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INTRODUCTION

In six personal jurisdiction decisions over the last nine years, the Roberts Court upended several previously accepted jurisdictional norms. The Court jettisoned decades of lower court jurisdictional holdings that "continuous and systematic" forum business contacts sufficed for general jurisdiction,[1] tightened the jurisdictional focus on the forum conduct of the defendant itself (rather than an intermediary or the plaintiff),[2] insulated foreign manufacturers using independent American distributors from products liability claims in the absence of regular forum sales,[3] and rejected the relevance of defendants' extensive forum contacts unrelated to the dispute, unless the defendant was at home in the forum.[4]

Most academic commentaries on these decisions are critical;[5] corporate business interests and the defense bar largely celebrate the results.[6] Some

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* Professor of Law, South Texas College of Law Houston. This Essay extends the conversation that we began in an amicus brief we filed in *Ford Motor Co. v. Montana Eighth Judicial District Court*. Brief amici curiae of Civil Procedure and Federal Courts Professors, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., No. 19-368 (U.S. filed Apr. 3, 2020). We wish to thank Professors Bryan Camp, Jack Harrison, Sharona Hoffman, Benjamin Madison, Andrew S. Pollis, and Joan M. Shaughnessy for helpful comments on the brief.

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[1] *See* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017); Daimler AG v. Bauman, 571 U.S. 117 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

[2] *See* Walden v. Fiore, 571 U.S. 277 (2014).

[3] *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

[4] *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773 (2017).

[5] *See, e.g.*, Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 45 (2018) ("A new restrictive turn in personal jurisdiction threatens the salutary benefits of aggregation in federal civil litigation."); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499, 505 (2018) (arguing the Roberts Court's jurisdictional decisions "implement[] radical law reform without the hard work of constructing persuasive explanations . . .").

[6] *See, e.g.*, James Beck, *Post*-BMS *Personal Jurisdiction Cheat Sheet*, DRUG & DEVICE LAW (July 31, 2017), https://www.druganddevicelawblog.com/2017/07/post-bms-personal-jurisdiction-cheat-sheet.html [https://perma.cc/Z5SP-6PEP] (referring to both *Bristol-Myers Squibb* and *BNSF* as "defense wins," collecting "favorable" post-*BMS* cases, and urging personal jurisdiction should be further limited to those fora with "a major causal tie" to the defendant); Sarena M. Holder, Daimler *and Challenges to Personal Jurisdiction*

academic critics suggest the Court's new jurisdictional revolution masquerades the Justices' pro-business, anti-consumer, and anti-litigant policy preferences.[7] Others hypothesize that the decisions could stem from the Court's formalistic respect for state regulatory and territorial boundaries vis-à-vis sovereign sister-state interests and transnational comity concerns.[8]

Two cases currently pending before the Supreme Court may settle this debate. During the October 2020 Term, the Court will consider consolidated products liability cases against Ford Motor Company—one from Minnesota and one from Montana—that raise questions going to the heart of traditional state judicial authority. The underlying alignment of *amici* is revealing, with the states generally supporting jurisdiction and corporate business interests mostly appearing on the other side.[9] If the Court ultimately affirms the state courts' jurisdictional assertions, then the Roberts Court's personal jurisdiction jurisprudence likely prioritizes horizontal federalism and international comity as independent due process considerations, placing new restrictions on state judicial authority when the forum state's regulatory authority is minimal compared to that of other sovereigns. If, however, the Court reverses the state court rulings, then the Court will have prioritized policy concerns championed by corporate defendants over the states' traditional judicial authority, upending the historical balance of state and federal power and insulating many nonresident national manufacturers and distributors from the states' judicial power.

I. THE *FORD* CASES

Both cases currently before the Supreme Court arose out of state products liability claims against Ford Motor Company. In the first case, a Minnesota resident was driving a Ford Crown Victoria purchased from an in-state used-car dealer on a snowy Minnesota day when he rear-ended a snowplow and the car landed in a ditch. The airbags failed to deploy, and the car's passenger—also a Minnesota resident—suffered a traumatic brain

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in Asbestos Cases, DRI'S THE WHISPER (Oct. 2015) ("*Daimler* is a significant step toward protecting defendants' due process rights.").

[7] *See* MICHAEL VITIELLO, ANIMATING CIVIL PROCEDURE 64–70 (2017); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 364–69 (2013).

[8] *See* Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 788–90 (2017). This view might be supported because, in all but one of the six decisions, at least eight Justices joined the majority opinion, and the underlying facts either involved defendants without purposeful forum state activities or a forum with little, if any, connection to plaintiffs' claims or injuries. The exception is *Nicastro*, where the Court did not issue a majority opinion and three Justices dissented. 564 U.S. 873 (2011).

[9] *See* Docket, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 443 P.3d 407 (Mont. 2019), *appeal docketed*, 140 S. Ct. 917 (Jan. 17, 2020) (No. 19-368), https://www.supremecourt.gov/search.aspx?filename=docket/docketfiles/html/public/19-368.html.

injury.[10] The passenger sued both the driver and Ford in Minnesota state court, alleging the driver's negligence and Ford's design and manufacturing defects, failure to warn, and negligence contributed to his injury. The Minnesota Supreme Court subsequently concluded that the state trial court could properly exercise personal jurisdiction over Ford.[11]

In the second case, a Montana resident driving a Ford Explorer that had been purchased second-hand in Montana suffered a fatal accident when the tread on one of the tires separated and the car skidded off the highway and landed upside down.[12] Her heirs brought products liability claims against Ford for design defects, failure to warn, and negligence in Montana state court, and the Montana Supreme Court likewise allowed the case to go forward.[13]

A decade earlier, these state courts certainly could have exercised personal jurisdiction over Ford in both cases. Ford regularly delivers thousands of vehicles for sale to dozens of dealerships in both states, and it regularly purchases advertising in local markets. Under prior doctrine, courts would have found that such continuous, systematic, and substantial contacts gave rise to general jurisdiction in the state—that is, that Ford could expect to be haled before the courts of the state for any cause of action, whether or not the plaintiffs' claims related to its actions in the state.[14] In the Supreme Court's 2014 decision *Daimler AG v. Bauman*, however, general jurisdiction was explicitly limited to those states where the defendant was "at home"—typically the defendant's domicile.[15] Nonetheless, state courts can still exercise specific jurisdiction over defendants such as Ford as long as three requirements are satisfied: First, that the defendant purposefully conducted activities in or established contacts with the forum; second, that the plaintiff's claim "aris[es] out of or relate[s] to the defendant's contacts with the forum"; and third, that exercising jurisdiction would not be otherwise unreasonable.[16]

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[10] Bandemer v. Ford Motor Co., 931 N.W.2d 744, 748–49 (Minn. 2019), *cert. granted*, 140 S. Ct. 916 (2020).
[11] *Id.* at 747–49, 755.
[12] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 443 P.3d 407, 411 (Mont. 2019), *cert. granted*, 140 S. Ct. 917 (2020).
[13] *Id.* at 411–12.
[14] *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 214 (2014) [hereinafter Rhodes & Robertson, *New Equilibrium*].
[15] 571 U.S. 117, 137 (2014) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.") (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011)).
[16] *See id.* at 126–27, 139 n.20 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)).

The question presented in these cases to the U.S. Supreme Court focuses on the second of the three requirements: Whether the plaintiffs' claims arise out of or relate to Ford's forum contacts. In both cases, Ford originally designed, manufactured, and sold the cars out of state. Third parties brought them into Montana and Minnesota, where they were purchased second-hand. Ford argues that the required connection supporting specific jurisdiction does not exist between its extensive activities in the forum states and these particular vehicles because none of its forum activities proximately caused the accidents.[17]

But the nexus requirement should not be viewed in isolation, divorced from the underlying constitutional functions of the jurisdictional framework. At their core, these cases raise a more fundamental issue that informs the scope of the necessary jurisdictional connection: state sovereign power.[18] Do state courts have sovereign judicial power to protect their citizens from allegedly dangerous products by compelling a product manufacturer conducting extensive in-state marketing and sales to answer claims for its products causing injury in the state but not designed, manufactured, or originally sold there?

II. STATE PRIMACY IN PERSONAL JURISDICTION

In general, states have considerable leeway in determining the scope and limits of state court authority.[19] The Framers, according to the Supreme Court, "intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts."[20] Scholars also recognize that "[f]ew activities of government are more fundamental to sovereignty than the power of a state to resolve disputes through its courts."[21]

For the first century of U.S. history, the states' power to compel defendants' appearance in court was essentially limited only by the practical ability to enforce a judgment. The Constitution at that time did not restrict

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[17] Brief for Petitioner at 42–47, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., No.19-368 (U.S. filed Feb. 28, 2020).

[18] *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 400 (2020).

[19] *See* Linda Sandstrom Simard, *Seeking Proportional Discovery: The Beginning of the End of Procedural Uniformity in Civil Rules*, 71 VAND. L. REV. 1919, 1926 (2018) (explaining the "striking differences between federal and state civil caseloads" and the concomitant different procedural interests of state and federal courts).

[20] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

[21] Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1, 19 (2014).

a state court's authority with respect to in-state judgment recognition,[22] although the Full Faith and Credit Clause authorized constraints on the interstate recognition of such judgments.[23] The effectiveness of state proceedings thus typically depended on whether a defendant—if an individual—could be physically brought before a court or whether the defendant possessed in-state assets that could be seized to pay a judgment.

The states' adjudicative authority confronted a new limit after the Supreme Court's 1878 decision *Pennoyer v. Neff*.[24] *Pennoyer* explained that the then-new text of the Fourteenth Amendment's Due Process Clause would protect defendants in state-court proceedings.[25] *Pennoyer*'s territorial-based holding would soon face numerous exceptions and later be displaced by the Supreme Court's "minimum contacts" requirement in *International Shoe Co. v. Washington*.[26] But the premise that the authority of state courts over out-of-state defendants must comply with constitutional due process has remained firm.

Although it has been almost a century and a half since the Supreme Court first acknowledged the existence of due process constitutional limits on state adjudicative authority, those limits remain murky and uncertain. Most of the Supreme Court's decisions since *International Shoe* addressed the outermost limits of specific jurisdiction predicated on singular or isolated connections with the forum state.[27] So long as the Court invalidated jurisdictional assertions only in unusual cases at the outer margins of the states' jurisdictional reach, the Court's theoretical and doctrinal inconsistencies did little harm to the core competency of the states' judicial power.

But now these unresolved questions take on a new urgency, as the Court will consider state authority to hear two cases involving state citizens injured on state roadways by vehicles purchased and registered within the state, bringing the state's regulatory power front and center. Perhaps the Court will acknowledge and reaffirm the states' traditional power to resolve such cases. If the Court does strike down the states' authority to adjudicate these cases, however, it will favor policy concerns championed by corporate defendants at the expense of the traditional sovereign adjudicative power of the states.

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[22] State constitutional provisions occasionally provided such limits, however. *See, e.g.*, Beard v. Beard, 21 Ind. 321, 328–29 (1863).
[23] *See* D'Arcy v. Ketchum, 52 U.S. 165, 174–76 (1850).
[24] 95 U.S. 714 (1878).
[25] *Id.* at 732–33.
[26] 326 U.S. 310, 316–20 (1945).
[27] Rhodes & Robertson, *New Equilibrium*, *supra* note 14, at 236.

III. THREE STRANDS OF DUE PROCESS JURISDICTIONAL LIMITATIONS

Personal jurisdiction is not a mere common law doctrine, dependent upon judicial interpretation divorced from fundamental questions of state sovereignty. Instead, the due process limits on a state's jurisdictional authority are derived from the Constitution and should be clearly articulated and precisely defined. The Supreme Court's shifting jurisprudence, though, has left open significant questions about how, exactly, the Due Process Clause limits the states' exercise of jurisdiction. Three separate themes surface from this wavering doctrine.

First, the Due Process Clause protects nonresident defendants against the potential unfairness of litigating in a distant or inconvenient forum.[28] In other words, a state's exercise of jurisdiction could violate procedural due process principles—that is, it could impose an undue burden so oppressive that it interferes with defendants' ability to have a meaningful opportunity to be heard.[29] The Supreme Court's first few decisions in the aftermath of *International Shoe* predominantly focused on this due process interest, upholding the jurisdictional assertion in each one.[30]

But thirteen years after *International Shoe*, the Court began to emphasize two other interrelated jurisdictional due process limitations grounded in horizontal federalism and substantive due process. *Hanson v. Denckla* first explained that personal jurisdiction restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limits on the power of the respective States."[31] *Hanson* continued that the Clause also prevented a nonresident defendant from being compelled to answer suit in a state "unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."[32] The Supreme Court in its subsequent opinions has frequently reiterated that the Due Process Clause prevents state courts from "reach[ing] out beyond the limits imposed on them by their status as coequal sovereigns in a federal system," as each state's sovereignty implies "a limitation on the sovereignty of all of its sister States."[33] Moreover, the

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[28] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[29] *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) (Due Process Clause at least requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing"); *cf.* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1038 n.102 (1983) ("*International Shoe*'s standard . . . has roots in rights of procedural due process—the rights to notice and opportunity to be heard.").

[30] *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950).

[31] 357 U.S. 235, 251 (1958).

[32] *Id.*

[33] *World-Wide Volkswagen*, 444 U.S. at 292–93.

Court has continued to recognize that the Clause protects defendants from deprivations of liberty or property in the absence of lawful power in accord with jurisdictional traditions.[34] The former of these limitations, preventing a state's exercise of jurisdiction encroaching on the right or authority of sister states, has been described as an aspect of "horizontal federalism."[35] The latter of these limitations, protecting the defendant's historically grounded liberty interest from arbitrary assertions of government authority, is linked to substantive due process principles.[36]

IV. THE DUE PROCESS LIMITATIONS APPLIED TO *FORD*

In cases involving large international corporations such as *Ford*, the latter two of the three due process interests are primarily at issue, related to horizontal federalism and substantive due process. Ford does not argue that it would suffer any burdensome procedural barriers in litigating in either Montana or Minnesota.[37] Indeed, Ford reasonably expects to be litigating in both states for cases involving any of the thousands of cars that Ford sells directly in-state to consumers.[38] Ford instead raises arguments sounding in horizontal federalism and substantive due process: Ford contends that the forum states do not have a sufficient interest in regulating the design and manufacturing of its vehicles and further urges that it has a protected liberty interest from these courts' binding judgments in the absence of a causal relationship between its forum conduct and the plaintiffs' claims.[39] But neither argument comports with traditional understandings of sovereign state adjudicative authority.

A. HORIZONTAL FEDERALISM CONCERNS

A viable descriptive explanation of the Roberts Court's jurisdictional decisions to date is a newfound emphasis on horizontal federalism and comity principles as a distinct due process limitation, even in those situations when jurisdiction has been traditionally authorized. The Court's rejection of both general doing-business jurisdiction and of the relevance of extensive unrelated forum contacts when the defendant is not at home in the forum could be defended as designed to prevent the forum state from encroaching on the authority of other sovereigns when the forum has minimal regulatory

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[34] *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879 (2011) (plurality opinion); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).
[35] *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 6–7 (2010).
[36] *See* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 575–76 (2007).
[37] *See* Brief for Petitioner at 18–26, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., No.19-368 (U.S. filed Feb. 28, 2020).
[38] *See id.*
[39] *Id.*

interest in the dispute.[40] The supporting rationale might be that even though lower court decisions had long authorized jurisdiction in these situations, the Due Process Clause, "acting as an instrument of interstate federalism,"[41] barred adjudicative authority when other states were more closely related to the disputes.[42]

Such a descriptive understanding of the Roberts Court's jurisdictional decisions does not help Ford, as no other states are more closely related to these lawsuits. Although Ford nevertheless suggests that neither forum state has a significant regulatory interest regarding out-of-state design or manufacturing because the "'obligations' . . . arose entirely outside [their] boundaries,"[43] Ford's arguments contravene the American federalist structure.

Sovereigns—including the U.S. states—have always had "prescriptive jurisdiction," or the power to regulate, beyond extraterritorial boundaries.[44] Even in the transnational context, with its presumption against extraterritoriality, the Supreme Court has required only that Congress clearly states that the legislation is intended to apply outside of national boundaries.[45] A state's sovereign power within its borders necessarily includes some ability to regulate conduct outside its borders: "States frequently regulate activities that occur entirely within one State but that have effects in many."[46]

The question, then, is not whether the state's regulatory authority reaches some out-of-state conduct, but instead whether that regulation of out-of-state conduct encroaches on the interest of a sister state more tightly connected to the conduct at issue. In products cases, the traditional American rule is that the law of the state in which the product caused the injury applies.[47] Thus, even if the plaintiffs in *Ford* had filed their suits in a state where Ford designed, manufactured, or originally sold the vehicles, the courts would likely apply the law of the state where the vehicles caused the

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[40] *See* Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773 (2017); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017); Daimler AG v. Bauman, 571 U.S. 117 (2014).
[41] *Bristol-Myers Squibb*, 137 S. Ct. at 1781 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980)).
[42] Although this argument might descriptively explain the Roberts Court's jurisdictional decisions, theoretical and normative questions regarding the Court's approach would remain. *See* Erbsen, *supra* note 35, at 8 (envisioning that a horizontal federalism approach might overhaul jurisdictional doctrine).
[43] Brief for Petitioner at 25, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., No.19-368 (U.S. filed Feb. 28, 2020).
[44] Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984) ("[L]egislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intended to damage the protected interests within the territory.").
[45] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2015).
[46] Am. Bev. Ass'n v. Snyder, 735 F.3d 362, 379 (6th Cir. 2013) (Sutton, J., concurring).
[47] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (AM. LAW INST. 1971).

injury.[48] Under the American system of interstate federalism, the interest of a state in regulating the safety of products that caused in-state injuries is so strong that it typically receives deference from other states. This belies any argument that Minnesota's or Montana's exercise of jurisdiction would contravene the interests of another state with a greater interest in the dispute.

The contrast between the pending *Ford* cases and the Supreme Court's recent holding in *Bristol-Myers Squibb v. Superior Court* is telling. In *Bristol-Myers Squibb*, the forum state had little or no regulatory interest in the claims at issue, leading to a jurisdictional dismissal.[49] Out-of-state plaintiffs had joined a nationwide, mass-action products liability suit in California against the manufacturer of the drug Plavix. The Supreme Court first stressed the defendant's burden in "submitting to the coercive power of a State that may have little legitimate interest in the claims in question" before turning to whether there was a sufficient connection between the defendant's forum activities and the out-of-state plaintiffs' claims.[50] The Court found no "connection between the forum and the specific claims at issue" because "the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California."[51]

Bristol-Myers Squibb bears no meaningful resemblance to the pending *Ford* cases, however. Each Ford vehicle was purchased second-hand in the forum, registered and driven in the forum, and caused an in-state injury to a forum resident. Minnesota and Montana thus possess strong sovereign interests in adjudicating these claims, and the plaintiffs established the necessary "connection between the forum and the specific claims at issue" to satisfy the traditional demands of due process.[52] When no other state has a greater interest in adjudicating or otherwise regulating these incidents, neither Minnesota nor Montana in any way exceeded "the limits imposed on them by their status as coequal sovereigns in a federal system."[53]

B. SUBSTANTIVE DUE PROCESS

Ford also urges that it has a substantive liberty interest to be free from a binding judgment if a causal relationship does not exist between its forum conduct and the plaintiffs' claims.[54] A nonresident defendant's personal

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[48] *See* Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1901–04.
[49] 137 S. Ct. 1773, 1784–85 (2017).
[50] *Id.* at 1780–81.
[51] *Id.*
[52] *See id.* at 1781.
[53] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).
[54] Brief for Petitioner at 18–22, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 140 S. Ct. 917 (2020) (No. 19-368).

jurisdiction liberty interest, though, depends on its expectations from those forum activities that create ties with and indicate submission to the state and its jurisdictional authority.[55] The proper focus, then, considers traditional jurisdictional principles. The dispositive question here is whether it is unreasonable for Ford to expect to submit to the binding judgment of a state for a claim arising from one of its vehicles (sold in a second-hand, in-state transaction) that injures a state citizen on the state's roads, when Ford sells thousands of the same vehicle, provides automotive repairs and services, operates dealerships, and advertises extensively in the forum.

Under our historical traditions of fair play and substantial justice, the answer is clear. Before *Daimler*, nonresident defendants, in accord with the then-prevailing scope of general jurisdiction, typically did not contest jurisdiction for any claim when undertaking a similar level of in-forum activity.[56] Even in specific jurisdiction cases, lower court decisions since *International Shoe* frequently have held that a nonresident defendant purposefully selling its product in a market could not escape jurisdiction when an identical product originally sold in another state caused injury in the forum.[57] And the Supreme Court never held or indicated that these decisions were erroneous. To the contrary, the Supreme Court has opined that, when a plaintiff suffers an injury within the forum from a product which the defendant is purposefully marketing in the forum state, the defendant's forum contacts are sufficiently related to the operative facts of the litigation to sustain jurisdiction.[58]

Consider *World-Wide Volkswagen Corp. v. Woodson*.[59] The Court there, while holding that a New York automobile retailer and its regional distributor were not amenable to jurisdiction in Oklahoma for an in-state car accident because they conducted no Oklahoma activities, added the following statement concerning jurisdiction over the vehicle manufacturer and distributor:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve,

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[55] *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011) (plurality opinion); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–76 (1985).

[56] *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799–802 (1985) (recounting that a Delaware corporation headquartered in Oklahoma did not object to its own amenability in Kansas for named plaintiffs' claims based on Texas and Oklahoma oil-and-gas leases).

[57] *See, e.g.*, Le Manufacture Francaise des Pneumatiques Michelin v. Dist. Court, 620 P.2d 1040, 1045–48 (Colo. 1980); Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 766–67 (Ill. 1961).

[58] *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[59] 444 U.S. 286 (1980).

> directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.[60]

This was not loose language that was pronounced and then ignored. In the last ten years, both *Daimler*[61] and *Goodyear Dunlop Tires Operations, S.A. v. Brown*[62] recited this quote as parenthetical descriptions of *World-Wide Volkswagen*'s import in specific jurisdiction cases.[63] And many lower courts have relied on this quotation in upholding specific jurisdiction over manufacturers and distributors serving the in-state market whose products cause an injury there, even if the products were originally sold elsewhere.[64]

The same principle is also evident in the various opinions in *Asahi Metal Industry Co. v. Superior Court*.[65] Although the *Asahi* Court could not converge on a single opinion, each of the opinions would support jurisdiction in the *Ford* cases. In her plurality opinion, Justice O'Connor—joined by three other Justices—explained, after quoting the language from *World-Wide Volkswagen* above, that the tire valve manufacturer Asahi would have purposefully availed itself of the California market if it had engaged in other conduct in the forum state, such as advertising.[66] Four other members of the Court reasoned that Asahi had purposefully availed itself of the California market and accordingly would normally be amenable to suit there, except that the transnational nature of the remaining indemnity action made such jurisdiction unreasonable.[67] But even under Justice O'Connor's view, Asahi could reasonably be subject to jurisdiction in California if it had engaged in other activities indicating its intent to serve the market for its product there—even activities such as advertising that did not directly give rise to

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[60] *Id.* at 297.
[61] Daimler AG v. Bauman, 571 U.S. 117 (2014).
[62] 564 U.S. 915 (2011).
[63] *Daimler*, 571 U.S. at 129 n.7; *Goodyear*, 564 U.S. at 927.
[64] For a small sampling from published federal circuit and state high court decisions, see, for example, Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1565–67 (Fed. Cir. 1994); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1546–50 (11th Cir. 1993); Montalbano v. Easco Hand Tools, Inc., 766 F.2d 737, 742–43 (2d Cir. 1985); Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 490–91 (3d Cir. 1985); Nelson v. Park Indus., Inc., 717 F.2d 1120, 1125–26 (7th Cir. 1983); Noel v. S. S. Kresge Co., 669 F.2d 1150, 1154 (6th Cir. 1982); Oswalt v. Scripto, Inc., 616 F.2d 191, 199–201 (5th Cir. 1980); Bryant v. Ceat S.p.A., 406 So.2d 376, 378–79 (Ala. 1981); A. Uberti & C. v. Leonardo, 892 P.2d 1354, 1362–63 (Ariz. 1995); Waters v. Deutz Corp., 479 A.2d 273, 276 (Del. 1984); Book v. Doublestar Dongfeng Tyre Co., 860 N.W.2d 576, 584–85 (Iowa 2015).
[65] 480 U.S. 102 (1987).
[66] *Id.* at 110–12 (plurality opinion).
[67] *Id.* at 116–17 (Brennan, J., concurring in part). Justice Stevens suggested purposeful availment existed while concluding that discussing minimum contacts was unnecessary. *Id.* at 121–22 (Stevens, J., concurring in part).

the claim in question.[68] Once purposeful availment is established through the defendant's additional forum market activities, then specific jurisdiction "may lie over a foreign defendant" for an in-state injury.[69]

In attempting to counter this longstanding tradition, Ford tries to narrow the focus to the Supreme Court's prior holdings "allowing specific jurisdiction," which Ford maintains all involved a causal relationship between defendants' forum conduct and plaintiffs' claims.[70] But Ford's argument misapplies the role of historical practice in evaluating due process protections. The relevant historical practice is not limited to Supreme Court cases "allowing" jurisdiction, as if the Court were a parental authority setting a child's curfew. Instead, given the separate sovereignty of the states, the relevant measure is the authority the states historically exercised and whether the Supreme Court ever restricted these traditional practices under the Due Process Clause. The dispositive tradition here is that, where the defendant sought to benefit from marketing to state citizens and its products caused harm to those citizens, state courts typically asserted jurisdiction, a practice which the Supreme Court never restricted and, in fact, implicitly approved.[71]

Fundamental state sovereign interests support this jurisdictional tradition. The Supreme Court pronounced in its first case considering due process jurisdictional limitations that "[e]very State owes protection to its own citizens,"[72] and then, a century later, recognized a state has a "'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."[73] States also possess a "significant interest in redressing injuries that actually occur within the State," including those suffered by nonresidents, in order to regulate and deter wrongful conduct within their borders.[74] "Few matters could be deemed more

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[68] *See id.* at 112 (plurality opinion).

[69] *See* Daimler AG v. Bauman, 571 U.S. 117, 128 n.7 (2014) (describing O'Connor's opinion as reflecting that "specific jurisdiction may lie over a foreign defendant that places a product into the 'stream of commerce' while also 'designing the product for the market in the forum State, advertising in the forum State . . . .'"); *cf.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 927 (2011) ("Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to *specific* jurisdiction.").

[70] Brief for Petitioner at 11, 24–25, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 140 S. Ct. 917 (2020) (No. 19-368).

[71] *See World-Wide Volkswagen*, 444 U.S. at 297–98 (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961)); *cf. Asahi*, 480 U.S. at 112 (referencing the Third Circuit's compilation of authorities upholding jurisdiction when the "manufacturers involved had made deliberate decisions to market their products in the forum state" (quoting Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 299 (3d Cir. 1985))).

[72] Pennoyer v. Neff, 95 U.S. 714, 723 (1878).

[73] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

[74] Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984).

appropriately the concern of the state in which [an] injury occurs or more completely within its power" than "the bodily safety and economic protection" of those injured there.[75] Imposing a strict causation requirement would insulate defendants from judicial process for many injuries suffered in the very states whose markets they seek to exploit. Such a result is inconsistent with the states' well-recognized historical power to protect their citizens and other individuals from in-state injuries.

Under these longstanding traditions, an injury occurring in the forum from a product marketed by a manufacturer or distributor there is sufficiently related to or connected with the defendants' forum conduct to authorize state jurisdictional authority. In order for Ford to prevail, then, the Court will have to favor two policy concerns championed by corporate defendants—limiting litigation exposure and better correlating litigation risks to in-state sales volume[76]—over the traditional adjudicative power of the states. The Court's choice between state sovereignty and corporate interests here will foreshadow not only the future of jurisdictional doctrine, but the broader availability of access to justice under the Roberts Court.

CONCLUSION

The road to take should not be difficult. The courts of Montana and Minnesota did not violate the Due Process Clause by exercising personal jurisdiction over Ford in these cases. In *Bristol-Myers Squibb*, the Court barred California from adjudicating claims filed by non-Californians for drugs purchased outside California, ingested outside California, and causing harm outside California.[77] But if the Court disclaims jurisdiction here, plaintiffs will often be forced to sue manufacturers and distributors in states where the plaintiffs did not purchase products, did not use products, and did not suffer injuries from products. Such a holding would limit corporate accountability and undercut the well-accepted traditional understandings of the adjudicative authority of sovereign states.

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[75] Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 503 (1939).
[76] Brief for Petitioner at 26–28, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., No.19-368 (U.S. filed Feb. 28, 2020).
[77] Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1780–81 (2017).