

THEIR BEEF IS WITH *BURGER KING*

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The Justices of the Supreme Court seem increasingly uneasy about International Shoe’s paradigm for personal jurisdiction. But those concerns (both explicit and implicit) are misdirected. The doctrinal corner into which the Court has painted itself is not the fault of International Shoe, but of the doctrinal scaffolding the Court built around it in the mid-1980s. In cases like Burger King v. Rudzewicz, Helicopteros Nacionales de Colombia, S. A. v. Hall, and Asahi Metal Industries Co. v. Superior Court, the Supreme Court bifurcated personal jurisdiction analysis into general and specific jurisdiction and articulated a three-part test for specific jurisdiction that we still teach 1Ls today. This festschrift essay draws on Professor Linda Silberman’s prescient contemporaneous commentary about these doctrinal developments to remind readers of the choices made and paths not taken. Rather than abandoning International Shoe’s framework, the Court could scrape off some of the barnacles of interpretation that have accumulated on top of it. Granted, even a scrubbed-down version of International Shoe’s framework may not be enough to placate those Justices (like Gorsuch and Thomas) who are seeking an originalist understanding of the Due Process Clause. But better and more stable progress will be made if we can at least diagnose the source of current complaints correctly.

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I. INTRODUCTION

*International Shoe Co. v. Washington*¹ was decided seventy-five years ago, and there are some rumblings that it is showing its age. On the Supreme Court, Justice Gorsuch has been the most open skeptic, wondering whether “*International Shoe* just doesn’t work quite as well as it once did,”² though Justice Thomas³ and Justice Alito⁴ have shared similar concerns. While other Justices seem less open to jettisoning *International Shoe* itself,⁵ they have nonetheless worried about its limits, raising questions about online commerce,⁶ coffee farmers in Kenya,⁷ and duck decoy makers in Maine.⁸ In the two years since the Supreme Court handed down *Ford Motor Co. v. Montana Eighth Judicial District Court*,⁹ I have been surprised by how readily my students agree with Justice Gorsuch’s concurrence in that case: perhaps *International Shoe* just isn’t worth the trouble.¹⁰

These complaints are misdirected. The Justices’ criticisms (both explicit and implicit) are not really about *International Shoe*—they are about the doctrinal scaffolding that the

1. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

2. *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring).

3. Justice Thomas joined Justice Gorsuch’s concurrence in *Ford*. See *id.* at 1038.

4. *Ford Motor Co.*, 141 S. Ct. at 1032 (Alito, J., concurring) (“[F]or the reasons outlined in Justice Gorsuch’s thoughtful opinion, there are grounds for questioning the standard that the Court adopted in *International Shoe*, [as well as] reasons to wonder whether the case law we have developed since that time is well suited for the way in which business is now conducted.”).

5. Transcript of Oral Argument at 9, *Mallory v. Norfolk Southern Ry.*, 143 S. Ct. 2028 (2023) (No. 21-1168) (Roberts, C.J.) (“[H]istory and tradition move on . . . Doesn’t *International Shoe* sort of relegate that body of cases to the dust bin of history?”); *id.* at 44–45 (Kagan, J.) (expressing skepticism of petitioner’s argument because it would be inconsistent with the *International Shoe* paradigm).

6. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 890 (2011) (Breyer, J., concurring).

7. *Id.* at 891–92.

8. See Transcript of Oral Argument at 39–41, *Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017 (2021) (Nos. 19-368, 19-369) (Roberts, C.J.) (raising hypothetical about Maine-based maker of duck decoys who sells his wares online).

9. *Ford Motor Co.*, 141 S. Ct. 1017.

10. See *id.* at 1039 (Gorsuch, J., concurring) (expressing doubt as to *International Shoe*’s fit with modern society).

Supreme Court superimposed on top of *International Shoe* in the mid-1980s. In cases like *Burger King v. Rudzewicz*,¹¹ *Helicopteros Nacionales de Colombia, S. A. v. Hall*,¹² and *Asahi Metal Industries Co. v. Superior Court*,¹³ the Supreme Court bifurcated personal jurisdiction analysis into general and specific jurisdiction and articulated a three-part test for specific jurisdiction that we still teach 1Ls today.¹⁴ This tribute Essay draws on Professor Linda Silberman's prescient contemporaneous commentary about these doctrinal developments to remind readers of the choices made and paths not taken. As Professor Silberman has already flagged, the limitations of the resulting doctrinal structure have only become more clear—and more pressing—since the Supreme Court strictly cabined general jurisdiction in *Daimler AG v. Bauman*¹⁵ in 2014.¹⁶

If *Burger King*'s effort to rulyfy personal jurisdiction is proving unworkable, that is not a reason to abandon *International Shoe*. Instead the Court could simply scrape off some of the barnacles of interpretation¹⁷ that have accumulated on top of *International Shoe*, a process that *Ford* may already have started.¹⁸ Granted, even a scrubbed-down version of *International Shoe*'s framework may not be enough to placate those Justices (like Gorsuch and Thomas) who are seeking an originalist

11. *Burger King v. Rudzewicz*, 471 U.S. 462 (1985).

12. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408 (1984).

13. *Asahi Metal Industries Co. v. Superior Court*, 480 U.S. 102 (1987).

14. According to *Burger King*, the specific jurisdiction analysis involves first determining (1) that the defendant has purposefully availed itself of the forum and (2) that the controversy “arise[s] out of or relate[s] to” those contacts. *Burger King*, 471 U.S. at 472. Even if the defendant has such “minimum contacts” with the forum, the court should still (3) consider whether the exercise of jurisdiction would be unreasonable in the circumstances of that case. *Id.* at 476.

15. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014).

16. See Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 686–691 (2015) (flagging after *Daimler* the need to clarify “arise out of or relate to,” address the effects of registration statutes, and separately consider jurisdiction for judgment enforcement).

17. See Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 498 (1950) (complaining that procedural rules can become “entirely obscured by [their] interpretive barnacles”).

18. See *infra* Part III.

understanding of the Due Process Clause.¹⁹ But better and more stable progress will be made if we can at least diagnose the source of current complaints correctly.

II. EXPLICIT COMPLAINTS

The most explicit critique of the *International Shoe* paradigm emanating from the Court came in Justice Gorsuch's concurring opinion in *Ford* (joined by Justice Thomas), which assigns to *International Shoe* a litany of faults. The problem is, none of those faults can be found in *International Shoe* itself; they were all created by later decisions, some of them quite recent.²⁰

"Since *International Shoe*," the concurrence begins, "this Court's cases have sought to divide the world of personal jurisdiction in two," between specific and general jurisdiction.²¹ That division in the Court's cases did not happen, however, until the 1980s. Indeed, even the idea of specific versus general jurisdiction was not articulated until twenty years after *International Shoe*. In a 1966 article, Professor Arthur von Mehren and Donald Trautman first suggested the distinction between the power to adjudicate based solely on the relationship between the forum and the defendant (a power they called "general jurisdiction") and the power to adjudicate based on the relationship between the forum and the controversy (a power they called "specific jurisdiction").²² The Supreme Court did not itself adopt or discuss a distinction between "general" and "specific" jurisdiction until the *Helicopteros* decision in 1984.²³

19. "May" here is the operative word; I reserve for another day what the pre-*Pennoyer* understanding of adjudicatory jurisdiction actually was.

20. The following exegesis of Justice Gorsuch's concurrence draws heavily on conversations with my co-authors, in particular Pamela Bookman. See, e.g., Maggie Gardner et al., *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455 (2022) (considering the limits of general jurisdiction and arguing that it is not the fail-safe the Supreme Court has suggested it is).

21. *Ford Motor Co.*, 141 S. Ct. at 1034 (Gorsuch, J., concurring).

22. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

23. See *Helicopteros Nacionales*, 466 U.S. 408 at 414–15, 414 nn.8–9 (citing von Mehren & Trautman, *supra* note 22, at 1144–64) (invoking the concepts of specific and general jurisdiction). A month before it issued *Helicopteros*, the Court referenced "general jurisdiction" in another decision but without additional elaboration. See *Calder v. Jones*, 465 U.S. 783, 787 (1984) (describing a prior case as relying on "general jurisdiction").

The Gorsuch concurrence next worries that “[w]hile our cases have long admonished lower courts to keep these concepts [of general and specific jurisdiction] distinct, some of the old guardrails have begun to look a little battered.”²⁴ In particular, when it comes to general jurisdiction, “[i]f it made sense to speak of a corporation having one or two ‘homes’ in 1945, it seems almost quaint in 2021 when corporations with global reach often have massive operations spread across multiple states.”²⁵ This characterization of *International Shoe* is also anachronistic. The limitation of general jurisdiction to a corporation’s “home”—and the clarification that its “home” will typically be just one or two places—came in 2011 and 2014, respectively.²⁶ Before 2011, corporations engaged in such “massive operations spread across multiple states” would indeed have been subject to general jurisdiction in all of those states.

In a particularly *Through the Looking-Glass* moment, Justice Gorsuch ends his reflections on general jurisdiction by asserting that, “[t]o cope with . . . changing economic realities, this Court has begun cautiously expanding the old rule [of general jurisdiction] in ‘exceptional case[s].’”²⁷ The current Court, of course, has not expanded the rule; it has contracted it. The “exceptional case” to which Justice Gorsuch refers is the 1952 decision in *Perkins v. Benguet Consolidated Mining Co.*,²⁸ and the quote comes from *Daimler*’s efforts to relegate *Perkins* to obscurity without outright overturning it.²⁹ In short, Justice Gorsuch’s general jurisdiction beef is as much with *Daimler* as it is with *Helicopteros* and has nothing to do with *International Shoe* itself. It is not “the old *International Shoe* dichotomy” that

24. *Ford Motor Co.*, 141 S. Ct. at 1034.

25. *Id.*

26. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011); *Daimler*, 571 U.S. 117 (explaining that a corporation is subject to general jurisdiction at its place of incorporation and its principal place of business).

27. *Ford Motor Co.*, 141 S. Ct. at 1034 (quoting *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017)).

28. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952).

29. *See BNSF Ry. Co.*, 137 S. Ct. at 1558 (quoting *Daimler*, 571 U.S. at 139 n.19 (explaining that *Perkins* is an exceptional case in which in-state operations were so substantial that they rendered the corporation “at home” in that State)).

“look[s] increasingly uncertain,”³⁰ but the dichotomy that the Court adopted in 1984 and tightened in 2014.³¹

Justice Gorsuch’s concurrence then turns to specific jurisdiction, which he criticizes as being out of step with the modern economy: “When a company ‘purposefully availed’ itself of the benefits of another State’s market in the 1940s,” he notes, that purposeful availment involved physical presence in the state.³² But “[a] test once aimed at keeping corporations honest about their out-of-state operations now seemingly risks hauling individuals to jurisdictions where they have never set foot.”³³ Again, Justice Gorsuch anachronistically assigns to *International Shoe* doctrinal concepts that evolved later—in this instance, the idea of “purposeful availment” that was first introduced in the 1958 case of *Hanson v. Denckla*.³⁴ But the concurrence also seems confused about the facts of *International Shoe* itself. The whole point of *International Shoe* was that International Shoe had very carefully avoided setting physical foot (or shoe) in the forum state. *International Shoe*’s entire point was to enable states to assert personal jurisdiction over defendants who have never *physically* entered the state because their out-of-state conduct

30. *Ford Motor Co.*, 141 S. Ct. at 1036; see also *id.* at 1039 (referring to “*International Shoe*’s increasingly doubtful dichotomy”).

31. Justice Gorsuch also worries at length about the disparate treatment of individuals, who are subject to general jurisdiction on the basis of “tag” jurisdiction, and corporations, which are not. He suggests that a return to *Pennoyer*’s strict presence rule would even that playing field by subjecting corporations to general jurisdiction anywhere they could be found. See *id.* at 1036–39. The disparate treatment of individuals and corporations, however, does not stem from *International Shoe* itself. As von Mehren and Trautman argued, *International Shoe* should have led to the retirement of pure “tag” jurisdiction for individuals as well. See von Mehren & Trautman, *supra* note 22, at 1164–66 (noting that *International Shoe* may be incompatible with existing bases of general jurisdiction such as the defendant’s temporary presence in the forum); see also Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. Rev. 33, 75–76 (1978) (flagging the constitutional doubt that *Shaffer* cast on tag jurisdiction). It was instead the Court’s splintered decision in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), that effectively locked in the disparate treatment that now worries Justice Gorsuch, a situation that could just as easily be resolved by extending *International Shoe* to “tag” jurisdiction, thereby mirroring the treatment of corporations in *Daimler*.

32. *Ford Motor Co.*, 141 S. Ct. at 1038.

33. *Id.*

34. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

may nonetheless cause predictable effects within the state. That is a feature, not a bug.

While Justice Gorsuch (and Justice Thomas) may be ready to reconsider *International Shoe* as a matter of first principles, they have not yet identified a practical need for doing so that stems from *International Shoe* itself, rather than from the Burger, Rehnquist, and Roberts Courts' interpretation of it.

III. IMPLICIT COMPLAINTS

Even among Justices still ready to defend *International Shoe*'s paradigm, recent cases have revealed frustrations over the formulation of specific jurisdiction. Most of those frustrations, however, trace back not to *International Shoe* itself, but to *Burger King* and its contemporaries. Those Burger/*Burger* era glosses on personal jurisdiction are not all set in doctrinal stone—indeed, *Ford* suggests the Court may already be walking away from some of them. Clearing away the underbrush that has accumulated around personal jurisdiction doctrine may not solve all the hard questions, but it would prevent that underbrush from distracting us from what the real fights are.

A. “Arise out of or relate to”

In both *Ford Motor Co.* and *Bristol-Myers Squibb Co. v. Superior Court of California*,³⁵ the Supreme Court struggled with the second step of the specific jurisdiction analysis: what it means for a dispute to “arise out of or relate to” the defendant’s contacts with the forum. In *Ford*, Justices Gorsuch, Thomas, and Alito insisted that the phrase has always implied a causal connection, and they criticized the majority—which assumed that “or relate to” covers something more than the direct causation implied by “arise out of”—for “pars[ing] this phrase ‘as though we were dealing with language of a statute.’”³⁶

The concurring Justices are right that too much reliance has been placed on the phrase “arise out of or relate to.” Not only is it not the language of a statute, but it is also not the language of

35. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255 (2017).

36. *Ford Motor Co.*, 141 S. Ct. at 1033 (Alito, J., concurring) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)); see also *id.* at 1034 (Gorsuch, J., concurring) (using almost identical language).

International Shoe.³⁷ The phrase was first used to help define specific jurisdiction in *Helicopteros* in 1984.³⁸ *Burger King* then reiterated that language as part of its synthesis of a three-part test for specific jurisdiction.³⁹ The phrase was not used again until the Roberts Court incorporated it into its standard recitation of specific jurisdiction in *Nicastro*,⁴⁰ *Goodyear*,⁴¹ and *Daimler*.⁴² The only other personal jurisdiction decisions to use this phrase—and, indeed, the only ones to consider what it might mean—are *Bristol-Myers Squibb*⁴³ and *Ford Motor Co.*⁴⁴

More of the Court's personal jurisdiction decisions have used a different formulation to describe the specific jurisdiction inquiry: "the relationship among the defendant, the forum, and the litigation."⁴⁵ That language originated in *Shaffer v. Heitner* and was repeated in several more decisions⁴⁶ before *Helicopteros* reformulated it. One benefit of this alternative language is that it tracks more closely with von Mehren and Trautman's distinction between general and specific jurisdiction, with the latter being based on the relationship between the forum and the dispute.⁴⁷ It is also more intuitive to apply

37. The language that *International Shoe* uses is "arise out of or are connected with." *Int'l Shoe Co.*, 326 U.S. at 319. Oddly, that language has been used in only two personal jurisdiction cases. See *Nicastro*, 564 U.S. at 881; *Daimler*, 571 U.S. at 133 n.10.

38. Similar language was, however, used in *Perkins* to describe the lack of relationship between Ohio and Ms. Perkins' claims. *Perkins*, 342 U.S. at 438 ("The cause of action sued upon did not arise in Ohio and does not relate to the corporation's activities there."); *id.* at 440 (framing the question as whether Ohio could "enforce a cause of action not arising in Ohio and not related to the business or activities of the corporation in that State").

39. *Burger King*, 471 U.S. at 472.

40. *Nicastro*, 564 U.S. at 881.

41. *Goodyear*, 564 U.S. at 923–24.

42. *Daimler*, 571 U.S. at 127.

43. *Bristol-Myers Squibb*, 582 U.S. at 262.

44. *Ford Motor Co.*, 141 S. Ct. at 1025.

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

46. The phrase also appears in *Rush v. Savchuck*, 444 U.S. 320, 327 (1980), *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984), and *Walden v. Fiore*, 571 U.S. 277, 287 (2014), as well as in *Calder*, 465 U.S. at 788, *Helicopteros*, 466 U.S. at 414, *Daimler*, 571 U.S. at 126, and *Ford Motor Co.*, 141 S. Ct. at 1021. Justice Breyer's controlling concurrence in *Nicastro* used this formulation as well. *Nicastro*, 564 U.S. at 891.

47. See von Mehren & Trautman, *supra* note 22, at 1136 (distinguishing specific jurisdiction from general jurisdiction, which is based solely on the relationship between the forum and the defendant).

than *Helicopteros*'s "arise out of or relate to" requirement, and it makes clear that there never was a causal requirement for the exercise of specific jurisdiction. Notably, *Ford* discussed the "arise out of or relate to" language of prior decisions,⁴⁸ but it also emphasized the idea of the relationship among the defendant, the forum, and the dispute—which it called "the essential foundation of specific jurisdiction."⁴⁹

The simple point here is that the formulation "arise out of or relate to" is the creation of *Helicopteros* and *Burger King* and has not been applied so consistently or extensively as to make it an indelible part of the specific jurisdiction analysis. Reverting to the prior (and equally common) language of relationship does not necessarily solve the underlying question of how much of a relationship is enough, but it would at least move the analysis away from parsing "arise/relate" as though it were part of the Constitution. The *Ford* majority has already opened the door in that direction.

B. *Maine Decoy Makers and Kenyan Coffee Farmers*

From *Nicastro* to *Ford*, Justices on the Supreme Court have expressed a lot of concern for the little guy: artisans who might sell just a couple products into a forum without appreciating that doing so might require them to defend lawsuits there.⁵⁰ This repeated concern is a little odd since *Burger King*'s specific jurisdiction test already has a way to account for the little guy: the reasonableness factors.⁵¹ The Justices' hypotheticals seem to assume that if the minimum contacts test is satisfied,

48. *Ford Motor Co.*, 141 S. Ct. at 1026 (majority).

49. *Id.* at 1028 (internal quotation marks omitted); *see also id.* at 1025 (in initially defining specific jurisdiction, noting the arise/relate language but then rephrasing it as "an affiliation between the forum and the underlying occurrence" (quoting *Bristol-Myers Squibb*, 582 U.S. at 262 (quoting *Goodyear*, 564 U.S. at 919))).

50. *See Nicastro*, 564 U.S. at 885 (discussing implications for "the owner of a small Florida farm"); Transcript of Oral Argument, *Ford*, *supra* note 8, at 39–41; *see also, e.g.*, Transcript of Oral Argument, *Mallory*, *supra* note 5, at 35 (Justice Alito asking about a "small company" that ships "some products into the state based on Internet sales").

51. Gardner et al., *supra* note 20, at 476–81 (urging renewed attention to the reasonableness factors as a means of resolving many of the Justices' recent worries about personal jurisdiction).

personal jurisdiction must exist. In short, the reasonableness factors have gone missing at the Roberts Court.⁵²

I have some sympathy for the Justices: I don't like *Burger King's* reasonableness factors, either. The last two factors—"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"⁵³—are not easy to apply in most cases, and I find myself omitting them when walking through specific jurisdiction with 11s. Part of the problem is that Justice Brennan in *Burger King* reified language from *World-Wide Volkswagen Corp. v. Woodson* that was not clearly intended to be a finite list of what might make the exercise of personal jurisdiction unreasonable.⁵⁴ The resulting set of reasonableness factors may simply not fit the task well.⁵⁵

Or perhaps the problem runs deeper. As Professor Silberman worried at the time, the doctrinal misstep in *Burger King* and *Asahi* might have been separating reasonableness out from the analysis of contacts in the first place.⁵⁶ The point of *International Shoe* is that the defendant's minimum contacts must themselves justify jurisdiction by satisfying "traditional notions of fair play and substantial justice." Separating reasonableness into a distinct inquiry was bound to fail because judges would still feel constrained to find a lack of *minimum* contacts if the amount or nature of those contacts did not make the exercise of jurisdiction feel fair—precisely the intuition driving hypotheticals about

52. See *id.* at 476 (discussing the Court's "apparent forgetfulness of, or possibly discomfort with, . . . the reasonableness factors").

53. *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

54. See *World-Wide Volkswagen*, 444 U.S. at 292 (describing how the Due Process Clause protects against inconvenient litigation, as compared to its role in checking interstate federalism).

55. See Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1665–70 (2020) (describing the negative doctrinal effects of misaligned tests).

56. Linda J. Silberman, "Two Cheers" For *International Shoe* (and *None* for *Asahi*): An Essay on the Fiftieth Anniversary of *International Shoe*, 28 U.C. DAVIS L. REV. 755, 758–60 (1995); see also Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 579–83 (1991) (raising a similar concern about *Asahi's* embrace of reasonableness as a distinct inquiry); *id.* at 590 (concluding that reasonableness should be baked into general rules for personal jurisdiction or otherwise reserved for *forum non conveniens* dismissals).

Maine decoy makers, Kenyan coffee farmers, and Appalachian potters.

In *Burger King*, Justice Brennan separated minimum contacts from reasonableness in hopes of establishing an inverse relationship under which less of one could be offset by more of the other.⁵⁷ In the end, that game was not worth the candle because the relationship only works one way: the Court has since made clear that reasonableness can never make up for a lack of minimum contacts. And once the relationship works only in the other direction—with a lack of reasonableness overcoming otherwise sufficient minimum contacts—the reasonableness factors will become redundant (or forgotten) because some degree of reasonableness will remain implicit in the minimum contacts analysis itself.⁵⁸

Ford continued the recent trend of not mentioning *Burger King*'s reasonableness factors. Instead it asserted that the minimum contacts analysis “derive[s] from and reflect[s] two sets of values—treating defendants fairly and protecting ‘interstate federalism.’”⁵⁹ Fairness in turn entails reciprocity (meaning that the defendant’s benefitting from the state justifies the state’s power to “hold the [defendant] to account for related misconduct”) and “fair warning” (meaning that jurisdiction attaches with enough predictability that the defendant can structure its primary conduct “to avoid exposure to a given State’s courts” if it so desires).⁶⁰ The federalism aspect of personal jurisdiction requires ensuring that “States with ‘little legitimate interest’ in a suit do not encroach on States more affected by the controversy.”⁶¹

57. See *Burger King*, 471 U.S. at 477–78 (“These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. . . . Nevertheless, minimum requirements inherent in the concept of ‘fair play and substantial justice’ may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.”).

58. See Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws*, 27 DUKE J. COMP. & INT’L L. 405, 408 (2017) (finding that lower courts only seem to use the reasonableness factors to dismiss cases against foreign defendants).

59. *Ford Motor Co.*, 141 S. Ct. at 1025 (quoting *World-Wide Volkswagen*, 444 U.S. at 293).

60. *Id.*

61. *Id.* (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1776). If this sounds like choice-of-law analysis, it is. See, e.g., Silberman, Reflections on *Burnham*,

This discussion of fairness and federalism in *Ford* may be an effort to recast the reasonableness factors. In applying the minimum contacts analysis to the facts in *Ford*, the Court reasoned that “allowing jurisdiction in these cases treats Ford fairly,” while “principles of interstate federalism support jurisdiction over these suits.”⁶² The assertion of jurisdiction was fair, the Court elaborated, because Ford benefits from the laws and markets of these states when it sells the same car models in them and because it was on notice “that it will be subject to jurisdiction in the State’s courts when the product malfunctions there.”⁶³ And the assertion of jurisdiction did not offend interstate federalism because the forum states have a significant interest in enforcing their safety regulations and providing convenient forums for their residents, while no other state had a greater nexus to these disputes.⁶⁴

If this is the new version of reasonableness, how might it be distilled for future cases? First, it is not clear that it is a distinct analysis, separate from the analysis of minimum contacts. The Court described these considerations not as a separate checklist, but as values intertwined with the evaluation of minimum contacts.⁶⁵ And it applied those values to bolster its conclusion that a sufficient relationship existed between Ford, the forum states, and the disputes.⁶⁶ The Court may be folding reasonableness back into minimum contacts. Second, the Court did not define a discrete set of considerations, akin to *Burger King*’s five factors. Note that as applied in *Ford*, the consideration of federalism could encompass most of *Burger King*’s reasonableness factors—but there may no longer be a need to walk through each of those factors mechanically.

However the Court wants to rephrase the reasonableness analysis, and however it wants to fit it into the specific jurisdiction framework, the critical point is that reasonableness is there. The problem of the little guy was not a problem created

supra note 56, at 584–87 (flagging and critiquing how jurisdictional rules “function as the disguised regulator of [states’] choice-of-law power” in the federal system).

62. *Ford Motor Co.*, 141 S. Ct. at 1029–30.

63. *Id.* at 1030.

64. *Id.*

65. *Id.* at 1025.

66. *Id.* at 1029–30.

by *International Shoe*, it is instead a problem for which *International Shoe* already accounts.

C. *The Binary Choice of General and Specific Jurisdiction*

Burger King's effort to formalize specific jurisdiction into a three-part test has perhaps outlived its usefulness, with *Ford* suggesting a possible new path forward. More deeply entrenched is the gloss on personal jurisdiction that the Court adopted one month before *Burger King*, when it divided personal jurisdiction into its "general" and "specific" forms. The distinction between jurisdiction based on a relationship with the defendant and jurisdiction based on a relationship with the dispute remains useful. But the precise labels of "general" and "specific" jurisdiction, and the binary distinction that these categories imply, can be misleading.

First, the labels themselves may suggest that "general" jurisdiction is broader in scope than "specific" jurisdiction. The opposite is true, both in theory and in law. "Specific" in this sense does not mean narrow, or even particularly limited; it means only that the jurisdiction is linked to a *specific dispute*. As von Mehren and Trautman explained in 1966, *International Shoe* ushered in an era of dispute-linked jurisdiction that would eventually displace the old defendant-linked approach to jurisdiction.⁶⁷ The Supreme Court similarly recognized in *Daimler* that specific and general jurisdiction "have followed markedly different trajectories post-*International Shoe*," with specific jurisdiction being the primary basis for personal jurisdiction and general jurisdiction fading in relevance (a trend that *Daimler* itself aimed to further).⁶⁸

Second, the terms imply a binary choice: you must have either general or specific jurisdiction (as defined by the Court's cases). This is not, of course, how *International Shoe* was written. Justice Stone described different combinations of contacts and disputes that might or might not give rise to jurisdiction; like many civil procedure professors, I teach *International Shoe* as suggesting a continuum. Unfortunately, *Bristol-Myers Squibb* explicitly foreclosed the use of a "sliding scale"

67. See von Mehren & Trautman, *supra* note 22, at 1141–44 (distinguishing *International Shoe* from the general jurisdiction regime that came before).

68. *Daimler*, 571 U.S. at 132–33.

between the number of the defendant's forum contacts and the degree of required connection between the forum and the dispute.⁶⁹ This reduction of personal jurisdiction to the rigid general jurisdiction test of *Daimler* and the rigid specific jurisdiction test of *Bristol-Myers Squibb* risks leaving on the cutting room floor those disputes that fall somewhere in between (as Ford then tried to argue in its favor). Even if the Court is unwilling to consider specific jurisdiction as a continuum, might *Ford* represent a third category, like a "doing business" forum of specific jurisdiction?⁷⁰

Third and relatedly, the binary distinction suggests a formalist approach to personal jurisdiction, a sense that *Daimler* reinforced in articulating a simple rule for general jurisdiction.⁷¹ That framing encourages a hunt for more formal distinctions and rule-like constructs. But this formalist framing is in tension with *International Shoe*'s central insight: that dispute-linked jurisdiction needs to be a flexible standard in order to be adequately precise in borderline cases.⁷²

IV. TWO CHEERS FOR *INTERNATIONAL SHOE*

This, then, is the real heart of the fight: can personal jurisdiction be defined as a rule, or must it be a standard? Justice Gorsuch's complaint about *International Shoe* is at root that it is a standard that turns on fairness.⁷³ That is a fair critique,

69. *Bristol-Myers Squibb*, 582 U.S. at 264.

70. Cf. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 614, 681 (1988) (arguing for a broad understanding of specific jurisdiction that would encompass doing business jurisdiction); see also von Mehren & Trautman, *supra* note 22, at 1148–49 (suggesting that a corporation's "continuous relationships" with a forum should give rise to specific jurisdiction over "any matter that bears a reasonable and substantial connection to the forum community").

71. See *Daimler*, 571 U.S. at 137 (casting the simplicity of its rule for at-home jurisdiction as a justification for its adoption).

72. *Int'l Shoe Co.*, 326 U.S. at 319 ("It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.").

73. See, e.g., Transcript of Oral Argument, *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017) (No.16-466), at 38 (Gorsuch, J.) (worrying that under the plaintiffs' proposed approach to specific jurisdiction, "it all just boils down to fundamental fairness").

and echoes Justice Black's dissent in *International Shoe* itself.⁷⁴ I—and I suspect at least several of the current Justices—instead see this formulation of personal jurisdiction as a fairness-based standard to be *International Shoe's* great advancement. *Pennoyer's* strict territorial rule was not working.⁷⁵ Like any rule, it was both over-inclusive and under-inclusive. Its over-inclusiveness led judges to develop discretionary bases for declining jurisdiction in cases that lacked any real nexus to the forum—what we today call *forum non conveniens*.⁷⁶ Its under-inclusiveness led to unfairness as plaintiffs (like the State of Washington in *International Shoe*) could not hold out-of-state defendants to account for in-state harms, which in turn led to the use of legal fictions and dubious distinctions to prevent denials of justice. In short, there is no escaping the exercise of judicial discretion when it comes to borderline cases for adjudicatory jurisdiction.

International Shoe gave us a way to channel that discretion more transparently and consistently. Nor does its use of a standard lead inexorably to unpredictability. Rules of thumb—including those informed by history and tradition—can identify in advance whether the mine run of cases will satisfy that standard.⁷⁷ But efforts to rulify that standard—like *Burger King*—create more problems than they solve. In the words of Professor Silberman, the Burger/*Burger Court's* “recasting of the *International Shoe* test should itself be re-evaluated, and the minimum contacts test of *International Shoe* reaffirmed in its original form. Perfect, it is not, but surely viable for another fifty [or seventy-five] years.”⁷⁸

74. See *Int'l Shoe*, 326 U.S. at 324-26 (Black, J., dissenting); cf. Silberman, *Reflections on Burnham*, *supra* note 56, at 581-83 (worrying that the Court's focus on reasonableness in *Asahi* would decrease predictability in an area where predictability is of significant value, “lead[ing] to increased transaction costs that are inappropriate for issues which need to be determined quickly and efficiently at the outset of litigation”); *id.* at 590 (concluding that reasonableness can be accounted for with general rules of personal jurisdiction and discretionary application of *forum non conveniens*).

75. See, e.g., *Burnham*, 495 U.S. at 617-18 (opinion of Scalia, J.).

76. See William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163 (2023) (mapping the emergence of *forum non conveniens* in U.S. state courts after *Pennoyer* as a tool for avoiding cases with no real nexus to the forum).

77. See, e.g., Silberman, *Reflections on Burnham*, *supra* note 56, at 576 (advocating for some clear rules for personal jurisdiction that would avoid a “reasonableness” inquiry in every case and expressing support for Justice Scalia's opinion in *Burnham* on this basis).

78. Silberman, “*Two Cheers*,” *supra* note 56, at 767.