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Personal Jurisdiction in Comparative Context

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This Article places the recent evolution of U.S. personal jurisdiction in comparative context. Comparativism helps illuminate and explain both the modest convergences and the more pervasive divergences. On the convergences side, the Supreme Court's acknowledgment of transnational litigation and express invocation of European approaches to personal jurisdiction have helped move general jurisdiction away from the exorbitant "doing business" jurisdiction that seemed previously to be settled U.S. law. But persistent divergences tell the more interesting story. The Court's refusal to deviate from its commitment to transient jurisdiction, its recent narrowing of specific jurisdiction since 2011, its implicit rejection of pendent-party personal jurisdiction, and its adherence to a strong form of consent-based personal jurisdiction all reveal a stark contrast with other countries' approaches to personal jurisdiction. That contrast is founded on deep and stubborn ties to American history, political structure, and litigation norms, all of which make broader convergence difficult, if not implausible. For these reasons, U.S. personal-jurisdiction doctrine is more likely to continue to develop on an independent track rather than hew to global trends. Some areas of parallelism might still occur, but substantial convergence is likely to remain elusive.

Introduction

In the United States, personal jurisdiction—known elsewhere as part of "jurisdiction to adjudicate"—is the power of a court to enter a binding judgment governing the rights and obligations of the parties in a case. In a world of many sovereigns and many courts, personal jurisdiction helps determine *which* sovereign's courts can hear a case, and that determination is influenced by the nature of the parties and their connections to the forum.

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The United States treats personal jurisdiction as domestic law[1]: each sovereign can set its own rules. Those rules begin with constitutional and statutory prescriptions of U.S. personal jurisdiction, but the codifications are open ended and vague, so the work developing the doctrine has fallen primarily on the U.S. Supreme Court. Thus, in the United States, the Court's opinions set the justification and scope for personal jurisdiction.

Those opinions largely have attended to U.S. doctrine without regard to the law of judicial jurisdiction in other countries. Instead, the Court has looked to features unique to the American experience: interstate federalism,[2] constitutional due process, court precedent, and the tug of history. That grounding formed a doctrine of personal jurisdiction that was, for many years, rather exceptional when compared to foreign norms and trends.

In the last few years, however, the U.S. Supreme Court has refocused on personal jurisdiction and has handed down a flurry of decisions that reveal a new evolution in the doctrine. There is some indication in those recent decisions that the Court is paying closer attention to how other countries structure jurisdiction to adjudicate, and how the reach of U.S. courts could affect the interests of foreign countries. Justice Ruth Bader Ginsburg, in particular, has tried to steer U.S. doctrine more in line with the scope of personal jurisdiction elsewhere, and, at least with respect to general jurisdiction, she has largely succeeded.[3] But in other contexts, American personal jurisdiction remains stubbornly exceptional. And even the Court's recent effort to move general jurisdiction toward restrictions common in the rest of the world has resulted, perhaps ironically, in a rigidity that creates new tensions with the laws of other countries.

This Article places the recent evolution of U.S. personal jurisdiction in comparative context. Comparativism helps illuminate and explain both the modest convergences and the more pervasive divergences. On the convergences side, the justices' own international travel, acknowledgment of transnational litigation, and express invocation of European approaches to personal jurisdiction have helped move general jurisdiction away from the exorbitant "doing business" jurisdiction that seemed previously to be settled U.S. law. That movement overcomes a major obstacle to U.S. participation in international

1. *Cf.* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 422 (AM. LAW INST. 2018) (Reporters' Note 11) ("This Section restates rules of personal jurisdiction exclusively as domestic law of the United States.").

2. Interstate federalism, often also called horizontal federalism, refers to the relationships among the states of the United States, as opposed to the relationship of the states to the national government.

3. *See* Daimler AG v. Bauman, 571 U.S. 117, 134 (2014) (noting consistency between the new test for general jurisdiction and the scope of jurisdiction in other countries). *See also* J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 909 & n.16 (2011) (Ginsburg, J., dissenting) (noting the conflict between the case result and the personal jurisdiction law of other countries).

agreements on judgment recognition that may now be back on the table.[4] Personal jurisdiction, in many ways, is about inter-sovereign relationships, and, at the very least, the recent trends suggest that the Court is taking those relationships seriously.

But the persistent divergences tell the more interesting story. The Court's refusal to deviate from its commitment to transient jurisdiction, its narrowing of specific jurisdiction, its implicit rejection of pendent-party personal jurisdiction, and its adherence to a strong form of consent-based personal jurisdiction all reveal a stark contrast with other countries' approaches to personal jurisdiction. That contrast is founded on deep-seated ties to American history, political structure, and litigation norms, all of which make broader convergence difficult, if not implausible. At the same time, the new cases reveal a doctrine still in search of a rationale, and the unsettled moorings means that U.S. personal jurisdiction is likely to drift in unpredictable ways in the near term.

For these reasons, U.S. personal-jurisdiction doctrine, as molded by the U.S. Supreme Court, is more likely to continue to develop on an independent track rather than hew to foreign trends. Some areas of parallelism might still occur, but substantial convergence is likely to remain elusive.

I. Personal Jurisdiction in the United States

This Part sets out the U.S. law on personal jurisdiction. It starts with some foundational principles, then lays out the law prior to the new wave of cases that began in 2011, and concludes with the post-2011 changes.

A. Foundational Principles

Two key attributes of the United States have influenced U.S. personal jurisdiction in distinctive ways. The first is the federal structure of the United States, which exhibits both national sovereignty and independent state sovereignty. Because state courts are creatures of their own state and not of other states or of the United States government, the personal jurisdiction of state courts is limited by the sovereign interests of sister states. This federal structure influences U.S. personal jurisdiction in a number of ways. Most importantly, it glosses U.S. personal jurisdiction with the need to protect interstate harmony. Although federal courts arguably do not have to worry about interstate friction because they are beholden to the national

4. One possibility is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (July 2, 2019), www.hcch.net/en/instruments/conventions/full-text/?cid=137 (not yet in force) [hereinafter 2019 Judgments Convention]. Although the 2019 Judgments Convention focuses on jurisdiction only indirectly, as part of judgment recognition and enforcement, the Judgments Project will now turn to matters relating to direct jurisdiction.

sovereign rather than any one state, the scope of personal jurisdiction in state court and in federal court are roughly equivalent. For state courts, the Constitution ties personal jurisdiction to the particular state's personal-jurisdiction reach.[5] For federal courts, although the Constitution ties personal jurisdiction to the personal-jurisdiction reach of the United States as a whole, the Federal Rules of Civil Procedure typically peg the personal-jurisdiction reach of a federal court to the same scope as that applicable to a state court.[6] The result is that the purely domestic concern of interstate federalism has played a significant role in the development of the doctrine.

The second attribute is the protection, in the U.S. Constitution, of the Fifth and Fourteenth Amendments' guarantee of "due process,"[7] which the Supreme Court has identified as the source of the constitutional limits on the exercise of personal jurisdiction.[8] Importantly, the Constitution sets an outer reach of adjudicatory authority; the particular court's sovereign can further restrict that reach by statute or rule, as the Federal Rules of Civil Procedure do, for example, for federal courts. Because the Constitution's Due Process Clauses do not distinguish between domestic and foreign parties, nor do most statutory or rule-based authorizations of jurisdiction to adjudicate, U.S. law of personal jurisdiction typically does not distinguish between domestic and foreign defendants, though the distinction does play a role in application of the doctrine.[9]

With these two attributes in mind, the next subsections provide an account of the development of U.S. personal jurisdiction.

B. Personal Jurisdiction Prior to 2011

Until the mid-1900s, a state court's personal jurisdiction, absent consent or waiver, was typically limited to parties residing in or served within the court's state.[10] That presence-based concept was tested by

5. *Nicastro*, 564 U.S. at 884 (plurality opinion) ("[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.").

6. *See* FED. R. CIV. P. 4(k)(1). There are some deviations from this general rule of federal law. *See, e.g.*, Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1474 n.67 (2019) (listing statutory grants of nationwide service).

7. U.S. CONST. amend. V; *id.* amend. XIV, § 2.

8. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–03 n.10 (1982).

9. A foreign defendant, for example, is far more likely than a domestic defendant to convince a court that a state's exercise of personal jurisdiction was fundamentally unfair. *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1214–15 (2018). *See also* Asahi Metal Indus. Co. v. Sup. Ct., 480 U.S. 102, 113–14 (1987) (recognizing the "unique burdens placed upon one who must defendant oneself in a foreign legal system").

10. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1878) ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."); *id.* at 722 ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory."). I will not address in-rem or quasi in-rem jurisdiction here.

the rise of corporations and interstate activities, and, in 1945, the Supreme Court decided the path-marking case of *International Shoe v. Washington*, which added a new way for a state court to exercise personal jurisdiction over a nonresident who was not served in the forum state: when the defendant has sufficient "minimum contacts" with the forum state such that "the suit does not offend traditional notions of fair play and substantial justice."[11] *International Shoe* and its progeny indicated that personal jurisdiction serves two interests: protecting the individual litigant's right to be free from the burdens of litigating afar, and an interstate federalism interest in keeping the states from infringing on each other's sovereignty.[12] *International Shoe* also ushered in a new kind of personal-jurisdiction doctrine founded on standards and balancing tests rather than rules.[13]

Today, the Supreme Court recognizes four discrete bases for personal jurisdiction under the Constitution. First, a state always has jurisdiction over its residents even when they are out of state when sued.[14] Second, a state has jurisdiction over a nonresident if the nonresident consents to jurisdiction, either by ex ante contract or by ex post waiver or forfeiture of jurisdictional objections.[15] Third, a state has personal jurisdiction over an individual nonresident who is personally served while in the forum state (so-called tag or transient jurisdiction).[16] Fourth, a state has jurisdiction over a nonresident when the nonresident's contacts meet the "minimum contacts" test of *International Shoe*.

This fourth basis for personal jurisdiction—minimum contacts—is further divided into two species.[17] The first species—"specific

11. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

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

13. *See* Alexandra Lahav, The New Privity 17 (July 2, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413349.

14. *See* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

15. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (ex ante consent); Adam v. Saenger, 303 U.S. 59, 67–68 (1983) (plaintiff consent by initiating the case in the court); FED. R. CIV. P. 12(h) (waiver and forfeiture).

16. *See* Burnham v. Sup. Ct., 495 U.S. 604 (1990). Prior to *Burnham*, some commentators and courts inferred an *International Shoe* reasonableness check on transient jurisdiction. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (AM. LAW INST. rev. ed. 1988) ("A state has power to exercise judicial jurisdiction over an individual who is present within its territory unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable."). Although *Burnham* does not resolve whether the exercise of transient jurisdiction is subject to a reasonableness analysis, *Burnham* makes clear that any reasonableness check is de minimis. *Compare Burnham*, 495 U.S. at 619 (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process."), *with id.* at 639 (Brennan, J., concurring) ("[A]s a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process."). *See also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 422 cmt. c (AM. LAW INST. 2018) ("General jurisdiction also exists if the defendant is a natural person and has been personally served with process within the forum.").

17. *See* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 17 (2018). The U.S. terms "specific jurisdiction" and "general jurisdiction" are not commonly used in other countries, but they are grounded in a division between claim-based jurisdiction and defendant-home jurisdiction that has analogues in other countries.

jurisdiction"—applies when the defendant's minimum contacts with the forum state give rise to or are related to the cause of action. Under specific jurisdiction, even a single contact with the forum state can justify personal jurisdiction, if the contact is significant enough that it would be fair and reasonable for the forum state to exercise personal jurisdiction. A key example is *Burger King Corp. v. Rudzewicz*,[18] which allowed a state to exercise personal jurisdiction over a nonresident whose only connections to the forum state were encompassed in the contract that was the subject of the cause of action. *Burger King* also noted that personal jurisdiction encompassed five "fairness factors," which could raise or lower the minimum level of contacts needed to justify the exercise of personal jurisdiction, though the Court remained vague how that interaction would work in practice.[19]

Up through the 1980s, the development of specific jurisdiction was episodic and thus difficult to synthesize into a coherent whole. For example, although the Court offered some guidance about what qualitative contacts were meaningful,[20] the Court left open how direct a defendant's contacts with the forum state had to be[21] and how related to the cause of action the defendant's contacts had to be.[22] Further, the Court seemed to suggest that the plaintiff's connection to the forum state could be meaningful.[23] Still, the standards produced workable guidance for the lower courts, which, over time, applied them fairly consistently in ways that mimicked rules. For example, the state courts developed (and the Supreme Court later endorsed) a rule that the minimum-contacts test subjected manufacturers to personal jurisdiction wherever their products caused injury, if the distribution of their products to that state was foreseeable.[24]

The second species of "minimum contacts" is called "general jurisdiction" and applies to nonresidents who are sued in a state for a cause of action unrelated to the nonresident's contacts with the

18. 471 U.S. 462 (1985).

19. *Id.* The five fairness factors are the burden on the defendant, the plaintiff's interest in obtaining effective relief, the interest of the forum state, the policies of other states or nations, and the judicial system's interest in efficiency. *See* Asahi Metal Indus. Co. v. Sup. Ct., 480 U.S. 102, 113–15 (1987).

20. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (identifying contacts that reap "the benefits and protections of the laws of that state").

21. *See Asahi*, 480 U.S. at 102.

22. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984).

23. Calder v. Jones, 465 U.S. 783, 784–85 (1984).

24. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."). *E.g.*, Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766 (Ill. 1961); Shepard v. Rheem Mfg. Co., 106 S.E.2d 704 (N.C. 1959); Nixon v. Cohn, 385 P.2d 305 (Wash. 1963); O'Brien v. Comstock Foods, Inc., 194 A.2d 568 (Vt. 1963); Andersen v. Nat'l Presto Indus., Inc., 135 N.W.2d 639 (Iowa 1965); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965).

state.[25] General jurisdiction requires significantly more contacts than specific jurisdiction. Until 2011, general jurisdiction was understood to require "continuous and systematic" contacts,[26] a formulation that might subject large businesses with significant operations in all fifty states (like, say, McDonald's) to general jurisdiction in any state for any cause of action.[27] Some lower courts and commentators even equated general jurisdiction with "doing business" jurisdiction, which would subject defendants to general jurisdiction anywhere they did business, even if the suit arose for reasons other than the business conducted in that state.[28]

During this time, the Court appeared to settle on an underlying theory of "minimum contacts" jurisdiction as primarily a due process right based on fairness and reasonableness, rather than as a component of interstate federalism and sovereign limits.[29] Because personal jurisdiction has features of an individual right, personal jurisdiction is a defendant-by-defendant inquiry, with constitutional standards

25. *Helicopteros*, 466 U.S. at 415–17. *See also International Shoe*, 326 U.S. at 318 (stating that "continuous corporation operations within a state [can be] 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").

26. *See* Daimler AG v. Bauman, 571 U.S. 117, 134 (2014) (Sotomayor, J., concurring) (stating that the language had been "taught to generations of first-year law students"); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 767 (1988) ("Courts currently measure the sufficiency of unrelated business contacts between the forum state and the defendant with the continuous and systematic test."). The *Restatement (Second) of Conflict of Laws*, which was drafted shortly after the original general-jurisdiction case of *Perkins v. Benguet*, 342 U.S. 437 (1952), provides a slightly different formulation that does not account for subsequent general-jurisdiction gloss: "A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 47(2) (AM. LAW INST. 1971). *See also id.* § 47 cmt. e (citing to *Perkins*).

27. *See* Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 75 (2018). The United States distinguishes personal jurisdiction from venue, which is a statutory mechanism designed to select the proper set of courts within a judicial system based on convenience and efficiency. *See, e.g.*, 28 U.S.C. § 1391. Thus, although a broad formulation of general jurisdiction might allow the exercise of personal jurisdiction over McDonald's in any state, venue directives might limit the range of proper federal courts to just one or two federal districts.

28. *See* Meir Ferer, Goodyear, *"Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 675 (2012) ("[L]ower courts widely embraced the notion that any corporation 'doing business' in a state was subject to general jurisdiction there."). For critiques of doing business jurisdiction, see Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119; Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171.

29. *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 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.").

applicable as to each defendant.[30] Thus, U.S. courts have not adopted a pendent-jurisdiction doctrine that would allow personal jurisdiction over one defendant simply because the forum had personal jurisdiction over another defendant on a related claim in the same action.[31] However, some lower federal courts adopted a doctrine of pendent personal jurisdiction over joined related claims against the *same* defendant.[32] The rationale was that once the defendant is properly before the court on one claim, there was no unfairness or unreasonableness in having the court adjudicate all other related claims against that defendant, even if the court would lack personal jurisdiction over the defendant based on those related claims alone.[33]

C. Personal Jurisdiction After 2011

U.S. law has not deviated from its adherence to transient jurisdiction[34] or to its understanding that parties can establish personal jurisdiction by consent or waiver. However, starting in 2011, the Supreme Court began to restrict other facets of personal jurisdiction.[35] The Court decided a series of six cases—three on specific jurisdiction and three on general jurisdiction—that dramatically narrowed both species of "minimum contacts" jurisdiction over nonresidents.

The first in the specific jurisdiction line is *J. McIntyre Machinery, Ltd. v. Nicastro*.[36] There, a New Jersey resident, injured in New Jersey by a metal-shearing machine, sued the machine's British manufacturer in New Jersey state court.[37] The manufacturer contracted with an American distributor (who was not sued) to sell machines in the United States, but the manufacturer did not specifically target New Jersey. The facts accepted by a majority of the justices indicated that just one of the machines entered New Jersey. Those two facts were dispositive for the Court. The plurality held that specific targeting of New Jersey was indispensable for New Jersey to exercise personal jurisdiction, even when the manufacturer generally targeted the United States as a whole.[38] The concurrence held that the lack of state-specific targeting, coupled with such a low number of products entering the forum state, was sufficient to deny jurisdiction.[39] The dissent would have held that New Jersey's exercise of personal

30. *See* Rush v. Savchuk, 444 U.S. 320, 332 (1980).
31. U.S. rules do authorize a very limited form of pendent-party jurisdiction in federal court. *See* FED. R. CIV. P. 4(k)(1)(B) (authorizing personal jurisdiction over defendants joined under Rule 14 or Rule 19 if served within 100 miles of the forum courthouse).
32. Dodson, *supra* note 17, at 21–22.
33. *Id*.
34. *See supra* text accompanying note 16.
35. Dodson, *supra* note 17, at 5.
36. 564 U.S. 873 (2011).
37. *Id.* at 878 (plurality opinion).
38. *Id.* at 886–87.
39. *Id.* at 888 (Breyer, J., concurring).

jurisdiction was reasonable based on the fact that the injury occurred there, that the manufacturer directly targeted the United States as a whole, and that even a single machine was a significant sale.[40]

Although *Nicastro* lacked a controlling opinion, the case makes two important moves. First, *Nicastro* unsettles the theory behind personal jurisdiction, which previously was grounded primarily in a due process right and in notions of fairness rather than in sovereignty or interstate federalism; four *Nicastro* justices would have held personal jurisdiction to be about consent to the adjudicatory authority of the sovereign; three would have held personal jurisdiction to be about the reasonableness of the sovereign's exercise of adjudicatory authority; and two expressed skepticism of both positions.[41] Second, *Nicastro* is controlling authority for the proposition that targeting of the United States in general, coupled with a single sale that causes harm in the United States, is not enough to confer specific jurisdiction in a state court. That authority means that a foreign manufacturer might be immune from U.S. personal jurisdiction despite manufacturing a product for use in the United States that causes harm in the United States.

The next case in the specific jurisdiction line is *Walden v. Fiore*.[42] There, the question was whether the plaintiff's continuous harm suffered in the forum state was a connection between the forum and the defendant sufficient to meet the minimum contacts test. The Court answered no: the defendant must directly create contacts with the forum state, and such contacts cannot arise solely because of the relationship of the plaintiff to the forum state.[43] *Walden* "necessitates a direct link between the defendant and the forum" and backs away from prior cases that appeared to place some weight on the plaintiff's location.[44]

In the third case, *Bristol-Myers Squibb v. Superior Court*,[45] plaintiffs from California and other states sued Bristol-Myers Squibb in California for injuries sustained in their home states. All claims were founded on the same theory of liability. Although California clearly had personal jurisdiction over the California plaintiffs' claims for injury sustained in California, the Court held that California did not have personal jurisdiction over the non-California claims because there was no connection between California and the non-California claims.[46] The rationale was not fairness (for Bristol-Myers Squibb was already properly before a California court to defend the California claims) but rather interstate sovereignty: that California adjudication

40. *Id.* at 905 (Ginsburg, J., dissenting).
41. *Id.* at 880–81 (plurality opinion); *id.* at 900–01 (Ginsburg, J., dissenting).
42. 571 U.S. 277 (2014).
43. *Id.* at 284–85.
44. Dodson, *supra* note 17, at 24.
45. 137 S. Ct. 1773 (2017).
46. *Id.* at 1780–82.

of non-California claims would infringe on the prerogatives of the states where those injuries occurred.[47]

Bristol-Myers Squibb thus makes two moves. First, *Bristol-Myers Squibb* requires a direct link between the defendant's forum-related activities and the claim.[48] This determination undermines the doctrine of pendent personal jurisdiction widely adopted in the lower federal courts, at least as applied to claims brought by different plaintiffs against a single defendant. Second, *Bristol-Myers Squibb* holds that interstate federalism and state sovereignty are important components of U.S. personal jurisdiction. This holding offers a new ground for restricting an otherwise reasonable exercise of personal jurisdiction.

These three cases alter the law of specific jurisdiction. Today, specific jurisdiction requires a direct link between the forum and the defendant and between the forum and the claim. Specific jurisdiction also requires more than causing harm in the forum state, and the plaintiff's connection to the forum state is irrelevant except to the extent that the plaintiff establishes a direct connection between the forum and the defendant. Finally, even if otherwise reasonable, principles of interstate federalism and state sovereignty might restrict the exercise of specific jurisdiction.

A recent example of the new restrictions on specific jurisdiction is *M.J. v. Ford Motor Co.* There, a Missouri car owner's daughter sued Ford when the car owner died from an accident allegedly caused by a Ford car's defective steering wheel. The accident occurred in Missouri, and the suit was brought in a Missouri federal district court. Ford is a Delaware corporation with its principal place of business in Michigan. The facts showed that Ford sold the car in question to an independent dealership in Tennessee. It was unclear how the car got to Missouri, but, presumably, a consumer purchased it from the Tennessee dealership and drove it to Missouri. The facts also showed that Ford had substantial business in Missouri, including maintaining offices and manufacturing plants in Missouri, selling thousands of cars directly in Missouri, and directly marketing cars similar to the car in question in Missouri. The district court dismissed for lack of personal jurisdiction over Ford, relying on *Walden* and *Bristol-Myers Squibb*, and reasoning as follows:

> Here, the Vehicle was last distributed by Ford when it was sold to a dealership in Tennessee. There are no allegations that it ended up in Missouri by the acts of Ford, its agent, or its alter-ego. Because Ford did not commit particular acts connecting to the Vehicle, this forum, and this litigation, no specific personal jurisdiction over Ford exists in Missouri.[49]

47. Dodson, *supra* note 17, at 27–28.
48. *Id.* at 28.
49. M.J. v. Ford Motor Co., No. 4:19CV1846 HEA, 2019 WL 4194372 (E.D. Mo. Sept. 4, 2019).

As this case makes clear, lower courts are finding a lack of specific jurisdiction even when the injury occurs in the forum state and the defendant has substantial and direct business with the forum state.

The Court's restrictive turn in general jurisdiction began with *Goodyear Dunlop Tires Operations, S.A. v. Brown* in 2011.[50] There, the Court replaced the commonly accepted standard of "continuous and systematic contacts" with contacts that were "so constant and pervasive" as to render the defendant "at home" in the state.[51] "Paradigm" examples include the domicile of an individual and the place of incorporation and principal place of business for a corporation.[52] *Daimler AG v. Bauman*,[53] decided three years later, affirmed *Goodyear*, made *Goodyear*'s "paradigm" examples presumptively exclusive, and emphasized that the "at home" test is comparative, in that the contacts with the state must be assessed in light of the contacts the defendant has with other states when determining where the defendant is "at home."[54] Finally, in *BNSF Railway Co. v. Tyrrell*,[55] the Court reconfirmed its commitment to this new general jurisdiction framework.

These general-jurisdiction cases eliminate any vestige of "doing business" jurisdiction and essentially reduce general jurisdiction to a domicile test. No longer is McDonald's subject to general jurisdiction in all fifty states; rather, it is subject to general jurisdiction only in two states: its state of incorporation and the state of its headquarters offices. For foreign defendants, even if they do substantial business in the United States, general jurisdiction likely does not exist at all.[56]

II. U.S. Personal Jurisdiction in a Comparative Context

This Part puts the U.S. law of personal jurisdiction in a comparative context. It analyzes the lines of convergence and points of divergence in the various manifestations of personal jurisdiction.

A. Transient Jurisdiction

The U.S. commitment to transient jurisdiction continues to be shared by only a handful of other countries, such as the United Kingdom. The EU and most other counties consider transient jurisdiction to be exorbitant and will refuse to honor judgments based upon it.[57] Nevertheless, the United States continues to adhere to transient

50. 564 U.S. 915 (2011).
51. *Id.* at 924.
52. *Id*.
53. 571 U.S. 117 (2014).
54. *Id.* at 122, 139–40 & nn.19–20.
55. 137 S. Ct. 1549 (2017).
56. *See* Dodge & Dodson, *supra* note 9, at 1220 ("For alien defendants, . . . the likelihood is that *no* U.S. state will be able to exercise general jurisdiction.").
57. *See* Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 Tul. J. Int'l & Comp. L. 111, 116 (1999). *See also*

jurisdiction, at least for individuals, reflecting a part of the doctrine that is deeply and stubbornly rooted in history and tradition.[58]

B. Consent to Jurisdiction

By contrast, the U.S. commitment to consent as a basis for personal jurisdiction—and particularly ex ante consent by contract—is shared with other countries, which largely recognize the ability of parties to consent to a particular court's authority to resolve the dispute.[59] However, while the United States adheres to a fairly broad notion of consent, other countries are more willing to impose limits on contract-based consent to personal jurisdiction, particularly when suspected unequal bargaining power between the contracting parties exists. For example, the Brussels I Recast prevents ex ante contracts from superseding the jurisdictional provisions for consumer claims in ways that disadvantage the consumer.[60] The 2019 Judgments Convention disclaims judgment recognition if the judgment was entered based on ex ante consent to jurisdiction and was against a consumer "in matters relating to a consumer contract" or against "an employee in matters relating to the employee's contract of employment."[61] And the Choice of Court Convention excludes employment contracts and certain other specified claims from the otherwise presumptive jurisdiction in a contractually selected court.[62] Similarly, the domestic law of individual

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RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (AM. LAW INST. 1987) (acknowledging that service of process on a person only transitorily in the territory of the state is not generally acceptable under international law). *E.g.*, European Regulation No. 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5, 2012 O.J. (L 351) 1 [hereinafter Brussels I Recast] (restricting EU jurisdiction to other grounds). For more on exorbitant jurisdiction, see Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474 (2006).

58. *See* Burbank, *supra* note 57, at 116.

59. *See, e.g.*, Brussels I Recast, *supra* note 57, art. 19 (acknowledging the general rule of consent); MINJI MINSOHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, art. 3-8 (Japan) (allowing waiver of the defense to personal jurisdiction); Civil Procedure Rules 1998, SI 1998/3132, Practice Dir. 6B, ¶¶ 3.1(6)–(7) (Eng.) (allowing parties to select English courts by contract). *See also* Hague Convention on Choice of Court Agreements art. 5, June 30, 2005, 44 I.L.M. 1294 [hereinafter Choice of Court Convention] ("The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies [absent specified exceptions] . . . ."). For a comprehensive discussion, see RONALD A. BRAND & PAUL M. HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS (2008).

60. Brussels I Recast, *supra* note 57, art. 19 (providing that no private contracts can supersede the consumer-claim provisions unless the contract arises *after* the dispute, or allows the consumer *more* choice of where to sue, or which confers jurisdiction on the courts of a particular member state where both parties were "domiciled or habitually resident").

61. 2019 Judgments Convention, *supra* note 4, art. 5(2). For such parties, the Judgments Convention allows judgment recognition if the judgment were entered based on consent addressed orally or in writing to the judgment-rendering court. *Id.*

62. Choice of Court Convention, *supra* note 59, art. 2(1).

countries qualify consent to personal jurisdiction. Japan, for example, allows consent in consumer cases only where the consumer was domiciled at the time of the consumer contract.[63] In contrast to these more flexible, fairness-based notions of consent to jurisdiction, U.S. doctrine does not vary based on supposed unequal bargaining power or even the status of a contract as a contract of adhesion.[64] This manifestation of U.S. doctrine is grounded in party autonomy and litigation predictability rather than in the fairness of the forum selected.

C. Specific Jurisdiction

Although the U.S. formulation of "minimum contacts" reflects a highly fact-dependent and standards-based inquiry, specific jurisdiction once seemed, as illustrated by the rule that manufacturers generally are subject to personal jurisdiction where their products cause injury,[65] to produce results in line with the more rule-based codifications found in other countries. As Linda Silberman has noted, "the place of injury is a well-accepted jurisdictional basis . . . embraced in national law in many countries of the world,"[66] including England, Germany, France, China, and others.[67] The Brussels I Recast also

63. MINSOHŌ art. 3-7. For a general assessment, see Koji Takahashi, *The Jurisdiction of Japanese Courts in a Comparative Context*, 11 J. PRIV. INT'L L. 103 (2015).

64. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585, 593–95 (1991) (subjecting a contractual forum-selection clause only to scrutiny for the "fundamental fairness" of the forum selected and ignoring the adhesive status of the contract or the burden on the consumer to litigate in the forum selected by the defendant). One intriguing and looming wrinkle on U.S. consent doctrine involves state attempts to extract consent to general jurisdiction through business-registration statutes. The *Restatement (Second) of Conflict of Laws* adopts this position, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 44 (AM. LAW INST. 1971), and the caselaw holds analogous support, see, e.g., Hess v. Pawloski, 274 U.S. 352, 356 (1927) (extracted consent to specific jurisdiction under a nonresident motorist statute). Some lower courts have held that the strong form of consent applies to registration statutes too. *See* 4A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1069.2 n.25 (4th ed. 2017) (collecting cases). For expressions of skepticism, see Dodson, *supra* note 27, at 84; Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1346 (2015).

65. *See supra* text accompanying notes 20–24.

66. Linda J. Silberman, Goodyear *and* Nicastro*: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 593 (2012).

67. Civil Procedure Rules 1998, SI 1998/3132, Practice Dir. 6B, ¶ 3-1(9); STRAFPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 32 (Ger.); CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 46 (Fr.); Interpretation No. 5 of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (issued by the Sup. People's Ct., Jan. 30, 2015, effective Feb. 4, 2015), arts. 24–25, CLI.3.242703(EN) (Lawinfochina) (China) [hereinafter SPC Interpretation No. 5]. A potential exception is Canada, which recently declined to endorse a firm rule of personal jurisdiction based on place of injury. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para. 89. For exposition of *Van Breda*, see Tanya J. Monestier, *(Still) a "Real and Substantial" Mess: The Law of Jurisdiction in Canada*, 36 FORDHAM INT'L L.J. 396 (2013).

adopts this principle,[68] as do more specific international projects.[69] However, the Court's recent decisions have narrowed specific jurisdiction in several ways that depart from what many other countries would tend to allow.[70] For example, *Nicastro* and *Walden* disclaimed that the place of injury was enough to satisfy personal jurisdiction in a tort case. Justice Ginsburg, in her *Nicastro* dissent, pointedly contrasted *Nicastro*'s more restrictive view with the trends and approaches elsewhere in the world.[71]

In addition, U.S. law's marginalization of the plaintiff's connection to the forum is contrary to a foreign trend to allow adjudicatory jurisdiction in the plaintiff's home state under certain circumstances. Although most countries consider personal jurisdiction based solely on the plaintiff's nationality to be exorbitant,[72] they typically allow personal jurisdiction in the plaintiff's home country in certain circumstances (usually for consumer contracts) that would not be permitted under U.S. law.[73] For example, the Brussels I Recast allows an EU-domiciled consumer to sue a provider in the consumer's domicile state, and the provider can only sue an EU-domiciled consumer in the consumer's domicile state.[74] Swiss law allows Swiss consumers to

68. Brussels I Recast, *supra* note 57, art. 7.2 (providing for jurisdiction "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur"). Interestingly, the 2019 Judgments Convention focuses on where the act or omission that causes injury took place, not on where the injury was suffered. 2019 Judgments Convention, *supra* note 4, art. 5.1(j) (providing for recognition of a judgment when "the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred").

69. *See, e.g.*, Erik Jayme & Symeon C. Symeonides, Eighth Comm'n, Inst. of Int'l Law, Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments arts. 2.1, 5 (2019) (providing for jurisdiction in the "home state of the person who suffered or may suffer an injury" arising from injuries caused through the use of the Internet to a person's rights of personality, unless the defendant demonstrates that "it did not derivate any pecuniary or other significant benefit from the accessibility of the material in the forum State" and that "a reasonable person could not have foreseen that the material would be accessible [or] cause injury in that State").

70. I should point out that other countries do not use the term "specific jurisdiction" (or "general jurisdiction") as the United States has adopted. However, most countries do recognize the two species of case-linked and case-independent jurisdiction that "specific" and "general" roughly refer to.

71. J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 909 & n.16 (2011) (Ginsburg, J., dissenting).

72. *See* text accompanying note 57. France appears to be the exception, see C.P.C. art. 14 (jurisdiction in France over nonresidents for "obligations" to a French person), but perhaps only when no other basis of jurisdiction can be used, see Oscar Chase et al., Civil Litigation in Comparative Context 654 (2d ed. 2017). For a discussion, see Clermont & Palmer, *supra* note 57, at 487–99.

73. Silberman, *supra* note 66, at 611 ("[The U.S.] focus on the forum's connection to the defendant . . . make[s] it impossible in the United States to [allow] creditors or consumers to sue at home—as many other jurisdictional regimes permit.").

74. Brussels I Recast, *supra* note 57, arts. 18.1–.2.

bring their claims in courts located at their domicile.[75] And Chinese law allows certain internet-based torts to give rise to personal jurisdiction in China over a nonresident tortfeasor where the plaintiff is domiciled or where the plaintiff accessed the information.[76] By contrast, U.S. personal jurisdiction is adamant that the plaintiff's connections to the forum are relevant only to the extent they create a direct link between the defendant and the forum. The U.S. refusal to accommodate certain plaintiffs' interests in home-state litigation demonstrates U.S. doctrine's more pointed focus on the defendant's contacts with the forum.[77]

D. General Jurisdiction

In contrast to U.S. trends in specific jurisdiction, which have distanced the United States from foreign trends, the U.S. trends in general jurisdiction have brought the United States more in line with the rest of the world. Most other countries have long considered "doing business" general jurisdiction to be exorbitant,[78] and that conception of general jurisdiction caused tension between the United States and other countries during the 1990s attempt to develop a judgments convention.[79] But the U.S. Supreme Court's recent general jurisdiction cases eliminate "doing business" jurisdiction and significantly narrow general jurisdiction essentially to where the defendant is "at home."[80]

This U.S. trend moves toward the approach followed in other countries. The Brussels I Recast and most countries permit general jurisdiction in the defendant's country of domicile.[81] And most jurisdictions

75. Bundesblatt [Private International Law Statute] Dec. 18, 1987, I 5-60, art. 114(a) (Switz.).

76. *See* SPC Interpretation No. 5, art. 25; Interpretation No. 20 of the Supreme People's Court on the Application of the Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks (issued by the Sup. People's Ct., Dec. 17, 2012, effective Jan. 1, 2013), art. 15, CLI.3.191740(EN) (Lawinfochina). Chinese courts have upheld such exercises of jurisdiction even when the defendant does not actively target the forum (unlike, say, someone who sends an e-mail to a recipient in a particular forum). *E.g.*, Mai Jai v. Apple Inc. & iTunes S.a.r.l., No. 5279 (Beijing Intermediate People's Ct. Apr. 23, 2013) (exercising jurisdiction over nonresidents Apple and iTunes based on a Chinese plaintiff's iTunes download, in Beijing, of works that infringed her copyright). For a discussion, see Jie (Jeanne) Huang, *Personal Jurisdiction Based on the Location of a Server: Chinese Territorialism in the Internet Era?*, 36 Wis. Int'l L.J. 87, 94 (2019).

77. *See* Walden v. Fiore, 571 U.S. 277 (2014). To be clear, the plaintiff's interests are relevant when considering the fairness factors, but they are irrelevant when assessing the minimum contacts the defendant has with the forum.

78. Chase et al., *supra* note 72, at 673.

79. Burbank, *supra* note 57, at 119.

80. Daimler AG v. Bauman, 571 U.S. 117, 147 (2014).

81. *See, e.g.*, Brussels I Recast, *supra* note 57, art. 4.1 (domicile); Strafprozessordnung [ZPO] [Code of Civil Procedure] §§ 12–13 (Ger.) (residence); Code de procédure civile [C.P.C.] [Civil Procedure Code] arts. 42–43 (Fr.) (for individuals, where domiciled or, if no domicile, where resident; for corporations, where the corporation is established); Minji Minsohō [Minsohō] [C. Civ. Pro.] 1996, art. 3-2, § 1 (Japan) (for individuals, where domiciled or, if no domicile, where resident); Civil Procedure Rules 1998,

define the domicile of businesses to be where they have their "statutory seat," "central administration," or "principal place of business," or where "incorporated or formed."[82] This standard is close to the U.S. "at home" standard, with its "paradigm" illustrations of place of incorporation and principal place of business.[83] Indeed, in *Daimler*, the Court noted that one justification for narrowing general jurisdiction was to bring U.S. personal jurisdiction more in line with other countries.[84]

However, it appears that U.S. general jurisdiction now is actually narrower than that of many other countries because U.S. general jurisdiction more rigidly resists exceptions to domicile-based general jurisdiction. The U.S. Supreme Court has refused to broaden general jurisdiction beyond the paradigm examples except in extraordinary cases, such as when a foreign corporation wholly relocates its operations temporarily to a state.[85] But other countries' formulations of general jurisdiction permit more relaxed exceptions. In Germany, for example, individuals' place of long-term but temporary abode (such as for students and certain workers) may qualify for general jurisdiction for claims under property law.[86] In Japan, if no business office can be located, general jurisdiction is appropriate if a representative of the business is domiciled in Japan.[87] In China, an individual not domiciled in China is subject to general jurisdiction in China if they have resided there for twelve consecutive months.[88]

These approaches reflect a more functional doctrine of general jurisdiction that incorporates sensitivity to the fairness to the parties and to the need to ensure a reasonable forum for the plaintiff. By contrast, U.S. general jurisdiction is more rigid and blind to its effects. As Justice Sotomayor has pointed out, the rigidity of U.S. general jurisdiction means that

> a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States. . . . Similarly, a U.S. business that enters into a

SI 1998/3132, Practice Dir. 6B, ¶ 3.1(1). The Judgments Convention recognizes judgment enforcement when the underlying judgment was issued by a court located in the defendant's place of "habitual residence." 2019 Judgments Convention, *supra* note 4, art. 5.1(a).

82. *See, e.g.*, Brussels I Recast, *supra* note 57, art. 63.1; 2019 Judgments Convention, *supra* note 4, art. 3.2. *See also* ZPO § 17(1) (defining residence of a business at its "registered seat" and "administrative center"); MINSOHŌ art. 3-2, § 3 (principal office or principal place of business); SPC Interpretation No. 5, art. 3 (where an organization has its "principal office").

83. Silberman, *supra* note 66, at 608.

84. *Daimler*, 571 U.S. at 141–42.

85. *Id*.

86. ZPO § 20.

87. MINSOHŌ art. 3-2, § 3.

88. SPC Interpretation No. 5, art. 4.

> contract in a foreign country to sell its products to a multinational company there may be unable to seek relief in any U.S. court if the multinational company breaches the contract, even if that company has considerable operations in numerous U.S. forums. . . . Indeed, the majority's approach would preclude the plaintiffs in these examples from seeking recourse anywhere in the United States even if no other judicial system was available to provide relief. I cannot agree with the majority's conclusion that the Due Process Clause requires these results.[89]

E. Pendent Jurisdiction

In the United States, *Bristol-Myers Squibb*'s implicit rejection of pendent jurisdiction in the single-defendant context—when one claim satisfies personal jurisdiction but another otherwise would not—is inconsistent with many other countries' adoption of pendent jurisdiction in the multidefendant context. The Brussels I Recast allows pendent jurisdiction over EU domiciliaries in any member state where one defendant is domiciled if the claims are related.[90] Many other countries' domestic laws allow pendent personal jurisdiction over multiple defendants when the claims are closely connected.[91] These differences relate to the underlying features of personal jurisdiction. In the United States, personal jurisdiction is a defendant-by-defendant inquiry designed to protect each defendant from its own individualized burdens. In Europe, by contrast, personal jurisdiction is used to facilitate joinder for efficiency and consistency purposes.

F. Theoretical Bases

As Linda Silberman has noted, looking at personal jurisdiction developments can "reveal[] the different values reflected in other systems' jurisdictional rules."[92] U.S. personal jurisdiction once seemed settled on the foundation of due process notions of fairness and reasonableness, but recent cases have disparaged notions of fairness[93] and have reinvigorated the idea that personal jurisdiction helps manage

89. *Daimler*, 571 U.S. at 156 (Sotomayor, J., concurring).

90. Brussels I Recast, *supra* note 57, art. 8(1) (providing for jurisdiction "in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings"). Interestingly, the 2019 Judgments Convention does not mention pendent jurisdiction.

91. *See, e.g.*, Civil Procedure Rules 1998, SI 1998/3132, Practice Dir. 6B, ¶¶ 3-1(3)(b), 3-1(4); Minsohō art. 3-6. One exception is Germany. *See* Peter L. Murray & Rolf Stürner, German Civil Justice 517 (2004).

92. Silberman, *supra* note 66, at 592.

93. *See* J. McIntyre Mach. Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (Kennedy, J.) (asserting that "freeform notions of fundamental fairness" are not enough).

sovereign prerogatives.[94] The splintered decision in *Nicastro* confirms that the theoretical basis of personal jurisdiction remains unsettled in the United States. By contrast, European notions of jurisdiction to adjudicate are more firmly established and focus on different aims. The Brussels I Recast was designed "to lower costs by increasing certainty and diminishing procedural delays; improve access to justice, especially for weaker parties; and create better coordination of legal proceedings."[95] The Choice of Court Convention was premised on the idea that personal jurisdiction should lead to "enhanced judicial co-operation" in furtherance of "international trade and investment."[96] And the 2019 Judgments Convention reiterates the international-trade rationale and adds the desire to "promote effective access to justice for all."[97] The emphases on justice "for all" and inter-sovereign "co-operation" and "coordination" are quite different from the recent U.S. emphases on the protection of defendants from the burdens of litigation and the need to police inter-sovereign friction.

III. Observations on Personal Jurisdiction in the United States

U.S. exceptionalism in personal jurisdiction has frustrated the formation of a multinational agreement on personal jurisdiction that includes the United States. That is not for a lack of interest on the part of the United States. To the contrary, the United States long sought such a mechanism to facilitate the enforcement of U.S. judgments abroad. The United States even initiated the effort, in the late 1990s, to design a worldwide convention on personal jurisdiction.[98] But other countries objected to some of the broader facets of U.S. personal jurisdiction, especially the "doing business" jurisdiction seemingly sanctioned by the Supreme Court prior to *Goodyear*.[99] At the time, U.S. scholars involved in the project thought it "probably too late in the day" for the Court to scale back general jurisdiction based on "substantial business systematically and continuously" conducted in

94. *See* Bristol-Myers Squibb Co. v. Sup. Ct., 137 S. Ct. 1773, 1780 (2017) ("As we have put it, restrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." (internal quotation marks omitted)).

95. Chase et al., *supra* note 72, at 646.

96. Choice of Court Convention, *supra* note 59, pmbl.

97. 2019 Judgments Convention, *supra* note 4, pmbl.

98. Letter from Edwin D. Williamson, Legal Advisor, U.S. Dep't of State, to Georges Droz, Sec'y Gen., the Hague Conference on Private Int'l Law (May 5, 1992) (distributed with Hague Conference Document L.C. ON No. 15 (92)).

99. Silberman, *supra* note 66, at 614 ("The expansive interpretations of doing business jurisdiction in the United States have been a source of criticism abroad. . . . In the recent negotiations for a world-wide jurisdiction and judgments convention at the Hague Conference, efforts were made to curtail that type of jurisdiction by placing it on the prohibited list. The United States objected, and this was one of the issues over which the Hague negotiations broke down."). *See also* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DePaul L. Rev. 319, 338–46 (2002).

a U.S. state.[100] The judgments project stalled and was repackaged in a far more limited form,[101] ultimately resulting in the Choice of Court Convention that was adopted in 2005 (though still not ratified by the United States).

The judgments project was reconstituted in 2011 and resulted in the adoption of the 2019 Judgments Convention. With the United States having dispensed with "doing business" general jurisdiction, and with general jurisdiction's "at home" test looking a lot more like general jurisdiction in other countries,[102] it is not fantastical to hope that the United States might be inclined to ratify the convention. That hope is supported by recent statements in the Court's opinions comparing the U.S. doctrine with that of other countries. Although U.S. procedure remains internally focused,[103] those acknowledgments indicate that the Court is at least taking note of international views in ways that may be influential down the road.

But significant convergence remains unlikely, for three reasons. First, major areas of disagreement remain. Tag jurisdiction has deep historical ties, and the United States shows no signs of relinquishing it. The strong form of consent, without relaxation for unequal bargaining power, is inconsistent with recent trends in other countries. The recent narrowing of specific jurisdiction in the United States—especially without regard to the plaintiff's connections to the forum and disavowal of the place of injury as appropriate for personal jurisdiction in a tort case—suggest a trend away from the laws of other countries, as does the move to make general jurisdiction rigid. Pendent jurisdiction regarding multiple parties seems all but dead in the United States, despite its enhancement of efficiency, as other countries recognize. Yes, some movement has been toward the rest of the world. But there is a long way to go for more comprehensive overlap.

Second, the underlying rationales make justifications for parallelism difficult. Europe views personal jurisdiction as about intersovereign cooperation, efficiency and convenience, and fairness to all. The United States, by contrast, continues to struggle to articulate a clear theoretical foundation for personal jurisdiction and has vacillated between reasonableness, fairness focused on the individual rights of each defendant, and protection of state sovereignty and alleviation of inter-sovereign frictions. It is difficult to imagine these origin points generating similar doctrines.

100. Burbank, *supra* note 57, at 119.

101. For a discussion, see David Goddard, *Rethinking the Judgments Convention—A Pacific Perspective*, 3 Y.B. Priv. Int'l L. 27 (2001).

102. Silberman, *supra* note 66, at 613.

103. *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 Am. J. Comp. L. 277, 278 (2002); Scott Dodson, *Pleading Standards in a Comparative Context*, 158 U. Pa. L. Rev. 441, 442, 446 (2010); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 Am. J. Comp. L. 709, 709 (2005).

Third, the United States is hampered mechanistically. Personal jurisdiction in most civil law countries, and even in many common law countries, is a creature of code and convention, which can be created all at once with inter-sovereign compromises in mind and clear rules set out in the codified language. Personal jurisdiction in the United States, meanwhile, is developed primarily by case-by-case decisions from the Supreme Court,[104] whose decision making is heavily influenced by U.S. precedent, American-style litigation,[105] history and tradition, federalism, and constitutional rights. It is true that the common law process has titrated the broad standards of U.S. personal jurisdiction into some settled rule-like applications, but those applications have tended to deviate from global analogues. Theoretically, Congress or the Rules Committees could step in to expand or contract personal jurisdiction in federal court without regard to state boundaries or interstate concerns, even creating a reticulated and specific regime akin to the Brussels I Recast. But neither Congress nor the Rules Committees has shown interest or political will in taking on such a project.[106]

All this means that U.S. personal jurisdiction is likely to evolve in unpredictable ways in the near term and seems more likely to follow an independent track rather than hew to foreign norms. Some areas of parallelism might still occur, but substantial convergence is likely to remain elusive.

Still, there is a silver lining. Comparativism is not all about convergence. One benefit is enrichment to better understand, and critique, home systems.[107] Global perspectives also confirm civil procedure's "universality."[108] The benefit is particularly important for law students,[109] and comparativism in American civil procedure courses is on the rise.[110] Comparative personal jurisdiction seems ripe for closer scrutiny in American classrooms. Further, the benefit is not limited to students: "Advocates, advisers, and judges must have at least a working knowledge of foreign procedures to be able to frame, anticipate, or decide legal issues that cross national boundaries."[111] And

104. Codified rules do have a role to play in subconstitutional contours of U.S. personal jurisdiction, but the focus has always been on the constitutional contours as interpreted by the Supreme Court.

105. U.S. procedural exceptionalism and litigation culture means that issues of personal jurisdiction crop up in varied places, especially in aggregate litigation, where the issues become both contentious and politicized. *See, e.g.*, Dodson, *supra* note 6 (exploring the applicability of personal jurisdiction to plaintiffs in multidistrict litigation cases); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811 (1985) (applying personal jurisdiction to unnamed class members).

106. Dodson, *supra* note 27, at 83–84.

107. Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. Legal Educ. 524, 525 (2006); Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 Ala. L. Rev. 133, 138 (2008).

108. James E. Pfander, Book Review, 56 Am. J. Comp. L. 506, 509 (2008).

109. *Id.* at 508.

110. *Id.* at 507.

111. Dodson, *supra* note 103, at 444.

academic research provides these benefits to scholars too,[112] whose comparative study can enrich understanding and debate in academic circles.[113] For these reasons, comparative approaches to personal jurisdiction offer promising opportunities for cross-border research and education.

Conclusion

This Article has aimed to study U.S. personal jurisdiction in a comparative context, revealing both the similarities and convergences and the differences and divergences. That comparison, in turn, has highlighted the different theoretical and systemic foundations at work behind the doctrine. Those differences may continue to present obstacles to large-scale convergence. But studying them nevertheless has its own benefits, as this Article strives to attest.

112. *See* John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 Am. J. Comp. L. 545, 545 (1995).

113. Dodson, *supra* note 103, at 464.