

RETHINKING PERSONAL JURISDICTION AFTER BAUMAN AND WALDEN

by
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This Article, part of a symposium on personal jurisdiction, considers the impact of the Supreme Court's 2014 opinions in Daimler v. Bauman and Walden v. Fiore. The Article contends that, read together, the recent opinions reject the Court's disastrous 2011 Nicaastro decision. Although that is a good result, the Court still has failed to develop a useful alternative to the faulty two-step minimum-contacts-plus-reasonableness analysis derived from the International Shoe decision. The remainder of the Article critiques the specifics of Bauman and Walden before suggesting a better path. With respect to Bauman's discussion of general jurisdiction, the Article finds fault with the new "at-home" test in several ways, including the striking disparity between the protections it gives to corporations and the vulnerability it creates for individuals. Walden is less significant. It pulls back on expansive uses of the Calder v. Jones effects test and more firmly integrates that analysis into the minimum-contacts approach, but its true failing is in its too easy acceptance of that traditional approach.

The last Part of the Article develops an approach to personal jurisdiction that would link it more firmly with legislative jurisdiction, a result that several other commentators have also urged. Even if this approach would not lead to the broader personal jurisdiction doctrine that the Article envisages, the results would still be better than those produced by current doctrine.

Finally, the Article comments on the possibility of altering personal jurisdiction for diversity cases by amending Rule 4 to allow nationwide service of process, which would have the effect of turning venue selection into a constitutional analysis, albeit one with little bite. The Article agrees that such change would be possible but wonders whether it is desirable for diversity cases in light of the forum shopping and disparities between state and federal courts that it would create. Better, the Article concludes, to have a personal jurisdiction doctrine that makes sense.

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INTRODUCTION

In 2011, after nearly twenty years away from the field, the Supreme Court decided two cases on personal jurisdiction: *Goodyear Dunlop Tires Operations, S.A. v. Brown*,¹ which dealt with general personal jurisdiction, and *J. McIntyre Machinery v. Nicastro*,² which dealt with specific personal jurisdiction. Justice Ginsburg's opinion for a unanimous Court in *Goodyear* spoke clearly about the scope of general jurisdiction even as its new vocabulary raised questions and suggested a shift in doctrine.³ By contrast, the Court fractured badly in *Nicastro*. Justice Kennedy's plurality opinion and Justice Ginsburg's dissenting opinion each departed markedly from the "minimum contacts plus reasonableness" test that had dominated the Court's treatment of personal jurisdiction since 1980.⁴

¹ 131 S. Ct. 2846 (2011).

² 131 S. Ct. 2780 (2011).

³ See John T. Parry, *Introduction: Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 829–30 (2012) (questioning how the "at-home" test would apply to companies such as Boeing, and to Alien Tort Statute cases such as *Bauman*).

⁴ See *id.* at 848–52; see also Richard D. Freer, *Four Specific Problems with the New General Jurisdiction*, 15 NEV. L.J. (forthcoming 2015) (manuscript at 27), <http://ssrn.com/abstract=2490034>; Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 755–57 (2012). Even Justice Breyer's opinion, which asserted that "the outcome of this case is determined by our precedents," *Nicastro*, 131 S. Ct. at 2791 (2011) (Breyer, J., concurring in the judgment), failed to

Although commentators had detailed the numerous problems with this test and/or the Court's application of it before *Nicastro*,⁵ the *Nicastro* opinions—considered individually and collectively—did not advance useful solutions to those problems. To the contrary, by destabilizing personal jurisdiction doctrine, the *Nicastro* opinions made things worse.⁶

In 2014, the Court decided two more personal jurisdiction cases: *Daimler AG v. Bauman*,⁷ on general jurisdiction, and *Walden v. Fiore*,⁸ on specific jurisdiction. And again, Justice Ginsburg's opinion in *Bauman* addresses general jurisdiction doctrine in clear and straightforward ways. But, also like her opinion in *Goodyear*, Justice Ginsburg's *Bauman* opinion avoids important issues and questions about the nature and scope of general personal jurisdiction even as it confirms the doctrinal shift begun in *Goodyear*. With respect to specific personal jurisdiction, Justice Thomas's opinion for a unanimous Court in *Walden* clarifies the doctrinal landscape, but its focus on intentional torts and the scope of the *Calder v. Jones*⁹ "effects" test complicates the effort to determine whether it has broader significance.

On one issue, however, *Bauman* and *Walden* accomplish an important doctrinal result: the rapid and well-deserved interring of the *Nicastro* plurality opinion, although unfortunately not of the *Nicastro* result. *Walden*—the specific jurisdiction case—does not cite *Nicastro* at all. The *Bauman* opinions cite *Nicastro* three times, but in striking ways: once in the majority opinion, to Justice Ginsburg's *Nicastro* dissent,¹⁰ and twice in Justice Sotomayor's concurrence, to the *Nicastro* plurality.¹¹ None of those citations endorse any of the *Nicastro* plurality's controversial contentions about personal jurisdiction. Nor do they endorse the *Nicastro*

mention, let alone apply, the reasonableness factors articulated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–94 (1980).

⁵ See, e.g., Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 5 (2010) (“[C]ommentators by near ‘consensus’ routinely deride [pre-*Nicastro*] doctrine as ‘unacceptably confused and irrational,’ ‘convoluted and arcane,’ ‘in chaos,’ ‘half-baked,’ ‘precarious,’ and ‘plagued’ by ‘ambiguity and incoherence.’” (footnotes omitted)).

⁶ See Parry, *supra* note 3, at 851–52; see also Wendy Collins Perdue, *What’s “Sovereignty” Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 729 (2012) (“Personal jurisdiction also seems to inspire foolish remarks and poor opinions, and *Nicastro* may set a new low in that regard.”).

⁷ 134 S. Ct. 746 (2014).

⁸ 134 S. Ct. 1115 (2014).

⁹ 465 U.S. 783 (1984).

¹⁰ See *Bauman*, 134 S. Ct. at 757 (citing the *Nicastro* dissent to indicate “unanimous agreement” that there was no general jurisdiction on the facts of *Nicastro*).

¹¹ See *id.* at 768 (Sotomayor, J., concurring) (citing the *Nicastro* plurality’s discussion of general jurisdiction); *id.* at 772 (quoting the *Nicastro* plurality for the proposition that states have personal jurisdiction over “defendants who have manifested an unqualified ‘intention to benefit from and thus an intention to submit to the[ir] laws’”).

dissent's approach to specific personal jurisdiction. This effective silence speaks volumes about the value of *Nicastro* as a precedent. And there is more. In *Bauman*, the general jurisdiction case, the eight justice majority also stated its understanding of the proper methodology for resolving specific jurisdiction issues. Citing the pre-*Nicastro* decisions in *Asahi Metal Industry Co. v. Superior Court* and *Burger King v. Rudzewicz*, the Court stated: "First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case."¹² Justice Sotomayor's concurrence also embraced the two parts of the pre-*Nicastro* personal jurisdiction analysis.¹³ The message seems clear. Forget *Nicastro* and go back to the two-step analysis for specific personal jurisdiction cases.

Still, disposing of *Nicastro*—if that is what the Court did¹⁴—is one thing. Having a sensible doctrine of specific personal jurisdiction is quite another. By acting as if *Nicastro* never happened, *Walden* and *Bauman* reanimated the "minimum contacts plus reasonableness" test. Although this test is better than no test at all—and certainly better than Justice Kennedy's submission-to-sovereignty test in *Nicastro*¹⁵—it is hardly optimal. We are simply back where we started before *Nicastro* was decided, out of the fire but back in the frying pan.¹⁶

¹² *Id.* at 762 n.20 (majority opinion) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–14 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)). Justice Ginsburg, whose *Nicastro* dissent never mentioned minimum contacts and argued for a reasonableness-centered approach to personal jurisdiction, wrote the *Bauman* opinion. Both Justice Kennedy, whose *Nicastro* plurality opinion rejected fairness concerns and insisted on submission to sovereignty, and Justice Breyer, whose *Nicastro* concurrence never mentioned or applied the *World-Wide Volkswagen* reasonableness factors, joined her *Bauman* opinion without comment.

¹³ *Bauman*, 134 S. Ct. at 764 (Sotomayor, J., concurring) ("Our personal jurisdiction precedents call for a two-part analysis. The contacts prong asks whether the defendant has sufficient contacts with the forum State to support personal jurisdiction; the reasonableness prong asks whether the exercise of jurisdiction would be unreasonable under the circumstances."). Justice Sotomayor differed from the majority on two issues: (1) whether the contacts analysis must come first, and (2) whether this two-part analysis applies to general personal jurisdiction as well as to specific personal jurisdiction. *See id.* at 764–65 & n.2.

¹⁴ Although *Bauman* and *Walden* are inconsistent with the *Nicastro* plurality and dissent, neither case explicitly nor directly rejects the *Nicastro* opinions.

¹⁵ *See Nicastro*, 131 S. Ct. at 2787–88 (2011) (plurality opinion) (using "submit" or "submission" six times in two paragraphs); *see also* Parry, *supra* note 3, at 848–49, 856, 860–63 (criticizing the plurality's test); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C.L. REV. 481, 491–498 (2012) (same).

¹⁶ *See* Erbsen, *supra* note 5, at 5 (citing criticism of pre-*Nicastro* doctrine); Parry, *supra* note 3, at 851 (suggesting *Nicastro* merits "qualified celebration" to the extent it jettisoned the two-part inquiry but also criticizing the failure to substitute "something more coherent in place of the old test").

This Article considers the doctrinal impact of *Bauman* and *Walden*, addresses some of the questions they leave open, and considers the future direction of personal jurisdiction doctrine. *Bauman* and *Walden* suggest that the Supreme Court has backed away from significant changes to specific jurisdiction and is content to tweak the same old doctrine. With general jurisdiction, the Court is pretending that significant change is a mere refinement of the old test, thereby sidestepping important questions. Despite the Court's clear reluctance to rethink personal jurisdiction, the renewed debate that the recent cases have spurred could help the Court recast its own views about the purposes and resulting doctrines of personal jurisdiction. To that end, and in company with many other commentators, I continue to argue for a very different approach to personal jurisdiction doctrine.

I. ANSWERS AND QUESTIONS IN *BAUMAN* AND *WALDEN*

In addition to stepping back from the *Nicastro* precipice, the decisions in *Bauman* and *Walden* provide information about the content of contemporary personal jurisdiction doctrine. But they also raise several questions about the precise scope of that doctrine and about the rationale for the Court's doctrinal choices—particularly with respect to general jurisdiction.

A. *General Jurisdiction After Bauman: Under-Theorized and Inconsistent*

1. *The At-Home Test and the Exceptional Case*

Bauman confirms, first, that the at-home test governs assertions of general personal jurisdiction and, second, that “at home” has a limited meaning. A natural person is at home in his or her state or country of domicile, while a corporation is at home where it is incorporated and where it has its principal place of business.¹⁷

Bauman did not define a corporation's principal place of business for purposes of personal jurisdiction, but it did invoke the earlier decision in *Hertz Corp. v. Friend*, which defined principal place of business as a corporation's “nerve center” for the purpose of subject matter jurisdiction.¹⁸ Personal jurisdiction, one might reasonably suspect, is heading toward the same rule—although the justification for such a result is not clear. Whatever the virtue of a clear rule for the purpose of interpreting the diversity statute, the need for such a rule is less obvious in the context of personal jurisdiction analysis, which is based, not on principles of statutory interpretation of a non-waivable rule, but instead on a case-by-case due

¹⁷ *Bauman*, 134 S. Ct. at 760 (citing *Goodyear*, 131 S. Ct. at 2853–54).

¹⁸ *See id.* (stating place of incorporation and principal place of business “have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable,” which in turn “afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims”) (citing *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)).

process analysis of a waivable issue, where that analysis is flexible and rule-averse by nature.¹⁹

Although the at-home test generates presumptive answers to the locations of general personal jurisdiction, the Court also stated that more locations might be possible in “exceptional cases.”²⁰ Because *Bauman* was not itself an exceptional case, the Court did not take the opportunity to clarify this remark despite the inevitability that it will generate litigation. Consider the Boeing Corporation, which is incorporated in Delaware and headquartered in Illinois, but was originally incorporated and headquartered in Washington and which still retains its most extensive manufacturing operations in that state.²¹ Do these facts establish an “exceptional case” for general jurisdiction in Washington? If they do not, could the reason be that the exception turns on fairness to the plaintiff in the individual case? For example, could Daimler’s extensive connections with the United States and with California in particular lead to general personal jurisdiction over it in California in a suit by a citizen or resident of the state who claims to have been injured in Germany by Daimler?²² The “paradigm” places for general jurisdiction over Daimler are not in the United States, and forcing the plaintiff to litigate in Germany could be burdensome, perhaps even exceptionally so.

Allowing the plaintiff’s specific circumstances to establish an exception would mean either that general jurisdiction includes a case-by-case inquiry that turns on the relative situations of the plaintiff and defendant, or that sympathetic facts will simply supply the wedge for general jurisdiction in all cases. The latter characterization would allow the exception to threaten the rule by replicating the proliferation of general jurisdiction that the Court has sought to eliminate in *Goodyear* and *Bau-*

¹⁹ Compare Stan Cox, *Avoiding Carts Before Horses in Daimler AG*, JURIST (Nov. 1, 2013), <http://jurist.org/forum/2013/11/stan-cox-personal-jurisdiction.php> (resisting the equation of the two standards), Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, OHIO ST. L.J. (forthcoming) (manuscript at 49–51) (same), and Freer, *supra* note 4, at 16–19 (same), with John P. Lenich, *A Simple Question That Isn’t So Simple: Where Do Entities Reside for Federal Venue Purposes?*, 84 MISS. L.J. (forthcoming) (manuscript at 29 & n.127) (advocating the same rule in both contexts and citing pre-*Daimler* commentary on the issue).

²⁰ *Bauman*, 134 S. Ct. at 761 n.19 (“We do not foreclose the possibility that in an exceptional case a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.” (citation omitted)).

²¹ Boeing Co., Annual Report (Form 10-K) (Feb. 9, 2012); *General Information*, BOEING, <http://www.boeing.com/company/general-info/index.page> (2015) (listing employment data showing that over half of Boeing employees work in Washington); see also Parry, *supra* note 3, at 829 n.6 (discussing general jurisdiction over Boeing).

²² This hypothetical differs from the facts of *Goodyear* because I am assuming Daimler has far more extensive contacts with the United States and California than did the European subsidiaries of Goodyear. The hypothetical comes closer to Goodyear USA’s relationship with North Carolina, the jurisdictional impact of which was not addressed in the *Goodyear* case.

man. The former, by contrast, suggests a general jurisdiction doctrine that consists of the paradigm categories, together with true exceptions—rare ad hoc departures from the norm in individual cases. Less clear is whether this norm-exception relationship could remain stable.²³

Bauman discusses the exceptional case solely in the context of a corporation.²⁴ Could there also be exceptions from the paradigm domicile rule for natural persons? The traditional analysis of domicile requires presence in the jurisdiction plus intent to remain, which leads to only one domicile.²⁵ Does that approach make sense with, for example, the hundreds of thousands, probably millions, of Americans who spend large parts of the year living in another state?²⁶ One reasonably could ask whether such persons have two domiciles for purposes of personal jurisdiction, rather than one. Further, even if the correct doctrine is to have only one domicile for natural persons, the traditional approach creates strange results. Addressing this issue, Carol Andrews cites *Mas v. Perry*²⁷ and suggests it made little sense to say that Judy Mas’s domicile was Mississippi when she lived elsewhere, had not lived there for years, and appeared to have no intention of returning.²⁸ Should domicile instead turn, in most cases, on residence? Should domicile simply be replaced by residence for purposes of general jurisdiction?²⁹

²³ If general jurisdiction exists over a corporation in an exceptional case, why wouldn’t general jurisdiction exist over that corporation in the same state for claims by other plaintiffs? A doctrine of case-specific general jurisdiction would require an additional level of explanation that would build on the significance and impact of an exception. For a useful discussion of exceptional cases, see Cornett & Hoffheimer, *supra* note 19, at 53–57.

²⁴ *Bauman*, 134 S. Ct. at 761 n.19.

²⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 15, 16, 18 (1971) (stating basic rules for choice of domicile); *id.* § 11(2) (“[N]o person has more than one domicile at a time.”).

²⁶ See, e.g., Stanley K. Smith & Mark House, *Snowbirds, Sunbirds, and Stayers: Seasonal Migration of Elderly Adults in Florida*, 61B J. GERONTOLOGY: SOC. SCI., at S232, S238 (2006), available at <http://archive.news-press.com/assets/pdf/A4536321212.pdf> (estimating “that some 818,000 snowbirds were in Florida at the peak of the 2005 winter season”).

²⁷ 489 F.2d 1396 (5th Cir. 1974).

²⁸ Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1057–58 (2012). Although *Mas v. Perry* used the traditional presence-plus-intent approach to domicile, it rejected the traditional matrimonial domicile rule, at least in the circumstances of that case. See *Mas*, 489 F.2d at 1399–1400. Adhering to the former may have made rejection of the latter easier.

²⁹ In the course of rethinking domicile and seeking to reduce its importance for family law, Susan Frelich Appleton notes the possibility of using “home state” or “habitual residence” in place of domicile, highlights the ability of “habitual residence” to generate more than one location, and suggests that by analogy to the “home” of corporations for personal jurisdiction purposes a marriage could also have more than one domicile. See Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1507–09, 1517 (2014).

2. *The Puzzle of General Jurisdiction Based on Service in the Forum State*

Bauman's insistence on the general jurisdiction paradigms also creates tension with the tradition-based idea that service on a natural person within the territory of the forum suffices to establish general jurisdiction.³⁰ Corporations are not subject to tag jurisdiction,³¹ and neither *Goodyear* nor *Bauman* referred to it—even though both cases stressed that the paradigm case for general jurisdiction over a natural person is domicile.³² *Bauman* takes the further step of suggesting that the paradigm situations equate with general jurisdiction unless an exceptional case justifies a different result. Tag jurisdiction over individuals cannot fit within the category of the *exceptional* case because it is far too easy to establish. Thus, *Bauman* means either that tag jurisdiction no longer suffices for general jurisdiction over individuals, or that adherence to tradition leads to a general jurisdiction doctrine that takes diverging and inconsistent paths. On the first path, individuals are subject to general jurisdiction wherever they chance to be in addition to their domiciles. On the second path, corporations are protected from general jurisdiction in locations with which they have purposely formed lasting and/or extensive connections.

³⁰ See *Burnham v. Superior Court*, 495 U.S. 604, 608–16 (1990) (plurality opinion); *Pennoyer v. Neff*, 95 U.S. 714, 724 (1878). See also Freer, *supra* note 4, at 14 (highlighting this inconsistency); Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 548–49 (2012) (same). Note that Justice Brennan’s minimum-contacts rationale for tag jurisdiction in *Burnham*, 495 U.S. at 635–39 (Brennan, J., concurring in the judgment), cannot survive *Goodyear* and *Bauman*, because it depends on an analysis that no longer has any purchase in the general jurisdiction context. See *infra* notes 43–48 and accompanying text.

³¹ See, e.g., *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1064 (9th Cir. 2014) (Fletcher, J.) (“We hold that *Burnham* does not apply to corporations.”). Although they are not subject to tag jurisdiction, state registration statutes raise the prospect of a similar result for corporations. Every state requires corporations doing business in the state to register and appoint an agent for service of process. Many state and some federal courts have held that appointment of the agent constitutes consent for general jurisdiction in the courts of that state (not just for specific jurisdiction based on claims arising out of the corporation’s activities in or affecting the state). For an overview of registration statutes and their jurisdictional consequences, see Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1363–71 (2015); see also Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. (forthcoming Nov. 2015). If these assertions of general personal jurisdiction are valid, then a corporation that registers in a state may be subject to general personal jurisdiction in that state even if it is not actually conducting any business there, and even though the corporation would not be subject to general personal jurisdiction under the *Bauman* test. See Monestier, *supra*, at 1409 (suggesting this result is “strange”). As both Benish and Monestier explain, commentators tend to reject the validity of general-jurisdiction-by-registration, as have some courts. I agree with many of the arguments of these commentators, and my analysis here assumes that a state may not legitimately force a corporation to consent to general jurisdiction by making it a condition for registering to do business in the state.

³² With respect to my questions about domicile in Part I.A.1, *supra*, allowing tag jurisdiction makes the idea of multiple domiciles less pressing, but only because it excessively multiplies the potential for general jurisdiction over natural persons.

Importantly, adherence to tradition for general jurisdiction based on service in the territory of the state also implies a political relationship between state and person that depends on whether the “person” is natural or corporate. Under *Bauman*, the corporation is able to enter the state and establish a permanent and possibly extensive presence through its operations, but it is not required to answer to all legal claims in that location unless that location is also its place of incorporation or principal place of business.³³ But if tag jurisdiction persists, then this freedom or partial immunity provides corporations with a higher status than the natural persons who remain subject to the absolute authority of a sovereign state within which they are only temporarily present and with which they do not have a citizen–state relationship.³⁴ What could explain this difference, other than the fact of raw power over the bodies of people who cross borders—even as raw power over the assets or employees of the corporation is insufficient? Nor is tag jurisdiction consistent with the apparent rationale behind the *Goodyear/Bauman* reformulation of general jurisdiction, because the Court took care to assert that domicile alone suffices to provide the convenient location for all-purpose jurisdiction.³⁵ Adherence to tradition in this context thus licenses a sovereign prerogative that stretches the idea of “submission” to sovereignty beyond any reasonable scope for a modern liberal democracy.³⁶

³³ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760–62 (2014). As Linda Silberman points out, a focus on long-term, physical presence in the forum—in the form of offices, factories, or the like—could provide a reasonably workable basis for a doctrine of general jurisdiction that is broader than the grudging “at home” test while also significantly more constrained than an open-ended focus on in-state activities. 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, 681–84 (2015).

³⁴ Strangers in the territory of a state have a different status from citizens in early modern political theory. Rather than being participants in the social contract, they exist in a state of nature vis-à-vis their host state, with the result that the state has relatively unconstrained authority over them. See Parry, *supra* note 3, at 862 n.157; Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 415–17 (2012) (discussing the relationship between submission to sovereign authority and the Lockean social contract). But if tag jurisdiction persists after *Bauman*, then two categories of stranger exist in the political theory of modern personal jurisdiction doctrine: the abject natural person stranger, and the privileged corporate stranger that can move across borders in a manner that, in this context, has similarities to diplomatic status.

³⁵ See *Bauman*, 134 S. Ct. at 760.

³⁶ In *Nicastro*, Justice Kennedy stressed the idea of submission to sovereign authority as support for the concept of purposeful availment, but he also connected it to general jurisdiction: “Presence within a State at the time suit commences through service of process is another example [of submission]. . . . Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State.” *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion).

3. *Other Business Entities*

Bauman says nothing about business entities that do not follow the corporate form. For example, is a partnership of natural persons “at home” in every state in which one of the partners is domiciled?³⁷ Is the same true for an unincorporated association? Or should these entities be treated in the same fashion as corporations, so that they are subject to general jurisdiction in the state in which they have their principal place of business and perhaps also in the state of their formation?³⁸

4. *What Is General Jurisdiction?*

Finally, *Bauman* indicates that general jurisdiction and specific jurisdiction no longer exist along a continuum. Treating the two types of personal jurisdiction as entirely separate categories is a departure from the analysis of earlier cases. In *International Shoe* the Court stated: “[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”³⁹ Similarly, in *Helicopteros v. Hall*, the Court assessed “the nature of Helicol’s contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts” that would be “sufficient” to support general jurisdiction.⁴⁰ In both cases, the point of the analysis was to determine whether the corporation’s contacts with the forum state were more extensive than the fewer but more targeted contacts necessary for specific personal jurisdiction and whether those more extensive contacts were significant enough to support general or all-purpose jurisdiction. Lower courts have understood the doctrine in the same way. They have applied the *International Shoe* test to assess the contacts between the defendant and the forum and have then asked whether the assertion of general jurisdiction would be reasonable.⁴¹

³⁷ Cf. *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 23 (2d Cir. 1998) (allowing general jurisdiction over a partnership based on in-state service on one of its partners).

³⁸ See Lenich, *supra* note 19, at 30–31 (advocating general jurisdiction over unincorporated entities in their state of formation and the state where they have their principal place of business).

³⁹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

⁴⁰ *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414, 416 (1984).

⁴¹ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 764–65 & n.1 (2014) (Sotomayor, J., concurring in the judgment) (discussing general jurisdiction in terms of the minimum-contacts-plus-reasonableness test and citing numerous lower court cases that applied the test); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1067.5 (3d ed. 2002) (“[T]he defendant must be engaged in longstanding business in the forum state, such as marketing or shipping products, or performing services or maintaining one or more offices there; activities that are less extensive than that will not qualify for general in personam jurisdiction. Thus, the threshold for satisfying the requirements for general jurisdiction before considering convenience or more general fairness concerns is substantially higher than in specific jurisdiction cases.” (footnote omitted)).

Bauman's at-home analysis is inconsistent with an *International Shoe*-based approach to general jurisdiction. The Court began by characterizing general and specific jurisdiction as having separate pedigrees:

Specific jurisdiction has been cut loose from *Pennoyer's* sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized. As this Court has increasingly trained on the “relationship among the defendant, the forum, and the litigation,” *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme.⁴²

Then, the majority specifically rejected the plaintiff's argument that general jurisdiction could exist “in every State in which a corporation ‘engages in a substantial, continuous, and systematic course of business.’ That formulation, we hold, is unacceptably grasping.”⁴³

Although the defendant's contacts still matter for general jurisdiction, they matter in a way that differs from the specific jurisdiction test: “[T]he inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation's ‘affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.’”⁴⁴ The Court then stressed, again, that except in exceptional cases, “at home” means the place of incorporation and the place where the corporation has its principal place of business.⁴⁵

Finally, in a footnote, the Court made clear the limited role of contacts analysis for general jurisdiction:

[T]he general jurisdiction inquiry does not “focu[s] solely on the magnitude of the defendant's in-state contacts.” General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, “at home” would be synonymous with “doing business” tests framed before specific jurisdiction evolved in the United States. Nothing in *International Shoe* and its progeny sug-

⁴² *Bauman*, 134 S. Ct. at 757–58 (majority opinion) (footnote omitted) (citation omitted) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

⁴³ *Id.* at 760–61 (citation omitted).

⁴⁴ *Id.* at 761 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (internal quotation marks omitted)). If this is how general jurisdiction analysis works, then the Court's assertion that an additional reasonableness inquiry “would be superfluous,” *id.* at 762 n.20, makes sense, except possibly with respect to the unexplored country of the “exceptional case” *Id.* at 761 n.19. Yet it is worth noting that Justice Ginsburg's analysis here echoes Justice Kennedy's in *Nicastro*, where he disdained a reasonableness inquiry in favor of a stricter test for purposeful availment. *See* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion). Justice Ginsburg objected strongly to that effort. *See id.* at 2800–02 (Ginsburg, J., dissenting). If the two forms of personal jurisdiction are entirely separate categories rather than positions along a continuum, there may be no inconsistency in Justice Ginsburg's views.

⁴⁵ *See Bauman*, 134 S. Ct. at 761 & n.19.

gests that “a particular quantum of local activity” should give a State authority over a “far larger quantum of . . . activity” having no connection to any in-state activity.⁴⁶

Specific jurisdiction continues to require consideration of contacts and reasonableness to determine whether, on the facts of the specific case, jurisdiction is appropriate. By contrast, the new general jurisdiction inquiry consists of determining a natural person’s domicile or a corporation’s place of incorporation and also using something similar to a contacts analysis to determine the place in which it has its principal place of business. These places remain the same across cases, or if they change, they do so for reasons independent of personal jurisdiction. This inquiry becomes all the more mechanical if a corporation’s principal place of business ends up being the place of its “nerve center,” although some minor contacts-like inquiry may be necessary to fix this location. It is only in the “exceptional case” that a more familiar contacts analysis might count.⁴⁷

If general jurisdiction is a separate category, then it also requires a theory to explain why that category exists and the purposes that it serves. On this issue, *Bauman* disappoints. The Court suggested that general jurisdiction rests on a historical basis and therefore is bound by “limits traditionally recognized,”⁴⁸ but it made no effort to explain why deriving rules from that tradition makes sense today. If, as appears from the Court’s reference to *Pennoyer*, this is the same tradition that supports general jurisdiction over natural persons based on service in the forum, then the basis for that tradition is the raw and minimally-bounded power of a sovereign over persons and things present in its territory or that owe their existence to its laws.⁴⁹

Presumably, the affirmation of such a power relationship is not the majority’s goal. But the Court spent little time in *Goodyear* and *Bauman* developing a positive rationale for its new doctrine.⁵⁰ Justice Ginsburg cited law review articles by Lea Brilmayer and von Mehren & Trautman, but she used those materials selectively, and the doctrine of *Goodyear* and *Bauman* diverges from the general jurisdiction doctrine for which those

⁴⁶ *Id.* at 762 n.20 (citations omitted). As Justice Sotomayor made clear, and despite the assertions in footnote 20 of the majority opinion, the Court previously and reasonably interpreted *International Shoe* in exactly the way that the Court has now rejected as unsupported by that decision. *See id.* at 767–69 (Sotomayor, J., concurring in the judgment).

⁴⁷ *See* Cornett & Hoffheimer, *supra* note 19 (manuscript at 30–31).

⁴⁸ *Bauman*, 134 S. Ct. at 757–58.

⁴⁹ *See supra* notes 33–36 and accompanying text. For the effort to provide a theory for the Court’s new approach to general jurisdiction, see Stanley E. Cox, *The Missing “Why” of General Jurisdiction*, 76 U. PITT. L. REV. (forthcoming 2015).

⁵⁰ *See also* Freer, *supra* note 4 (manuscript at 3) (“[T]he doctrinal limitation should be grounded in theory. The Court’s effort is not; it never tells us why we have general jurisdiction in the first place, let alone why it feels the need to limit the scope of the doctrine.”).

writers advocated.⁵¹ The closest that the Court comes to a distinct rationale for its new doctrine is the claim that the categories of domicile, state of incorporation, and principal place of business “have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. . . . These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.”⁵²

There is a great deal of value in clear rules and in the pragmatic desire to ensure “at least one clear and certain forum.” But, rules tend to be over- and under-inclusive, with the result that their benefits come with costs, both of which must be measured against the costs and benefits of alternative approaches—something the Court never attempted in *Goodyear* or *Bauman*.⁵³ Further, however praiseworthy the desire to ensure “at least one clear and certain forum” may be in general, that desire rings false in context, for the clear and certain forum of the at-home test is the remnant of the multiple fora that typically existed for plaintiffs under the “substantial contacts” test.⁵⁴

In short, after *Goodyear* and *Bauman*, we know that we have a new doctrine of general jurisdiction, but we lack a convincing account of why.

B. *Specific Jurisdiction After Walden: Not Nicastro; Not as Much Calder*

Beyond its silent dismissal of *Nicastro*, *Walden*'s doctrinal accomplishments are not as significant or as head-scratching as those of *Bauman*. The assertion by the lower courts of jurisdiction in Nevada federal

⁵¹ Justice Ginsburg's citations to Brilmayer allow a reader to conclude that Brilmayer advocated the “at home” test. See *Bauman*, 134 S. Ct. at 760 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEXAS L. REV. 721, 728 (1988)); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011) (same). But Brilmayer made clear in the article that these “paradigm” locations were a starting point from which to build a broader doctrine. See Brilmayer et al., *supra*, at 735, 771. Justice Ginsburg also cited Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136, 1144–64, 1177–79 (1966), for background discussion of personal jurisdiction, as if to suggest that their framework of specific and general jurisdiction is consistent with her analysis. See *Bauman*, 134 S. Ct. at 754–55, 758 n.9; *Goodyear*, 131 S. Ct. at 2851, 2853. Although von Mehren & Trautman were skeptical of broad approaches to general jurisdiction, their advocacy of a more limited doctrine was explicitly linked to an expansive vision of specific jurisdiction. See von Mehren & Trautman, *supra*, at 1141–44. Despite Justice Ginsburg's efforts, as in her *Nicastro* dissent, overall personal jurisdiction does not reflect the von Mehren & Trautman approach. By nonetheless putting forward something similar to their view of general jurisdiction, Justice Ginsburg ultimately departs from and distorts their approach.

⁵² *Bauman*, 134 S. Ct. at 760 (citations omitted).

⁵³ Hence Cornett & Hoffheimer's suggestion that the at-home test for general jurisdiction, stripped of any reasonableness inquiry, ends up as formalism, in the sense that it appears not to serve any purpose other than being a rule that will substitute for analysis. See Cornett & Hoffheimer, *supra* note 19 (manuscript at 63–64).

⁵⁴ See 4 WRIGHT & MILLER, *supra* note 41, § 1067.5 (collecting cases).

court over defendant Walden—the official who stopped plaintiffs Fiore and Gipson at the Atlanta airport and seized their cash, who knew they were traveling to Nevada, and who drafted a probable cause affidavit after learning that their attorney was in Nevada⁵⁵—was a stretch of the *Calder v. Jones* effects test.⁵⁶

In *Calder*, the plaintiff lived and worked in California, and the defendants worked for the *National Enquirer*, which sold more papers in that state than in any other.⁵⁷ According to the Court, the defendants knew that their article about Jones would have its most significant impact in California, hence the Court's conclusion that their conduct was "expressly aimed" at California.⁵⁸ Lower courts have attempted to turn the fact-specific result of *Calder* into a more general test that centers on intentional torts.⁵⁹ But in *Fiore*, the Ninth Circuit upheld jurisdiction on the theory that the allegedly false probable cause affidavit was aimed at Nevada because Walden could foresee that it would affect people who had a "significant connection" to Nevada by denying them the use in Nevada of their money.⁶⁰ Perhaps knowledge of the plaintiff's significant connection

⁵⁵ See *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014); *Fiore v. Walden*, 688 F.3d 558, 570–72 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1115 (2014). Although Fiore and Gipson informed TSA agents in San Juan that they lived at least part-time in Nevada, they had California drivers licenses and it is not clear from the opinions whether Walden knew when he acted that the plaintiffs lived at least part time in Nevada. It is a reasonable but not necessary inference that Walden believed they were Nevada residents based on the fact that their attorney was from that state.

⁵⁶ 465 U.S. 783 (1984).

⁵⁷ *Id.* at 785 ("The Enquirer is a Florida corporation with its principal place of business in Florida. It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California.").

⁵⁸ *Id.* at 789.

⁵⁹ See, e.g., *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 256 (3d Cir. 1998) ("[F]or *Calder* to apply, the plaintiff must allege facts sufficient to meet a three-prong test. First, the defendant must have committed an intentional tort. Second, the plaintiff must have felt the brunt of the harm caused by that tort in the forum, such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort. Third, the defendant must have expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity."). Cf. *Tamburo v. Dworkin*, 601 F.3d 693, 703–04 (7th Cir. 2010) (requiring "defendant's knowledge that the effects would be felt—that is, the plaintiff would be injured—in the forum state" instead of the more demanding requirement that the plaintiff feel the "brunt" of the harm in the forum state and that the forum be "the focal point of the harm"). See also *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (noting intentional torts may receive their own jurisdictional analysis and citing *Calder*).

⁶⁰ Here is the critical language on these points from Judge Berzon's opinion for the majority of the Ninth Circuit panel in *Fiore*: "[W]hether Fiore and Gipson were residents of Nevada at the time of the filing of the false probable cause affidavit is not determinative of the question of personal jurisdiction over Walden. Moreover . . . it is not relevant who *initiated* the contacts with Nevada. Instead, the critical factor is whether Walden, knowing of Fiore and Gipson's significant connections to Nevada, should be taken to have intended that the consequences of his actions would be felt

to the forum ought to suffice for personal jurisdiction in an intentional tort case, but that situation is nonetheless meaningfully distinct from the kind of connection that Jones had with California in *Calder*.⁶¹

In reversing the Ninth Circuit, the Supreme Court applied the minimum contacts test, particularly the requirement that analysis of contacts must turn on “the relationship among the defendant, the forum, and the litigation.”⁶² As the Court also noted, previous cases have rejected or are inconsistent with the idea that the “unilateral” actions of the plaintiff or other persons can create contacts between the defendant and the forum.⁶³ The Court found no actions by Walden that connected him to Nevada. He may have directed the allegedly defamatory statement in the affidavit at the plaintiffs, but he was not aiming specifically at Nevada.⁶⁴ Similarly, the fact that the plaintiffs would not be able to use their money in Nevada was, for the Court, a matter of chance. “Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had.”⁶⁵ In short, the Court characterized *Walden* as a case about an intentional tort that was not directed at any particular lo-

by them in that state. . . . The final prong of the *Calder*-effects test is the requirement that the conduct at issue caused foreseeable harm in the forum. We ‘do[] not require that the brunt of the harm be suffered in the forum.’ Instead, the foreseeable-harm ‘element is satisfied when defendant’s intentional act has “foreseeable effects” in the forum.’ ‘If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.’ . . . Walden knew from their plane tickets, and from the San Juan DEA agent, that Fiore and Gipson were heading to Las Vegas, along with their \$97,000. . . . Walden knew, by the time he wrote the fraudulent probable cause affidavit, that the money seized represented their professional earnings. The documentation also demonstrated that he had seized their \$30,000 ‘bank,’ which they needed to pursue their trade in Nevada. . . . The delay in returning the funds to Fiore and Gipson in Las Vegas caused them foreseeable harm in Nevada.” *Fiore*, 688 F.3d at 580–82 (9th Cir. 2012) (citations omitted), *rev’d*, 134 S. Ct. 1115 (2014).

⁶¹ Dissenting from denial of rehearing en banc, Judge O’Scannlain asserted that the panel decision in *Fiore* conflicted with the approaches of the other circuits: “The majority of circuits have held that, under *Calder*, a defendant must expressly aim the conduct forming the basis of the claim *at the forum state*—not just at a known forum resident—before the courts of that state may exercise jurisdiction over the defendant. The Third and Fourth Circuits, for example, have held that a defendant ‘must manifest behavior intentionally targeted at and focused on the forum for *Calder* to be satisfied.’ The Tenth Circuit has aligned itself with the Third Circuit in concluding that *Calder* requires ‘that the forum state itself’—not just ‘a known forum resident’—‘must be the focal point of the tort.’ The Seventh Circuit has agreed with these courts, noting that *Calder* ‘made clear’ that a defendant must ‘expressly aim[] its actions at the state with the knowledge that they would cause harm to the plaintiff there.’ The law of other circuits is in accord.” *Id.* at 565 (O’Scannlain, J., dissenting from denial of rehearing en banc) (citations omitted).

⁶² *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), *quoted in* *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

⁶³ *See Walden*, 134 S. Ct. at 1122.

⁶⁴ *See id.* at 1125.

⁶⁵ *Id.*

cation outside the forum in which the defendant acted. The Court insisted that it was merely applying “[w]ell-established principles of personal jurisdiction,” and it specifically disavowed any attempt to resolve situations that include internet conduct.⁶⁶

Walden reins in expansive uses of *Calder* by the lower courts, or at least by the Ninth Circuit. By stressing the California-focused nature of the defendant’s activity in that state, the *Walden* Court read the earlier decision narrowly. After *Walden*, the effects test appears to work only when (1) the defendant knew that the forum state would be the place where the plaintiff would suffer significant harm, and (2) the defendant’s activities were in some way directed at the forum state.⁶⁷ The plaintiff or her conduct “cannot be the only link between the defendant and the forum.”⁶⁸

This reading of *Calder*, while perhaps grudging, is not a glaring misinterpretation of that decision.⁶⁹ The significance of *Walden* is less that it chose a restrictive but also reasonable reading of *Calder*, and more that it integrates the effects test into the “well-established” minimum contacts analysis. Although *Calder* recites the minimum contacts test and the importance of the defendant-forum-litigation connection, the brief reasoning that follows, which leads to the conclusion that “[j]urisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California,”⁷⁰ does not explain why those effects create minimum contacts. *Calder* can thus appear to stand apart as a separate inquiry, and that perception allowed lower courts—including the Ninth Circuit in *Fiore*—to find personal jurisdiction under circumstances that might not (or, here, would not) satisfy the minimum contacts test as it applies in other contexts.

The *Walden* opinion is more careful about placing the “effects” analysis within the overarching minimum contacts analysis. To that end, the Court stressed that in *Calder* “the ‘effects’ caused by the defendants’ article . . . connected the defendants’ conduct to *California*, not just to a

⁶⁶ *Id.* at 1125 n.9, 1126. For discussion of targeting, effects, and the internet, see Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, U.C. DAVIS L. REV. (forthcoming) (manuscript at 19–20).

⁶⁷ *Cf. supra* note 59 (citing pre-*Walden* lower-court tests).

⁶⁸ *Walden*, 134 S. Ct. at 1122.

⁶⁹ In *Calder*, the Court stressed, first, that “[h]ere, the plaintiff is the focus of the activities of the defendants out of which the suit arises,” *Calder v. Jones*, 465 U.S. 783, 788 (1984), and, second, that “California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California.” *Id.* at 789. *But see* Rhodes & Robertson, *supra* note 66 (manuscript at 44–45) (suggesting *Walden*’s efforts to distinguish *Calder* are unpersuasive and that *Walden* “is a ‘stealth overruling’ of *Calder*”).

⁷⁰ *Calder*, 465 U.S. at 789.

plaintiff who lived there.”⁷¹ The connection to California was necessary, at least in hindsight, to satisfy the defendant-forum-litigation analysis.

Notably, and unlike *Bauman*, the Court in *Walden* did not provide an opinion that would generate clear results across cases. The results are unclear for situations that fall between *Calder* and *Walden* in terms of the degree of connection with the forum or the level of awareness that the harm would take place in the forum. In the months after the decision, members of the civil procedure email list discussed several hypotheticals in which the defendant commits an intentional tort that has effects elsewhere, and in which the specific location is not specifically known but is foreseeable. For example, a person sends anthrax or a bomb through the mail, or a hacker creates a computer virus intended to cause harm wherever possible. Does personal jurisdiction exist wherever those materials cause harm, even if not in the state of destination? Does it really matter what kind of knowledge the plaintiff had about the path of the item? *Walden* provides the analytical structure for applying the minimum contacts test to these situations, but it does not compel the rejection of jurisdiction. Indeed, lower courts would almost certainly use *Walden* even if they were to assert jurisdiction in such cases.⁷²

Walden has relatively modest ambitions. It rejects interpretations of *Calder* that would allow jurisdiction based on foreseeability of harm in the forum state, but it still requires case-by-case analysis.⁷³ And, the rejection of foreseeability is consistent with the majority opinion in *World Wide Volkswagen*, as well as with Justice O’Connor’s opinion in *Asahi*.⁷⁴ It is difficult to complain about consistency in doctrine. Nonetheless, if the minimum contacts analysis is itself flawed, then a more expansive reading of *Calder* would be desirable even if (or perhaps even because) it created tension in the doctrine.

In short, *Walden*’s primary flaw is that it seeks to reinforce the minimum contacts test when, instead, fundamental reform is necessary.

⁷¹ *Walden*, 134 S. Ct. at 1124; see also *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 801 (7th Cir. 2014) (Wood., J.) (“*Walden* serves as a reminder that the inquiry has not changed over the years, and that it applies to intentional tort cases as well as others.”).

⁷² Lower courts have certainly relied on *Walden* to support the conclusion that personal jurisdiction does not exist. Some of those decisions are convincing. See, e.g., *Advanced Tactical*, 751 F.3d 796, 801 (holding defendant’s sending of a mass email to a list that includes forum residents does not establish personal jurisdiction over defendant in the forum). Others are not. See, e.g., *Rockwood Select Asset Fund XI (6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1179–80 (10th Cir. 2014) (holding *Walden* precludes personal jurisdiction in plaintiff’s home forum in suit against law firm over alleged falsehoods in an opinion letter that defendant drafted for plaintiff). For discussion of additional post-*Walden* cases, see Julie Cromer Young, *The Online Contacts Gamble after Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 753, 763–66 (2015).

⁷³ *Walden*, 134 S. Ct. at 1125.

⁷⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–97 (1980); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109–13 (1987) (plurality opinion).

II. PERSONAL JURISDICTION, STATE INTERESTS, AND INDIVIDUAL RIGHTS

A. *Introduction*

Contemporary state and federal constitutions recognize, create, or permit legislatures to create courts so that a forum will exist for the resolution of disputes in a manner that is, one hopes, “just, speedy, and inexpensive.”⁷⁵ As creatures of the constitutions or governments that created them, courts exercise sovereign power, but that power is defined and limited by constitutional provisions, statutes, traditions of practice, and social norms or values.⁷⁶ If a government entity, including a court, reaches beyond the limits of its power, that action will have repercussions across multiple categories. Such an act could, for example, upset the balance or separation of power within a state, as when the legislature or executive encroach on the other’s prerogatives.⁷⁷ Or, the action could upset the balance of power among states, so that one state aggrandizes its power or asserts its interests at the expense of others. Within the United States, of course, the relationship among states has significant constitutional dimensions.⁷⁸ By contrast, among countries relationships are defined in part by national law and in part by international law.⁷⁹ Another set of repercussions takes account of the people affected by the action, asking, for example, whether the action violates their legal and/or human rights in some way.

But the mere fact that a government entity takes actions that have these repercussions may not be sufficient (even if necessary) to establish that it went beyond the limits of its power. Clear lines often do not exist, institutions often have the formal authority to create disarray within or

⁷⁵ FED. R. CIV. P. 1.

⁷⁶ I am, therefore, placing this discussion within a conventional set of assumptions about the nature and goals of liberal constitutional democracies.

⁷⁷ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (stating separation of powers doctrine should operate as “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other”). In the United States, the concern about aggrandizement of power has landed on all three branches. See, e.g., *id.* at 129 (“[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (Liberty Fund 1997) (1975); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006).

⁷⁸ See, e.g., U.S. CONST. art. I, § 10; *id.* art. IV, § 1; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978).

⁷⁹ For example, does the national constitution allow this activity or not, see, e.g., U.S. CONST. art. I, § 8 (enumerating the legislative powers of Congress), and does the law purport to regulate extraterritorially? See *infra* notes 85–99 and accompanying text.

across borders, and analysis of the scope and limits of institutional power may come down to balancing tests and matters of degree.⁸⁰

This extremely general analysis applies to executive, legislative, or judicial actions—any part of a government may take actions that have some or all of these repercussions, and those actions may violate legal rules or settled practices, or they may not. More specifically, when a court asserts jurisdiction over a case and the parties, that assertion could impact the balance of power within the jurisdiction (for example, did the legislature authorize the court to decide cases of this type?) or among jurisdictions (for example, do other jurisdictions have a valid interest in the litigation?). The assertion of jurisdiction will also impact the rights of the individuals involved in the litigation.

Long-arm statutes create the framework for managing the internal-balance, separation-of-powers concern; they also provide some information about the scope of the state's asserted interests.⁸¹ State courts and legislatures may come into conflict over the terms and interpretation of a

⁸⁰ Compare, e.g., *INS v. Chadha*, 462 U.S. 919, 952 (1983) (asserting a bright line rule for questions about legislative power), with, e.g., *Morrison v. Olson*, 487 U.S. 654, 693–96 (1988) (balancing interests and treating separation of powers issues as turning on matters of degree).

⁸¹ State long-arm statutes take a variety of forms. Some states adopt the simple approach of relying entirely on due process. See, e.g., ALA. R. CIV. P. 4.2(b) (“An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States”); CAL. CIV. PROC. CODE § 410.10 (West 2004) (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”). Other states have detailed statutes that do not reach as far as the federal Constitution would allow. See, e.g., N.Y. C.P.L.R. 302 (McKinney 2010); Jay C. Carlisle, *Recent Jurisdiction Developments in the New York Court of Appeals*, 29 PACE L. REV. 417, 419 (2009). See also *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 535 (5th Cir. 2014) (discussing the Florida long-arm statute, FLA. STAT. ANN. § 48.193 (West 2006), and noting that “some courts interpreting Florida’s statute have noted that it ‘confers less jurisdiction upon Florida courts than allowed by the Due Process Clause’”). In other states with detailed long-arm statutes, the courts have interpreted those statutes to go as far as due process allows. See, e.g., GA. CODE ANN. § 9-10-91 (2007), construed in *Innovative Clinical & Consulting Servs., LLC v. First Nat’l Bank of Ames*, 620 S.E.2d 352, 354 (Ga. 2005) (discussing changes in construction of subsection 2 of the statute and holding that subsection 1, which allows jurisdiction over any person who “[t]ransacts any business within this state,” goes to the limit of due process). Other states have detailed statutes that also expressly provide for all available personal jurisdiction. See OR. R. CIV. P. 4 (laying out numerous precise situations in which state courts may exercise personal jurisdiction and then providing, in section L, “Notwithstanding a failure to satisfy the requirement of sections B through K of this rule, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States.”). See also FED. R. CIV. P. 4(k)(1) (“Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located”).

long-arm statute,⁸² but that conflict is an issue of state law so long as the resulting interpretation stays within the bounds of constitutional personal jurisdiction doctrine. Failure to satisfy the terms of a long-arm statute, where that statute is more restrictive than due process, frees courts from considering the constitutional aspects of personal jurisdiction. By contrast, of course, a state or federal court's conclusion that a defendant falls within such a statute leads to consideration of the constitutional issues.⁸³

Because the assertion of personal jurisdiction over an out-of-state defendant by the courts of one state will impact both the interests of other states or countries and the rights of the defendant over whom power is asserted, any consideration of the constitutional issues must take both impacts into account.

B. State Interests and Out-of-State Defendants

According to the *Restatement (Third) of the Foreign Relations Law of the United States*, international law provides a state with "jurisdiction to prescribe law with respect to":

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.⁸⁴

⁸² See *Innovative Clinical & Consulting Servs.*, 620 S.E.2d at 355 (discussing the court's interpretations of the Georgia long-arm statute and its conclusion that, under "our system of checks and balances," the state courts must construe the long-arm statute according to its "literal language").

⁸³ See, e.g., *Kitrosor v. Hurt*, 85 So. 3d 1084, 1087 (Fla. 2012) ("In *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989), we outlined a two-step inquiry to determine whether long-arm jurisdiction extends over a nonresident defendant. First, a court must determine whether sufficient jurisdictional facts are alleged to bring the action within the ambit of Florida's long-arm statute. If the first step of the inquiry is satisfied, a court must then determine whether the defendant has sufficient 'minimum contacts' with the state to satisfy the Fourteenth Amendment's due process requirements." (citation omitted)).

⁸⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); see *id.* § 404 (allowing universal jurisdiction in some circumstances). Under the RESTATEMENT (THIRD), the exercise of prescriptive jurisdiction is also subject to the reasonableness standards in § 403. The draft RESTATEMENT (FOURTH) deletes the reasonableness requirement. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION

The current draft of the *Fourth Restatement of Foreign Relations Law* takes a substantially similar view of prescriptive jurisdiction, specifically including the power to regulate “conduct that has a substantial effect within [a state’s] territory.”⁸⁵ Of course, the law or constitution of an individual state may impose further restrictions on legislative authority, as in Article I of the U.S. Constitution and the general, albeit misleading, idea that the federal government has only limited and enumerated powers. But the draft Fourth Restatement also takes the position that the constitutional scope of U.S. practice includes regulation of “conduct that has a substantial effect within its territory.”⁸⁶

The broad power to regulate in compliance with international law does not stop with the federal government, because the individual U.S. states also have sovereign authority within the federal system. According to the Supreme Court, the Constitution “specifically recognizes the States as sovereign entities.”⁸⁷

The federal system established by our Constitution preserves the sovereign status of the States [by] reserv[ing] to them a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status. The States “form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.”

....

The States thus retain “a residuary and inviolable sovereignty.” They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.⁸⁸

As sovereigns, the individual U.S. states possess a broad “police power” to regulate, subject to (1) the prescriptive jurisdiction limits of inter-

§ 211 reporters’ note 2 (Preliminary Draft No. 3, Sept. 15, 2015) [HEREINAFTER RESTATEMENT (FOURTH): JURISDICTION]. But, the draft goes on to note that as a matter of domestic practice, “In construing the geographic scope of U.S. law, U.S. courts follow a principle of reasonableness.” *Id.* § 201 cmt. l; *see also id.* § 201 reporters’ note 11.

⁸⁵ RESTATEMENT (FOURTH): JURISDICTION § 213; *see id.* §§ 211–17. The Reporters’ Notes indicate that international law also continues to allow jurisdiction over conduct that had no effect in the state but was intended to do so. *See id.* § 213 cmt. c & reporters’ note 4.

⁸⁶ *Id.* § 201(2); *see also id.* § 201 cmt. f (“The United States exercises jurisdiction to prescribe with respect to conduct outside its territory that was or is intended to have a substantial effect within its territory.”).

⁸⁷ *Alden v. Maine*, 527 U.S. 706, 713 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996)).

⁸⁸ *Id.* at 714–15 (quoting THE FEDERALIST No. 39, at 245 (Madison) (Clinton Rossiter ed. 1961)).

national law⁸⁹ and (2) the textual and implied constitutional limitations on state power to regulate, including dormant Commerce Clause and preemption doctrine.⁹⁰ At the federal level, the presumption against extraterritoriality also ensures that Congress generally must make clear its intent to regulate beyond U.S. territory.⁹¹ But, the federal presumption against extraterritoriality does not apply to state statutes, and states are free to apply their own presumption, or not, subject again to constitutional constraints.⁹²

These principles apply most clearly to statutes and public law in general.⁹³ To the extent that they do not apply to private law such as torts or contracts, conflict-of-laws principles, including choice-of-law doctrine, take on controlling authority. The *Restatement (Second) of Conflict of Laws* declares that a court may apply “the local law of its own state to determine a particular issue [if] application of this law would be reasonable in the light of the relationship of the state and of other states to the person, thing or occurrence involved.”⁹⁴ It goes on to say that “[t]he local law of a

⁸⁹ See RESTATEMENT (FOURTH): JURISDICTION § 204 reporters’ note 4 (“The Supreme Court has held that a State with a legitimate interest may regulate extraterritorially to the same extent as the federal government, but in a context where jurisdiction to prescribe under customary international law clearly existed. See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (‘If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.’)).

⁹⁰ See, e.g., RESTATEMENT (FOURTH): JURISDICTION § 202 & cmts.; Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1084–92 (2009) (explaining that some dormant Commerce Clause decisions support a broad rule against state power to legislate about out-of-state conduct that has in-state effects, but also noting few commentators believe the decisions properly sweep so far); *supra* notes 77–80 (noting some of the constitutional limitations on state power).

⁹¹ See RESTATEMENT (FOURTH): JURISDICTION § 203 & cmt. d.

⁹² *Id.* § 203 reporters’ note 5 (“The presumption against extraterritoriality is a presumption about the intent of Congress and therefore applies only to federal statutes. The Supreme Court has held that States may regulate extraterritorially on the same terms as the federal government. Subject to constitutional constraints, the geographic scope of State statutes is a question of State law.” (citations omitted)).

⁹³ See *id.* § 211 reporters’ note 4.

⁹⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (1971). The Comments rephrase this rule: “A state has jurisdiction to apply its local law to determine a particular issue if the issue is within the reasonable scope of the state’s regulatory power.” *Id.* § 9 cmt. d. The preliminary draft of the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW discusses whether customary international-law rules of prescriptive jurisdiction extend beyond statutes on matters of public law to encompass private law (including common law), and it concludes that they should. See RESTATEMENT (FOURTH): JURISDICTION § 211 reporters’ note 4. It takes the same position with respect to U.S. practice. See *id.* § 201 reporters’ note 3. The RESTATEMENT (SECOND) OF CONFLICTS takes the position that its rule of reasonableness applies equally to statutes and common law, where the focus is clearly on private law. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. e.

state may . . . usually be applied to determine whether a person is liable for the effects within its territory of an act done by him elsewhere.”⁹⁵

A state may choose not to exercise this authority in all cases. But, as a matter of federal constitutional law, state courts have substantial freedom to deploy their own versions of choice-of-law doctrine, and to apply their own law.⁹⁶ Due process and full faith and credit impose “modest restrictions” on this choice;⁹⁷ they require only that a state “have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”⁹⁸ Note, as well, the special role that the idea of “contacts” plays in this analysis. A state need only have a contact that is sufficient to create a non-arbitrary interest in applying its law, where the relevant “interests” presumably are those that a state is permitted to pursue under international law and conflicts doctrine.⁹⁹

The upshot is that although the individual U.S. states do not have “the full authority of sovereignty,”¹⁰⁰ they nonetheless have power to regulate conduct that takes place outside their territory, as a matter of and subject to choice-of-law doctrine, international law, and U.S. constitutional law. A state legislature legitimately can impose reasonable regulations on activities that take place outside the state’s territorial boundaries, if those activities have an impact in-state, so long as those regulations comply with the Constitution. The question then is whether state courts have a similar reach. For example, can a state court adjudicate claims that arise under a state statute that legitimately engages in extraterritorial regulation? If the answer to that question is yes—as it ought to be—then can a state court extend the state’s common law in the same way, to hear cases involving extraterritorial conduct that has in-state effects? Again, the answer ought to be yes in the vast majority of cases. And, in fact, state courts hear such cases on a routine basis.¹⁰¹

The Constitution might prevent a state court from applying forum law when the state’s interests rest only on theories of passive personality

⁹⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. f.

⁹⁶ Indeed, this freedom may surpass the legislature’s ability to legislate extraterritorially. See *generally* Florey, *supra* note 90.

⁹⁷ *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818 (1985).

⁹⁸ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion); see *Phillips Petrol.*, 472 U.S. at 818–19 (adopting the *Allstate* plurality’s test).

⁹⁹ See RESTATEMENT (FOURTH): JURISDICTION § 211 reporters’ note 4 (“[I]nternational law permits a wide variety of solutions to conflict-of-laws problems. Thus, assertions of private law in civil cases normally are disposed of by national law and treaty regimes.”).

¹⁰⁰ *Alden v. Maine*, 527 U.S. 706, 715 (1999).

¹⁰¹ Indeed, it was the desire to apply state law in this way that helped drive the revolution in choice-of-law doctrine. See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963) (refusing to apply Ontario statute and instead applying New York law to litigation involving New York residents but arising out of an accident in Ontario).

or the protective principle.¹⁰² But the Constitution rarely will prevent application of forum law when jurisdiction rests on the power over territory. (Although the issue could certainly come up if a state court sought to apply forum law to a case between non-residents, involving out-of-state activity, where personal jurisdiction rested solely on the defendant's transient presence in the forum.) Nor should the Constitution have much to say when the assertion of the power to prescribe law and adjudicate claims rests upon the increasingly accepted principle (well-established as a matter of U.S. law) that a state may regulate conduct that has or is intended to have effects in that state.¹⁰³

Does this broad power to adjudicate cases involving extraterritorial conduct that has in-state effects translate into state court power to exercise personal jurisdiction over the persons or entities that caused those effects? Leaving aside the question whether, in a specific case, a defendant might have compelling fairness arguments against jurisdiction, a rebuttable presumption should exist that state courts have personal jurisdiction when the state has prescriptive jurisdiction.¹⁰⁴ Any other result would hamstring the states by undercutting their legitimate regulatory authority.¹⁰⁵

¹⁰² See *supra* note 79 and accompanying text.

¹⁰³ See RESTATEMENT (FOURTH): JURISDICTION §§ 201 & cmt. f, 213 & reporters' note 4; Florey, *supra* note 90, at 1131–33 (arguing that notwithstanding doctrinal statements that pull in the opposite direction, international-law standards, including the power to regulate conduct with in-state effects, should govern the legislative jurisdiction of individual states, and noting that this standard has strong corollaries in choice-of-law analysis).

¹⁰⁴ See Parry, *supra* note 3, at 857; A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 659 (2006) (“It is possible that a state may have an interest in an isolated issue among many, such that its law will apply only to that issue. But when the dispute is viewed as a whole, the state’s interest may become diminutive and insufficient to prevent an assertion of [personal] jurisdiction from being arbitrary.”).

¹⁰⁵ Other commentators have already charted roughly the same path. For a substantially overlapping analysis, see, for example, Spencer, *supra* note 104, at 647–62. Specifically, Spencer contends that “[a] closer affinity between choice-of-law analysis and the law of jurisdiction is desirable because significant differences between a state’s authority to enact legislation applicable to a dispute and its authority to adjudicate that dispute make little sense.” *Id.* at 659 (citing James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 879–80 (1980); Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978)). Spencer also notes that state long-arm statutes might provide a good starting point for determining a state’s regulatory interests. See *id.* at 649–50. For a somewhat more cautious view about the relationship between “interests” and personal jurisdiction, see Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 106–107. For the suggestion that a state’s “non-regulatory interests” should also support the assertion of personal jurisdiction, see Rhodes & Robertson, *supra* note 66 (manuscript at 54–59). See also Cox, *supra* note 49 (manuscript at 33–40) (arguing a focus on regulatory jurisdiction can provide the only viable basis for general jurisdiction); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 747 (1987)

The analysis could be more complicated when a state seeks to exercise personal jurisdiction over a non-consenting defendant even though, under its choice-of-law rules, forum law would not apply. But, it is frequently the case that more than one state will have legitimate regulatory interests in a particular case, with the result that more than one state's law legitimately could apply to the dispute.¹⁰⁶ Thus, the reason for applying the law of a different jurisdiction may not be a determination that the forum state lacks an interest in the constitutional sense. The interests of the other jurisdiction may simply be stronger, or the forum's choice-of-law rules may simply disregard that interest for choice-of-law purposes (but might consider that interest for jurisdictional purposes).¹⁰⁷ Despite the fact that the state has disclaimed its interest for choice-of-law purposes, the assertion of personal jurisdiction in such a case should not be presumptively invalid.¹⁰⁸ At the same time, however—and notwithstanding the limited test under current constitutional doctrine with respect to choice of law—the interests of another state may be so significant, and the interests of the forum state so modest, that the forum state should not be permitted to impose its law or assert jurisdiction over the defendant(s).¹⁰⁹

The hardest case arises when a state seeks to assert personal jurisdiction over a non-consenting defendant where, as a constitutional matter, it would lack any legitimate interest in applying its law to the defendant's conduct. Under current personal jurisdiction doctrine, the relationship among the defendant, the forum, and the litigation would likely be insuf-

("[J]urisdictionally significant contacts . . . are those that demonstrate a forum state interest in regulating the conduct at issue in the underlying cause of action."); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1201 (2013) (arguing personal jurisdiction doctrine should accommodate "both the [regulatory] interest of a defendant's home state and the interest[] [in protecting its residents] of the state in which the defendant's product allegedly caused injury").

¹⁰⁶ Sometimes, the forum court will try to reconcile these varying interests by applying the law of different states to different aspects of a case, but at other times the interests of different states will apply to the same issue, thus requiring a choice between or among their laws.

¹⁰⁷ See, e.g., *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, (N.J. 2008) (applying the *Restatement (Second) of Conflict of Laws* to determine that Pennsylvania's legitimate regulatory interests outweigh those of New Jersey, with the result that Restatement's presumption that Pennsylvania law will apply to tort committed in Pennsylvania is not overcome).

¹⁰⁸ Cf. Brilmayer et al., *supra* note 51, at 779 (exploring the relationship between legislative and adjudicative jurisdiction in the context of general jurisdiction and asserting that "the contacts justifying general legislative jurisdiction should be greater than those contacts that support general adjudicative jurisdiction").

¹⁰⁹ Once a court in one state asserts jurisdiction over a case, every other state will be bound to give full faith and credit to that court's judgment (unless the defendant took a default judgment and thereby reserved the right to litigate personal jurisdiction later). The potential imposition that this demand for recognition creates in such a case provides a federalism argument for a modest limitation on an otherwise broad power to assert jurisdiction. See Parry, *supra* note 3, at 856.

ficient to allow specific personal jurisdiction in such a case. Under an interest-centered analysis, the result likely would be the same, particularly (but not necessarily only) where only one other state has a significant regulatory interest. Notably, however, this precise situation could arise if a state court were to assert general jurisdiction over a non-resident defendant where personal jurisdiction rested purely on service in the forum and there was no other connection with the forum.

A rebuttable presumption of personal jurisdiction over a defendant when a state has a legitimate regulatory interest in that defendant's conduct would likely produce a different result in *Walden*. Fiore brought a federal-question claim in federal district court, and there is little doubt that the federal government has a legitimate interest in the conduct of its officials and the rules governing liability for misconduct. But the federal government's interest was not relevant to the court's ability to exercise personal jurisdiction over Walden, because Federal Rule of Civil Procedure 4(k)(1)(A) allows federal courts to exercise personal jurisdiction in most cases over a defendant only if the courts of the state in which it sits would also have personal jurisdiction over that defendant.¹¹⁰ The issue in *Walden*, therefore, would not be the federal interest but rather Nevada's interest. A state has prescriptive jurisdiction to regulate conduct that has substantial effects in the forum, whether or not the person or entity engaging in the conduct intended those effects or aimed them at the forum.¹¹¹ If this interest-based analysis and personal jurisdiction analysis were the same, then the only issue in *Walden* would be whether the effects in Nevada of Walden's conduct were "substantial." There is room for debate on that issue, but a court reasonably could determine that the effects were, in fact, substantial.

As for *Bauman*, the plaintiffs in that case also made federal claims in federal court, and the district court's ability to exercise personal jurisdiction was similarly limited by Rule 4(k)(1)(A) to whatever California courts could assert.¹¹² The federal government's legislative interest in the

¹¹⁰ See FED. R. CIV. P. 4(k)(1) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . ."). Rule 4(k)(1)(C) did not apply because no federal statute authorizes broader service of process for Fiore's federal claim. For discussion of nationwide service of process and federal civil rights claims, see Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769, 774 n.26 (2015); Daniel Klerman, *Walden v. Fiore and the Federal Courts: Rethinking FRCP 4(k)(1)(A) and Stafford v. Briggs*, 19 LEWIS & CLARK L. REV. 713 (2015).

¹¹¹ Although the *Restatement (Third)* and draft *Restatement (Fourth) of Foreign Relations Law* allow prescriptive jurisdiction over intended effects, neither document requires intent. It is enough that the conduct produces effects in the jurisdiction. See RESTATEMENT (FOURTH): JURISDICTION §§ 201(2), 213; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. d.

¹¹² See *supra* note 110. Plaintiffs also invoked FED. R. CIV. P. 4(k)(2), but the original Court of Appeals panel held that the issue had been waived. See *Bauman v.*

events at issue in *Bauman* would rest on universal jurisdiction, which is the one basis for legislation that can be fully divorced from connection with the forum.¹¹³ Typically, however, universal-jurisdiction cases arise when the forum state already has personal jurisdiction over the defendant because the defendant is present in the forum.¹¹⁴ Indeed, if universal jurisdiction is appropriate in civil cases, this could be the one instance in which tag jurisdiction would retain validity.

Whatever the validity of tag jurisdiction in the universal-jurisdiction context may be, that form of obtaining personal jurisdiction does not ap-

DaimlerChrysler Corp., 579 F.3d 1088, 1097–98 (9th Cir. 2009), *vacated on reh'g*, 644 F.3d 909 (9th Cir. 2011), *rev'd*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014). On rehearing, the court found it unnecessary to consider the issue because California courts would have personal jurisdiction over DaimlerChrysler, with the result that Rule 4(k)(1)(A) applied. *See* Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 918 n.9 (9th Cir. 2011), *rev'd*, Daimler AG, 134 S. Ct. 746. In retrospect, however, Rule 4(k)(2) likely would make no difference. Applying Rule 4(k)(2)(A), DaimlerChrysler probably was not subject to specific personal jurisdiction in any state court with respect to plaintiffs' claims. Under the *Bauman* standard, it also would not be subject to general jurisdiction in any state, because it is incorporated and has its headquarters in Germany. *See* Bauman, 134 S. Ct. at 752. Under Rule 4(k)(2)(B), therefore, a federal court still could have personal jurisdiction if "exercising jurisdiction [were] consistent with the United States Constitution." But unless Daimler had sufficient national contacts with respect to plaintiffs' claim (perhaps based on information not developed below), there would be no specific personal jurisdiction in the United States. And, unless the Fifth Amendment test for general jurisdiction is different from the Fourteenth Amendment test, Daimler still would be at home in Germany and the Fifth Amendment would bar general jurisdiction. *See* 4 WRIGHT & MILLER, *supra* note 41, § 1068.1 n.76.50 (Supp. 2015) (citing several cases in which courts of appeals held that defendants lacked sufficient contacts with the United States for purposes of specific or general jurisdiction). Possibly, the "exceptional case" category could play a larger role under Rule 4(k)(2), but allowing it to do so would create tension with the analysis and result of *Bauman*. Also, the use of agency theories to impute contacts remains in flux after *Bauman* and, if imputation were possible, then Daimler would be subject to jurisdiction in some state under Rule 4(k)(1)(A). *But see* Donald Earl Childress III, *General Jurisdiction After Bauman*, 66 VAND. L. REV. EN BANC 197, 201 (2014) ("[W]ould Daimler be subject to general jurisdiction in Delaware or New Jersey, where MBUSA would be subject to general jurisdiction, as these are its places of incorporation and principal place of business? Given that under the Court's test MBUSA is at home in these fora, can its contacts be imputed to Daimler? We do not know the answer to that question in light of the Court's silence on imputation. But, I suspect that the answer would be no in light of the Court's strong language limiting general jurisdiction.").

¹¹³ RESTATEMENT (FOURTH): JURISDICTION § 217 cmt. a ("A state may exercise universal jurisdiction even if it has no connection to the perpetrator, the victim, or the place where the crime occurred."); *id.* § 217 reporters' note 4 (discussing universal jurisdiction in civil cases). The United States so far "has not exercised universal jurisdiction to the full extent permitted by customary international law." *Id.* § 201 reporters' note 9; *see also id.* § 201 (noting U.S. practice of exercising universal jurisdiction over "certain offenses of universal concern").

¹¹⁴ *See id.* § 217 cmt. e & reporters' note 5, *cf.* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (noting the defendant was served with process in the forum in case arising under the Alien Tort Statute, 28 U.S.C. § 1350).

ply to corporations.¹¹⁵ Further, while allowing federal courts to exercise jurisdiction in federal-question cases on the basis of contacts with the United States might be a good idea, current law requires district courts to exercise personal jurisdiction as if they were state courts. Absent universal jurisdiction, California has no legitimate regulatory interest in events that took place in Argentina and did not involve Californians. Personal jurisdiction is appropriate in California, therefore, only if Daimler can be seen as a Californian on the basis of the contacts there of its subsidiary, thus creating at least some regulatory jurisdiction (although perhaps still not enough for the *Bauman* facts), or if U.S. states legitimately may regulate and adjudicate on the basis of universal jurisdiction *and* that ability overcomes what would ordinarily be compelling objections to personal jurisdiction (under current doctrine or under the regulatory jurisdiction-based model that I am suggesting).

C. *The Rights of the Out-of-State Defendant*

All litigants have an interest in litigating close to their home or place of business and not being forced to litigate in another location where the law might be different, travel and other costs might multiply the expenses of litigation, their attorneys might not be licensed to practice, and so on. Because plaintiffs have the initial choice of forum, these burdens typically fall upon defendants.

Whatever the strength of this interest, the question for purposes of personal jurisdiction is more focused: does one have a right not to answer for one's conduct in a distant location if that conduct has affected people in that location and, in so doing, has also triggered a legitimate state regulatory interest? As I already have argued, a state court presumptively should be able to exercise personal jurisdiction over a defendant if the state has a legitimate regulatory interest in that defendant's conduct. The state interest would trump the defendant's interest unless the defendant could show significant and prejudicial inconvenience.

So far, I have discussed the defendant's interest with little regard for borders. Much of the inconvenience of distant litigation results from the effects of that distance alone. A resident of Yreka, in northern California, might reasonably complain about the inconvenience of litigating hundreds of miles away in San Diego, even though both cities are in the same state. By contrast, the Yreka resident might have little cause to complain that litigating a few miles away in Medford, in southern Oregon, is inconvenient. Typically, however, the difficulties of litigating at a significant distance from one's home will arise in cases that also involve crossed borders. Borders contribute to the convenience calculus in a way that goes beyond distance, because they are critical to the creation or relinquishment of some privileges, rights, and/or duties.¹¹⁶ Changes in those rights,

¹¹⁵ See *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1064 (9th Cir. 2014).

¹¹⁶ Although international law takes account of territory and borders with respect

privileges, or duties could make litigation in another jurisdiction more or less convenient, particularly when the defendant had little or no awareness that its actions implicated legitimate forum interests.

Personal jurisdiction analysis comes into play at the constitutional level primarily when a defendant must cross a border, but the issues created by that border will not necessarily be the heart of the defendant's convenience concerns.¹¹⁷ Further, the constitutional analysis must neither assume the impacts of crossing a border nor fetishize that crossing. The mere fact of extraterritorial regulation, for example, should not generate grave concern. The defendant's interests should prevail where the forum state has no legitimate regulatory interest in the defendant's conduct. Issues of awareness and expectations with respect to the border might also play a role. But in general, where such an interest exists, personal jurisdiction should also be appropriate unless the defendant faces a significant and prejudicial inconvenience from having to litigate in the forum state.

to jurisdictional issues, the concept of international human rights depends in part on the idea that borders are irrelevant to certain fundamental rights and in part on the effort to agree that borders are irrelevant to many other rights. Nothing in my analysis would allow a U.S. court to exercise personal jurisdiction in violation of, on the one hand, international law limits on jurisdiction or, on the other hand, international law protections of human rights.

¹¹⁷ The Yreka resident forced to litigate in San Diego has a legitimate due process interest in avoiding that distant litigation, but constitutional personal jurisdiction doctrine focuses on litigation that crosses borders. The reason for this focus, however, is not based on facts. Rather, it derives from *Pennoyer's* insistence on territorial sovereignty and *International Shoe's* effort, based on the realities of modern transportation and commerce, to loosen the *Pennoyer* regime for defendants "not present within the territory of the forum." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This analysis, in turn, supports the idea that there are two kinds of personal jurisdiction: general and specific. But due process doctrine ought to recognize the claims of defendants whenever they raise legitimate fairness concerns, because the point of due process is to protect against state power, not merely against state power directed at those from another state. *See Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) ("We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."). Justice Scalia's opinion in *Burnham* notwithstanding, there is no reason for personal jurisdiction doctrine to respect ideas of absolute state sovereignty over persons and things within its territory. *See supra* notes 30–36 and accompanying text. That said, however, a state resident who complains about litigating in a distant part of the same state will almost always lose. The state will almost certainly have a legitimate regulatory interest in its resident's conduct, and there will be none of the inconveniences that arise from crossing a border. State venue statutes likely will require that the litigation take place in a county with which it has a meaningful connection, and the defendant, in turn, will likely have a connection to that location as well. Any residual claim of inconvenience seems destined to fail. Traditionally, of course, a defendant in such a situation is said to be subject to general personal jurisdiction. But as I argue in the text, general jurisdiction is just a term for one of the conclusions generated by due process analysis.

D. *Constitutional Limits on Personal Jurisdiction*

1. *The General Rule*

Personal jurisdiction's concern for state interests and litigant convenience suggests that the constitutional analysis should turn on (1) an analysis of whether those interests are reasonable and legitimate in a given case and (2) an assessment of whether the costs, inconvenience, and legal burdens of litigating in another state render that process fundamentally unfair. The first issue mirrors the basic due process test for the legitimacy of state action, and the state fails this test only when there is no rational basis for its assertion of jurisdiction. As noted above, however, general federalism concerns suggest a modest refinement to this analysis: the forum state should not be able to exercise personal jurisdiction if another state or states has a significantly stronger interest. The second issue matches the basic due process test for procedural legitimacy. A state may not exercise personal jurisdiction if to do so would result in fundamental unfairness to the defendant.¹¹⁸

Stripped of its subsequent doctrinal epicycles, the Court's discussion in *International Shoe* fits this analysis. First, does the defendant have sufficient contacts with the forum to trigger a legitimate regulatory concern on the part of the forum? Second, is there any reason to think that the assertion of personal jurisdiction is inconsistent with fair play and substantial justice? If one reads *International Shoe* in a way that forwards concern for state interests as well as for distance, expectations, and borders, the following test emerges:

[A] state court may presumptively exercise jurisdiction over non-consenting defendants who know or ought to know that their voluntary acts or omissions, and/or the effects of those acts or omissions, implicate the legitimate regulatory interests of the forum state, unless the defendant demonstrates that (1) the forum state's interests in the litigation are minimal and significantly outweighed by those of another state or (2) the burdens on the defendant would make litigation in that forum significantly unfair in relation to another available forum and the potential burdens on the plaintiff.¹¹⁹

This test speaks the language of specific jurisdiction, but with a clear presumption in favor of personal jurisdiction when the state has a legitimate regulatory interest. Under this broad test, general jurisdiction would exist if the forum state's interests were so significant that the forum would have a legitimate regulatory interest in everything that the defendant were to do, whether or not within the forum. Critically, however, general jurisdiction would return to its former status within the *International Shoe* analysis. It would not be a separate category based on a sepa-

¹¹⁸ See Parry, *supra* note 3, at 853–54 (making the same point and citing other commentators who have done the same).

¹¹⁹ *Id.* at 857.

rate analysis that seeks to establish the defendant's "home." General jurisdiction is simply the label placed on the conclusion of the personal jurisdiction analysis, when that analysis establishes a sufficiently complex web of legitimate state regulatory interests over the defendant and the defendant's fairness claims turn on arguments about distance divorced from the legal disabilities of border crossing.¹²⁰

2. Federal Courts

My focus so far has been on state interests as the driver of personal jurisdiction analysis. Under Federal Rule of Civil Procedure 4(k)(1), federal district courts have personal jurisdiction in federal-question or diversity cases only if "a court of general jurisdiction in the state where the district court is located" would also have personal jurisdiction.¹²¹ Under a broad approach to personal jurisdiction, such as the proposal in this article, this limitation on personal jurisdiction in federal court probably does not impose serious constraints, particularly because Rule 4(k)(1) also provides that "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . (C) when authorized by a federal statute."¹²²

But personal jurisdiction in federal court deserves closer attention for at least two reasons. First, under current doctrine, Rule 4 may impose undue restrictions on federal court jurisdiction over litigants, because federal courts derive their power from the national sovereign, not from the individual state sovereigns. Second, under an interest-based approach to personal jurisdiction, personal jurisdiction in federal-question cases cannot turn on the degree of the federal interest if the Rule 4 test requires a focus on what state courts could do.

Fortunately, Rule 4(k) is not a constitutional mandate. Congress can change it outright, or the Advisory Committee on Civil Rules can propose changes. Numerous commentators have advocated revisions to Rule 4(k) that would allow every federal district court to exercise personal jurisdiction in federal-question cases—and perhaps also in diversity cases—whenever a defendant possessed a sufficient connection with the United States.¹²³ Such proposals mean, among other things, that every resident of the United States and every business located in the United States would

¹²⁰ See *supra* note 41 and accompanying text; *Cf. Int'l Shoe*, 326 U.S. at 316–17 (1945) (making a similar point about the concept of corporate presence: "[T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.").

¹²¹ FED. R. CIV. P. 4(k)(1).

¹²² *Id.*

¹²³ See Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 49 (1982); Klerman, *supra* note 110, at 717; Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1315–16 (2014); A. Benjamin Spencer, *Nationwide Personal Jurisdiction for Our Federal Courts*, 87 DENV. U. L. REV. 325, 329–330 (2010).

be subject to personal jurisdiction in every federal district for cases filed in federal court. Under these proposals, venue takes on the critical role, because concerns about fairness and convenience would get worked out through the venue selection and transfer process.

With respect to federal-question cases, the regulatory interest of the federal government easily justifies special personal jurisdiction rules for federal courts. For diversity, by contrast, the federal government does not have a direct substantive regulatory interest in the conduct at issue. It is true that in most diversity cases, Congress could have enacted a rule of decision, such that the creation of special personal jurisdiction rules for such cases can be seen as a lesser power that falls within the greater power to regulate. Greater-power-includes-the-lesser-power arguments have an intuitive force, but they are not always correct, and they generate constitutional and ethical issues in some contexts.¹²⁴ There is no need to address that issue here, however, because Congress also has a legitimate interest, granted by the Constitution, in the fair resolution of cases involving citizens of different states, whether or not the rule of decision is federal.¹²⁵ This interest appears sufficient to permit special personal jurisdiction rules in diversity cases that would allow federal district courts to exercise power over defendants even if no state court would possess such authority.

Whether it makes sense to change Rule 4, particularly for diversity cases, is a harder question.¹²⁶ Having a better overall personal jurisdiction doctrine that would also empower state courts is a more attractive option for diversity cases. Amending Rule 4, by contrast, would create an incentive to file state-law cases in federal court, although whether the ease of obtaining personal jurisdiction over distant defendants would outweigh the burdens of federal pleading and summary-judgment standards is difficult to say.

Finally, the move to personal jurisdiction based on national contacts or federal regulatory interests does not quash all of the constitutional problems of personal jurisdiction. Defendants still have (Fifth Amendment) due process rights against federal government action that is arbitrary or imposes unfair burdens, and federal court assertions of jurisdic-

¹²⁴ See Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693, 708 (2002); Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227; Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051, 1052 (1995); Mike Dorf, *Torture Versus Death and the Greater/Lesser Problem*, DORF ON LAW (Feb. 27, 2013), <http://www.dorfonlaw.org/2013/02/torture-versus-death-and-greaterlesser.html>.

¹²⁵ See U.S. CONST. art. III, § 2.

¹²⁶ See, e.g., Klerman, *supra* note 110, at 718 n.22 (noting reasons why state and federal personal jurisdiction should be the same in cases in which there is diversity of citizenship).

tion are not immune from due process constraints.¹²⁷ If these issues do not come up at the personal jurisdiction stage, then they will have to be addressed with venue. Thus, under the proposals to change Rule 4, venue doctrine becomes constitutional law, at least in part.¹²⁸ Still, the constitutional constraint on venue would be relatively minor. It would be more than the constraint imposed within a U.S. state, both because of distance and because crossing state borders might still impact the defendant's rights in some ways, even in federal court. But it would not be enough to make a difference in a significant percentage of cases (although the cases of greatest inconvenience might be exactly the kinds of cases that would find their way into federal court if Rule 4 were amended). Defendants in situations similar to Justice Kennedy's Florida farmers sued in Alaska are representative of the litigants who would present a compelling due process argument for a more convenient forum.¹²⁹ Yet even in such cases, transfer of venue, presumably under 28 U.S.C. § 1406,¹³⁰ would address any due process concerns created by nationwide service of process for federal-question cases.

E. *Some Responses to Potential Objections*

In this Section I want to highlight three potential objections to my analysis and to suggest responses to those objections.

¹²⁷ See, for example, the Eleventh Circuit's reasoning in *Republic of Panama v. BCCI Holdings (Lux.) S.A.*: "We discern no reason why these constitutional notions of 'fairness' and 'reasonableness' should be discarded completely when jurisdiction is asserted under a federal statute rather than a state long-arm statute. The language of the Fifth Amendment is virtually identical to that of the Fourteenth Amendment, and both amendments were designed to protect individual liberties from the same types of government infringement. Although the fact that the United States is the sovereign asserting its power undoubtedly must affect the way the constitutional balance is struck, the assertion of federal power should not cause courts to abandon completely their role as protectors of individual liberty and fundamental fairness." 119 F.3d 935, 945 (11th Cir. 1997) (footnote omitted) (citations omitted). As Allen Erbsen notes, four justices, none of whom are now on the Court, would have found no due process constraints at all on the exercise of personal jurisdiction by federal courts over residents of the United States, and the circuit courts are divided on the issue. See Erbsen, *supra* note 110, at 774–76. As I indicate in the text, I disagree with court holdings that suggest there can be no viable due process arguments against nationwide service of process. I agree, however, with Professor Erbsen that there likely would be no viable due process issue in a case such as *Walden v. Fiore*. See *id.* at 775–76.

¹²⁸ Cf. *id.* at 773–74 (suggesting constitutionalization of venue doctrine for physical location of litigation).

¹²⁹ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality opinion).

¹³⁰ If venue provided the doctrinal home for due process issues relating to the location of litigation, then § 1406 would be preferable to § 1404 in such cases because, if due process prevented a court from hearing a case in a particular location, venue in that location would be defective.

First, my analysis leads to a broad doctrine of personal jurisdiction for states, based on a starting assumption that the individual U.S. states have broad regulatory jurisdiction. But that assumption could be incorrect.¹³¹ To the extent the Constitution imposes greater constraints on state prescriptive jurisdiction than I have admitted, particularly with respect to regulation of conduct that takes place outside their borders, their adjudicatory jurisdiction would also diminish. That is to say, the scope of personal jurisdiction under my approach ebbs and flows with the regulatory authority of the states. Although I prefer a broader approach to personal jurisdiction, the risk that state regulatory jurisdiction is narrower than what I have claimed is not a significant concern. My primary goal is doctrinal recognition of the connection between regulatory and personal jurisdiction, even if the resulting doctrine does not match my preferences for the scope of state jurisdictional authority.

Second, if my claim about the breadth of state regulatory jurisdiction is correct, what happens to that authority if it is explicitly linked to personal jurisdiction? Perhaps an express correlation between the scope of the two doctrines would lead the Supreme Court to impose greater limits on state regulatory authority, at least in part from a desire to control personal jurisdiction. Some of those limits might make sense independent of personal jurisdiction concerns, although that is an issue that goes well beyond the scope of this paper. But, the Court might also limit state regulatory jurisdiction in undesirable ways.

In short, my proposal has a potential downside. Yet that is true of nearly any effort to improve personal jurisdiction doctrine, and the possible negative consequences might never come to pass. In the meantime, lower courts and litigants labor under the negative consequences of current doctrine. Further, there are safety valves in the analysis that I propose: a court must refuse personal jurisdiction when another state's interests clearly outweigh those of the forum and where there are strong fairness concerns. These limitations on the proposed doctrine could be refined and even expanded without damaging the scope of state regulatory jurisdiction.

Third, one might ask, what is wrong with divergence between regulatory and personal jurisdiction? My proposal assumes that symmetry is important and desirable, but is it?¹³² Again, however, the point of the pro-

¹³¹ See generally Florey, *supra* note 90, at 1081–83.

¹³² Thus, one might assert that choice-of-law doctrine undercuts the need for symmetry, because it rests on the premise that a forum court with jurisdiction over the defendant will apply the law of another jurisdiction that has a greater regulatory interest in the case. Perhaps choice of law was able to play that role decades ago, when personal jurisdiction and choice of law were grounded in ideas of territory and vested rights, but that is no longer the case. Choice-of-law doctrine no longer guides a court to a “best” choice of law. Instead, it allows courts to consider competing interests, and it recognizes that more than one jurisdiction’s law legitimately could apply. It may even allow a forum court to choose forum law instead of the law of the state(s) where important conduct or results took place.

positional is not to create symmetry for its own sake but rather to recognize a connection between these two forms of state power and to assert that this connection has significance within a federal constitutional order. I do not insist that regulatory jurisdiction and personal jurisdiction march in lock step all the way down to the level of every individual case. Over time and across cases, however, they should overlap extensively.

CONCLUSION

Legal doctrines rarely make perfect sense at any moment in time. That observation is particularly true for constitutional doctrine. But some legal doctrines make little sense over time, and they cry out for improvement. Personal jurisdiction is one of those areas. Personal jurisdiction doctrine would make much better sense if it were linked more closely to regulatory jurisdiction.

Bauman and *Walden* arguably show us a Court that is returning to its senses after the excesses of *Nicastró*. Now it is time for the Court to take the next step and forge a doctrine that reflects the actual role of states and of state interests in the federal system.