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Personal Jurisdiction and Aggregation

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Articles

PERSONAL JURISDICTION AND AGGREGATION

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ABSTRACT—Aggregation—the ability to join parties or claims in a federal civil lawsuit—has usually been governed by subject matter jurisdiction, claim and issue preclusion, and the joinder rules. These doctrines have tended to favor aggregation for its efficiency, consistency, and predictability. Yet aggregation is suddenly under attack from a new threat, one that has little to do with aggregation directly: personal jurisdiction. In this Article, I chronicle how a recent restrictive turn in personal jurisdiction—seen in modern cases narrowing general jurisdiction and October Term 2016's blockbuster case *Bristol-Myers Squibb*—threatens the salutary benefits of aggregation across a number of areas, including simple joinder of parties and claims, representative actions, and multidistrict litigation. I offer a solution for preserving aggregation's advantages in the face of this trend in personal jurisdiction: authorize a broader scope of personal jurisdiction in federal court for multiparty and multiclaim cases. I defend such a regime as constitutional and consistent with the norms of both personal jurisdiction and aggregation.

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INTRODUCTION

Consider the following scenario. Wow Chemicals, which is headquartered and incorporated in Russia, develops a new air-freshener product designed for use in cars to give them "that new-car smell." Wow does not sell the product directly to consumers but instead sells to various distributors around the world. Its American distributor is incorporated and headquartered in Delaware. The distributor markets and sells the product to retail stores in every state. Neither Wow nor the distributor puts any warnings on the packaging or in the advertising for the product.

The air freshener is an immediate hit. The first year the product is available, more than ten million Americans purchase and use it in their cars, including many ridesharing and taxi drivers. Five years later, medical experts conclude that an estimated one million people exposed to the air freshener have developed a chronic and painful throat condition triggered by chemicals in the product. Eventually, many affected individuals decide to file civil lawsuits against Wow and its distributor for failure to adequately warn of the air freshener's dangers.

Nothing prevents each injured individual from suing the distributor in a one-on-one lawsuit in either Delaware or the state where the injured individual purchased or used the air freshener, or from suing Wow in a

separate one-on-one lawsuit in Russia (to the extent Russian law would permit the suit).[1] But such individualized litigation is highly problematic.

It would be costly and inconvenient for plaintiffs to travel to possibly distant states (the place where they purchased or were exposed to the air freshener may be across the country from where they now reside) or foreign countries to sue in individual litigation. Plaintiffs forced to sue each defendant separately would suffer the costs of duplicative litigation and could face an "empty-chair defense," in which Wow blames the distributor to escape its fair apportionment of liability, while the distributor blames Wow to escape *its* fair apportionment of liability, leaving plaintiffs short of full, if any, compensation.[2]

Individualized litigation presents risks to defendants as well.[3] Each defendant faces the prospect of being forced to litigate the same issues in thousands of cases brought by separate plaintiffs, perhaps in different places around the country. The first successful judgment against a defendant could be used to establish liability against that defendant in future cases brought by different plaintiffs through the doctrine of issue preclusion.[4] Separate suits against Wow and its distributor could lead to a reverse-empty-chair problem of excessive liability apportionment against both, effectively overcompensating plaintiffs. Each plaintiff can seek punitive damages to deter the same conduct, effectively overpunishing both defendants. If plaintiffs seek injunctive relief directing the addition of warning labels on the packaging, courts may issue injunctions that create inconsistent obligations on each defendant.

The crush of individualized litigation burdens the system, too. Each individual case will present the same crucial issue—whether the defendants failed to provide adequate warnings—risking repetitious discovery and

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[1] Injured individuals *might* be able to sue Wow in the state where the injury occurred, but that possibility is uncertain in light of the fairness factors articulated in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), and in light of the direct connection between the defendant and the forum required by more recent specific jurisdiction cases. *See infra* Section II.C. Elsewhere, I have argued that alien defendants ought to be subject to a much broader scope of personal jurisdiction. *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1208 (2018) (arguing for a national contacts approach to personal jurisdiction over alien defendants).

[2] *See* McDermott, Inc. v. AmClyde, 511 U.S. 202, 217 (1994) ("[A] defendant will often argue the 'empty chair' in the hope of convincing the jury that the [absent defendant] was exclusively responsible for the damage."). *See generally* 3 LITIGATING TORT CASES § 29:34 (2017) (discussing the defense).

[3] It also presents the advantage of reducing the number of meritorious individual cases filed because of cost pressures on and inconveniences to those plaintiffs, but this is not an advantage that the civil justice system deems to be a virtue. *See infra* text accompanying notes 73–74.

[4] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–33 (1979).

pretrial motions, as well as exponential increases in litigation costs and attorney's fees.[5]

In contrast to the burdens, inefficiencies, and potential unfairness of individualized litigation, aggregation makes sense from all perspectives. Aggregation permits the common issues to be litigated once, with all interests presented and determined in a single adjudication. Both plaintiffs and defendants can pool their resources and share information to make their litigation efforts more efficient and effective. The lawsuits can be heard in a single court before a single judge and jury, saving the judicial system, the witnesses, and the parties millions of dollars and a great deal of time. A federal court would likely have jurisdiction to hear all related claims, even if some were for smaller values than others,[6] and the joinder rules would extend to all claims that depend upon a common issue, such as the defendants' alleged failure to provide adequate warnings.[7] The plaintiffs could also potentially join together in a class action or in multidistrict litigation (MDL), perhaps even uniting all affected users nationwide in a single lawsuit or consolidated action.[8]

Modern federal law generally encourages such aggregation, precisely for the efficiency and fairness that it provides,[9] and plaintiffs, defendants, and courts have used aggregation to reap these advantages.[10] Today, however, such benefits are all but impossible in a case like the air-freshener case above. That is not (primarily) because the law of aggregation has changed. Rather, it is because the law of personal jurisdiction has changed.

Personal jurisdiction—the adjudicatory authority of a court over a party—has historically had little to do with aggregation directly. But recent decisions from the Supreme Court cabining the reach of courts' personal jurisdiction over defendants—including October Term 2016's bombshell *Bristol-Myers Squibb Co. v. Superior Court*[11]—have imbued the doctrine

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[5] Issue preclusion could mitigate some of these costs, but the doctrine is flexible and pockmarked by exceptions. *See id.* at 329–31 (cautioning against overuse of offensive nonmutual issue preclusion if the plaintiff could have easily joined the earlier action or preclusion might be unfair to the defendant).

[6] *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005) (holding that supplemental jurisdiction permits joinder of plaintiffs who have jurisdictionally insufficient claims if joined with a plaintiff who has a jurisdictionally sufficient claim).

[7] *See* FED. R. CIV. P. 20(a).

[8] *See* 28 U.S.C. § 1407 (2012) (MDL); FED. R. CIV. P. 23 (class actions).

[9] For a recent history of aggregation, see Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765 (2017).

[10] *See, e.g.*, Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 263–66 (2006) (detailing the successes of aggregation for resolving asbestos claims in the early 1990s).

[11] 137 S. Ct. 1773 (2017).

with a powerful disaggregation effect by requiring a close connection between the forum state, each defendant, and each claim.

This restrictive approach to personal jurisdiction means that similarly situated plaintiffs injured in different states are unlikely to be able to sue co-defendants from different states, like Wow and its distributor, in the same lawsuit. Even as against one of the defendants, plaintiffs residing in the same state might not be able to join together in the same lawsuit if they were injured in different states.[12] The resulting disaggregation causes waste and unfairness to the parties and the system.

In this Article, I tell the intersecting stories of personal jurisdiction and aggregation. Part I opens with aggregation, and goes on to show that the modern incarnation of federal civil litigation seeks to reap the advantages of aggregation by favoring joinder, representative litigation, and consolidation. In some instances, the law even forces joinder over the preferences of the parties because the efficiencies and sensibilities of aggregation are so strong. This Part ties together ordinary party and claim joinder, class actions, collective actions, preclusion, and multidistrict litigation. The law's favoritism toward aggregation is not unfettered, as illustrated in recent class action cases, but limitations tend to be imposed as part of aggregation's own terms.

Part II switches to the doctrine of personal jurisdiction. Until recently, personal jurisdiction was largely solicitous of aggregation, and direct conflicts tended to be resolved in favor of modifying personal jurisdiction to accommodate aggregation. But 2011 marked a dramatic turn toward more restrictive personal jurisdiction.[13] This restrictive turn has not escaped commentators' notice, but, to date, commentators naturally have focused on the implications for personal jurisdiction doctrine directly;[14] few have interrogated the consequences of personal jurisdiction's restrictive trend for aggregation.[15] Here, I demonstrate that this trend poses severe threats to the salutary benefits of aggregation.

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[12] Plaintiffs could join together in the defendant's home state, but for foreign defendants like Wow, the relevant foreign home country might not permit aggregation. Russia, for example, does not allow class actions. *See* Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. KAN. L. REV. 965, 967 (2017).

[13] *See infra* Section II.B.

[14] *See, e.g.*, John T. Parry, *Rethinking Personal Jurisdiction After* Bauman *and* Walden, 19 LEWIS & CLARK L. REV. 607, 611 (2015); Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Personal Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 675–77 (2015).

[15] One exception is Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251 (2018), which focuses narrowly on the effects of *Bristol-Myers Squibb* on mass-tort litigation, with a particular

Part III turns to some solutions for restoring the balance. In federal court, the most promising solution is to broaden Rule 4(k) of the Federal Rules of Civil Procedure, which currently pegs personal jurisdiction in most federal court cases to the same scope that would apply in state court.[16] Rule 4(k)'s state-based limitation is the source of the disaggregation problems, but the Constitution does not require such a limitation in federal court. Thus, regaining the benefits and purposes of aggregation in a world of restrictive personal jurisdiction is simply a matter of expanding—by statute or rule amendment—personal jurisdiction in multiparty or multiclaim cases. In this Part, I explore that possibility, its virtues, and its potential vices.

I. LAW'S PREFERENCE FOR AGGREGATION

For many years, the civil system favored individual, one-on-one litigation that limited the range of issues to keep trial a simple affair.[17] But as travel became easier, as commerce expanded, as pretrial expenses ballooned relative to trial expenses, and as litigation became more complex, the simplification of litigation became unfair and unworkable.[18] The adoption of the Federal Rules of Civil Procedure in 1938 resulted in a culmination of equity-driven preferences, including for aggregation,[19] which became entrenched in law and practice in subsequent decades.[20] This Part explores the mechanisms in place to facilitate and encourage aggregation, and then identifies aggregation's limitations.

A. Aggregation's Advantages and Mechanics

Nearly everyone benefits in some form from aggregation. Courts and parties benefit from increased efficiency, the avoidance of duplicative

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emphasis on federal multidistrict litigation. *See id.* at 1256–57. In this Article, I take a much more expansive view of the intersection between personal jurisdiction and aggregation.

[16] *See* FED. R. CIV. P. 4(k)(1)(A).

[17] *See* Stephen N. Subrin, *How Equity Conquered the Common Law*, 135 U. PA. L. REV. 909, 915–16 (1987) ("The obligation to choose only one writ at a time limited the scope of law suits, as did rules severely restricting the joinder of plaintiffs and defendants."); *id.* at 916 ("Common law also evolved as a technical pleading system designed to resolve a single issue.").

[18] *See* Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 629 (1988) (detailing complaints about the constraints of pre-Rules joinder); Edson R. Sunderland, *Joinder of Actions*, 18 MICH. L. REV. 571, 581 (1920) (same).

[19] *See generally* William Wirt Blume, *Free Joinder of Parties, Claims, and Counterclaims*, 2 F.R.D. 250 (1943) (contrasting pre-Rules joinder with Rules joinder); *see also* Subrin, *supra* note 17, at 912 ("[T]he evolution of the Federal Rules reveals that rules of equity prevailed over common law procedure.").

[20] *See generally* Judith Resnik, *From "Cases" to "Litigation,"* 54 L. & CONTEMP. PROBS. 5 (1991) (documenting the rise of aggregation from the 1960s to the 1990s); Resnik, *supra* note 9 (offering a recent history of aggregation).

litigation, and consistency in judgments and precedent.[21] As a result, the law favors aggregation of claims, plaintiffs, defendants, and even cases.

1. Joining Claims

Claim joinder is liberal. Rule 18 allows a claimant to join as many claims as she has against a single opponent.[22] The theory behind Rule 18 is that once the parties are already before the court in an adversarial posture, there is no inconvenience in allowing the claimant to lodge all of her grievances at once. As the Advisory Committee Notes explain,

> The Rules proceed upon the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common. Accordingly, Rule 18(a) has permitted a party to plead multiple claims of all types against an opposing party, subject to the court's power to direct an appropriate procedure for trying the claims.[23]

The same permissiveness extends, in Rule 13, to all counterclaims that the defendant has against the plaintiff.[24] The result is that these rules allow the joinder of all claims between the original adverse parties.[25] Coparties may also assert claims against each other if they "arise[] out of the transaction or occurrence that is the subject matter of the original action."[26]

Jurisdictional principles facilitate this liberal claim joinder. If the joined claim satisfies diversity or federal question jurisdiction, the federal court can hear it.[27] For diversity jurisdiction, the amounts in controversy of claims joined under Rule 18(a) can be aggregated, allowing claims that would not separately meet the jurisdictional amount to be heard together.[28] In addition, a federal court can hear a claim under Rule 18 or Rule 13 that is not eligible

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[21] *See* Resnik, *From "Cases" to "Litigation," supra* note 20, at 21; *see also* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192–93 (2013).

[22] FED. R. CIV. P. 18(a) ("A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.").

[23] FED. R. CIV. P. 18(a) advisory committee's note to 1966 amendment (internal quotation marks and citations omitted).

[24] FED. R. CIV. P. 13(a), 13(b).

[25] Other rules allow joinder of new parties. *See, e.g.*, FED. R. CIV. P. 14, 19, 20, 24. Subsequent subparts address those joinder rules. *See infra* text accompanying notes 33–64.

[26] FED. R. CIV. P. 13(g).

[27] 28 U.S.C. §§ 1331, 1332 (2012).

[28] *See, e.g.*, Pearson v. Nat'l Soc'y of Pub. Accountants, 200 F.2d 897, 898 (5th Cir. 1953); James E. Pfander, *The Simmering Debate over Supplemental Jurisdiction*, 2002 U. ILL. L. REV. 1209, 1212 ("[T]he plaintiff may freely aggregate all of the claims he or she has against the defendant. This rule of permissive aggregation applies, even where the claims bear no transactional . . . relationship to one another.").

for diversity or federal question jurisdiction if the joined claim is related to a claim over which the federal court has original jurisdiction.[29]

Joining related claims promotes efficiency and inhibits inconsistencies to such a degree that the law compels assertion of certain related claims. Rule 13(a) compels counterclaims "aris[ing] out of the same transaction or occurrence that is the subject matter of the opposing party's claim."[30] Similarly, the federal common law of claim preclusion (also known as res judicata) prevents parties from litigating claims not raised in a previous suit that could have been raised because of their close relation to previously litigated claims between the parties.[31] Rule 13(a) and claim preclusion thus facilitate the benefits of claim aggregation by discouraging the waste of separate litigation and promoting the consistency of judgments.[32]

2. Joining Plaintiffs

Aggregating plaintiffs offers them the opportunity to reduce costs in a way that can make meritorious but otherwise economically nonviable litigation viable,[33] offers defendants the opportunity for mass resolution and potentially global peace in one fell swoop,[34] and furthers private enforcement of compliance with substantive law.[35] Plaintiffs may join together in one case through the rules of ordinary joinder or through procedural mechanisms providing for representative litigation, such as a class action.

Rule 20 permits plaintiffs to join in one action if they assert related claims and if "any question of law or fact common to all plaintiffs will arise

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[29] 28 U.S.C. § 1367(a) (2012) (granting supplemental jurisdiction for certain joined claims).

[30] FED. R. CIV. P. 13(a)(1)(A).

[31] *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."); RESTATEMENT (SECOND) OF JUDGMENTS §§ 24, 26 (AM. LAW. INST. 1982) (limiting claim preclusion to related claims). Federal common law establishes the claim-preclusive effect of a federal judgment, but if the first claim was a state claim, then federal preclusion law follows state preclusion law. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001).

[32] *See* Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1214–15 (1986) ("[P]reclusion doctrines promote conservation of severely-taxed federal judicial resources. . . . [G]rowing aversion to relitigation is a leading reason for the expansion of prelusion doctrines.").

[33] Even substantial tort claims can be economically nonviable after the expenses of litigation, experts, and attorney's fees. *See, e.g.*, Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952 (2017) (citing high litigation costs for such plaintiffs).

[34] *See* Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 414 (2014) ("Centralization [in MDL] likewise advantages defendants by making meaningful closure possible through a global settlement."); Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. KAN. L. REV. 219, 219 (2017) ("From the defendants' perspective, consolidation in a federal MDL proceeding may make nationwide litigation more manageable.").

[35] *See* Keith N. Hylton, *Deterrence and Aggregate Litigation* 2 (Boston Univ. Sch. of Law, Law and Econ., Research Paper No. 17-45, 2018), https://www.ssrn.com/abstract=3059583 [https://perma.cc/9JKR-F9H6].

in the action."[36] Plaintiffs may also intervene in a lawsuit, with permission of the court, if they "ha[ve] a claim or defense that shares with the main action a common question of law or fact."[37] As with claim joinder, the rules governing supplemental jurisdiction permit federal courts to exercise subject matter jurisdiction over all claims brought by plaintiffs joined under Rules 20 and 24 in a federal question case.[38] Even in diversity cases, supplemental jurisdiction extends to state claims brought by plaintiffs joined under Rule 20 that would fail to meet the amount-in-controversy requirement independently.[39]

In circumstances in which the case will impair nonparties' interests without their participation, joinder may be required under Rule 19 or allowed without resort to court discretion under Rule 24.[40] As the Advisory Committee Notes to Rule 19 state, "Whenever feasible, the persons materially interested in the subject of an[y] action . . . should be joined as parties so that they may be heard and a complete disposition made."[41] Because the mandatory nature of these joinder rules raises the possibility that parties will attempt to evade the limits of diversity jurisdiction by structuring the case to require joinder of a diversity-destroying party, supplemental jurisdiction over the claims of joined parties in diversity cases is more limited.[42]

At times, harmful conduct affects more plaintiffs than can reasonably be joined under the rules of ordinary joinder, but whose joinder would improve fairness and efficiency. In 1938, the same year as the original Federal Rules of Civil Procedure were promulgated, Congress passed the Fair Labor Standards Act (FLSA), which enabled employees to bring actions for owed wages for themselves and on "behalf" of "other employees

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[36] FED. R. CIV. P. 20(a)(1). I use the term "related" for convenience; the actual language is "any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences." *Id.* 20(a)(1)(A).

[37] FED. R. CIV. P. 24(b)(1)(B).

[38] 28 U.S.C. § 1367(a) (2012) (extending supplemental jurisdiction to related claims).

[39] *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 549 (2005).

[40] FED. R. CIV. P. 19(a)(1) (requiring joinder if feasible if "in that person's absence, the court cannot accord complete relief among existing parties," or if that person's absence may "impair or impede the person's ability to protect [an] interest [relating to the action]" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest"); FED. R. CIV. P. 24(a)(2) (granting intervention as a right to anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest").

[41] FED. R. CIV. P. 19 advisory committee's note to 1966 amendment.

[42] 28 U.S.C. § 1367(b) (excluding certain claims by plaintiffs joined under Rules 19 and 24). For more on the intersection of joinder and diversity jurisdiction, see Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 DUKE L.J. 1323 (2016).

similarly situated,"[43] a standard that is not difficult to meet in most FLSA cases involving a common employer.[44] The reason for allowing joinder in these so-called "collective actions" was summed up by one attorney working for the agency in charge of implementing the FLSA: "To require each employee to sue individually might well congest court calendars immeasurably and produce long delays in the gaining of rightful recoveries."[45] Judges have long taken the salutary benefits of collective actions to heart,[46] and statutes in several other contexts provide for the same collective-action framework.[47]

Collective actions' more famous sibling is, of course, the class action. Although class actions have a venerable history,[48] the modern rule was adopted in 1966, after the Supreme Court relaxed due process strictures on representative litigation.[49] Rule 23 imposes requirements designed to ensure efficiency gains in the action and fairness to the absent class members,[50] and showing entitlement to certification of a class can be difficult.[51] But class actions remain the vehicle of choice for large-scale litigation of securities, antitrust, consumer, and many discrimination and mass-tort claims.[52] Though

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[43] Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b) (2012)). Today, the Act requires all represented plaintiffs to file a consent with the court. *See* 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

[44] *See* Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 314 (2005).

[45] James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 ILL. L. REV. 119, 123 (1942).

[46] *See* Resnik, *supra* note 9, at 1786–87 (explaining how judges "f[ou]nd ways to welcome additional litigants into FLSA proceedings").

[47] *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (2012).

[48] *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (tracing the history of class actions through 1966); Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. REV. 917 (2017) (offering a history of failed Rule 23 amendment proposals); David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587 (2013) (recounting the history of the modern class actions through 1980); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323 (2005) (documenting the Rule 23 amendment history through the 2000s).

[49] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950) (relaxing notice requirements). For a discussion of *Mullane*'s relevance to the 1966 amendments to Rule 23, see Resnik, *supra* note 9, at 1779–80.

[50] *See* FED. R. CIV. P. 23.

[51] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–54 (2011) (requiring a "rigorous analysis" and "significant proof" that the class meets the certification requirements).

[52] *See* Resnik, *supra* note 9, at 1767, 1803.

highly controversial,[53] there is no doubt that class actions provide unparalleled "economies of scale for defendants and for judges by limiting repetitive work and inconsistent decisionmaking and by holding out promises of a 'comprehensive resolution' if not 'global peace.'"[54]

3. Joining Defendants

Aggregating defendants allows defendants to pool resources and share information to mount a joint defense,[55] protects plaintiffs from the "empty-chair defense" of each solo defendant pointing the finger at an unjoined defendant,[56] and furthers justice by allowing a full airing in a single case of all perspectives of a dispute. Modern litigation often implicates more than one defendant who is potentially liable for the harm caused; accordingly, joinder rules and special statutory regimes encourage defense-side joinder.

Rules 19, 20, and 24 permit or require joinder of defendants on the same liberal terms as for joinder of plaintiffs,[57] and Rule 23 even permits (and sometimes requires) defendant classes.[58] In addition, Rule 14 permits a defendant to implead a third party, who is usually aligned on the side of the defendant, and allows other claims between that third party and an existing party.[59]

Supplemental jurisdiction generally extends to all claims allowed by these joinder rules, except in diversity cases, to claims by plaintiffs against parties joined under Rules 14, 19, 20, or 24.[60] To encourage a plaintiff to join defendants who may be liable to it, the federal common law of issue

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[53] *See* Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 172 (2016) (surveying criticisms that class actions promote blackmail settlements against defendants and sweetheart deals for class counsel).

[54] Resnik, *supra* note 9, at 1779 (quoting Baker, *supra* note 33, at 1944); *see also* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 696–99 (2005) (discussing class actions' defense-side benefits); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563–64, 570–72 (1987) (identifying the benefits of mass-tort class actions).

[55] *See, e.g.*, Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813 (1989); Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1728–29 (1998). The most comprehensive scholarly treatment of defendant aggregation concludes that although defendants sometimes oppose defendant aggregation for misguided reasons founded on cognitive bias, defendants generally benefit from such aggregation. *See generally* Greg Reilly, *Aggregating Defendants*, 41 FLA. ST. U. L. REV. 1011 (2014).

[56] *See supra* note 2.

[57] FED. R. CIV. P. 19(a), 20(a)(2), 24.

[58] *Id.* 23.

[59] *Id.* 14(a).

[60] 28 U.S.C. § 1367(b) (2012).

preclusion can bar a plaintiff who loses against one defendant from relitigating the loss in successive lawsuits against similar defendants.[61]

One species of defendant joinder is actually a claimant-joinder regime: interpleader. The classic interpleader case involves an insurance company that concedes its contractual duty to pay an insurance benefit to which multiple persons claim entitlement. In such a case, the insurance company may face distinct lawsuits from several claimants for recovery of the same benefit, potentially resulting in the insurer being obligated to pay the full amount of a policy benefit multiple times.[62]

The Federal Interpleader Act remedies this situation by allowing the insurance company (or other stakeholder) to deposit the property held or owed with the court and institute an interpleader action naming the claimants as defendants.[63] All claimants then adjudicate their respective claims to the property in a single action, thereby protecting the stakeholder from multiple judgments with which it cannot comply, guarding against duplicative proceedings, and enabling full and fair adjudication of the competing rights of the claimants.[64]

4. Joining Cases

Whole cases can be joined together in a single proceeding under certain circumstances presenting fruitful efficiency gains and economies of scale. Rule 42, for example, authorizes a court to join for a hearing or trial, or formally consolidate any "actions before the court [that] involve a common question of law or fact."[65] The purpose of this rule "is to give the district court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties."[66] The liberality of Rule 42 consolidation has allowed courts to join cases often and fruitfully over the years, particularly as complex litigation has become more commonplace.[67]

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[61] Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971).

[62] *See* N.Y. Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916).

[63] 28 U.S.C. § 1335 (2012). For a history, see 7 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1701 (3d ed. 2012) [hereinafter WRIGHT & MILLER 3d ed.].

[64] *See* Zechariah Chafee, Jr., *Interpleader in the United States Courts*, 41 YALE L.J. 1134, 1134–35 (1932). Bankruptcy presents a similar remedy in the context of a specialized form of substantive law. *See* Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1950 (2016) (Sotomayor, J., dissenting) (describing the virtues of bankruptcy joinder).

[65] FED. R. CIV. P. 42(a).

[66] 9A WRIGHT & MILLER 3d ed., *supra* note 63, § 2381.

[67] *Id.* ("These procedures have proven extremely useful over the years; this has been particularly true ever since the tremendous growth in multiparty and multiclaim litigation in the federal courts.").

Consolidation under Rule 42 only applies to cases already pending in the same district court.[68] Cases pending in different district courts, however, can be transferred to the same federal judge for mass consolidation of pretrial issues under the Multidistrict Litigation Act of 1968.[69] The Act creates a Judicial Panel on Multidistrict Litigation (JPML) and grants the panel "broad discretion to consolidate cases sharing any common question of fact and to transfer them to a single federal district judge for coordinated pretrial proceedings."[70] Although the JPML was initially slow to order consolidation under the Act, multidistrict litigation became an accepted mechanism for mass torts by the 1990s and, today, is the prevailing mechanism for aggregating mass torts.[71] By some estimates, more than one-third of the current federal docket consists of MDL cases,[72] offering (usually) swift, efficient, and uniform resolution to what would otherwise be thousands of individual lawsuits.

B. Aggregation's Limits

Aggregation is not an unalloyed good. Some parties strategically oppose aggregation if their opponents are likely to reap a disproportionate share of its benefits. In *Bristol-Myers Squibb*, for example, the defendant opposed aggregation of plaintiffs because it suspected that "a lot of those cases aren't going to get filed" as stand-alone cases because the cost pressures on many plaintiffs to litigate individually would be too great.[73] But the law rightly denies that such a reason is a legitimate basis to oppose aggregation; to the contrary, a primary goal of aggregation is to enable litigation that might be too inefficient or uneconomical to pursue individually.[74]

Other drawbacks to aggregation are more defensible. Like individual litigation, aggregation can sometimes generate confusion, delay, and unfairness. For the most part, however, these risks are addressed within the

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[68] FED. R. CIV. P. 42(a) (addressing actions before "the court").

[69] 28 U.S.C. § 1407 (2012).

[70] Bradt & Rave, *supra* note 15, at 1262.

[71] *See id.* at 1261; Resnik, *supra* note 9, at 1801–02; *see also, e.g.*, *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 416, 419 (J.P.M.L. 1991) (consolidating more than 26,000 asbestos cases because of the "long delays," "transaction costs," and duplicative issues "litigated over and over").

[72] Bradt & Rave, *supra* note 15, at 1252; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1448 (2017).

[73] Bradt & Rave, *supra* note 15, at 1254 (purporting to quote Oral Argument at 23:00, Bristol-Myers Squibb Co. v. Superior Court, 175 Cal. Rptr. 3d 412 (Ct. App. 2014)).

[74] *See* Resnik, *supra* note 9, at 1801 ("Class action revisions aimed to *enable* litigation . . . . Class actions enabled sets of new plaintiffs—schoolchildren, prisoners, consumers, and employees—to make their way into the federal courts.").

rules of aggregation themselves. For example, the joinder rules provide for aggregation only when appropriate based on the litigation of common issues.[75] When joinder, representation, or consolidation could lead to confusion or prejudice, judges have broad discretion to disaggregate issues or claims for separate adjudication.[76]

Recent years have revealed increasing skepticism of plaintiff class actions as aggregation mechanisms.[77] There is at least some basis for this skepticism: aggregated proceedings can result in the dispensation of rough justice in the name of efficiency, and some of this rough justice turns out, on closer inspection, to be unjust.[78]

Solutions have focused on aggregation's own terms. For example, the Supreme Court has demanded "significant proof" of Rule 23's requirements,[79] even stressing that "heightened attention" to certain Rule 23 requirements are necessary in settlement classes;[80] it has imposed stricter interpretations of Rule 23(a) requirements;[81] and it has restricted the scope of the categories of Rule 23(b) classes.[82] At the same time, lower courts have interpreted Rule 23 to require the putative class to show, as a prerequisite to certification, that its members are "ascertainab[le]" through some objective

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[75] *See supra* Section I.A.

[76] *See* FED. R. CIV. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."); *see also id.* 20(b) ("The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party."); *id.* 23(c)(5) (authorizing a judge to divide a class action into subclasses); *id.* 23(d)(1)(A) (authorizing a judge presiding over a class action to "determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument"); *id.* 42(b) ("For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.").

[77] *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013).

[78] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619–20, 629 (1997) (rejecting a class settlement in part because of concerns of fairness to absent class members). Some commentators have begun to criticize MDL aggregation on similar grounds. *See, e.g.*, Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 75–77 (2015).

[79] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353 (2011); Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982).

[80] *Amchem*, 521 U.S. at 620–21 (identifying "predominance" in Rule 23(b)(3) and adequacy in Rule 23(a)(4) as deserving of scrutiny).

[81] *Dukes*, 564 U.S. at 350 (interpreting commonality under Rule 23(a)(2) to require common questions "capable of classwide resolution"); *Falcon*, 457 U.S. at 157 (rejecting an across-the-board theory of typicality under Rule 23(a)(3)).

[82] *Dukes*, 564 U.S. at 362 (limiting Rule 23(b)(2) to exclude most claims for monetary relief); Ortiz v. Fibreboard Corp., 527 U.S. 815, 843–45 (1999) (construing narrowly the scope of a "limited fund" eligible for certification under Rule 23(b)(1)(B)).

criteria.[83] Congress, too, has often sought to constrain class actions.[84] Importantly, with few exceptions, these curtailments of broad class aggregation are based on aggregation itself. The solution has been to tinker with the rules of aggregation to secure the very virtues of efficiency and fairness that aggregation promises.[85]

Controlling the scope of aggregation on its own terms makes sense. But recent decisions from the Supreme Court have drastically curtailed aggregation by addressing an issue having little to do doctrinally with aggregation: personal jurisdiction.

II. THE TURNING OF PERSONAL JURISDICTION

In this Part, I introduce personal jurisdiction into the aggregation narrative and show how personal jurisdiction has changed from being relatively expansive and solicitous of aggregation to being more constrictive and indirectly hostile to aggregation.

A. The Expansion of Personal Jurisdiction

For many years, personal jurisdiction depended upon the notion of territorial sovereignty. A court could obtain jurisdiction over a party and adjudicate that party's rights and liabilities only if the party was within that state's borders. As the famous case *Pennoyer v. Neff* put it: "[N]o State can exercise direct jurisdiction and authority over persons or property without its territory."[86] That model worked for an era in which state autonomy was jealously guarded, parties were primarily individual persons, and personal mobility was low; in such circumstances, it was unfair to both the person and the person's state for a different state to claim authority over the person, at least without the person's consent. And, because litigation was generally

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[83] *See* Dodson, *supra* note 48, at 925–27 (describing the lower courts' interpretation).

[84] For example, the Fairness in Class Action Litigation Act, which passed the House on March 9, 2017, would limit class certification in a number of ways. *See* Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017), https://www.congress.gov/115/bills/hr985/BILLS-115hr985rh.pdf [https://perma.cc/9PX5-ZLGR].

[85] Potential exceptions include the use of contractual arbitration to induce an enforceable waiver of class-action rights, *see* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 334 (2011), amendments making certain class actions less remunerative to class counsel, *see* 42 U.S.C. § 1997e(d) (2012) (limiting the fees payable to lawyers representing prisoners), and the Class Action Fairness Act of 2005, which sought to limit the power of state-court class actions by enabling them to be heard more often by federal courts, *see* 28 U.S.C. §§ 1332(d), 1441 (2012).

[86] 95 U.S. 714, 722 (1878); *see id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). For an incisive look at *Pennoyer*'s foundations, see Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249 (2017).

simpler, often involving only a single plaintiff and a single defendant, the effect on aggregation was minimal.[87]

The diminishment of state power, the rise of artificial entities, and the erosion of barriers to interstate travel led to reconsideration of the strict territorial approach of *Pennoyer* in the landmark case of *International Shoe Co. v. Washington*.[88] There, the Court allowed a state to exercise personal jurisdiction over a nonconsenting nonresident if the nonresident had "minimum contacts" with the state such that the exercise of personal jurisdiction would not offend "traditional notions of fair play and substantial justice."[89] Central to that determination was whether the nonresident's contacts with the forum made it "reasonable" for the state to exercise personal jurisdiction in light of the "inconveniences which would result . . . from a trial away from [the nonresident's] home."[90] In particular, the Court stated that when a nonresident "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 assert jurisdiction over the nonresident on claims "connected with the activities within the state."[91]

Over the next several decades, the Court glossed these standards with various considerations, leading to seemingly settled features of personal jurisdiction by the late-1980s. For example, the Court distanced personal jurisdiction's connection to both interstate federalism and state sovereignty, and instead linked personal jurisdiction primarily (even solely) to individual rights.[92] The Court also required, for minimum contacts, some "purposeful availment" of the forum by the defendant, such that the connection to the forum could not arise solely from the activities of unrelated third parties.[93] The Court further established that a plaintiff's lack of contacts with the forum

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[87] *See* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Became (Disguised) Summary Judgment*, 25 WASH. U. J. L. & POL'Y 61, 98 (2007) ("The current provisions of the Federal Rules of Civil Procedure were designed in an earlier era for litigation that on average has been far simpler than litigation today.").

[88] 326 U.S. 310 (1945).

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

[90] *Id.* at 317 (internal quotation marks omitted).

[91] *Id.* at 319.

[92] *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); *id.* at 702–03 n.10 ("The restriction on sovereign power described in [prior cases] . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.").

[93] *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).

state was irrelevant to the exercise of personal jurisdiction over the defendant,[94] but that the *strength* of the plaintiff's contacts with the forum could support such exercise.[95] Finally, the Court expanded upon the notion of "fair play and substantial justice" by articulating several relevant factors, including "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," as well as systemic interests in efficient dispute resolution and in the furtherance of social policies.[96] The Court additionally noted that these forum and systemic interests could enhance support for personal jurisdiction.[97]

A major development during this time was the division of personal jurisdiction into two distinct species: specific jurisdiction and general jurisdiction. Specific jurisdiction could be asserted when the defendant's conduct or activities in the state gave rise or were related to the cause of action. General jurisdiction could be asserted over a defendant with a strong connection to the state, even if the cause of action arose elsewhere and was unrelated to the defendant's contacts with the state.[98] Language from the Court's cases on general jurisdiction led most observers to conclude (and "[teach] to generations of first-year law students"[99]) that general jurisdiction applied to any defendant with "continuous and systematic" contacts with the forum state, meaning any kind of substantial business dealings.[100]

As personal jurisdiction was stretching from its more rigid moorings, federal civil litigation was becoming more complex. The Federal Rules of Civil Procedure—built on a tradition of equity—liberalized joinder of

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[94] *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779–80 (1984).

[95] *Id.* at 780 ("[P]laintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum."); Calder v. Jones, 465 U.S. 783, 788 (1984) ("The plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction, but they may be so manifold as to permit jurisdiction when it would not exist in their absence." (citation omitted)).

[96] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987).

[97] *See Keeton*, 465 U.S. at 777 ("New Hampshire also has a substantial interest in cooperating with other States . . . to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits.").

[98] *See Helicopteros*, 466 U.S. at 415–17; *cf.* 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] thought 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 (1988) (fleshing out the contours of general jurisdiction).

[99] Daimler AG v. Bauman, 134 S. Ct. 746, 770 (2014) (Sotomayor, J., concurring in the judgment).

[100] *See* Brilmayer, *supra* note 98, at 767 ("Courts currently measure the sufficiency of unrelated business contacts between the forum state and the defendant with the continuous and systematic test."); Meir Feder, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 675 (2012) (stating that "lower courts widely embraced the notion that any corporation 'doing business' in a state was subject to general jurisdiction there"); Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 533 (2012).

claims, parties, and cases.[101] Over the next several years, Congress provided for collective actions, Rule 23 was amended to liberalize class actions, and the Multidistrict Litigation Act was passed.[102] The 1970s and 1980s witnessed a dramatic turn toward, and acceptance of, complex civil litigation.[103]

The expansion of personal jurisdiction during this time tended to work in tandem with the expansion of complex litigation by facilitating joinder. In a multi-plaintiff case, for example, plaintiffs could join together under ordinary joinder or in representative litigation to sue in any forum in which the defendant had continuous and systematic contacts, even if their claims arose in different states. Walmart, for example, though incorporated in Delaware and headquartered in Arkansas, could be sued in any state for any cause of action,[104] making joinder of plaintiffs from different states unobjectionable on personal jurisdiction grounds.

Although the Court made clear that personal jurisdiction in a multi-defendant case is a defendant-by-defendant inquiry,[105] the combination of broad general jurisdiction, fairness-based specific jurisdiction, and enhancement from the plaintiff's forum contacts often produced multiple forums with personal jurisdiction over all defendants in a single case, thus facilitating joinder of defendants. For example, in *Calder v. Jones*, Shirley Jones, a television personality who lived and worked in California, sued the *National Enquirer*, its local distributor, its president, and a reporter in California state court for libel arising out of a story the magazine published about her.[106] The magazine and its distributor did not object to personal jurisdiction in California, no doubt because they believed themselves subject to either specific or general jurisdiction there based on the magazine's large circulation in the state.[107] The individual defendants, who resided and worked for the magazine in Florida, contested personal jurisdiction, but the Court found jurisdiction "proper in California based on the 'effects' of their Florida

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[101] *See supra* Section I.A.

[102] For a history of this trilogy, see Resnik, *supra* note 9, at 1801.

[103] *See* Resnik, *From "Cases" to "Litigation," supra* note 20, at 21.

[104] *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 214 (2014) (stating as conventional wisdom "that national corporations with substantial operations in all fifty states (such as McDonald's or Walmart) would likely be subject to general personal jurisdiction in all fifty states"); *cf.* William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 614 n.88 (1993) ("General jurisdiction may also exist over out-of-staters if their forum connections are very substantial. For example, most states will have general jurisdiction over McDonalds.").

[105] *See* Rush v. Savchuk, 444 U.S. 320, 332 (1980) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction.").

[106] 465 U.S. 783, 784–85 (1984).

[107] *Id.* at 785.

conduct in California" because "California is the focal point both of the story and of the harm suffered."[108] Shirley Jones was thus able to sue all four defendants together in California—and would have been able to do so in Florida as well.

Although the expansion of personal jurisdiction during this period tended to minimize its conflicts with aggregation, at least three circumstances presented direct conflicts. Each was resolved in favor of aggregation.

The first was personal jurisdiction over plaintiff class members. Personal jurisdiction over plaintiffs is usually a trivial consideration because plaintiffs consent to a forum's adjudicatory authority by filing in that forum.[109] Class actions, however, present a unique consideration because unnamed class members do not have full party status and do not expressly consent to their representatives' choice of forum.[110] Class actions thus pit class joinder against principles of personal jurisdiction.

In *Phillips Petroleum Co. v. Shutts*, the Supreme Court resolved this tension in favor of joinder by holding that class action rules with sufficient representational safeguards allow for personal jurisdiction over nonresident class members even if they lack minimum contacts with the forum state.[111] The Court contrasted the burdens on defendants—who must hire counsel, travel to the forum to appear under threat of a default judgment, and generally risk a money judgment or injunction on the merits—with unnamed class plaintiffs, who often may tag along to reap the advantages of the class action with few risks.[112] The Court reasoned: "Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter."[113]

The Court credited the risk that a class member's legal claim might be extinguished by the state court in a class proceeding. But the Court concluded that class members' interest in their claims was protected, consistent with the due process principles underlying personal jurisdiction, by the class requirements of adequate representation by class representatives,

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[108] *Id.* at 789.

[109] *See* Adam v. Saenger, 303 U.S. 59, 67–68 (1938) (stating that the plaintiff, "by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court").

[110] *See* Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002) ("Nonnamed class members . . . may be parties for some purposes and not for others.").

[111] 472 U.S. 797, 808–12 (1985).

[112] *Id.* at 808–10.

[113] *Id.* at 811.

notice, and the right of each class member to opt out to preserve their individual litigation rights.[114] Critical to the Court's reasoning was its recognition that aggregation of class claims might be necessary to make certain small-value claims viable for litigation.[115] *Shutts* thus represents an instance in which the Court directly confronted—and accommodated—the often competing interests of personal jurisdiction and aggregation.[116]

The second conflict between personal jurisdiction and aggregation involved interpleader.[117] In *New York Life Insurance Co. v. Dunlevy*, the Supreme Court held that the joinder of defendants in an interpleader action was subject to the limits of personal jurisdiction under *Pennoyer v. Neff*.[118] The consequence was that a stakeholder invoking interpleader in a multistate case could be subject to one judgment in the interpleader action, binding only the resident claimants, and a separate judgment in an action brought by a nonresident claimant for the same property, resulting in inconsistent or excessive judgments against the stakeholder.[119]

Dunlevy was decided in an era well before *International Shoe*. Accordingly, Congress stepped in to remedy the conflict between personal jurisdiction and interpleader. Congress did so by providing a nationwide-service provision for interpleader actions in federal court to obviate personal jurisdiction concerns (along with a requirement of minimal diversity and *de minimis* amount in controversy to minimize subject matter jurisdiction concerns).[120] The result was that interpleader actions in federal court could

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[114] *Id.* at 811–12.

[115] *Id.* at 812–13.

[116] Courts have tended to interpret *Shutts* as validating personal jurisdiction over plaintiffs for all Rule 23 classes, *see* Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 895–96 (1995), but the Court did not—and has not—decided the personal jurisdiction implications for classes certified as (b)(1) "mandatory" or (b)(2) "injunctive" classes in which there is no mandatory right to opt out, *see* Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (per curiam) (dismissing a writ of certiorari granted on this question).

[117] Bankruptcy, which presents aggregation needs similar to those of interpleader, has long allowed nationwide personal jurisdiction over claimants to ensure full and fair adjudication of creditor rights to the bankrupt estate. *See* FED. R. BANKR. P. 7004(d) ("The summons and complaint and all other process except a subpoena may be served anywhere in the United States.").

[118] 241 U.S. 518, 521–23 (1916).

[119] *See id.*

[120] 28 U.S.C. § 2361 (2012) ("In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be . . . addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found."); 28 U.S.C. § 1335(a) (2012) (providing for minimal diversity); *see also* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530–31 (1967) (confirming the constitutionality of minimal diversity).

be pursued under nationwide personal jurisdiction, effectively side-stepping state-based limits on personal jurisdiction to preserve the efficacy of multistate interpleader.[121]

The third conflict between personal jurisdiction and aggregation involved a single plaintiff suing a single defendant on multiple claims under the rules governing claim joinder, when some of the claims would subject the defendant to personal jurisdiction in the forum but not others.[122] Forcing separate lawsuits for such claims would be wasteful, especially if the claims relate to each other or present overlapping evidence. Although personal jurisdiction over a defendant is a claim-by-claim inquiry,[123] courts have generally exercised "pendent personal jurisdiction" over the defendant with respect to all claims related to a claim brought under a federal statute that provides for nationwide service of process.[124] Indeed, all federal courts of appeals to have considered the doctrine of pendent personal jurisdiction in this context have adopted it.[125] Courts are in more disagreement if the anchor claim entitles the court to personal jurisdiction under service rules restricted

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[121] *See* Chafee, *supra* note 64, at 1136 ("[A]n interpleader suit will not give complete relief to the stakeholder unless the entire controversy can be settled in the interpleader proceeding.").

[122] *See* William D. Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56, 56–57 (1965); Rhodes & Robertson, *supra* note 104, at 244.

[123] *See* 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1069.7 (4th ed. 2015) [hereinafter WRIGHT & MILLER 4th ed.] ("[A] plaintiff also must secure personal jurisdiction over a defendant with respect to each claim she asserts."). Interestingly, the Supreme Court, however, has tended to characterize specific jurisdiction as a *case*-linked doctrine. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780–81 (2017) (discussing the relationship between the "suit" and the forum); Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) ("[T]he defendant's *suit-related conduct* must create a substantial connection with the forum State.") (emphasis added); *id.* at 1121 n.6 (calling specific jurisdiction "case-linked jurisdiction" (internal quotation marks omitted)). It is unclear how the Court's phrasing might inform its approach to pendent personal jurisdiction.

[124] *See* James S. Cochran, Note, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 TEX. L. REV. 1463, 1471–72 (1986); Jon Heller, Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113, 116 (1989) ("For the past twenty years, courts have universally allowed such exercises of 'pendent personal jurisdiction.'").

[125] *See* Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1180–81 (9th Cir. 2004). For a history of the doctrine, see Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1632–42 (2001).

by state borders,[126] and most courts will not extend pendent personal jurisdiction to unrelated claims.[127]

Pendent personal jurisdiction is a judge-made doctrine grounded in the accommodation of aggregation.[128] As the Ninth Circuit recently wrote:

> When a defendant must appear in a forum to defend against one claim, it is often reasonable to compel that defendant to answer other claims in the same suit arising out of a common nucleus of operative facts. We believe that judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties is best served by adopting this doctrine.[129]

Certainly, pendent personal jurisdiction imposes no practical burden on a defendant already properly before the forum court on a related claim brought by the same party in the same case.[130] Pendent personal jurisdiction is widely accepted as constitutional, if not always statutorily authorized.[131]

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[126] *See* Rhodes & Robertson, *supra* note 104, at 245. The policies underlying pendent personal jurisdiction seem to apply equally to related claims falling under a nationwide service statute and related claims that do not. *See* 6 WRIGHT & MILLER 3d ed., *supra* note 63, § 1478 (making the case for pendent personal jurisdiction over any claims asserted between existing parties over which the court already has personal jurisdiction if the claims are related enough to qualify for supplemental jurisdiction); Simard, *supra* note 125, at 1624 (same). After all, a defendant's conduct that gives rise to liability to the plaintiff in both State A and State B gives the defendant "fair warning" of (and the defendant has not structured its primary conduct to avoid) the risk of suit in either state by the plaintiff. *Cf.* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (focusing on the importance of "fair warning" to the proper exercise of personal jurisdiction).

[127] *See* 4A WRIGHT & MILLER 4th ed., *supra* note 123, § 1069 ("[A] claim that is not part of the same constitutional case is much more likely to involve different litigational strategies and may require very different resources to defend against."); Rhodes & Robertson, *supra* note 104, at 244–45 (explaining that "the defendant could not have foreseen being called to defend the unrelated claim in the forum and [thus] considerations of federalism and comity would weigh against the exercise of jurisdiction over the defendant for an unrelated claim").

[128] 4A WRIGHT & MILLER 4th ed., *supra* note 123, § 1069.7 ("[P]endent personal jurisdiction must be a creature of federal common law.").

[129] *Action Embroidery*, 368 F.3d at 1181; *cf.* Robinson v. Penn Central Co., 484 F.2d 553, 555 (3d Cir. 1973) ("Once the defendant is before the court, it matters little, from the point of view of procedural due process, that he has become subject to the court's ultimate judgment as a result of territorial or extraterritorial process.").

[130] 4A WRIGHT & MILLER 4th ed., *supra* note 123, § 1069.7 ("[A] defendant who already is before the court to defend a federal claim is unlikely to be severely inconvenienced by being forced to defend a state claim whose issues are nearly identical or substantially overlap the federal claim. Notions of fairness to the defendant simply are not offended in this circumstance."); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1608 (1992) ("[A]ny inconvenience to the defendant from having to defend the state law claim in that state can hardly be of constitutional significance."); Heller, *supra* note 124, at 129–30 (arguing that pendent claims cannot add any constitutionally significant burdens).

[131] Casad, *supra* note 130, at 1607 ("The existing nationwide service statutes apply to specific federal claims and do not expressly authorize nationwide service for any other claims. . . . Nothing in the statutes or rules, then, expressly authorizes the exercise of personal jurisdiction for the pendent claims.");

These three examples illustrate how Congress and the Supreme Court modified personal jurisdiction doctrine to accommodate aggregation during the era of expanding personal jurisdiction and rising complex litigation.

B. The Narrowing of General Jurisdiction

The story of personal jurisdiction took an abrupt turn in 2011, when the Supreme Court began restricting the doctrine and creating, indirectly, more significant tension between personal jurisdiction and aggregation. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court moved away from the "continuous and systematic" formulation by stating that general jurisdiction extends only when a defendant's contacts are "so 'continuous and systematic' as to render them essentially at home in the forum State."[132] The Court illustrated this demanding test with "paradigm" examples: an individual's state of domicile and a corporation's state of incorporation or headquarters.[133]

Three years later, the Court doubled down on *Goodyear*'s "essentially at home" test in *Daimler AG v. Bauman*.[134] The plaintiffs had sued Daimler, a German company with its headquarters in Germany, in California for conduct occurring wholly outside the United States. They did so on the theory that Daimler's wholly-owned subsidiary and exclusive U.S. distributor sold substantial numbers of Daimler vehicles to California (making it "the largest supplier of luxury vehicles to the California market") and had "multiple California-based facilities."[135]

The Court rejected this theory, clarifying that the essential part of *Goodyear*'s test is the focus on where the defendant is "at home": "[T]he inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State."[136]

In addition, the Court made *Goodyear*'s "paradigm" general jurisdiction forums—an individual's domicile or a corporation's principal

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Jonathan Remy Nash, *National Personal Jurisdiction* (Emory Legal Studies Research Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119383 [https://perma.cc/SA5L-58FY].

[132] 564 U.S. 915, 919 (2011).

[133] *Id.* at 924.

[134] 134 S. Ct. 746 (2014). Three years after *Daimler*, the Court solidified its take on general jurisdiction in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

[135] *Daimler*, 134 S. Ct. at 750–52.

[136] *Id.* at 761 (internal quotation marks omitted); *see also id.* at 751 ("[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." (internal quotation marks omitted)).

place of business and place of incorporation—presumptively the *exclusive* forums for such jurisdiction, subject only to the "exceptional case" in which "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."[137] The nature of a "home," the Court reasoned, is that it is limited to one or two places, even if the defendant has substantial activity elsewhere.[138]

Prior to *Goodyear*, the common understanding was that companies doing substantial business in all fifty states—Daimler, Goodyear, Walmart, and the like—would have been subject to general jurisdiction in every state. Today, however, it is clear that those companies are subject to general jurisdiction only (except in an extraordinary case) in their state of incorporation and the state of their principal place of business. And, absent exceptional circumstances, a foreign company will be subject to general jurisdiction nowhere in the United States.[139]

C. The Narrowing of Specific Jurisdiction

As general jurisdiction has narrowed, so has specific jurisdiction. Specific jurisdiction has always depended upon the relationship between the defendant, the claim, and the forum, but three recent cases have made that triad considerably tighter.

In *Walden v. Fiore*,[140] Nevada residents sued in Nevada a Georgia officer who had seized their money at an Atlanta airport. The Supreme Court held that a defendant's out-of-state conduct, undertaken with knowledge of the effects it would have in the forum state, cannot establish minimum contacts because such contacts must arise not simply out of the relationship between the defendant and a forum plaintiff,[141] but "out of contacts that the defendant *himself* creates with the forum."[142] *Walden* thus necessitates a direct link between the defendant and the forum that cannot be bridged by

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[137] *Id.* at 761 & n.19.

[138] *Id.* at 762 n.20 ("[T]he general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." (internal quotation marks and citations omitted)).

[139] *See* Dodge & Dodson, *supra* note 1, at 1220.

[140] 134 S. Ct. 1115 (2014).

[141] *Id.* at 1123 ("[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction. . . . Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State . . . .").

[142] *Id.* at 1122 (internal quotation marks omitted).

the plaintiff's activities or presence, and it appears to scale back the importance of the plaintiff's connections to the forum.[143]

In *J. McIntyre Machinery, Ltd. v. Nicastro*,[144] the Court splintered over both the nature of personal jurisdiction and the limits of specific jurisdiction. McIntyre, a UK company headquartered in the UK, manufactured metal-shearing machines and sold them in the United States market through an exclusive American distributor headquartered in Ohio.[145] All agreed that although McIntyre did not target any state specifically,[146] it targeted the United States market generally by attending national conferences in the United States and by urging its distributor to sell as many machines as possible in the United States.[147] One (but perhaps only one) of McIntyre's machines ended up in New Jersey, the state with by far the largest market for metal-shearing machines.[148] There, the machine injured a New Jersey resident, Robert Nicastro, who sued McIntyre in New Jersey state court.[149]

The Supreme Court found no personal jurisdiction over McIntyre in New Jersey. A plurality of four justices would have gone further, casting personal jurisdiction as a doctrine of implied consent that requires "submission" to state adjudicatory authority.[150] As the touchstone for specific jurisdiction, the plurality would have rejected "[f]reeform notions of fundamental fairness" and reasonable foreseeability in favor of a focus on how "the defendant's actions" manifest an intent to be subject to state power.[151] Thus, the plurality would have reanimated the principle of state sovereignty as the basis of personal jurisdiction: "[I]f another State [other than the defendant's home state] were to 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."[152]

The dissent, by contrast, would have adhered to the modern focus on fairness and reasonableness to the defendant instead of on notions of implied

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[143] *Compare id.* at 1122–23 (distancing personal jurisdiction from the plaintiff's contacts), *with* Calder v. Jones, 465 U.S. 783, 788 (1984) (stating that the plaintiff's contacts with the forum "may be so manifold as to permit jurisdiction when it would not exist in their absence").

[144] 564 U.S. 873 (2011).

[145] *Id.* at 878 (plurality opinion).

[146] *Id.* at 886.

[147] *Id.* at 895–98 (Ginsburg, J., dissenting); *see also id.* at 885 (plurality opinion) ("In this case, petitioner directed marketing and sales efforts at the United States.").

[148] *See id.* at 895, 898 n.3 (Ginsburg, J., dissenting).

[149] *Id.* at 878 (plurality opinion).

[150] *Id.* at 880–81.

[151] *Id.* at 880, 882–83.

[152] *Id.* at 884.

consent to sovereign power.[153] "On what measure of reason and fairness," the dissent asked, "can it be considered undue to require McIntyre UK to defend in New Jersey [where the accident occurred] as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States?"[154] The dissent contended that "it would undermine principles of fundamental fairness" to allow "a manufacturer selling its products across the USA [to] evade jurisdiction in any and all States, including the State where its defective product is distributed and causes injury."[155]

The concurrence, disagreeing with both the plurality and the dissent, and worrying about the unfairness of expansive personal jurisdiction to defendants,[156] would have decided the case on the narrow grounds that prior precedent withheld personal jurisdiction when just one product ended up in a state through the stream of commerce, in the absence of affirmative efforts by the defendant to take advantage of that state's market.[157]

The combination of *Walden* and *Nicastro* restricts specific jurisdiction to circumstances creating a direct link between the defendant and the forum. Connections between the defendant and the forum that go through the plaintiff or third-party intermediaries will only support specific jurisdiction in the forum if the defendant's own conduct creates a direct link to the forum. *Walden* and *Nicastro* thus limited specific jurisdiction by requiring a tighter connection between the forum and the defendant.

Neither *Walden* nor *Nicastro* addressed the necessary connection between the forum and the claims. That issue was addressed in the Court's most recent personal jurisdiction case, *Bristol-Myers Squibb Co. v. Superior Court*,[158] decided in early 2017. There, plaintiffs from several different states sued Bristol-Myers Squibb and its California distributor McKesson in California state court.[159] The plaintiffs all claimed that they suffered injuries after taking Bristol-Myers Squibb's drug Plavix, which McKesson distributed nationwide.[160] Bristol-Myers Squibb is a Delaware company headquartered in New York, but it sells Plavix in large quantities to all fifty states and maintains substantial operations in California.[161] The non-

[153] *Id.* at 899–900 (Ginsburg, J., dissenting).

[154] *Id.* at 904.

[155] *Id.* at 906.

[156] *Id.* at 890–91 (Breyer, J., concurring).

[157] *Id.* at 888 ("None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient.").

[158] 137 S. Ct. 1773 (2017).

[159] *Id.* at 1784–85 (Sotomayor, J., dissenting).

[160] *Id.* at 1777 (opinion of the Court).

[161] *Id.* at 1777–78; *id.* at 1786 (Sotomayor, J., dissenting).

California plaintiffs, however, were prescribed, purchased, and took Plavix outside of California and claimed injuries outside of California.[162]

Before 2011, there was little doubt that the case would have been allowed to proceed as filed in California because both McKesson and Bristol-Myers Squibb would have been deemed subject to general jurisdiction in California on all of the plaintiffs' claims.[163] There was even support for finding specific jurisdiction over the defendants for all claims on the ground that the suit as a whole, or the non-California claims specifically, were connected or related to the defendants' California contacts.[164]

The Supreme Court, however, in an 8–1 decision, held that California could not assert specific jurisdiction over Bristol-Myers Squibb to adjudicate the non-California plaintiffs' claims. The Court emphasized that, for specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum.[165] The non-California plaintiffs' claims, the Court reasoned, did not arise out of or relate to Bristol-Myers Squibb's contacts with California.[166] The Court stated: "The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."[167] Accordingly, because there was no "connection between the forum and the specific claims at issue," California could not assert personal jurisdiction over the defendant regarding those claims.[168]

Personal jurisdiction over Bristol-Myers Squibb for the non-California claims failed in California even though no one doubted that personal jurisdiction in California was proper for the identical claims of California plaintiffs. In light of Bristol-Myers Squibb's substantial contacts with the state, no one contended that California was a logistically unfair or logistically burdensome forum in which to adjudicate even the non-California claims; counsel for Bristol-Myers Squibb even conceded that California was not an

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[162] *Id.* at 1778 (opinion of the Court).

[163] Bradt & Rave, *supra* note 15, at 1275 ("Until *Goodyear*, Bristol-Myers would almost certainly have been subject to general jurisdiction in California, based simply on the scope and continuousness of its contacts with the state: to wit, its nearly one billion dollars in sales of Plavix in California, its registration to do business in the state, and therefore, its appointment of an agent to receive service of process, and its operation of five offices and employment of some four-hundred people in the state.").

[164] *See* Brief for Petitioner at 18–20, *Bristol-Myers Squibb*, 137 S. Ct. 1773 (2017) (No. 16-466) (making this argument).

[165] *Bristol-Myers Squibb*, 137 S. Ct. at 1780.

[166] *Id.* at 1781–82.

[167] *Id.* at 1781.

[168] *Id.*

unfair forum.[169] To explain this peculiarity, the Supreme Court, echoing the sovereignty theory of the *Nicastro* plurality, returned to the "territorial limitations on the power of the respective States" and reasoned that those principles of interstate federalism sometimes work independently of any practical burdens on defendants to restrict the adjudicatory authority of a state.[170]

After *Bristol-Myers Squibb*, then, specific jurisdiction requires a direct link between not only the forum and the defendant but also between the forum and the claim. That link cannot be bridged by the presence of nearly identical joined claims that arose in the forum. Instead, interstate federalism disempowers a state from exercising adjudicatory authority over claims arising in other states. These restrictions on specific jurisdiction, coupled with the restrictions on general jurisdiction, have an adverse effect on the availability of joinder, as the next Part shows.

III. COLLISIONS AND EFFECTS

Today, general jurisdiction limits the forums that have all-purpose jurisdiction over a defendant to at most two states, while specific jurisdiction demands a close connection between the chosen forum and both the defendant and the claim. This narrowing of personal jurisdiction affects the various joinder mechanisms in a variety of ways.

A. Claim Joinder

Claim joinder is designed to be liberal, to encourage parties to assert all claims and counterclaims (and some crossclaims) that they have between them in the same lawsuit.[171] But the new personal jurisdiction restrictions hamstring claim joinder.

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[169] Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 891 (Cal. 2016). Bristol-Myers Squibb instead argued that it was unfair that the plaintiffs could shop for "plaintiff-friendly" California courts. *See* Pet. Writ Cert. at 30–32, *Bristol-Myers Squibb*, 137 S. Ct. 1773 (2017) (No. 16-466) ("[Plaintiffs should not be allowed] to shop claims with no causal connection to a defendant's California activities to what their counsel view as the more plaintiff-friendly California courts. . . . Plaintiffs should not be allowed to take their case to the most hospitable forum they can think of."). The Court did not appear to credit this argument.

[170] *Bristol-Myers Squibb*, 137 S. Ct. at 1780–81. It is difficult to understand why interstate federalism was so important in *Bristol-Myers Squibb*; because the claims were all essentially the same, the states should not have cared which state with an interest adjudicated them. Indeed, the facts of *Bristol-Myers Squibb* suggest that other factors supporting the exercise of personal jurisdiction in California should have been compelling, including "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." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). The Court in *Bristol-Myers Squibb* ignored these factors.

[171] *See supra* text accompanying notes 22–32.

In particular, *Bristol-Myers Squibb*'s emphasis on a connection between the claim and the forum calls into doubt the continued viability of pendent personal jurisdiction. Pendent personal jurisdiction depends not upon a connection between the forum and the claim but upon the connection between the forum and a different claim. The rationale is that when a defendant is already properly subject to personal jurisdiction in a forum on one forum-related claim, no additional burden or unfairness is caused by forcing the defendant to litigate related non-forum claims in the same case. But that was the precise line of reasoning rejected in *Bristol-Myers Squibb*, which did not rely on the unfairness to the defendant and instead required a "connection between the forum and the specific claims at issue" that could not be bridged by the joinder of in-state claims.[172]

True, *Bristol-Myers Squibb* confronted nonresident plaintiffs asserting non-forum claims, leaving open the possibility that, in a pure claim-joinder case, the plaintiff's residence in the forum state might support personal jurisdiction over a claim arising in a different state.[173] That reasoning, however, is less certain after *Walden*, which demanded more than just the plaintiff's residency. Instead, *Walden* required that the *defendant* create contacts with the forum to support each claim.[174] *Bristol-Myers Squibb* and *Walden* thus call into question the exercise of pendent personal jurisdiction over any non-forum claim regardless of the claimant's residency.

Bristol-Myers Squibb has the additional effect of treating the defendant more favorably than the plaintiff with respect to claim joinder. While *Bristol-Myers Squibb* appears to limit pendent personal jurisdiction over claims joined by a plaintiff, it does not limit personal jurisdiction over counterclaims asserted by the defendant against the plaintiff. That is because the plaintiff is deemed to have consented to the personal jurisdiction of the state in which the plaintiff filed, and that consent extends to counterclaims by the defendant.[175] As a result, plaintiffs will face jurisdictional limitations in joining out-of-state claims against defendants, but defendants will face few such restrictions in joining any and all counterclaims against the plaintiff.

B. Plaintiff Joinder

In nonclass cases, joined plaintiffs' claims arising in different states directly implicate the holding of *Bristol-Myers Squibb*, which will protect

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[172] *Bristol-Myers Squibb*, 137 S. Ct. at 1780–81.

[173] *See* Calder v. Jones, 465 U.S. 783, 788 (1984) (stating that the plaintiff's contacts with the forum "may be so manifold as to permit jurisdiction when it would not exist in their absence").

[174] Walden v. Fiore, 134 S. Ct. 1115, 1122–23 (2014).

[175] *See* Adam v. Saenger, 303 U.S. 59, 67–68 (1938).

the defendant from the exercise of specific jurisdiction.[176] Ironically, this is the case regardless of where the plaintiffs choose to sue. A California plaintiff injured in California could sue in California under specific jurisdiction, while a Texas plaintiff injured by the same defendant in exactly the same way in Texas could only sue the defendant in Texas under specific jurisdiction. Neither may join in the other's case, even if the defendant already expects to be sued for the same conduct in both states. Specific jurisdiction demands this result even if the Texas plaintiff has since moved to California and is now a California resident.

In representative actions like class actions, the specific jurisdiction inquiry is trickier.[177] Some have asserted that, after *Bristol-Myers Squibb*, "multistate or nationwide class actions based on state tort law are likely off the table in almost any state or federal court that does not have general jurisdiction over the defendant."[178] If the class action is no more than the sum of its parts—a grouping of individual claimants—then a straightforward application of *Bristol-Myers Squibb* seems clear: commonality among the claims would be as insufficient in class actions as in mass actions to bring non-forum claims into the personal jurisdiction fold.[179]

Other commentators, espousing a different view, assert that a class action is an entity with its own legal status and is more than the sum of its parts, not unlike how artificial entities like corporations or partnerships are more than the sum of their shareholders or members.[180] The law treats business entities as independent entities in many ways, including for

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[176] Bradt & Rave, *supra* note 15, at 1282 ("[A]fter *Bristol-Myers*, in most instances it is unlikely that plaintiffs could maintain a . . . mass joinder [with plaintiffs from multiple states] in state court anywhere other than the defendant's home state(s).").

[177] Collective actions are representative actions but, because the Court has not explained how much class action rules apply to collective actions, the analysis of personal jurisdiction as applied to collective actions is highly speculative. *See generally* Daniel C. Lopez, Note, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275 (2009) (exploring the application of Rule 23 principles to collective actions).

[178] Bradt & Rave, *supra* note 15, at 1256.

[179] *Cf.* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting) ("The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is 'essentially at home.'"). *But see, e.g.*, *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., No. 09-2047, 2017 WL 5971622, at *12 (E.D. La. Nov. 30, 2017) (holding *Bristol-Myers Squibb* inapplicable to class actions); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-cv-00564 NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) (distinguishing *Bristol-Myers Squibb* from class actions).

[180] *See* Sergio J. Campos, *The Class Action as Trust*, 91 WASH. U. L. REV. 1461, 1461 (2016); Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 385 (2012); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917–21 (1998); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 599 (1987); *cf.* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 653 (2014) (discussing an "external" view of certain classes that have inherent unity).

jurisdictional purposes. Corporations, for example, are citizens of their states of incorporation and principal place of business for purposes of diversity jurisdiction,[181] and, for purposes of personal jurisdiction, they are subject to general jurisdiction in those same states, even if no shareholder is a citizen of either state.[182]

Even a class action can have an independent entity status for some jurisdictional purposes. For diversity jurisdiction, both Class Action Fairness Act (CAFA) and non-CAFA classes are treated, in some ways, like independent entities.[183] As *Shutts* held, the representational quality of class actions lessens the strictures of personal jurisdiction over represented claimants.[184] And the Court has held that class claims are not mooted by the mooting of the named representative's claims.[185]

It is not an unreasonable stretch from these precepts to argue that certain class actions that act more like entities should be treated differently from the ordinary joinder of plaintiffs for purposes of establishing personal jurisdiction over the defendant. The difference would be to treat the class representatives' individual claims as establishing, for all class claims, specific jurisdiction over the defendant.[186] Such a theory might be enough to take some class actions out from underneath *Bristol-Myers Squibb*. Still, such a theory seems to be in tension with the Supreme Court's current trend narrowing personal jurisdiction and its current skepticism of class aggregation.

That leaves plaintiffs from different states with the possibility of joining together through ordinary joinder or in a representative action to sue where

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[181] 28 U.S.C. § 1332(c) (2012).

[182] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) (explaining that the "paradigm" locations for general jurisdiction over a corporation are the state of incorporation and the state of its principal place of business). Personal jurisdiction over partnerships is less clear, though some courts have concluded that partnerships should be treated like corporations. *See, e.g.*, Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 50 (2d Cir. 1991) ("[T]he form of organization by which a defendant does business is irrelevant" to personal jurisdiction and thus there is "no reason to distinguish between corporate and non-corporate" defendants.); *see also* Waldman v. Palestine Liberation Org., 835 F.3d 317, 332 (2d Cir. 2016) (holding an unincorporated association to be subject to general jurisdiction in the state of its principal place of business). The Class Action Fairness Act states that, "[f]or purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." 28 U.S.C. § 1332(d)(10).

[183] *Compare* 28 U.S.C. § 1332(d)(2) (specifying that the entire amount claimed by a CAFA class is the amount in controversy for purposes of diversity jurisdiction), *with* Snyder v. Harris, 394 U.S. 332, 340 (1969) (looking only to the named representatives' citizenships for determining the citizenship of a non-CAFA class for diversity jurisdiction purposes).

[184] *See supra* text accompanying notes 111–16.

[185] *See* Sosna v. Iowa, 419 U.S. 393, 399, 401–02 (1975).

[186] Wood, *supra* note 180, at 616 ("[T]he contacts supporting the individual's claim against the defendants [in a representational class action] should support the entire class's claims.").

the defendant is subject to general jurisdiction.[187] After *Daimler*, however, the number of forums available for general jurisdiction over domestic defendants is limited to no more than two in all but the exceptional case,[188] and the defendant's home state may be highly inconvenient or otherwise unappealing for the vast majority of individual plaintiffs.[189] In cases involving a foreign defendant, the number of domestic forums able to exercise general jurisdiction is likely to be zero.[190] In such cases, plaintiffs wishing to aggregate from different states must file in a foreign country, which may not allow the kind of liberal party joinder preferred in the United States.[191] Foreign defendants, like the hypothetical Wow Chemicals, could use the new restrictions on personal jurisdiction to escape plaintiff aggregation entirely.[192] To the extent aggregation is the only realistic vehicle for rendering plaintiffs' claims economically viable, a defeat of aggregation could mean a defeat of the claims themselves.

C. Defendant Joinder

Current personal jurisdiction doctrine curtails the ability of plaintiffs to join defendants in the same lawsuit. Before 2011, plaintiffs relied on general jurisdiction, which allowed them to sue defendants in any forum where all defendants had continuous and systematic contacts regardless of where the injury occurred. The prevailing wisdom was that general jurisdiction was broad enough to subject most national corporations to general jurisdiction in

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[187] *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783–84 (2017) ("Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS.").

[188] *See* Daimler AG v. Bauman, 134 S. Ct. 748, 761 n.19 (2014).

[189] *See* Bradt & Rave, *supra* note 15, at 1294 ("The types of corporations that find themselves as mass-tort defendants—Big Tobacco, Big Pharma, Big Anything—are often major political and social players in their home states. Even if they did not choose their headquarters to minimize litigation risk, they may have powerful lobbies in the state legislature and, over time, may seek protective substantive or procedural legislation and work to help shape the (often elected) state judiciary. Similarly, local jurors may not be eager to put a major local employer and economic engine out of business."). Admittedly, any inconvenience is likely to be minimal for represented class members. *See* Wood, *supra* note 180, at 615 ("[T]he nonresident unnamed class members need do little or nothing during the pendency of the suit. The class device itself protects them from inconvenience.").

[190] *See* 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."); Dodge & Dodson, *supra* note 1, at 1220 ("For alien defendants, by contrast, the likelihood is that *no* U.S. state will be able to exercise general jurisdiction.").

[191] *See, e.g.*, Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 6 (2009) (noting that European aggregation "stops markedly short" of American aggregation).

[192] For more on personal jurisdiction over aliens, including the argument that specific jurisdiction over aliens should be determined by a national contacts approach, see Dodge & Dodson, *supra* note 1.

every state.[193] In *Shutts*, for example, the defendant challenged personal jurisdiction in Kansas over absent nonresident class members, but not over the defendant itself, almost certainly because the defendant believed itself subject to general jurisdiction in Kansas based on its substantial contacts with the state.[194]

Today, however, general jurisdiction is a far less viable option. After *Daimler*, general jurisdiction is limited to the one or two states (if that) where the defendant is essentially at home. Those states may overlap with the homes of other defendants, but such overlap is likely to be very limited.[195] In its absence, defendant joinder in a state where all plaintiffs can also join together is unlikely without the defendants' consent.[196]

Plaintiffs willing to trade less plaintiff joinder for more defendant joinder may have more options, but even those are quite limited. For example, plaintiffs injured in a single state could sue multiple defendants in that state if the state has specific jurisdiction over both defendants, or specific jurisdiction over some defendants and general jurisdiction over the rest. In *Bristol-Myers Squibb*, for example, plaintiffs injured in California could sue the manufacturer under specific jurisdiction (because of the manufacturer's minimum contacts with California) and the distributor under either specific or general jurisdiction (because the distributor sold the product in California and was headquartered there).[197] The Court predicted that plaintiffs injured in other states could join together in those states to sue both defendants together on similar theories of personal jurisdiction.[198]

That was likely true in *Bristol-Myers Squibb*, but *Nicastro* complicates this theory for the future. In *Nicastro*, five justices determined that a foreign

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[193] *See supra* text accompanying notes 98–100.

[194] *See* Bradt & Rave, *supra* note 15, at 1284 ("Yet after *Bristol-Myers*, it is difficult to see how the Kansas court could have had personal jurisdiction over Phillips Petroleum for the vast majority of the class members' claims."); *see also, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980) (explaining that the national defendants did not consent to personal jurisdiction in Oklahoma).

[195] Delaware, the one state with many common corporate charters, offers the most likely place for defendant joinder, though it is possible that restrictive forum selection clauses could limit the availability even of a forum that would have general jurisdiction. *Cf.* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (upholding restrictive forum selection clauses generally).

[196] *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017) (Sotomayor, J., dissenting) ("It will make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States."); *id.* at 1789 ("After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States.").

[197] *See id.* at 1778 (opinion of the Court) (describing the defendants).

[198] *Id.* at 1783 ("Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. . . . Alternatively, the plaintiffs who are residents of a particular State . . . could probably sue together in their home States.").

manufacturer could not be subject to personal jurisdiction in a state in which it made no affirmative efforts to market and in which only a single product ended up, even though the manufacturer targeted *all* states generally and the injury occurred in the forum state.[199] The plurality would have further denied specific jurisdiction even with substantial sales into the forum state.[200] Under specific jurisdiction, the plaintiffs could have sued the distributor, but not the manufacturer, in the state of injury. To add insult to injury, the distributor went bankrupt, and the plaintiff was unable to sue the manufacturer in the manufacturer's home forum.[201]

The manufacturer in *Nicastro* was a foreign manufacturer, but nothing prevents a domestic manufacturer from using the same business model to outsource marketing and distribution to avoid specific jurisdiction in states where its product causes injury. This strategy would leave the distributor subject to personal jurisdiction only in the state of injury and the distributor's home state, and would leave the manufacturer subject to personal jurisdiction only in its home state. The area of overlap, even with substantial disaggregation of plaintiffs, is likely to be minimal, if it exists at all.[202]

D. Case Joinder

The two main mechanisms for case joinder in federal courts are consolidation and multidistrict litigation. Each offers appreciable benefits of aggregation, but each is afflicted by the recent trend in personal jurisdiction.

Consolidation requires that the cases already be before the same court.[203] It therefore suffers from all the same frailties imposed by personal jurisdiction on plaintiff joinder and defendant joinder.

Multidistrict litigation (MDL), in which many cases from different courts are transferred to a single court for coordinated pretrial proceedings, is a more curious mechanism. Although personal jurisdiction limits normally prohibit transfer of a case to a forum that would lack personal jurisdiction

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[199] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 882–84 (2011) (plurality opinion); *id.* at 888 (Breyer, J., concurring).

[200] *Nicastro*, 564 U.S. at 882–84 (plurality opinion).

[201] *Id.* at 896 n.2 (Ginsburg, J., dissenting).

[202] *Bristol-Myers Squibb* and *Nicastro* were both product-based tort cases, but their personal jurisdiction limits affect all kinds of cases. An example is mass-copyright litigation, when a copyright licensee or holder sues a number of potential infringers at once, sometimes thousands of them, in what are "essentially inverted mass tort cases." Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation*, 71 MD. L. REV. ENDNOTES 51, 52 (2012). Plaintiffs usually claim that all defendants are subject to personal jurisdiction in a single forum of the plaintiff's choice because each claim is related to at least one claim that arises in the state, *id.* at 56–57, but this is unlikely to be allowed today under *Bristol-Myers Squibb*.

[203] *See* FED. R. CIV. P. 42(a).

over a defendant had the case been filed there,[204] some courts have characterized the MDL statute as authorizing nationwide jurisdiction under the Fifth Amendment,[205] thereby obviating the problems of state-based limits of personal jurisdiction.

Yet it is hard to justify this view, both on legal and practical grounds. The MDL statute is a venue provision, not an authorization of personal jurisdiction. The statute is codified in a section of the U.S. Code devoted to venue, and its language mirrors other venue transfer rules,[206] rules to which the limits of personal jurisdiction apply.[207] The statute contains neither a service provision nor the kind of language that Congress normally uses to prescribe nationwide personal jurisdiction.[208]

Some have argued that personal jurisdiction limits in an MDL transferee court are irrelevant because the transfer is only for pretrial proceedings.[209] The Judicial Panel on Multidistrict Litigation (JPML), though not entirely clear on this point, appears to agree that the pretrial focus means that MDL consolidation is "simply not encumbered by considerations of in personam jurisdiction."[210]

But as a practical matter, the pretrial focus, with its implicit promise of remand to the transferor court for final disposition, is a charade. Indeed, two leading MDL scholars call resort to the "temporary" nature of MDL a "masquerade[] . . . to get around the limits . . . on a federal court's personal jurisdiction."[211] Transferee courts can decide dispositive motions, including motions for summary judgment,[212] and can approve global settlements for all

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[204] 28 U.S.C. § 1404(a) (2012); Hoffman v. Blaski, 363 U.S. 335, 344 (1960).

[205] *See* Howard v. Sulzer Orthopedics, Inc., 382 F. App'x 436, 442 (6th Cir. 2010); *In re* Agent Orange Prod. Liab. Litig., 996 F.2d 1425, 1432 (2d Cir. 1993).

[206] 28 U.S.C. § 1407(a) (2012) (allowing consolidation in any federal district when "such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions").

[207] *See* Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228023 [https://perma.cc/Z2QM-AGA2]; *see also* Sullivan v. Behimer, 363 U.S. 335, 338–39 (1960) (rejecting venue transfer under § 1404(a) because the defendant could not be subject to personal jurisdiction in the transferee court).

[208] *Compare supra* note 207 and accompanying text, *with infra* note 224.

[209] Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1169 (2017); *see* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 34 (1998).

[210] *In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976); *In re* Library Editions of Children's Books, 299 F. Supp. 1139, 1141 (J.P.M.L. 1969).

[211] Bradt & Rave, *supra* note 15, at 1297.

[212] 28 U.S.C. § 1407(b); 15 WRIGHT & MILLER 4th ed., *supra* note 123, § 3866.

cases.[213] As a result, transfers are usually permanent; more than 97% of MDL cases are resolved by the transferee court.[214]

The interaction between personal jurisdiction and MDL transfer is by no means clear. By some estimates, more than one-third of the current federal docket—comprising tens of thousands of individual cases—is multidistrict litigation,[215] with all the advantages such aggregation entails. Those advantages are under threat from the Supreme Court's stringent take on personal jurisdiction.

Personal jurisdiction's effects on case joinder, as well as party and claim joinder, erode the salutary benefits of aggregation. The next Part explores ways to regain those benefits.

IV. EXPANDING PERSONAL JURISDICTION FOR AGGREGATION

The solution in federal court to these tensions between personal jurisdiction and aggregation is to expand the statutory or rule authorization for federal courts to exercise personal jurisdiction in aggregation cases. Arguments for expanding personal jurisdiction in federal court are not new; others have made such arguments with respect to all cases, or to all federal question cases, or to cases involving aliens.[216] Here, I chart a narrower

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[213] Burch, *supra* note 34, at 414.

[214] Bradt, *supra* note 209, at 1206.

[215] *See id.* at 1165.

[216] *See, e.g.*, Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 1–2 (1982) (arguing for the wholesale 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); Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 37 (1987) (using international norms to argue that aliens should be subject to a national contacts approach to personal jurisdiction); 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) (aliens); Dodge & Dodson, *supra* note 1 (arguing for nationwide personal jurisdiction over aliens); Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 11, 38–61 (1984) (exploring the constitutionality of a national contacts approach to personal jurisdiction in federal courts); 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); 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, 717 (2015) ("propos[ing] that federal district courts be given personal jurisdiction in federal question cases to the full extent allowed by the Fifth Amendment"); Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 86 (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"); 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) (arguing that "jurisdiction should be constitutional [under the Fifth Amendment] on the

course: I argue for expanding personal jurisdiction in federal courts to cases involving aggregation. This Part sketches some options, explains why they are constitutional, and anticipates some objections.

A. The Subconstitutional Fix

The typical way to establish the scope of personal jurisdiction in federal courts is by authorizing service of process.[217] The general authorization is in Rule 4(k)(1) of the Federal Rules of Civil Procedure, which provides that "service establishes personal jurisdiction over a defendant" when the defendant "is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."[218] Rule 4(k)(1) thus limits personal jurisdiction in federal court to the scope that would exist in the state in which the federal court sits,[219] and it is this state-based limitation that causes many of the aggregation problems identified in this Article.

Rule 4(k) contains some exceptions, but they are limited. Personal jurisdiction over defendants "joined under Rule 14 or 19" is established when they are served "not more than 100 miles from where the summons was issued," which could be across state lines.[220] And service on a defendant sued on a federal claim establishes personal jurisdiction to the full reach of the Constitution if no individual state would have personal jurisdiction.[221] These exceptions offer little utility for the much broader range of multistate joinder available in many other cases.

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basis of effects in the United States"); 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 based on political legitimacy); A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 325 (2010) (arguing for nationwide personal jurisdiction in federal courts); Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 770–88 (1984) (arguing for nationwide personal jurisdiction over aliens); Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1149 (1989) (arguing for national jurisdiction in all federal question cases).

[217] *See* FED. R. CIV. P. 4(k)(1) (specifying the conditions under which "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant"); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1555 (2017) ("Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process."). Perhaps the federal courts could adopt a federal common law of personal jurisdiction outside the confines of existing Rule 4, but the Supreme Court has expressed doubt about the propriety of that possibility. *See* Omni Capital Int'l, Ltd. v. Rudolff Wolff & Co., 484 U.S. 97, 109 (1987).

[218] FED. R. CIV. P. 4(k)(1)(A).

[219] About half the states have long-arm statutes that extend to the full reach of the Due Process Clause of the Fourteenth Amendment, *see* Laura Beck Knoll, *Personal Jurisdiction over Maritime Defendants*: Daimler, Walden, *and Rule 4(k)(2)*, 40 TUL. MAR. L.J. 103, 121 (2015), but the states cannot authorize personal jurisdiction beyond what the Constitution allows.

[220] FED. R. CIV. P. 4(k)(1)(B).

[221] *Id.* 4(k)(2). This provision does not cover plaintiffs—like the hypothetical plaintiffs in the Wow Chemicals example—suing on state-law grounds.

To safeguard the benefits of aggregation from the threat of personal jurisdiction, then, an amendment is needed. The rule recognizes that Congress can supply broader personal jurisdiction where it wishes,[222] as Congress has with a number of specific statutes, including, most relevantly here, interpleader.[223] Whether amendment is by rule or statute is irrelevant for my purposes. What are more important are the content and the principles behind it.

The broadest grant of personal jurisdiction to federal courts would be to allow nationwide personal jurisdiction to the extent permitted by the Constitution over all parties and claims in a multiclaim or multiparty lawsuit. This would provide maximum flexibility for aggregation purposes by essentially removing all personal jurisdiction barriers to aggregation, with the possible exception of alien defendants whose connections to the United States are so attenuated that the exercise of personal jurisdiction by a federal court would violate the Constitution.

The breadth of this formulation could lead to some odd results from the perspective of personal jurisdiction. For example, a single plaintiff from California could sue a single defendant from Oregon in Florida federal court for two claims arising in California; based solely on the presence of multiple claims, Florida would have personal jurisdiction despite the lack of any Florida connection to the parties or the claims.

But even were such oddities to occur under the broad version of nationwide personal jurisdiction, they would be largely corrected by venue constraints. The venue statute imposes an independent limitation on the propriety of the forum, restricting venue to (1) a district in a state where all defendants reside, (2) a district "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated," or (3) a district where "any defendant is subject to the court's personal jurisdiction" if no proper venue otherwise exists.[224] Thus, the venue statute would limit proper venue in the case above to a federal court in Oregon (where the defendant resides) or a federal court in California (where the claims arose).

It is true that when the first two venue prongs cannot apply, oddities can return under the third prong. Say instead the plaintiff above sues two defendants, one from Oregon for a claim arising wholly in Oregon, and one from Washington for a claim arising wholly in Washington. Then, only the third venue provision would apply and, under a nationwide personal

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[222] *Id.* 4(k)(1)(C).

[223] *See infra* text accompanying notes 239–43.

[224] 28 U.S.C. § 1391(b) (2012).

jurisdiction regime, would allow the suit to be filed in Florida under both personal jurisdiction and proper venue.

However, if the claims arise wholly in different states because they are unrelated or share no common question of law or fact, then Rule 20 will disallow joinder of the defendants[225] and prevent the case from proceeding in Florida. For those cases that do survive the joinder rules, the venue transfer statute will allow defendants to transfer venue out of the highly inconvenient forum of Florida and to a more convenient forum on the West Coast.[226] Plaintiffs could try to use nationwide personal jurisdiction to shop for particularly favorable state law,[227] but the Constitution imposes limits on the application of the law of states with no connection to the dispute.[228] And, as other commentators have proposed, Congress could easily change the choice of law rules for venue transfer in this context to protect against unfair law-shopping.[229] If Congress does not, the choice of law issue could even be resolved by federal common law.[230] For these reasons, the venue statutes and choice of law doctrines can control most troubling aspects of nationwide personal jurisdiction in multiparty or multiclaim cases.

Admittedly, some oddities might linger, but it is unclear whether the costs of those residual oddities would outweigh the simplicity of a nationwide jurisdiction regime and the benefits of aggregation. Regardless, such costs are no argument for retaining a narrowed form of personal jurisdiction. At most, they merely suggest consideration of more modest expansions of personal jurisdiction.

Several permutations are possible. For example, the doctrine of pendent personal jurisdiction could be codified to allow a federal court to exercise personal jurisdiction over a defendant as to all claims asserted by a single plaintiff if the federal court has personal jurisdiction under Rule 4(k) as to at least one of those claims. Or, personal jurisdiction could be expanded to track the supplemental jurisdiction statute, effectively providing for personal jurisdiction whenever the rules allow joinder and subject matter jurisdiction, as long as personal jurisdiction under Rule 4(k) is proper for one of the original claims.[231] Like the supplemental jurisdiction statute, and consistent

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[225] FED. R. CIV. P. 20(a).

[226] 28 U.S.C. § 1404(a) (2012).

[227] *See* Ferens v. John Deere Co., 494 U.S. 516, 519–21 (1990).

[228] *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 310–11 (1981) (stating that a state with "only an insignificant contact" cannot constitutionally apply its own law).

[229] *See* Sachs, *supra* note 216, at 1303–04.

[230] *See* Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 583 (2013) (providing for a special choice of law rule for venue transfers based on forum selection clauses).

[231] Some courts have read the supplemental jurisdiction statute as implicitly authorizing personal jurisdiction, *see* Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp. 2d 796,

with the joinder-based protections against prejudice,[232] such joinder-based personal jurisdiction could even be discretionary, such that a court could decline to exercise personal jurisdiction over a defendant for a particular claim if doing so would be unfair or intrude upon notions of interstate federalism.

I do not argue here for a particular formulation of expanded personal jurisdiction for aggregation cases. Rather, I merely argue that personal jurisdiction should be expanded beyond its current state-based limits.[233] Such expansion would reap the considerable advantages of multistate aggregation and eliminate the restrictions on aggregation imposed by a doctrine that has little to do with it.

B. Constitutionality

Any such expansion of personal jurisdiction exercised by federal courts is almost certainly constitutional. Although the Supreme Court has never decided whether the Constitution permits federal courts to exercise nationwide personal jurisdiction,[234] the Court has hinted in the affirmative,[235] and commentators nearly uniformly agree that the Constitution permits federal courts to exercise nationwide personal jurisdiction based upon a national contacts test.[236]

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804 (N.D. Ohio 1998), but there is little statutory support for that reading, 4A WRIGHT & MILLER 4th ed., *supra* note 123, § 1069.7 ("Neither the plain meaning of this statute, which shows it to be a subject matter jurisdiction provision, nor its legislative history supports the conclusion that Congress intended Section 1367 to include personal jurisdiction.").

[232] *See supra* note 76; 28 U.S.C. § 1367(c) (2012).

[233] It appears the Advisory Committee on Civil Rules is primed to take up discussion of such an expansion. *See* Judicial Conference of the United States, Meeting of the Advisory Committee on Civil Rules 335–42 (April 10, 2018), http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2018 [https://perma.cc/JCK4-YF2R] (discussing possible amendments to expand Rule 4(k)).

[234] *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017) (leaving "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court"); Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102 n.5 (1987) (reserving the same question); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (plurality opinion) (same).

[235] *See, e.g.*, Miss. Pub'g Corp. v. Murphree, 326 U.S. 438, 442 (1946) (stating that "Congress could provide for service of process anywhere in the United States"); Toland v. Sprague, 37 U.S. 300, 328 (1838) (stating that "Congress might have authorized civil process from any circuit court, to have run into any state of the Union"); *cf.* Stafford v. Briggs, 444 U.S. 527, 553–54 (1980) (Stewart, J., dissenting) (stating that the Fifth Amendment requires minimum contacts with the United States as a whole).

[236] *See, e.g.*, Dodge & Dodson, *supra* note 1, at 1236 (calling this "an easy proposition"); Sachs, *supra* note 216, at 1319–20 (calling the question "about as settled by precedent as it could be"); *see also* Casad, *supra* note 130, at 1602 & n.68 (citing cases). For a recent and careful analysis concluding that the Fifth Amendment looks to national contacts, see Nash, *supra* note 131.

Congress has provided for nationwide personal jurisdiction in federal court on a number of specified federal claims.[237] Lower courts consistently find these statutes constitutional and apply a national contacts test, freed from state borders, to evaluate personal jurisdiction under such statutes.[238]

Importantly, Congress and the rulemakers have provided for nationwide personal jurisdiction in some contexts specifically for purposes of facilitating joinder, such as in interpleader,[239] certain property claims,[240] and bankruptcy.[241] In narrow joinder contexts already surveyed, the Federal Rules of Civil Procedure already allow for expanded personal jurisdiction beyond the normal state-based limits.[242] And in the past, both the Standing Committee of the Judicial Conference of the United States and the American Law Institute have proposed nationwide service for all federal question cases in federal courts for purposes of facilitating joinder.[243] As the Supreme Court once observed: "There is, therefore, nothing in the Constitution which forbids Congress to enact that . . . [the district court] in which the suit may

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[237] Federal Arbitration Act, 9 U.S.C. § 9 (2012); Sherman Act, 15 U.S.C. § 5 (2012); Trust Indenture Act of 1939, 15 U.S.C. § 77vvv (2012); Clayton Act, 15 U.S.C. § 22 (2012); Securities Act of 1933, 15 U.S.C. § 77v (2012); Securities Act of 1934, 15 U.S.C. § 78aa (2012); Investment Company Act of 1940, 15 U.S.C. § 80a-43 (2012); Investment Advisers Act of 1940, 15 U.S.C. § 80b-14 (2012); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1965 (2012); Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1608 (2012); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(2) (2012); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921 (2012); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613 (2012); Railroad Unemployment Insurance Act, 45 U.S.C. § 362 (2012).

[238] *See* Heller, *supra* note 124, at 125 (reporting that "every federal Court of Appeals" has applied a nationwide contacts test to nationwide service statutes and that "no federal court" has found a nationwide service statute unconstitutional). *But see* Terry Park, Comment, *National vs. Forum Contacts: Does ERISA's Nationwide Service of Process Automatically Constitute Federal Personal Jurisdiction?*, 32 SW. U. L. REV. 527, 528–29 (2003) (stating that circuits are split on whether the ERISA provision gives rise to nationwide personal jurisdiction dependent upon minimum contacts with the United States as a whole).

[239] 28 U.S.C. §§ 1332, 1397, 2361 (2012).

[240] 28 U.S.C. §§ 1655, 1692 (2012).

[241] FED. R. BANKR. P. 7004(d), (f). The benefit is that "any necessary litigation [can be adjudicated together] in a single forum before a judge familiar with the debtor's business and financial affairs." Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1200 (1991).

[242] *See* FED. R. CIV. P. 4(k). As justification, the Advisory Committee Notes state: "The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party." *See* FED. R. CIV. P. 4 advisory committee's note to 1993 amendment.

[243] *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, 127 F.R.D. 237, 266, 273–74, 280 (1989); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1314(d) & note (1969) ("This provision is essential if venue is laid at the place where the events occurred and some defendants are not amenable to process in that state."). For more on the proposed amendment to Rule 4, see Erichson, *supra* note 216, at 1117–18 (1989).

be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision."[244]

For these reasons, a joinder-based authorization of personal jurisdiction in federal court, expanded beyond state-based boundaries, would boast significant historical precedent and would almost surely be constitutional.

C. Counterpoints

Some downsides to expanded personal jurisdiction in aggregation cases are worth considering, though they ultimately do not carry the day.

One is that expanded opportunities for aggregation in federal court, compared to more limited opportunities for aggregation in state court, might induce vertical forum shopping by encouraging plaintiffs to file in federal court. Such vertical forum shopping would not pose a constitutional problem,[245] and it would not seem to pose a normative problem in light of the current trends favoring the "federalization" of aggregation.[246] Further, it is unlikely that the selection magnitude is great enough to distort the workable allocation of cases between state and federal courts. Many aggregated cases based on diversity or federal question jurisdiction are likely to be eligible for federal jurisdiction in disaggregated form, and their aggregation will lighten, rather than exacerbate, the burden on the federal docket. Some aggregation will allow federal jurisdiction where it did not exist previously, such as in cases of supplemental jurisdiction over nondiverse state claims, or in cases involving small claims aggregated under claim joinder to meet the amount-in-controversy threshold for diversity jurisdiction, but the impact of these cases is likely to be quite small.[247]

A more serious downside is the expansion of opportunities for horizontal forum shopping among various federal courts around the country. But, as I have argued, the venue and choice of law rules, combined with defendants' ability to restrict forums through forum selection clauses,

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[244] United States v. Union Pac. R.R., 98 U.S. 569, 604 (1878).

[245] *See* Arrowsmith v. United Press Int'l, 320 F.2d 219, 226 (2d Cir. 1963) ("[T]he constitutional doctrine announced in *Erie* . . . would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not . . . .").

[246] Bradt & Rave, *supra* note 15, at 1258 (arguing that doctrines shifting cases into MDL are "consistent with the broader trend toward federalization of mass litigation"); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1358 (2006) (discussing trends toward judicial federalization).

[247] *See* ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY tbl.C-2 (June 2017), http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2017 [https://perma.cc/QU2N-LGVK].

ameliorate much of that evil.[248] In addition, the Supreme Court has made clear that personal jurisdiction is largely blind to choice of law problems.[249] At bottom, however, the existence of the state differences that lead to horizontal forum shopping is a product of our federal system that is tolerated both because of respect for state sovereignty[250] and because of the advantages of convenience and efficiency,[251] the same values underlying aggregation.

In addition, it is important to note that restrictive personal jurisdiction presently exacerbates forum shopping opportunities for defendants. Defendants can consent to personal jurisdiction in any forum for any case, no matter the rules of personal jurisdiction, and they can seek transfer to those forums.[252] In MDL proceedings, for example, defendants can cherry-pick favorable cases to try as bellwether trials by consenting to personal jurisdiction, while objecting to personal jurisdiction over less favorable cases.[253] For putative class actions, defendants can hold a "reverse auction" for the most favorable settlement proposal, and then consent to have the case filed in the forum most likely to accept that settlement.[254] American corporations can choose to incorporate or set up their headquarters in defendant-friendly states.[255] Foreign defendants can structure their business dealings, like Daimler and McIntyre did, to avoid personal jurisdiction in the United States entirely and force lawsuits to be filed in their home countries. And business entities have nearly unfettered power to control forum selection through contractual forum selection clauses.[256]

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[248] *See supra* text accompanying notes 224–30.

[249] *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 (1984) ("[A]ny potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the court to adjudicate the claims. . . . [W]e do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry."); *cf.* Hanson v. Denckla, 357 U.S. 235, 254 (1958) ("The issue is personal jurisdiction, not choice of law.").

[250] *Keeton*, 465 U.S. at 779.

[251] Ferens v. John Deere Co., 494 U.S. 516, 525 (1989) (vindicating the convenience values of venue transfer over the gamesmanship of law shopping).

[252] 28 U.S.C. § 1441(a) (2012).

[253] *See* Amanda Bronstad, *J&J Urges Halt to Hip Implant Trial in Dallas*, TEX. LAW. (Aug. 17, 2017), https://www.law.com/texaslawyer/almID/1202795822397/JampJ-Urges-Halt-to-Hip-Implant-Trial-in-Dallas/?mcode=1395262493112&curindex=179 [https://perma.cc/7D54-S68G] (reporting this kind of strategic consent).

[254] Bradt & Rave, *supra* note 15, at 1289; *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–73 (1995) (identifying the threat of reverse auctions); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2040 (2008) (same).

[255] *See* Genuine Parts Co. v. Cepec, 137 A.3d 123, 127 (Del. 2016) ("Businesses select their states of incorporation and principal places of business with care, because they know that those jurisdictions are in fact 'home' and places where they can be sued generally.").

[256] *See* Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 582 (2013). For discussions of that power, see generally Scott Dodson, Atlantic Marine *and the Future of Party Preference*,

A related potential downside is horizontal forum selling, in which federal judges or districts offer attractive results or procedures to incentivize plaintiff-side selection of their forum.[257] The patent docket of the Eastern District of Texas is one example; until recently, patent infringement plaintiffs routinely chose to file there to take advantage of procedures perceived as friendly to patent plaintiffs, and the relaxed patent venue rules allowed such selection.[258] But the Supreme Court put an end to that practice last term in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, when it more narrowly construed the patent venue statute.[259] There is little evidence that forum selling is a widespread problem, especially in light of normal venue constraints.[260] As mentioned above, a number of federal statutes authorize nationwide service of process, yet forum selling has not been observed under them.[261]

Further, forum selling is a two-way street. The reduction of plaintiff-side forum selling through restrictive personal jurisdiction rules expands opportunities for defendant-side forum selling.[262] Because restrictive personal jurisdiction is likely to draw lawsuits against companies to states where those companies choose to incorporate or set up their headquarters, states could offer their courts and laws as particularly defendant-friendly in an effort to attract safe havens for businesses likely to be named as defendants in civil lawsuits.[263] Indeed, because states need not empower their courts with the full reach of adjudicatory authority that the Constitution allows,[264] nothing prevents a state from limiting the scope of its general

66 HASTINGS L.J. 675 (2015) (discussing party control in forum selection); Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014) (proposing limits on party control of forum selection).

[257] *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 242–43 (2016).

[258] *See id.* at 247–70. *See generally* Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1 (2017) (discussing the patent docket of the Eastern District).

[259] 137 S. Ct. 1514, 1516–17 (2017).

[260] *See* Klerman, *supra* note 216, at 717–18, 724.

[261] *See* Klerman & Reilly, *supra* note 257, at 306 (conceding that although nationwide service statutes "make[] forum selling possible, . . . it does not seem to have materialized").

[262] *See id.* at 304 (acknowledging that restrictive forum doctrines "could lead to an equally harmful pro-defendant bias").

[263] Consider, by way of analogy, the competition for Amazon's HQ2 and the deals hopeful cities have offered. *See* Kaya Yurieff, *Cities are Doing Wacky Things to Host Amazon's Second Headquarters*, CNN (Oct. 4, 2017), http://money.cnn.com/2017/10/04/technology/amazon-second-headquarters-city-proposals/index.html [https://perma.cc/843X-X4CY].

[264] *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952) (finding general jurisdiction appropriate under the Constitution but remanding to the Ohio Supreme Court because "whether the courts of that State will choose to take jurisdiction over the corporation is reserved for the courts of that State").

jurisdiction over its residents, further insulating them from litigation and generating a race to the bottom among states seeking to attract businesses through promises of limited personal jurisdiction.[265]

A final objection is that aggregation is already too liberal, and expanding personal jurisdiction will enable more opportunities for aggregation. Even were that true, the appropriate way to address excessive aggregation is on aggregation's own terms, not through a doctrine having little to do with aggregation. The aggregation rules and statutes are up to the challenge of balancing the virtues and vices of aggregation on their own; there is no need to complicate matters through the convoluted morass of personal jurisdiction.

CONCLUSION

A new restrictive turn in personal jurisdiction threatens the salutary benefits of aggregation in federal civil litigation. The Supreme Court's recent decisions narrowing both specific and general jurisdiction hinder the joinder of claims, parties, and cases in ways that reduce the fairness and efficiency of litigation. The solution is for Congress or the rulemakers to authorize expanded personal jurisdiction for aggregation cases in federal court. Such an effort would be constitutional and consistent with the spirit of the federal rules of joinder.

[265] *Cf.* 10 DEL. CODE ANN. tit. 10, § 3104(c) (2006) (providing for narrower specific jurisdiction than that allowed by the Constitution); Genuine Parts Co. v. Cepec, 137 A.3d 123, 129 (Del. 2016) (holding Delaware's corporation-registration statute not to confer general jurisdiction by consent).