answer be different for state courts under the Fourteenth Amendment? Technically, the Fourteenth Amendment's Due Process Clause is distinct from its Fifth Amendment counterpart. But if a national-contacts approach is fair for personal jurisdiction over aliens under the words "due process" in the Fifth Amendment,

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state service on out-of-state corporations for federal claims, see Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 428 n.88 (1981).

201. See 4A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1069, at 124–125 (4th ed. 2015) (reporting that courts applying Rule 4(k)(1)(C) have concluded that the Fifth Amendment controls); Brilmayer & Norchi, *supra* note 116, at 1220 (accepting the assumption that the Fifth Amendment applies to federal long-arm statutes).

202. See *Abrams*, *supra* note 30, at 1–2; *Borchers*, *supra* note 32, at 155 (asserting that personal jurisdiction in the federal courts under the Fifth Amendment is controlled by "minimum contacts with the nation as a whole, as opposed to minimum contacts with a single state"); *Perdue*, *supra* note 32, at 456 (arguing that "jurisdiction should be constitutional [under the Fifth Amendment] on the basis of effects in the United States"); *Sachs*, *supra* note 30, at 1303 (suggesting "a system of nationwide federal personal jurisdiction . . . over any defendant that has adequate contacts with the United States as a whole").

203. See FED. R. CIV. P. 4(k)(1) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant[ ] (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . .").

204. See *id.* ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant[ ] . . . (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued . . .").

205. See *supra* note 202 (citing commentary). For an argument that state courts should follow federal rules on personal jurisdiction when hearing federal question cases, see David S. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 49–51 (1987).

then it ought to be fair under the same words in the Fourteenth Amendment.<sup>206</sup> For an alien defendant, as we have already shown, the critical question is not which state will be able to exercise personal jurisdiction but whether the defendant will be subject to personal jurisdiction in the United States at all. From a fairness perspective, it would be as fair to subject the defendant in *McIntyre* to jurisdiction in New Jersey state court as in New Jersey federal court.

If there is a reason that state courts may not rely on national contacts with respect to alien defendants, it must lie in the differing authorities possessed by the state and federal governments. One potential basis for differing authorities is interstate federalism. This basis holds water for distinguishing between the Fourteenth Amendment and the Fifth Amendment in domestic-defendant cases because of a home state's special relationship with its domiciliaries. But, as we showed above, a state court's exercise of personal jurisdiction based on national contacts does not intrude upon the sovereignty of other states when the case involves an alien defendant. Because no state can claim a special home-state relationship with alien defendants, one state's exercise of personal jurisdiction based on national contacts does not intrude on the authority of any other state. When the defendant is an alien, interstate-federalism principles offer no legitimate basis for distinguishing between the Fourteenth Amendment and the Fifth Amendment.

Stephen Sachs argues for distinguishing state and federal courts on a different basis—namely, the political legitimacy of the exercise of a sovereign's adjudicatory authority.<sup>207</sup> He writes: “[T]he authority of a distant court ought to be supported by *some* theory of political obligation.”<sup>208</sup> Sachs's proposal is to “assign litigation, to the extent possible, to a sovereign with undoubted authority over the parties.”<sup>209</sup> He argues that state courts do not have legitimate authority over out-of-state defendants who lack minimum contacts with that state because those defendants “haven't voted for the politicians who pick the judges” of that state.<sup>210</sup> By contrast, all federal courts have legitimate authority over all U.S.-citizen defendants because they are subject to the authority of the federal government.<sup>211</sup>

Sachs's argument works, of course, for defendants who are citizens of the United States.<sup>212</sup> But it is much weaker as applied to alien defendants

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206. Cf. *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) (“To suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.”).

207. Sachs, *supra* note 30, at 1310–14.

208. *Id.* at 1311.

209. *Id.* at 1315.

210. *Id.* at 1311; see also *id.* at 1312 (“No jurisdiction, one might say, without representation.”). Sachs does qualify his focus on representation. See *id.* at 1312 (“[W]e don't really expect jurisdiction always to be paired with the vote.”).

211. *Id.* at 1317.

212. See *id.* (“But the Constitution empowers the United States, of which the defendant is a citizen, to try the case in a federal forum.”). Although Sachs's political-legitimacy argument in favor of national contacts works better for domestic defendants than for aliens, we note that

whose subjection to any American political authority is attenuated.<sup>213</sup> Sachs does acknowledge that an alien's "relationship to the United States as a whole is *a fortiori* no weaker, and usually far stronger, than its relationship to any one state in particular."<sup>214</sup> We agree, and to the extent the relationship with the United States as a whole confers legitimacy, it is unclear why a particular state could not legitimately exercise jurisdiction on behalf of the United States based on national contacts.<sup>215</sup>

We agree with Sachs that it is legitimate for federal courts to exercise personal jurisdiction over alien defendants based on national contacts. As he points out, there are nonrepresentational bases for the legitimacy of adjudicative jurisdiction.<sup>216</sup> We simply think that those other bases apply equally to state courts in the case of alien defendants and allow state courts to exercise political authority over aliens on behalf of the United States based on national contacts.

If there is no good reason to distinguish between federal and state courts with respect to alien defendants, there is one very powerful reason not to do so: uniformity in personal jurisdiction rules guards against vertical forum

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there is less practical need for a national-contacts approach with respect to domestic defendants because those defendants will be subject to general jurisdiction somewhere in the United States. See *supra* text accompanying note 125.

213. Aliens cannot vote in U.S. elections and are even prohibited from making campaign contributions in federal elections. See 52 U.S.C. § 30121 (2012); see also *Bluman v. FEC*, 800 F. Supp. 2d 281, 283, 291, 292 n.4 (D.D.C. 2011) (upholding the constitutionality of a prohibition on donations by alien individuals and corporations and recognizing the Supreme Court's precedent that the government can bar aliens from voting).

214. Sachs, *supra* note 30, at 1317.

215. In an attempt to show the limits of state-court authority, Professor Sachs compares state courts to French courts, Bill Gates, and the Pope, none of which would have legitimate authority to decide a tort suit arising in the United States. See *id.* at 1311–12. But the comparison is inapt. French courts, Bill Gates, and the Pope each lack authority to act on behalf of the United States. State courts, by contrast, can and do exercise such authority. Indeed, under international law, the United States is responsible for the actions of state courts but not for the actions of Bill Gates. See *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. GAOR Supp. No. 10 art 4, cmt. 9, at 41, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 41, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (noting that the national government is responsible for "a component unit of a federal State"); *id.* ch. 2, cmt. 3, at 38 (noting that "the conduct of private persons is not as such attributable to the State"). That the United States may be held internationally responsible for the acts of state courts is one of the reasons Article III permits federal courts to exercise subject-matter jurisdiction in most cases that are likely to affect noncitizens. See *THE FEDERALIST* No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."). The precise balance between state and federal courts in cases involving noncitizens is one the Constitution leaves to Congress, which need not authorize federal subject-matter jurisdiction to the full extent permitted by Article III. The point for present purposes is that unlike French courts, Bill Gates, and the Pope, state courts can and do exercise authority on behalf of the United States.

216. See Sachs, *supra* note 30, at 1312.

shopping and inequitable administration of the laws.<sup>217</sup> If federal courts applied a national-contacts approach to personal jurisdiction over aliens while state courts applied a state-contacts approach, then plaintiffs might seek ways to invoke diversity jurisdiction as a means of establishing personal jurisdiction in a favorable state—such as the plaintiff's home state—when the state courts in that state would lack personal jurisdiction.<sup>218</sup> Such plaintiffs would also have an unfair advantage over similarly situated alien plaintiffs, who would not be able to invoke federal diversity jurisdiction.<sup>219</sup> Thus, “the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.”<sup>220</sup> Alternatively, plaintiffs might add relatively insignificant federal claims in an effort to secure a federal forum. It is for such reasons of vertical uniformity that portions of the federal-court–long-arm rule mirror state-court personal jurisdiction.<sup>221</sup> Adopting a national-contacts approach only for federal courts would violate this principle of uniformity.

It would also increase the burden on federal courts and slight the role of state courts in our federal system. Although diversity and alienage jurisdiction allow access to federal courts in situations where there is reason to fear that state courts might be biased,<sup>222</sup> state courts remain the foundation of the justice system in the United States. Allowing federal but not state courts to exercise personal jurisdiction would shift at least some cases away from state courts as plaintiffs sought a federal forum that could exercise personal jurisdiction over the defendant.<sup>223</sup> A national-contacts approach for alien defendants does not pose a horizontal-federalism problem in the sense that one state court would be intruding on the domain of another state court.<sup>224</sup>

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217. These goals are sometimes associated with the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (referring to “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws”).

218. See 28 U.S.C. § 1332(a) (2012).

219. The Constitution's grant of alienage jurisdiction does not extend to cases between two aliens. See *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800).

220. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

221. FED. R. CIV. P. 4(k)(1)(A). The rule recognizes exceptions only for joined parties who are served within 100 miles of the federal court, *id.* 4(k)(1)(B), when a federal statute authorizes nationwide service of process, *id.* 4(k)(1)(C), and for federal claims if the defendant is not subject to jurisdiction in the courts of any state, *id.* 4(k)(2). Cf. Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733, 746 (1988) (using this point to argue for federal-court service rules that mirror state service rules).

222. See 28 U.S.C. § 1332.

223. The number would be greater if national contacts were used in federal court for all defendants and less if national contacts were used in federal court only for alien defendants.

224. See *supra* Section II.B.2.

But a national-contacts approach only for federal courts would pose a vertical-federalism problem by allowing federal courts to reach cases that state courts could not.<sup>225</sup>

In sum, the constitutional rules of personal jurisdiction applicable to the states under the Fourteenth Amendment should be the same as those applicable to federal courts under the Fifth Amendment. If it would be fair for a federal court in New Jersey to use national contacts to exercise personal jurisdiction over an alien, then it is fair for a state court in New Jersey to do so as well. State courts enjoy as much legitimacy with respect to alien defendants as federal courts do. And applying the same rules for personal jurisdiction in state and federal courts respects longstanding principles of uniformity and federalism.

### III. NATIONAL CONTACTS IN ACTION

A national-contacts approach to personal jurisdiction should not produce a forum that is constitutionally unfair to an alien defendant. Nevertheless, it is possible that a particular forum within the United States could impose meaningful inconveniences or litigation burdens on that defendant. An alien defendant from Vancouver, for example, whose claim-related U.S. conduct is concentrated in Seattle, Washington, might face inconvenience and other burdens if haled into court in South Carolina.

The minimum-contacts component of personal jurisdiction, however, is not the only determinant of forum. Other doctrines can help isolate an appropriate forum under a national-contacts approach to personal jurisdiction over alien defendants, including doctrines of reasonableness, venue, and forum non conveniens.<sup>226</sup> In this Part, we retrain focus on these limits, tailored to our proposal and updated to account for recent developments.

#### A. Reasonableness in State and Federal Courts

The Supreme Court has made clear that even when minimum contacts exist, the Due Process Clauses prohibit the exercise of personal jurisdiction when it would be unreasonable.<sup>227</sup> Although this reasonableness requirement does not have much impact on suits against domestic defendants, it does

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225. In other contexts, scholars have distinguished between horizontal federalism and vertical federalism. See, e.g., Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008).

226. Others have made similar suggestions in other defenses of a national-contacts approach to personal jurisdiction. See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746, 771 (2014) (Sotomayor, J., concurring); Abrams, *supra* note 30, at 36; Casad, *supra* note 12, at 1592; Degnan & Kane, *supra* note 34, at 818; Hay, *supra* note 31, at 435; Lilly, *supra* note 30, at 148 n.240; Packel, *supra* note 172, at 920; Parrish, *supra* note 107, at 55–56; Perdue, *supra* note 32, at 468; Sachs, *supra* note 30, at 1313, 1338; Spencer, *supra* note 30, at 333.

227. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 115 (1987).

result in the dismissal of some cases against alien defendants.<sup>228</sup> As a constitutional limitation, reasonableness applies equally in state and federal courts.<sup>229</sup>

To determine whether the exercise of personal jurisdiction over an alien defendant is reasonable, a court must consider: (1) “the burden on the defendant,” (2) “the plaintiff’s interest in obtaining relief,” (3) “the interests of the forum State,” (4) “the procedural and substantive policies of other *nations*,” and (5) “the . . . judicial system’s interest in obtaining the most efficient resolution of controversies.”<sup>230</sup> In *Asahi*, the Supreme Court stated: “When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.”<sup>231</sup> This means that suits brought by U.S. plaintiffs based on harm that occurs in the United States are unlikely to be dismissed on reasonableness grounds. But that is as it should be, given the plaintiffs’ interest in obtaining relief and the appropriateness of the place of injury as a basis for subjecting a defendant to personal jurisdiction.

Nevertheless, the reasonableness component may offer some protection when the plaintiff is not a U.S. resident.<sup>232</sup> In addition, it is possible that the burdens on the defendant could be substantial enough to outweigh the plaintiff-focused factors even in a case involving a domestic plaintiff and to make the exercise of personal jurisdiction in a particular state unreasonable. In the case of the small Vancouver defendant who caused injury in Seattle and whose U.S. business is concentrated in Seattle, defending in South Carolina might be unreasonably burdensome given the more reasonable forum in Seattle. And the interests of the Seattle plaintiff and of the state of South Carolina in a South Carolina forum are unlikely to be substantial enough to outweigh those burdens. Reasonableness thus serves as a limited check for exceptional cases in which a national-contacts approach would lead to unusual burdens on alien defendants relative to the other factors in the reasonableness analysis.

### B. *Limits on Suits in Federal Courts*

A case in federal court is subject to rules of venue under federal law. In domestic-defendant cases, venue law is restrictive.<sup>233</sup> In alien-defendant cases, however, venue law lays proper venue in any federal district court.<sup>234</sup> It is worth noting that venue’s approach to aliens is consistent with a national-

228. See Silberman & Yaffe, *supra* note 8, at 408.

229. This stands in contrast to the subconstitutional limits we discuss below, which depend on whether the case is in state or federal court. See *infra* Sections III.B, III.C.

230. *Asahi*, 480 U.S. at 113, 115.

231. *Id.* at 114.

232. This was the case in *Asahi*. See *id.*

233. See 28 U.S.C. § 1391 (2012).

234. See *id.* § 1391(c)(3).

contacts approach to personal jurisdiction.<sup>235</sup> Our proposal is fully consistent with the policies animating venue.

Importantly, however, the broad rules on venue with respect to alien defendants are subject to the possibility of transfer to a more convenient forum. The venue-transfer statute allows transfer “[f]or the convenience of parties and witnesses” to any district where the case “might have been brought.”<sup>236</sup> Because every federal court would have personal jurisdiction and proper venue in an alien-defendant case, the venue statute allows such a case to be quickly transferred to the most convenient and appropriate U.S. forum. Although the burden is on the defendant to show that transfer is appropriate, the Supreme Court has held that Congress “intended to permit courts to grant transfers upon a lesser showing of inconvenience” than under the federal doctrine of *forum non conveniens*.<sup>237</sup> In particular, courts will give relatively little weight to the plaintiff’s choice if it chooses a forum unrelated to the case.<sup>238</sup> The point is that any inconveniences imposed on alien defendants by a national-contacts approach to personal jurisdiction can be remedied in federal court by venue transfer. The small Vancouver defendant whose business was concentrated in Seattle can thus transfer an action filed in South Carolina to Washington. It is true that the comparative conveniences among states may be less clear in a case against Justice Breyer’s Kenyan coffee farmer. But that just reinforces the point of a national-contacts approach to personal jurisdiction over aliens: in contrast to domestic defendants, relative state inconveniences are often beside the point for alien defendants.<sup>239</sup>

One nuance of national venue complicates matters: where the case begins affects which law applies to the case, no matter where it ends up. The usual rule in federal court is that the choice-of-law rules of the court where the case is filed apply even if the case is transferred to a court that would otherwise apply different choice-of-law rules.<sup>240</sup> This rule means that the law ultimately applied by a particular federal court may differ between a case filed in or removed to that court and a case transferred to that court from a

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235. See Johnson, *supra* note 1, at 39 (arguing that the venue statute seems to assume “that, for an alien, suit in any district in the United States is just as convenient as any other”).

236. 28 U.S.C. § 1404(a).

237. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

238. See, e.g., *Bowen v. Elanes N.H. Holdings, LLC*, 166 F. Supp. 3d 104, 108 (D. Mass. 2015) (“Where the forum has no obvious connection to the case or where the plaintiff is not a forum resident, the plaintiff’s presumption carries less weight.”).

239. Cf. Sachs, *supra* note 30, at 1327 (“Giving plaintiffs their choice of ninety-four federal judicial districts would create a forum shopper’s paradise, in which the threat of suit in distant and inconvenient fora—thousands of miles from defendants’ homes—would become a cudgel for settlement. That regime would produce far more injustice than it would prevent.”).

240. See *Ferens v. John Deere Co.*, 494 U.S. 516, 524–25 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 634–35 (1964).



different court.<sup>241</sup> Because a national-contacts approach to personal jurisdiction widens the range of forums in which a state-law case against an alien could be brought, it may incentivize plaintiffs to choose a particular forum because of the particular law that forum would apply.

Law shopping is an accepted and anticipated cost of America's system of horizontal federalism that does not concern venue transfer.<sup>242</sup> Nevertheless, Professor Sachs has homed in on this nuance to argue, primarily from a domestic-defendant perspective, that the choice-of-law rules for venue transfer should be changed under a national-contacts approach to personal jurisdiction so that plaintiffs cannot shop for the most favorable substantive law.<sup>243</sup> We are not opposed to his proposed reforms, but we note that the benefits of his approach for domestic defendants are less compelling for alien defendants. In alien-defendant cases, the opportunities for law-shopping-through-forum-shopping conduct are quite limited because the alien defendant's status as an outsider narrows the range of possibly applicable laws. Few choice-of-law regimes will direct the application of the law of a jurisdiction with only minimal connections to the case, even if the case could be brought there.<sup>244</sup> The alien defendant's absence will train focus on the smaller set of connections—and therefore on a narrower range of applicable laws. In short, it is highly unlikely that a national-contacts approach to personal jurisdiction over aliens will result in a case tried under the substantive law of a state that no party anticipated.

Finally, the federal doctrine of *forum non conveniens*—which allows federal courts to dismiss a case more suitable to an available foreign tribunal—is also an option for aliens in federal court. One survey of federal district court decisions found that *forum non conveniens* motions succeeded in 30.4 percent of cases brought by domestic plaintiffs and 63.4 percent of cases brought by foreign plaintiffs.<sup>245</sup> Thus, even in cases where the presumption

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241. Federal courts apply state choice-of-law rules to diversity claims. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

242. See *Ferens*, 494 U.S. at 524–25; *Van Dusen*, 376 U.S. at 634–35.

243. Sachs, *supra* note 30, at 1338 (proposing amendments to “establish[ ] a presumption in favor of venue transfer, eliminat[e] the deference to the plaintiff, and adopt[ ] choice-of-law rules based on where the case ends up, not where it began”); *id.* at 1340 (discussing the adverse effects of plaintiff-side forum shopping).

244. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221, 291 tbl.2 (2016) (showing, in a table of the choice-of-law rules for each state, that states overwhelmingly follow choice-of-law rules that depend in some part on contacts with the state whose law is to be chosen); see also *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”).

245. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 503 & tbl.1 (2011).

in favor of the plaintiff's choice of forum is strongest,<sup>246</sup> alien defendants have a substantial chance of success.<sup>247</sup>

All this is simply to say that existing law substantially reduces—below the constitutional threshold—the risk of unusual burdens imposed by our national-contacts approach to personal jurisdiction over alien defendants. Under our proposal, Congress retains the flexibility to modify existing venue or choice-of-law schemes to impose additional, subconstitutional restraints on federal courts.<sup>248</sup> Others have proposed such modifications,<sup>249</sup> and these may help reduce burdens on alien defendants even further.

### C. *Limits on Suits in State Courts*

Venue transfer across state lines is not possible when the case is in state court, but alien defendants have options there too. One option is removal to federal court. Aliens can remove all federal-law cases from state court to federal court based on federal-question jurisdiction and most state-law cases based on alienage jurisdiction.<sup>250</sup> Once in federal court, the alien defendant can move to transfer to a more convenient state under the federal venue-transfer rules.<sup>251</sup> Of course, removal is not available for state-law claims if (1) the amount in controversy is less than \$75,000, (2) a plaintiff is an alien, or (3) a co-defendant is a domestic citizen of the same state as one of the plaintiffs or of the forum state.<sup>252</sup> But these occurrences are rare.<sup>253</sup>

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246. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (“[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum . . . . [But] the presumption applies with less force when the plaintiff or real parties in interest are foreign.”).

247. Professor Whytock did not code his sample for whether the defendant was an alien. Whytock, *supra* note 245, at 502–03, 503 tbl.1. But it stands to reason that the chances of an alien defendant succeeding on a *forum non conveniens* motion should not be less than the chances of defendants in general.

248. See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 1 (1991) (arguing that Congress has the constitutional authority to pass a federal choice-of-law statute for multistate claims).

249. See, e.g., Sachs, *supra* note 30, at 1338–40.

250. See 28 U.S.C. §§ 1331–1332(a) (2012).

251. See *supra* Section III.B.

252. See § 1332(a). The seminal case *World-Wide Volkswagen* was such a case. See ANDREAS F. LOWENFELD, *CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES* § 7.04, at 565 (1986). Removal also would not be possible in a state-law case if the alien defendant is an individual who is a lawful permanent resident of the same state as at least one plaintiff, see 28 U.S.C. §§ 1332(a)(2), 1441(a), but, in that case, the state likely would have general personal jurisdiction over the resident alien independent of any national-contacts test. As noted above, *supra* text accompanying note 248, Congress could modify the removal statute to alleviate even these minor concerns of strategic or fraudulent joinder by plaintiffs to deny removal.

253. See Johnson, *supra* note 1, at 40 (stating that alienage jurisdiction's removal privilege makes it rare that suits against alien defendants are heard in state courts). Alienage cases make up a small fraction of the federal diversity docket. See *id.* at 5 n.19 (reporting about 7.3 percent of diversity cases).

In the rare instances in which removal is unavailable, the alien defendant may ask the court to dismiss under the state's doctrine of *forum non conveniens* if the suit could be brought in another state or foreign court and the alternative forum would be more appropriate. Most state *forum non conveniens* doctrines follow the federal doctrine's presumption in favor of the plaintiff's choice of forum.<sup>254</sup> But assuming that state dismissal rates mirror the federal rates,<sup>255</sup> state *forum non conveniens* remains a viable option for alien defendants even when the plaintiff is a U.S. resident.

#### D. Other Practical Protections

If these legal doctrines were not enough to protect alien defendants from state-specific inconveniences in a personal jurisdiction regime founded on national contacts, alien defendants can take matters into their own hands. Defendants can enter into contracts with forum selection clauses that limit the range of possible courts in which the signatory can sue the defendant. Arbitration clauses, which are used widely around the world, are one kind of forum selection clause and are specifically enforceable in federal courts, even in a state-law case.<sup>256</sup> Clauses that choose a particular judicial forum are also generally enforceable.<sup>257</sup> Forum selection clauses only work to limit suits by another party to the contract. But with respect to such potential plaintiffs, they are an effective strategy.

With respect to other potential plaintiffs, an alien defendant who wishes to avoid the burden of litigating in a U.S. court retains the option of defaulting and resisting enforcement of the U.S. judgment.<sup>258</sup> If the alien defendant does not have assets in the United States against which a U.S. judgment can

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254. See, e.g., *Cortez v. Palace Resorts, Inc.*, 123 So. 3d 1085, 1091 (Fla. 2013) (noting that the Florida Supreme Court had “adopted the federal test for dismissing an action on *forum non conveniens* grounds”); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 304 reporters’ note 2 (AM. LAW INST., Tentative Draft No. 2, 2016) (giving other examples).

255. See *supra* text accompanying note 245.

256. 9 U.S.C. § 205 (2012).

257. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 302 reporters’ note 3 (discussing the exercise of jurisdiction by the chosen court); *id.* § 304 reporters’ note 6 (discussing the dismissal of suit by a court not chosen); see also Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 49–51 (2014) (discussing forum selection clauses). If the forum selection clause specifies a U.S. federal court, venue transfer pursuant to the forum selection clause mandates that the transferee court apply its own choice-of-law rules instead of those of the transferor court, which curtails opportunities for plaintiffs to shop for favorable law. See *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 582–83 (2013); see also Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 HASTINGS L.J. 675 (2015) (discussing *Atlantic Marine* and its implications for venue transfer).

258. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (“A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.”).

be enforced, the plaintiff will have to seek enforcement of the default judgment in another country where the defendant does have assets. Many foreign jurisdictions will recognize and enforce U.S. default judgments when personal jurisdiction is proper under our approach, but the cost and uncertainty of this additional step will make it unattractive to bring suit against many smaller alien defendants who lack U.S. assets. As a practical matter, this simple fact may provide the greatest protection for Justice Breyer's small Egyptian shirtmaker or Kenyan coffee farmer.

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In sum, under a national-contacts approach, alien defendants will continue to enjoy a range of practical and doctrinal protections against the possibility of a truly inconvenient or burdensome U.S. forum. On a practical level, an alien can choose a convenient forum to resolve disputes with its contract partners in a forum selection clause. If the alien defendant lacks substantial assets in the United States, it can also default and resist enforcement of the U.S. judgment abroad, a possibility that will discourage many plaintiffs from bringing suit in the first place.

Larger alien defendants with assets in the United States are also likely to have more resources to defend themselves in litigation. Here, a range of doctrinal tools become available. In both state and federal courts, alien defendants are protected against extreme inconvenience by the reasonableness requirement of the Due Process Clauses. For suits filed initially in federal court, the option of venue transfer is available. For suits filed initially in state court, motions to dismiss under state doctrines of *forum non conveniens* will often be available, or the alien defendant may be able to remove the suit to federal court and then move to transfer venue to a more convenient federal forum. These safeguards allow the minimum-contacts test for personal jurisdiction over aliens to remain focused on national contacts.

#### CONCLUSION

We have advanced a national-contacts approach to personal jurisdiction over aliens, and we have defended the approach on grounds of fairness, federalism, and practicality. Our goal has been to offer an attractive way to resolve some of the Court's open personal jurisdiction questions while maintaining consistency with existing precedent. In the process, we hope our contribution refocuses attention on alienage in personal jurisdiction, which is likely to continue to generate significant litigation and commentary.

