



# Reconciling Transnational Jurisdiction: A Comparative Approach to Personal Jurisdiction over Foreign Corporate Defendants in US Courts

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## ABSTRACT

*The U.S. Supreme Court, in a series of recent cases, has restricted personal jurisdiction over corporate defendants—and foreign corporations in particular. The Court’s restrictions are—although a peripheral concern—motivated by an interest for international comity and an effort to bring US jurisdiction rules more in line with other nations’ laws. However, an in-depth comparative analysis between the EU Brussels Regulation and U.S. Supreme Court opinions reveals that the Supreme Court’s decisions remain deeply grounded in the traditional US paradigm of personal jurisdiction. Predictability appears to have different meanings to the EU legislator and the U.S.*

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*Supreme Court. For the Supreme Court, predictability comes at the price of restricting both general and specific jurisdiction to limit exposure of the alien defendant to fewer potential forums. The Brussels Regulation, in contrast, provides an exhaustive list of special heads of jurisdiction. It takes into account the interests of defendants, plaintiffs, and the forum state. The Regulation's use of clearly defined connecting factors, combined with European rejection of judicial discretion, could serve as a model to mitigate the shortcomings of the current US regime.*

#### TABLE OF CONTENTS

|      |   |      |
|------|---|------|
| I.   | INTRODUCTION .....  | 1245 |
| II.  | PERSONAL JURISDICTION: TERMINOLOGY, FUNCTION, AND<br>INTERNATIONAL LAW .....                                      | 1251 |
|      | A. <i>Terminology and Function</i> .....  | 1252 |
|      | B. <i>International Sources</i> .....   | 1254 |
|      | 1. Supreme Court Precedent on International<br>Law .....  | 1255 |
|      | 2. The Role of General International Law for<br>Personal Jurisdiction .....                                       | 1258 |
| III. | PERSONAL JURISDICTION IN THE UNITED STATES .....  | 1260 |
|      | A. <i>US Sources</i> .....  | 1260 |
|      | B. <i>Characteristics</i> .....   | 1261 |
|      | 1. Procedural Due Process and Minimum<br>Contacts .....   | 1261 |
|      | 2. Purposeful Availment, Fairness to the<br>Defendant, and Predictability .....                                   | 1263 |
|      | 3. Territoriality, Federalism, and Authority ....   | 1268 |
|      | C. <i>Recent Developments</i> .....   | 1271 |
|      | 1. <i>BNSF Railway Co. v. Tyrrell</i> and <i>Bristol-<br/>           Myers Squibb Co. v. Superior Court</i> ..... | 1271 |
|      | 2. Parent-Subsidiary Corporate Structures .....   | 1274 |
|      | 3. Public Policy Concerns .....   | 1275 |
| IV.  | PERSONAL JURISDICTION IN THE EUROPEAN UNION .....   | 1278 |
|      | A. <i>European Sources</i> .....  | 1278 |
|      | 1. The Brussels Regime .....  | 1279 |
|      | 2. Domestic Jurisdictional Rules .....  | 1281 |
|      | B. <i>Characteristics</i> .....   | 1285 |
|      | 1. Harmonization and Right to a Fair Trial ....   | 1285 |
|      | 2. Predictability, Legal Certainty, and<br>Judicial Discretion .....  | 1288 |
|      | 3. Efficiency, Access to Justice, and Balancing<br>Competing Interests .....                                      | 1294 |
| V.   | CONCLUSION .....  | 1302 |

## I. INTRODUCTION

After decades of inactivity, the issue of personal jurisdiction over foreign corporate defendants with little to no physical presence in the forum state has resurfaced on the agenda of the U.S. Supreme Court<sup>1</sup> and is attracting attention from the legal community both domestically and internationally.<sup>2</sup> Until recently, American courts have treated personal jurisdiction generously, to say the least. Since *International Shoe Co. v. Washington (International Shoe)*,<sup>3</sup> most lower federal and state supreme courts have asserted personal jurisdiction over foreign or domestic out-of-state corporate defendants<sup>4</sup> whenever the corporation has engaged in sufficiently “continuous, systematic and substantial” activity in the forum state.<sup>5</sup> This broad criterion, while difficult enough to comprehend in domestic cases, proves particularly daunting in the international setting.

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1. See Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 43 (2012) (“Prior to the two personal jurisdiction cases that the Supreme Court promulgated in 2011, it had been nearly twenty-five years since the Supreme Court last considered whether a state court may exercise personal jurisdiction over a nonresident defendant who has no physical presence in the forum jurisdiction.”).

2. See generally Kate Bonacorsi, *Not at Home with “At-Home” Jurisdiction*, 37 FORDHAM INT’L L.J. 1821 (2014); Patrick J. Borchers, *One Step Forward and Two Steps Back: Missed Opportunities in Refining the United States Minimum Contacts Test and the European Union Brussels I Regulation*, 31 ARIZ. J. INT’L & COMP. L. 1 (2014); Donald Earl Childress III, *General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67 (2013); Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775 (2017); 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 (2015) [hereinafter Silberman *End*]; Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 PENN ST. L. REV. 617 (2017). For foreign commentary, see, for example, Lauren Reynolds & Mark Zimmer, *Die Einschränkung der Extraterritorialen Zuständigkeit Amerikanischer Gerichte durch den US Supreme Court*, RECHT DER INTERNATIONALEN WIRTSCHAFT 509 (2013) (Ger.); Joachim Zekoll & Michael Schulz, *Neue Grenzen für die Internationale Zuständigkeit Amerikanischer Gerichte*, 60 RECHT DER INTERNATIONALEN WIRTSCHAFT 321, 324–27 (2014) (Ger.); Sarah Migliorini, *Jurisdiction of US Federal Courts on Non-US-based Companies for Violations of Human Rights*, CAMBRIDGE INT’L L.J. (Mar. 12, 2014), <http://cilj.co.uk/2014/03/12/jurisdiction-federal-courts-non-us-based-companies-violations-human-rights-occurring-abroad-recent-case-law-us-supreme-court/> [https://perma.cc/X9UU-3VF4] (archived Sept. 14, 2018).

3. Compare *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) [hereinafter *Int’l Shoe*] (addressing specific jurisdiction), with *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) [hereinafter *Perkins*] (regarded as the “paradigm case” for general jurisdiction).

4. As discussed later in this article, US personal jurisdiction rules apply equally to foreign and domestic out-of-state corporate defendants. Therefore, in the following, and unless indicated otherwise, “out-of-state” refers to both domestic and foreign out-of-state defendants.

5. See Robertson & Rhodes, *supra* note 2, at 779 n.16 (noting that before *Daimler* “[t]reatises printed as black letter law that corporations were subject to general jurisdiction wherever they engaged in a sufficiently high level of business activity” and that a leading casebook presented it as settled law).

Foreign corporations have faced lawsuits before US courts in cases with—in their eyes—little connection to the forum state in situations where their own domestic courts would typically deny jurisdiction.<sup>6</sup> Combined with special features of US procedural and substantive law such as class actions, contingent fees, discovery, and punitive damages, the U.S. Supreme Court’s “minimum contacts rule”<sup>7</sup> exasperates alien companies<sup>8</sup> and has spurred protest from foreign governments.<sup>9</sup> Though consternation over the US legal system may sometimes be exaggerated or emanate from false or incomplete information,<sup>10</sup> studies indicate foreign companies doing business in the United States rank “fear of legal liability” as among their top concerns.<sup>11</sup> They view “the legal system as a drawback regarding investment in the United States” and are concerned with the high legal costs and a perceived lack of predictability and litigation fairness,<sup>12</sup> which puts the United States at a competitive disadvantage in attracting foreign investment despite its otherwise business-friendly regulatory environment.<sup>13</sup>

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6. See Rolf Stürner, *Der Justizkonflikt zwischen U.S.A. und Europa*, in *DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA* 3, 6–9, 20 (Walther J. Habscheid ed., 1986) (Ger.) (providing numerous examples).

7. *Int’l Shoe*, 326 U.S. at 316 (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”).

8. See Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1006 (2006) (“Europeans are said to fear U.S. courts like medieval torture chambers; they regularly regard assertions of jurisdiction by U.S. courts as acts of judicial hegemonialism.”); see also Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court’s New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT’L L. & POL’Y 209, 212 (2015) (suggesting that due to the differences in procedural rules such as the broad US discovery rules foreign companies “may seek to avoid the jurisdiction of American courts”).

9. See *Daimler A.G. v. Bauman*, 571 U.S. 117, 141–42 (2014) [hereinafter *Daimler*] (holding that the Court was informed by the Solicitor General “that ‘foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.”); see also Stürner, *supra* note 6, at 7; Brief of Government of Switzerland as Amicus Curiae in Support of Petitioner, *Société Nationale Industrielle Aérospatiale v. United States District Court for the District of Iowa*, 482 U.S. 522 (1986).

10. U.S. DEP’T OF COMMERCE, *THE U.S. LITIGATION ENVIRONMENT AND FOREIGN DIRECT INVESTMENT SUPPORTING U.S. COMPETITIVENESS BY REDUCING LEGAL COSTS AND UNCERTAINTY* 6 (2008), [https://www.trade.gov/investamerica/Litigation\\_FDI.pdf](https://www.trade.gov/investamerica/Litigation_FDI.pdf) [<https://perma.cc/5A7Y-ZJDC>] (archived Aug. 28, 2018) (“[T]he highly complex and fragmented nature of our legal system has led to a perception that penalties are arbitrary and unfair, a reputation that may be overblown, but nonetheless diminishes our attractiveness to international companies.”).

11. *Id.* at 5–6 (citing EUROCHAMBRES CHAMBER OF COMMERCE & U.S. CHAMBER OF COMMERCE, *OBSTACLES TO TRANSATLANTIC TRADE AND INVESTMENT* 10–12 (2005)).

12. *Id.* at 6.

13. The United States is consistently ranked among the top countries in the world for ease of doing business. See MCKINSEY & COMPANY, *SUSTAINING NEW YORK’S AND THE US’ GLOBAL FINANCIAL SERVICES LEADERSHIP* 77, <http://www.nyc.gov/html/om/pdf/>

The United States is not alone, however, in providing “exorbitant jurisdiction.”<sup>14</sup> European countries allow plaintiffs access to their courts based on rules that are deeply concerning from an American perspective.<sup>15</sup> Legal commentators have called the difference in opinions and concepts a “justice conflict” between the United States and predominantly civil law European jurisdictions.<sup>16</sup> This disharmony has impeded international treaty negotiations,<sup>17</sup> and prevents mutual recognition of judgments<sup>18</sup> while also placing

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ny\_report\_final.pdf (last visited Mar. 19, 2018) [<https://perma.cc/UK2U-9QNC>] (archived Aug. 28, 2018) (finding New York underperformed compared to London when it comes to a fair and predictable legal environment and only about 15 percent of the surveyed senior executives “felt that the US [legal] system was better than the UK’s in terms of predictability and fairness, while over 40 percent favored the UK in both these regards”); see also *Rankings & Ease of Doing Business Score*, THE WORLD BANK, <http://www.doingbusiness.org/rankings> (last visited Mar. 19, 2018) [<https://perma.cc/2WV6-4K38>] (archived Aug. 28, 2018).

14. See Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 476 (2006) (defining “[e]xorbitant jurisdiction” as a “jurisdiction exercised validly under a country’s rules that nevertheless appears unreasonable because of the grounds necessarily used to justify jurisdiction”).

15. See Michaels, *supra* note 8, at 1007–08 (pointing towards jurisdiction based on the nationality of the plaintiff, the presence of the defendant’s property, or where a tort was committed in certain European countries).

16. Jurisdiction is but one aspect of the conflict. Europeans criticize wide-reaching US discovery rules, punitive damages, and the US contingency fee, while Americans are critical about far-reaching EU privacy rules and limitations on freedom of expression. See *id.* at 1006 (referring to American outrage over “France asserting jurisdiction over Yahoo! on the mere basis that its website was accessible from French computers”); see also Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT’L ECON. L. 1297, 1317–38 (2004) (describing the evolution of the justice conflict between the United States and Germany). See also generally Stürner, *supra* note 6.

17. See generally Audrey Feldman, Note, *Rethinking Review of Foreign Court Jurisdiction in Light of the Hague Judgments Negotiations*, 89 N.Y.U. L. REV. 2190 (2014). The original round of negotiations for the Hague Judgments Project ran between 1996 and 2001 and sought to draft a treaty that would regulate not only jurisdiction internationally but also recognition and enforcement of foreign judgments. This round failed, however, in part due to American delegates’ perception that the treaty provisions would be incompatible with Due Process Clause provisions in the U.S. Constitution’s Fourteenth Amendment and the prevailing “minimum contacts” test. Discussions resumed in 2012 but do not deal with personal jurisdiction regulation to avoid the pitfalls of the subsequent round. Instead, it seeks to regulate the recognition and enforcement of foreign judgment through “jurisdictional filters,” which allow the court located where enforcement is sought to review the jurisdiction of the court of origin. See *id.* at 2193.

18. See generally Samuel P. Baumgartner, *How Well do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT’L L. REV. 173 (2008).

economic burdens on plaintiffs and defendants.<sup>19</sup> Recent Supreme Court decisions suggest that this may be about to change.<sup>20</sup>

In a series of cases decided between 2011 and 2017, the Supreme Court appeared to take steps toward gradually restricting personal jurisdiction over corporate defendants in general—and foreign corporations specifically. In *J. McIntyre Machinery, Ltd. v. Robert Nicastro* (*McIntyre*), the Court limited specific jurisdiction in a product liability case requiring the plaintiff to show that the corporate defendant intended to “conduct [] activities within the forum State” where the injury had happened,<sup>21</sup> thereby denying personal jurisdiction—where, ironically, European courts would have granted it.<sup>22</sup>

In both *Goodyear Dunlop Tires Operations, S.A. v. Brown* (*Goodyear*)<sup>23</sup> and *Daimler A.G. v. Bauman* (*Daimler*), the Court limited general personal jurisdiction over alien corporations—except for “exceptional case[s]”<sup>24</sup>—to their “place of incorporation and principal place of business,”<sup>25</sup> in an attempt to bring US rules more in line with international approaches.<sup>26</sup>

The two most recent cases confirm the trend toward an increasingly narrow and more formalistic approach to personal jurisdiction over out-of-state corporate defendants.<sup>27</sup> Though mainly dealing with issues of venue, in *BNSF Railway Co. v. Tyrrell* (*BNSF*),<sup>28</sup>

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19. Instead of focusing on the substantive matter of the dispute, parties may have to spend considerable time and money on litigating the court’s competence to even hear the case. See Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1294–95 (1981) (discussing the hard-to-measure opportunity costs legal uncertainty creates with regard to innovation).

20. See Robertson & Rhodes, *supra* note 2, at 787 (“[T]he need of foreign companies for protection against litigation in U.S. courts is less today than it has been in decades, in both absolute and comparative dimensions.”).

21. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) [hereinafter *McIntyre*] (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) [hereinafter *Hanson*]).

22. See Borchers, *supra* note 2, at 4 (“[T]he English defendant clearly would have been subject to jurisdiction were New Jersey part of the E.U. and not the United States.”); Feldman, *supra* note 17, at 2205 (discussing a “reverse-*McIntyre*” case under EU jurisdiction rules).

23. See generally *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011) [hereinafter *Goodyear*].

24. *Daimler A.G. v. Bauman*, 571 U.S. 117, 139 n.19 (2014).

25. *Id.* at 137 (“With respect to a corporation, the place of incorporation and principal place of business are ‘paradig[m] . . . bases for general jurisdiction.’”); see also *Goodyear*, 564 U.S. at 919 (explaining to assert general jurisdiction over foreign corporations, the Supreme Court required the defendant to essentially be “at home” in the forum state).

26. See *Daimler*, 571 U.S. at 141 (“Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case . . .”).

27. See Robertson & Rhodes, *supra* note 2, at 788 (“[a]fter a century of being widely discredited, legal formalism has made a comeback into the heart of American legal practice”).

28. See generally *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) [hereinafter *BNSF*].

the Supreme Court, applying its holding from *Daimler*, found BNSF's contacts to the forum were in no way substantial enough to form an "exceptional case," nor "of such a nature as to render the corporation at home in that State."<sup>29</sup> In *Bristol-Myers Squibb Co. v. Superior Court (Bristol-Myers)*,<sup>30</sup> the Court held that a state court has jurisdiction over a nationally operating corporation only if all plaintiffs were injured in the forum state, *de facto* limiting nationwide class actions and mass joinders to the corporation's place of incorporation or principal place of business, notwithstanding the judicial remedy of federal multidistrict litigation.<sup>31</sup>

While *Goodyear* and *Daimler* have already produced considerable commentary,<sup>32</sup> the most recent cases have less so.<sup>33</sup> It is yet unclear whether the decisions indeed revolutionize personal jurisdiction rules,<sup>34</sup> clarify precedent previously applied inconsistently by lower

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29. *Id.* at 1553.

30. *See generally* *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017) [hereinafter *Bristol-Myers*].

31. *Id.* at 1784 (Sotomayor, J., dissenting) (arguing that the majority opinion will "result in piecemeal litigation and the bifurcation of claims"). For the decision's impact on class actions and multidistrict litigation, see generally Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Meyers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. (forthcoming 2018), <https://ssrn.com/abstract=3082527> [<https://perma.cc/AZ6K-UXSS>] (archived Sept. 14, 2018).

32. Previous articles have commented on the 2011 and 2014 cases either from a domestic perspective (*see generally* Vitiello, *supra* note 8), or they have compared isolated aspects of the US and EU approach to personal jurisdiction. *See, e.g.*, Borchers, *supra* note 2; Ronald A. Brand, *Access-to Justice Analysis on a Due Process Platform*, 112 COLUM. L. REV. SIDEBAR 76 (2012); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L. L. 327 (2004) [hereinafter *Silberman Impact*]; Samuel P. Baumgartner, *The External Dimensions of the European Law of Civil Procedure—A Transatlantic Perspective* (Univ. of Akron Sch. of Law Legal Stud. Research Paper Series, 2016), <http://ssrn.com/abstract=2742330> [<https://perma.cc/8QSF-2V25>] (archived Sept. 14, 2018). Michaels, *supra* note 8, provides an in-depth comparison of the US and EU jurisdictional "paradigm," but his thorough analysis has in part been overturned by the recent Supreme Court decisions and changes in EU law. The present Article attempts a comprehensive comparison between the current US and EU approach to personal jurisdiction over foreign corporate defendants.

33. *See generally* Alexandra Wilson Albright, *Personal Jurisdiction*, 30 APP. ADVOC. 9 (2017); Bradt & Rave, *supra* note 31; Todd E. Pettys, *From Playgrounds to Plavix: Civil Cases in the Supreme Court's October 2016 Term*, 53 COURT REV. 98, 104–05 (2017); *The Supreme Court 2016 Term: Leading Case: Federal Jurisdiction & Procedure – Personal Jurisdiction—BNSF Railway Co. v. Tyrrell*, 131 HARV. L. REV. 333 (2017).

34. *See* Robertson & Rhodes, *supra* note 2, at 782 (calling the Supreme Court's decision in *Daimler* a "major change" requiring "re-writing every first-year Civil Procedure casebook, as the "continuous and systematic" test had been previously viewed as well-settled law). *But see* Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1, 3 (2014) (arguing that three out of four of the Supreme Court's 2011 and 2014 decisions were "utterly predictable" suggesting that they may be less revolutionary than some commentators think); John T. Parry, *Rethinking Personal Jurisdiction after Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607, 610 (2015)

courts,<sup>35</sup> or raise more new questions in the place of those questions answered.<sup>36</sup> Policy considerations, as expressed by Justice Sotomayor in her dissenting opinions for *Daimler*, *BNSF*, and *Bristol-Myers*, could serve as a future point of contention for the Court. Additionally, the role of international law in formulating these jurisdictional rules has barely been addressed in either case law or scholarly commentary.

Based on a comparative analysis of jurisdictional rules in the United States and Europe, this Article discusses whether the renovated US paradigm of personal jurisdiction is apt to govern personal jurisdiction of global market realities in an equitable and effective manner. The Article analyzes how the two most recent decisions contribute to further defining jurisdiction in relation to foreign corporate defendants and the degree to which they help—or hurt—to reconcile opposing views both in and outside the United States. It argues that the Supreme Court’s decisions since 2011, though importing certain elements of EU law into US jurisprudence, remain deeply grounded in the traditional US paradigm of jurisdiction, leading to inconsistent results and a lack of a theoretically sound personal jurisdiction doctrine,<sup>37</sup> despite the Supreme Court’s concern for other nations’ divergent jurisdiction rules as expressed in *Daimler*.<sup>38</sup> This Article suggests that, in order to improve predictability and trust in the fairness of the US judicial system internally and internationally, an entirely different approach, which breaks with traditional notions, may be needed. One way to achieve this goal could be to adopt the formalistic model of the EU Brussels Regulation<sup>39</sup> and limit general personal jurisdiction while expanding specific jurisdiction in a way that is predictable, equitable, and in line with constitutional due process requirements.

To this effect, Part II discusses the meaning and function of personal jurisdiction in the United States and the European Union and analyzes the role of international law as a source for jurisdictional

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(arguing that *Daimler* and *Walden* achieve little more than “disposing of Nicastro” by “reanimating the “minimum contacts plus reasonable test”).

35. See *Bristol-Myers*, 137 S. Ct. at 1781 (“[O]ur settled principles regarding specific jurisdiction control this case.”).

36. See also Robertson & Rhodes, *supra* note 2, at 790–94 (discussing “unanswered questions” such as the “scope of the relatedness requirement for specific jurisdiction”). See generally Silberman *End*, *supra* note 2 (discussing several open questions arising out of the Supreme Court’s *Daimler* decision).

37. See Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction*, 36 HARV. INT’L L.J. 373, 390 (1995) (suggesting “[d]octrine-makers fail in their craft when their legal doctrines do not accurately reflect the underlying paradigm”).

38. See *Daimler A.G. v. Bauman*, 571 U.S. 117, 141 (2014) (referencing EU rules of general jurisdiction).

39. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1, 3 [hereinafter Brussels Regulation].

rules. Part III reviews the development of Supreme Court precedent and identifies the main sources and characteristics of US personal jurisdictional rules. It summarizes the recent decisions in *BNSF* and *Bristol-Myers* and places them within the earlier Supreme Court precedent. It also examines policy concerns raised by the minority opinions in *Daimler*, *BNSF Railways*, and *Bristol-Myers*. Part IV compares the US approach to that of the European Union and selected individual EU countries, particularly Germany, where much of the academic literature on the alleged US–EU justice conflict originates. It identifies fundamental differences and analyzes the degree of and prospects for convergence between the two jurisdictional regimes. Part V concludes.

## II. PERSONAL JURISDICTION: TERMINOLOGY, FUNCTION, AND INTERNATIONAL LAW

Rules of personal jurisdiction in the United States allow the adjudicating authority to determine whether it is competent to render a judgment against a particular defendant.<sup>40</sup> Various interests are at stake when developing rules that govern jurisdiction of domestic courts over foreign corporate defendants. Accordingly, jurisdictional rules can fulfill different functions in different jurisdictions.<sup>41</sup> Before examining the content and underlying rationale of the existing US and EU rules, it is necessary to first gain a basic understanding of what personal jurisdiction actually means. The following subpart compares the meaning and function of the terms used to describe personal jurisdiction in the United States and foreign legal systems.

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40. In light of this function, and in reference to the adjudicatory authority, the terms adjudicatory or jurisdictional jurisdiction are often used synonymously. See Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 282–83 (1985) (defining adjudicatory jurisdiction as “the willingness of a given politically organized society to furnish the law-applying agency—usually, but not necessarily, a court—for the adjudication of a matter involving significant elements that are not domestic to that society” and differentiating adjudicatory from jurisdictional jurisdiction, subject matter jurisdiction and venue).

41. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (“In determining whether personal jurisdiction is present, a court must consider a variety of interests.”); see also Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1252 (2017) (arguing “[a]s general law, jurisdiction is something on which different court systems can disagree”).

### A. Terminology and Function

Under US law, personal jurisdiction is a court's power to hear a case depending on the identity of the parties in the suit.<sup>42</sup> An out-of-state party who believes it is unfair to stand trial before the courts of that foreign state can object based on lack of personal jurisdiction.<sup>43</sup> Personal jurisdiction is different from venue—the territorial allocation of cases within a state's jurisdiction.<sup>44</sup>

Concepts similar to that of personal jurisdiction exist in foreign countries. However, terminology and function differ. The common terminology in many civil law jurisdictions is not personal jurisdiction, but “international competence.”<sup>45</sup> Unlike rules of personal jurisdiction in the United States, international competence determines jurisdiction exclusively in the international context, even in countries with a federal political system, such as Germany.<sup>46</sup> International competence deals with the distribution of judicial power between sovereign countries, while the territorial allocation of a case to a court in Berlin or Munich—though these two cities are located in different German federal states (*Länder*)—is a question of venue (*örtliche Zuständigkeit*).<sup>47</sup> A court typically decides on international competence by its own motion.<sup>48</sup> An appeal may be based on the lack

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42. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“Historically, the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person . . .”).

43. See Michaels, *supra* note 8, at 1032–33 (observing that in the United States jurisdiction is seen as “public intrusion into the defendant's freedom”).

44. Both a lack of personal or subject matter jurisdiction and improper venue are available to a defendant as grounds to dismiss suit. FED. R. CIV. P. 12(b)(1)–(3). Venue is governed by federal statute (see 28 U.S.C. § 1391 (2012)), and operates exclusively from personal jurisdiction. See *Polizi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953) (“In a case where [28 U.S.C. § 1391] applies, if its requirements are not satisfied, the District Court is not deprived of jurisdiction, although dismissal of the case might be justified if a timely objection to the venue were interposed.”). In either case, if a court finds that it lacks personal jurisdiction or is not a suitable venue, it must dismiss the case. Such a decision, like all judgments, are available to appeal, or can be brought in a more suitable forum.

45. Internationale Zuständigkeit in German speaking countries such as Germany, Switzerland, or Austria; compétence internationale in French.

46. See Christof von Dryander, *Jurisdiction in Civil and Commercial Matters under the German Code of Civil Procedure*, 16 INT'L L. 671, 672–73 (1982) (noting German states do not “enjoy jurisdictional power,” and, in contrast to the United States, “there is only one system of courts of general jurisdiction”).

47. See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Title 2, §§ 12–37, <https://www.gesetze-im-internet.de/zpo/> (Ger.); see also Code de Procédure Civile [C.P.C.] [CIVIL PROCEDURE CODE] Chapitre II: La Compétence Territoriale, <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716> (Fr.).

48. See REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT 665 (2015) (Ger.) (noting defendant can waive his right to object to an internationally incompetent court); Brussels Regulation, *supra* note 39, art. 28 (providing that “the court shall declare of its own motion, that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Regulation”).

of international competence, but not on a lack of territorial (venue) or subject-matter jurisdiction.<sup>49</sup>

The difference in terminology reflects an important difference in function.<sup>50</sup> International competence determines if the country's court system as a whole has the authority to decide an international case, or whether the courts of another country are better suited to adjudicate.<sup>51</sup> This is similar to the function of choice of law rules, but different from the way personal jurisdiction is currently conceptualized in the United States.<sup>52</sup> First, US jurisdiction rules decide not whether the US court system, in general, has jurisdiction over a foreign defendant, but if a particular federal or state court has jurisdiction.<sup>53</sup> Second, US personal jurisdiction rules do not assign competence between sovereign jurisdictions but determine if the defendant, as a function of constitutional due process, can fairly and reasonably be expected to stand trial in the state where she or he has been sued.<sup>54</sup>

In some foreign civil law jurisdictions, courts will determine if they have "judicial power" over the defendant separately from their international competence.<sup>55</sup> "Judicial power" means that a country has the authority to submit certain foreign persons or organizations (such as diplomats, international organizations, or foreign states) to the jurisdiction of its domestic courts.<sup>56</sup> As an issue of sovereignty between nations, this is mainly a question of international law. While a defendant may appeal a judgment rendered by an internationally

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49. See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Title 2, § 513, <https://www.gesetze-im-internet.de/zpo/> (Ger.). However, the ability of the defendant to invoke international incompetence on appeal requires that the defendant has objected to the court's lack of international competences before making an appearance in oral argument on the merits before the court of first instance. See GEIMER, *supra* note 48, at 39.

50. See Michaels, *supra* note 8, at 1018 (suggesting that Americans and Europeans do not mean the same thing by "jurisdiction" and that this fundamental difference is a reason for why the negotiations for an international convention on jurisdiction and recognition of judgments at the Hague failed).

51. See Reinhard Patzina, in 1 MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, 195 (Wolfgang Krüger & Thomas Rauscher eds., 2016) (Ger.) (noting that international competence distributes jurisdictional tasks between countries, but that international law prohibits one country from assigning judicial power to another sovereign country).

52. See Peter Hay, *The Interrelation of Jurisdiction and Choice-of-Law in United States Conflicts Law*, 28 INT'L & COMP. L.Q. 161, 183 (1979) (advocating for synchronization of jurisdiction and choice of law rules).

53. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) ("[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis."). *But see id.* at 904 (Ginsburg, J., dissenting) (suggesting that a foreign defendant is responsible for its actions on the territory of the United States as a whole as opposed to the territory of the state of incorporation of its US subsidiary).

54. See generally Michaels, *supra* note 8.

55. See Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], 1975, BUNDESGESETZBLATT (BGBl) at Title 1, §1 (Ger.); Legge 31, Art. 3 maggio 1995, n.218, in G.U. June. 3, 1995, n.128 (It.).

56. See, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (2012).

incompetent court, a decision rendered by a court without “judicial power” leads to the judgment being void.<sup>57</sup> In the United States, other Anglo-Saxon countries, and also in Austria—a civil law country—both issues fold into a single personal jurisdiction analysis.<sup>58</sup>

### B. *International Sources*

Surprisingly absent from the current debate is the role international law plays in determining personal jurisdiction in cases involving an international element which, for the purpose of this discussion, this Article will call “international jurisdiction.”<sup>59</sup> Legal commentators have analyzed differences between and convergences of countries’ systems of jurisdictional rules.<sup>60</sup> They have advocated for an international agreement on jurisdiction and recognition of judgments, but have rarely examined existing general rules of international law as a possible source of—or limitation to—international jurisdiction, or have quickly discarded them as irrelevant.<sup>61</sup> Discussion of international law typically is limited to questions of immunity,<sup>62</sup> while international jurisdiction is treated as a matter of domestic law.<sup>63</sup>

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57. Patzina, *supra* note 51, at 200 (arguing that if a court has no judicial power over the defendant, a decision rendered by that court will not have any effect on the defendant; therefore, that decision will be void).

58. See 28 U.S.C. § 1604 (2012) (stating “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States”); see also Patzina, *supra* note 51, at 196 (explaining Austrian or English law, for example, do not distinguish between international competence and judicial power).

59. The term combines elements of international competence and personal jurisdiction. It excludes domestic intrastate cases.

60. See generally Baumgartner, *supra* note 32.

61. See HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 87 (2014) (Ger.) (stating that there are no rules of international law that limit a state’s power to determine when its courts should have jurisdiction over international cases). *But see* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 16–20 (1987) (reviewing the importance of international law for judicial jurisdiction from the nineteenth century until the enactment of the 1968 Convention on the Jurisdiction of Courts and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, as amended, 21 O.J. EuR. Comm. (No. L 304) 77 (1978) [hereinafter Brussels Convention]).

62. See William S. Dodge, *The Customary International Law of Jurisdiction in the Restatement (Fourth) of Foreign Relations Law*, OPINIO JURIS (Mar. 8, 2018, 2:01 AM), <http://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/> [https://perma.cc/MPA4-A8Y4] (archived Aug. 27, 2018) (quoting RESTATEMENT FOURTH OF THE FOREIGN RELATIONS LAW OF THE U.S., intro. note, Part III (Am. Law Inst., Jurisdiction Tentative Draft No. 2, 2016) [hereinafter RESTATEMENT FOURTH]) (“With the significant exception of various forms of immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate.”).

63. See GEIMER, *supra* note 48, at 360 (stating that international law ideally should distribute international competence among nations; however, in the absence of international customary law countries are free to develop their own rules).

## 1. Supreme Court Precedent on International Law

In line with this thinking,<sup>64</sup> the U.S. Supreme Court has not applied international law in the limited number of international personal jurisdiction cases it has decided to date. In *Helicopteros Nacionales de Columbia, S.A. v. Hall (Helicopteros)*<sup>65</sup> and *Perkins v. Benguet Consolidated Mining Co. (Perkins)*,<sup>66</sup> the Court applied the minimum contacts test that had been developed for domestic defendants in *International Shoe* to foreign defendants without even mentioning international law, nor addressing whether this domestic standard was proper for the international character of the case.<sup>67</sup>

In *Asahi Metal Industry Co. v. Superior Court (Asahi)*, the Court acknowledged “that unique factors are involved in asserting personal jurisdiction over a foreign defendant.”<sup>68</sup> Nevertheless, it did not discuss how relevant rules of international law were to the case.<sup>69</sup> Similarly, in *Goodyear*, the Court discussed the international character of the case, ultimately requiring a corporation’s foreign subsidiary to essentially “be at home” in the forum state.<sup>70</sup> Nevertheless, like in previous decisions, these limitations were based on the Court’s application of the domestically slanted minimum contacts test without any mention of rules of international law.

Some federal courts have used what has been referred to as the “aggregate” or “national contacts” test in international cases.<sup>71</sup> Under this test, when searching for minimum contacts to establish jurisdiction over an alien corporate defendant, courts have analyzed the defendant’s contacts with the United States “as a whole” rather than its contacts in individual US states.<sup>72</sup> However, they have done so using the same rules of personal jurisdiction used for domestic cases, and the majority of state and federal courts refuse to treat personal jurisdiction over foreign defendants as different from that over

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64. This thinking is now also reflected in RESTATEMENT FOURTH, *supra* note 62. See Dodge, *supra* note 62 (stating that contrary to RESTATEMENT (THIRD), “[t]he Restatement (Fourth) does not have a . . . section restating the customary international law on jurisdiction to adjudicate because . . . modern customary international law generally does not impose limits on jurisdiction to adjudicate”).

65. See generally *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984) [hereinafter *Helicopteros*].

66. See generally *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

67. See Born, *supra* note 61, at 6.

68. Strauss, *supra* note 37, at 386 (citing *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 115 (1985) [hereinafter *Asahi*]).

69. See *id.*

70. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 (2011) (holding that a corporation’s foreign subsidiaries that are “in no sense at home” in the forum state cannot be required to submit itself to that forum’s general jurisdiction).

71. See Borchers, *supra* note 2, at 20 (“[T]here is strong lower court authority that under the Fifth Amendment, the standard is minimum contacts with the United States as a whole, rather than with the particular forum state . . .”).

72. Born, *supra* note 61, at 9–10.

domestic defendants.<sup>73</sup> The Supreme Court in *McIntyre* rebuked the aggregate contacts test, holding that “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis . . . . Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”<sup>74</sup> In her dissent, Justice Ginsburg, with passing reference to international law, argued that the UK defendant targeted “the United States as a single market” as opposed to just the state of New Jersey, where the product liability suit in question arose, but where the defendant maintained no physical presence.<sup>75</sup> However, the reference to international law in Justice Ginsburg’s opinion solely served to overcome the majority’s argument that the UK defendant did not “purposefully avail” itself of jurisdiction in New Jersey, not as a legal basis for personal jurisdiction over the foreign corporate defendants, which remained anchored in due process requirements per the U.S. Constitution.<sup>76</sup>

Finally, in *Daimler*, the majority opinion noted that “the transnational context of this dispute bears attention”<sup>77</sup> and expressly considered other nations’ diverging perspectives on personal jurisdiction, stating: “Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”<sup>78</sup> Nevertheless, as in previous holdings, the Court did not look to rules of international law to resolve the issue of personal jurisdiction over Germany-based company Daimler AG. Instead, it referred to US constitutional law, stating: “Considerations of international rapport thus reinforce our determination that subjecting

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73. See *id.* at 6–10 (analyzing Supreme Court precedent, state and federal decisions, and concluding that the majority refuses to apply different standards to international defendants); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 421 cmt. f (AM. LAW INST. 1987) [hereinafter RESTATEMENT THIRD] (“In the United States, the criteria for determining the reasonableness of an exercise of jurisdiction to adjudicate by State courts are generally similar to those for federal courts, but they are applied on a local (State) rather than a national basis. Thus, the courts of a State of the United States may exercise jurisdiction to adjudicate pursuant to paragraphs (b) and (c) of Subsection (2) only if the person in question has his domicile or residence in that State; pursuant to paragraphs (h), (i), and (j) only if the business or activity is carried out or has effect in that State; and pursuant to paragraph (k) only if the thing is situated in that State. Jurisdiction to adjudicate on the basis of United States nationality or citizenship in accordance with Subsection (2)(d) may be exercised by State courts pursuant to federal statute; whether they can do so on the authority of the State alone has not been determined. It may not be unreasonable for a State to exercise jurisdiction to adjudicate on the basis of State citizenship in a limited category of cases. Compare § 402, Reporters’ Note 5.”).

74. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).

75. *Id.* at 905 (Ginsburg, J., dissenting).

76. *Id.* (“*McIntyre UK*, by engaging *McIntyre America* to promote and sell machines in the United States, ‘purposefully availed itself’ of the United States market nationwide . . .”).

77. *Daimler A.G. v. Bauman*, 571 U.S. 117, 119 (2014).

78. *Id.* at 141 (referencing EU law).

Daimler AG to the general jurisdiction of courts in California would not accord with the ‘fair play and substantial justice’ due process demands.”<sup>79</sup> “Fair play and substantial justice” are elements of personal jurisdiction under the United States’ Fourteenth Amendment’s Due Process Clause as developed by the Supreme Court. There is no international custom that these criteria are—or should be—the guiding principles when determining personal jurisdiction. On the contrary, foreign laws use different factors and legal commentators have long criticized the United States for relying on such imprecise notions for determining personal jurisdiction.<sup>80</sup> The elements of “fair play and substantial justice” are therefore not general principles of international law and the Supreme Court certainly does not intend to treat them as such. Rather, by linking “considerations of international rapport” to due process, the Court tries to pay tribute to other countries’ sovereignty while remaining within the contours of its own precedent.<sup>81</sup>

As laudable as the Court’s respect for foreign countries’ interests may be, qualifying them as an element of due process seems theoretically flawed. Consideration of international rapport is nothing more than international comity and, as such, part of diplomatic relations. “Fair play and substantial justice” as developed by the Supreme Court, on the other hand, protect the right of the defendant to a fair trial under the Due Process Clause, sidelining the interests of the international legal community for more predictable or internationally harmonized jurisdictional rules.

One could argue that consideration of other nations’ more limited approaches to jurisdiction protects the defendant from being sued in a court the defendant could not reasonably expect to be competent to judge her case based on her home state jurisdictional rules. A disappointment of these expectations would have significantly more severe consequences for the foreign defendant who, expecting a court in Germany, is instead enjoined as a defendant in a US court, versus her domestic counterpart, who might expect to be a party before a New York court rather than a court in California. The foreign defendant risks navigating a legal system that differs dramatically from the one she is familiar with, including discovery practices, legal fees, and amount of potential damages.<sup>82</sup> Ultimately, to meet fairness and justice requirements, this would result in a separate due process test for foreign defendants, which would require the foreign defendant to

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79. *Id.* at 142.

80. *See, e.g.*, SCHACK, *supra* note 61, at 181 (criticizing the Supreme Court’s use of the term “traditional notions of fair play and substantial justice” in *Asahi* as an “empty shell”).

81. *Daimler*, 571 U.S. at 142.

82. *See* Born, *supra* note 61, at 39 (arguing “[f]or these reasons, requiring a foreign defendant to litigate in the United States, rather than in another country, has major consequences and can impose significant hardship”).

have stronger contacts in the forum than a domestic defendant.<sup>83</sup> Though this may constitute a theoretically sound solution, it represents a far more radical departure from Supreme Court precedent than the international comity considerations in *Daimler*.

## 2. The Role of General International Law for Personal Jurisdiction

Why is it that international law receives such little attention as a source for personal jurisdiction rules, and what role could it potentially play? As jurisdiction over foreign persons is inherently international, some commentators have argued for an international law of jurisdiction in civil and commercial matters.<sup>84</sup> However, its potential role is heavily disputed.<sup>85</sup> Some argue that there is no room for international law in adjudicatory jurisdiction because it leaves the sovereignty of other nations untouched. The judgment itself, they argue, does not have any effect on the territory of the foreign state unless that state decides to recognize and enforce it. Therefore, absent international treaties or conventions, or in cases of immunity, a state is free to determine for itself when its courts should have jurisdiction without further limitations by international law.<sup>86</sup>

Others argue a judgment as a command by a public court needs to obey limits of public international law just like orders by a sovereign's legislative or executive branch.<sup>87</sup> International jurisdiction and recognition of foreign judgments are two sides of the same coin. To promote an effective international judicial system, foreign countries' concerns need already be addressed at the jurisdictional level, rather than the enforcement level.<sup>88</sup> One author compares international

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83. See *id.* at 7–8 (referencing state court decisions).

84. See Strauss, *supra* note 37, at 407 (arguing that “it is precisely because jurisdiction is intrinsically international that the paradigm requires it to be prescribed by the international order, and that domestic courts should apply such international law as authoritative in cases involving foreign plaintiffs or defendants”).

85. See, e.g., SCHACK, *supra* note 61, at 87 (stating that international law does not limit a state's freedom to adjudicate).

86. See Arthur Lenhoff, *International Law and Rules on International Jurisdiction*, 50 CORNELL L. REV. 5, 7 (1964) (stating that besides international rules for state immunity “there are at present no ‘rules of international law specifically governing the jurisdiction of a state to prescribe rules for the adjudication or other determination of claims of a private nature’”).

87. See F.A. MANN, *THE DOCTRINE OF JURISDICTION IN INTERNATIONAL LAW*, 111 RECUEIL DES COURS 1, 73 (1964) (Neth.) (arguing that “[a] judgement, viz. a command conveyed through the courts, is not essentially different from a command expressed by legislative or administrative action”); see also Patzina, *supra* note 51, at 204 (stating that international law sets positive and negative limits on state courts' jurisdiction).

88. See MANN, *supra* note 87, at 75 (arguing that international jurisdiction “cannot be adequately discussed except in conjunction with the problem of the recognition of foreign judgements, which, very largely, is identical with the problem of the jurisdiction of foreign courts”); see also Strauss, *supra* note 37, at 416 (arguing that applying international law of jurisdiction to international cases “should promote an effective system of dispute resolution whereby opportunities for forum shopping will be

jurisdiction to the use of force by one state against another, which is clearly an issue of international law.<sup>89</sup>

While there may be many valid reasons for why international law should govern personal jurisdiction, the content of such international law is unclear. Some argue that customary international law does not allow a country to claim jurisdiction over disputes that lack at least some minimum contact to the forum state.<sup>90</sup> According to Restatement Third of the Foreign Relations Law of the US (Restatement Third), section 421: “[a] state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.” Reporters’ Note 1 goes on to explain:

[t]he modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the due process clause of the United States Constitution . . . The standards here set forth are comparable also to the criteria set out in Order 11 of the Rules of the Supreme Court of the United Kingdom (1983) and to the standards applicable among EEC domiciliaries set forth in the 1968 European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended in 1978 . . .<sup>91</sup>

In light of the minor role that the due process principle plays in many foreign jurisdictions, this note seems to represent a US rather than universal perspective; additionally, the reference to the 1968 Convention is misguided.<sup>92</sup>

The uncertainty about the content and even the existence of such generally accepted international jurisdiction rules turns the role of international law as a source of law for personal jurisdiction into a rather theoretical question. This could explain why it is rarely addressed in scholarship and practice. However, to acknowledge that jurisdiction over foreign defendants is inherently international and therefore, at least from a normative perspective, subject to delineations under international law, is important despite the indeterminacy of its content. First, customary international rules may emerge over time as courts both in the United States and internationally continue to consider foreign personal jurisdiction rules to a greater extent than in

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minimized, foreign judgements will be satisfied, and jurisdictional conflicts will be avoided”).

89. See Strauss, *supra* note 37, at 407 (noting “doctrine-makers clearly accept that the law governing the use of force by one state against another state is intrinsically a question of interstate relations that, under the paradigm, can only be prescribed by the international order” and “[t]here is no reason why that should be any less the case when it comes to jurisdiction”).

90. See Patzina, *supra* note 51, at 204 (noting that customary law does not prescribe what these minimum contacts are due to a lack of continuous international practice).

91. RESTATEMENT THIRD, *supra* note 73, § 421 n.1.

92. See *infra* Part IV.A.1 & 2.

the past.<sup>93</sup> Second, while international customary rules currently may not exist, the realization that personal jurisdiction is an issue best solved through international law underscores the need for an international agreement.<sup>94</sup> As jurisdiction ultimately involves questions of recognition of judgments, internationally agreed-upon norms are better suited to render international dispute resolution more effective than countries continuing to develop rules in isolation.<sup>95</sup> Still, regardless of the benefits of internationally agreed-upon norms, as the following Parts will show, deeply rooted differences between the US's and other countries' jurisdiction rules have impeded treaty negotiations in the past and continue to persist despite increased consideration of international rapport by the U.S. Supreme Court.

### III. PERSONAL JURISDICTION IN THE UNITED STATES

Since the United States is not party to any international agreement on jurisdiction, international jurisdiction in the United States is a matter of domestic law.<sup>96</sup> This Part outlines the current US rules and underlying characteristics.

#### A. *US Sources*

In the United States, no specific rules to determine jurisdiction over foreign defendants exist. By default, courts apply identical rules to determine personal jurisdiction over domestic and foreign defendants.<sup>97</sup> Though application of those rules may lead to different results when foreign parties are involved, under current US law the legal sources are the same for international and domestic cases.<sup>98</sup>

Against common misconception, the U.S. Supreme Court does not make jurisdictional rules, but only identifies the limits to those rules stemming from the U.S. Constitution.<sup>99</sup> As such, jurisdiction is a

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93. See *supra* text accompanying note 73.

94. See Strauss, *supra* note 37, at 423 (explaining why the treaty approach should be followed).

95. See *id.* at 416 (arguing that applying international law of jurisdiction to international cases "should promote an effective system of dispute resolution whereby opportunities for forum shopping will be minimized, foreign judgements will be satisfied, and jurisdictional conflicts will be avoided.")

96. See *id.* at 376–77 (stating that the United States is party to neither a bilateral nor regional agreement).

97. See generally RESTATEMENT THIRD, *supra* note 73, § 421 n.1 ("[t]he modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the Due Process Clause of the United States Constitution").

98. See *supra* Part II.B; see also Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 282 (1985) (pointing towards the effect the international character of a case may have on specific rules and results).

99. See Michaels, *supra* note 8, at 1018.

matter of state law, either in common law or statutory law, such as a state's long-arm statutes, the reach of which varies considerably from state to state.<sup>100</sup> However, because of the broad jurisdiction rules under most state laws, limitations to jurisdiction *de facto* have mostly become a matter of constitutional law.<sup>101</sup>

### B. Characteristics

US personal jurisdiction rules have been the subject of extensive discussion.<sup>102</sup> Rather than providing a historical overview or in-depth analysis of case law, which has been expertly done elsewhere,<sup>103</sup> the following subparts identify distinctive elements of US personal jurisdiction rules in order to enable comparison with EU law and to draw normative conclusions later in this Article.

#### 1. Procedural Due Process and Minimum Contacts

The Fourteenth and Fifth Amendments of the United States Constitution require that prior to a deprivation of life, liberty, or property, due process of law must be given.<sup>104</sup> Any rule relating to jurisdiction in the United States must adhere to this constitutional requirement; that due process be given to all parties in a suit is perhaps the most widely debated aspect of personal jurisdiction in the United States.<sup>105</sup> Shortly after the enactment of the Fourteenth Amendment,

100. *See id.* at 1019 (pointing towards the detailed rules of New York versus broad general jurisdiction solely limited by the Constitution under California law); *see also* Sachs, *supra* note 41, at 1252 (stating that “[a]s general law, jurisdiction is something on which different court systems can disagree”).

101. Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 122 (2001) [hereinafter Borchers *General Jurisdiction*] (calling state laws' personal jurisdiction rules “notoriously indeterminate” and noting that even New York, despite its more restrictive long arm statute “allows a common law basis of general jurisdiction over defendants who are ‘doing business’ in New York”); *see also* Michaels, *supra* note 8, at 1021 (noting that in the United States the U.S. Supreme Court's case law provides a detailed system of jurisdictional rules, but that this was not the case until the Court's landmark decision in *Pennoyer*).

102. *See generally* Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971 (2009); Borchers *General Jurisdiction*, *supra* note 101, at 122; Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207 (2014); Sachs, *supra* note 41; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

103. *See generally* Vitiello, *supra* note 8.

104. *See* U.S. CONST. amend. X, XIV, § 1.

105. *See* Borchers *General Jurisdiction*, *supra* note 101, at 121 (calling the constitutionalization of personal jurisdiction in the United States “an unfortunate mistake”); *see also* Feldman, *supra* note 17, at 2199 (arguing that the “constitutionalization” of personal jurisdiction is the biggest difference between US and EU jurisdiction law and “restricts the American's ability to ‘treatify’ it”).

the Supreme Court in *Pennoyer v. Neff* (*Pennoyer*)<sup>106</sup> held that, to comply with due process requirements, a court's jurisdiction over persons could reach "no farther than the geographic bounds of its forum."<sup>107</sup> *Pennoyer* remained the dominant holding of law on a tribunal's right to exercise jurisdiction over out-of-state as well as foreign defendants for over fifty years. However, its strict approach requiring territorial limitations did not fit in the evolving economic interconnectedness that paid no heed to state, much less international, territorial demarcations.<sup>108</sup> In response to the new economic order, in 1945, the Supreme Court partially overturned the precedent set in *Pennoyer* in its decision in *International Shoe*.

*International Shoe* set the framework for courts to determine, in deciding if personal jurisdiction was present, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States," as *Pennoyer* had required.<sup>109</sup> It is in *International Shoe* that the "minimum contacts" standard was hardened into a controlling rule. Following *International Shoe*, a court could exercise personal jurisdiction over an out-of-state defendant if the defendant had certain minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"<sup>110</sup>—a criterion that has been heavily criticized for its indeterminacy by international commentators ever since.<sup>111</sup> The focus thus shifted from limitations of states' power by their territorial borders for purposes of sovereignty to fairness to the defendant.<sup>112</sup>

A decade later, in *McGee v. International Life Insurance Co.* (*McGee*),<sup>113</sup> the Court further expanded "the permissible scope of state jurisdiction" over out-of-state corporations.<sup>114</sup> With growing nationwide commerce further expanded by the ease of transportation, it seemed less and less burdensome to require a nonresident to stand trial in a different state than his or her home state.<sup>115</sup> Accordingly, as long as the out-of-state defendant had been given adequate notice and

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106. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

107. *Daimler A.G. v. Bauman*, 571 U.S. 117, 125 (2014).

108. *See* *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 617 (1990) (citing "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity" as why *Pennoyer* fell out-of-date).

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

110. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

111. *See, e.g.,* SCHACK, *supra* note 61, at 181 (arguing that such meaningless rules benefit no one, but only contribute to raising litigation costs).

112. *See* Vitiello, *supra* note 8, at 215 ("In the mid-twentieth century, *International Shoe Co. v. Washington* reformulated the jurisdictional touchstone from a state's power over those present within its territory to an analysis of the fairness or reasonableness of an exercise of jurisdiction premised on the defendant's forum contacts.")

113. *See generally* *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

114. *Id.* at 223.

115. *Id.* at 222–23.

an opportunity to be heard, the defendant's right to due process did not limit a court's jurisdiction.<sup>116</sup> This emphasis on procedural due process became a distinctive feature of US personal jurisdiction rules.<sup>117</sup> Though the Supreme Court abandoned its overly broad approach in *World-Wide Volkswagen Corp. v. Woodson* (*World-Wide*),<sup>118</sup> procedural due process requirements continue to exist in US law, such as in the form of service of process jurisdiction, which is alien to and heavily criticized in European civil law jurisdictions.<sup>119</sup>

## 2. Purposeful Availment, Fairness to the Defendant, and Predictability

Subsequently, the Supreme Court restricted unlimited personal jurisdiction and notions such as fairness to the defendant and predictability became more prominent. The Court's decision in *World-Wide* is considered the first "retrenchment" on quasi-unlimited personal jurisdiction à la *McGee* and its progeny.<sup>120</sup> Here, the Supreme Court rejected the idea that state courts' personal jurisdiction over a nonresident was merely restricted by the undue burden a distant forum would place on the defendant,<sup>121</sup> and set the stage for further limitations, first in *Asahi*, then, thirty years later, in *McIntyre and Walden v. Fiore* (*Walden*).<sup>122</sup>

The Court in *World-Wide* significantly limited personal jurisdiction over nonresidents by requiring that a corporation "purposefully avail[] itself of the privilege of conducting activities within the forum State," thus rejecting the "stream of commerce"

116. Although after its decision in *McGee* the Court tried to limit specific jurisdiction in *Hanson*, lower courts and the Court's own subsequent rulings frequently ignored this decision for various reasons. See Vitiello, *supra* note 8, at 221–22.

117. See Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 113 n.9 (1978) ("In its procedural aspect, due process has typically been viewed as setting the conditions, if any, which must attach to deprivatory governmental action. When operative, these conditions have normally been defined in terms of a requirement of some sort of notice and opportunity to be heard prior to adverse governmental action.").

118. See generally *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) [hereinafter *World-Wide*].

119. See FED. R. CIV. P. 4(k)(1)(A) (stating that the service of summons is enough to establish jurisdiction over a defendant "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"); see also *infra* text accompanying note 180.

120. Vitiello, *supra* note 8, at 227.

121. *World-Wide*, 444 U.S. at 294 (citing *Hanson v. Denckla*, 357 U.S. 235, 254 (1958)) ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgement.").

122. See generally Vitiello, *supra* note 8 (tracing the development of Supreme Court precedent from *Pennoyer* through the 2014 decisions).

theory then in use by some lower courts.<sup>123</sup> Lower courts and (foreign) defendants struggled to apply the Supreme Court's holding in *World-Wide* due to the uncertainty created by the contours of the "purposeful availment" criteria.<sup>124</sup> The Court added to the general confusion by indicating that "minimum contacts" were less "minimal" than previously thought and that fairness to the defendant, rather than state sovereignty or fairness for all parties, was at the center of personal jurisdiction rules.<sup>125</sup> Simply put, the defendant's interest in predictability trumped the forum state's interest in the power to adjudicate as well as convenience for the plaintiff.<sup>126</sup>

Such concern for fairness to the defendant was further expanded in *McIntyre*, a product liability suit from New Jersey. The Supreme Court of New Jersey, relying on the Supreme Court's holding in *Asahi*, concluded that a British manufacturer could be party to an action in a state court when that manufacturer knows or reasonably should know that "its products are being distributed through a nationwide distribution system" that might lead to those products being sold in any of the fifty states.<sup>127</sup> The Supreme Court, however, overturned, determining that the "stream of commerce" doctrine used by the New Jersey court was untenable as a personal jurisdiction test.<sup>128</sup> In a "badly splintered" and highly criticized opinion,<sup>129</sup> the Court held that in cases where the defendant does not enter the forum, "[t]he principal inquiry . . . is whether the defendant's activities manifest an intention to submit to the power of a sovereign."<sup>130</sup> The foreign business can do so "by sending goods rather than its agents."<sup>131</sup> The Court stated the

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123. *World-Wide*, 444 U.S. at 297 (stating "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State"); see also *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 112 ("[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State"). But see *id.* at 117 (Brennan, J., concurring in part and concurring in judgment) (arguing that placing a product into the "stream of commerce" was sufficient to establish jurisdiction "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State").

124. See Vitiello, *supra* note 8, at 232–35 (describing the Court's division in subsequent rulings in *Ashai* and *Burnham*).

125. *World-Wide*, 444 U.S. at 297 ("The state for the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

126. *Id.* ("The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.").

127. *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 585 (N.J. 2010).

128. *McIntyre*, 131 S. Ct. at 2788.

129. Borchers, *supra* note 2, at 11.

130. *McIntyre*, 131 S. Ct. at 2788.

131. *Id.*

defendant needs to “target the forum”: as a general rule, it is not enough that “the defendant might have predicted that its goods will reach the forum State.”<sup>132</sup>

Three years later, in *Walden*,<sup>133</sup> the Court deemed the place where an intentional tort victim suffered injury irrelevant unless the “defendant himself” had created the necessary contacts with the forum.<sup>134</sup>

*World-Wide, McIntyre*, and *Walden* are specific jurisdiction cases: the Supreme Court, since *International Shoe*, has distinguished between specific and general jurisdiction. The first requires that the in-state activities of the corporate defendant be “not only . . . continuous and systematic, but also give rise to the liabilities sued on.”<sup>135</sup> The second type of jurisdiction, general jurisdiction, is as its name suggests: it is far broader and allows a plaintiff to sue a corporate defendant even if the corporation’s dealings are entirely separate from the suit at hand.<sup>136</sup> The strict limitations on specific jurisdiction in *McIntyre* resulted in plaintiffs increasingly pursuing cases based on general jurisdiction.<sup>137</sup> Thus, it came as no surprise that the Supreme Court, in its next chapter of cases relating to personal jurisdiction, such as *Goodyear* and *Daimler*, dealt with issues regarding the scope of general jurisdiction, curtailing it as well in the interest of fairness to the defendant.<sup>138</sup>

The Supreme Court in *Goodyear* sought to resolve uncertainty as to whether personal jurisdiction could be exercised over a foreign subsidiary through a domestic parent corporation whose activities in a forum were entirely unrelated to the claims presented. There, a defective tire manufactured by the Turkish Goodyear subsidiary caused a bus accident outside Paris, France, which resulted in the deaths of two North Carolina boys.<sup>139</sup> The parents brought suit against the parent company Goodyear USA, an Ohio corporation, and its subsidiaries organized and operating in Turkey, France, and Luxembourg.<sup>140</sup> While the parent corporation did not contest the North

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132. *Id.*

133. *Walden v. Fiore et al.*, 571 U.S. 277, 277 (2014).

134. *Id.* at 284 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

135. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

136. See *Daimler AG v. Bauman*, 571 U.S. 117, 118 (2014) (holding that general jurisdiction is present where “a foreign corporation’s ‘continuous corporate operations within a state [are] 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’”).

137. See generally Twitchell, *supra* note 102, at 610, 628 (noting that specific jurisdiction historically was far more commonly pursued than general jurisdiction, which used to play a reduced role in modern jurisdiction theory compared to its counterpart).

138. See Borchers, *supra* note 2, at 15 (explaining commentators have pointed out that the coupling of restricted specific and general jurisdiction leads to an increased “risk of arbitrarily denying to plaintiffs a U.S. forum”).

139. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011).

140. *Id.*

Carolina court's finding of jurisdiction, as it operated plants and regularly conducted business in the state, the subsidiaries contested the finding.<sup>141</sup> In an attempt to limit general jurisdiction over corporations to places analogous to a natural person's domicile,<sup>142</sup> the Supreme Court held that "[a] court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."<sup>143</sup> This ruling was further refined in *Daimler*.

In this case, probably the most publicized out of the recent personal jurisdiction cases, at least from an international perspective,<sup>144</sup> the plaintiffs sought to hold the German public corporation Daimler AG vicariously liable for its Argentinian subsidiary's actions during the Argentine "Dirty War" period before a California state court.<sup>145</sup> Neither did the subsidiary's actions take place in California nor were the plaintiffs California residents.<sup>146</sup> Instead, plaintiffs attempted to establish jurisdiction based on the contacts of Daimler's indirect subsidiary, Mercedes-Benz USA (MBUSA), in California.<sup>147</sup> Relying on its ruling in *Goodyear*, the Supreme Court concluded that to be subject to general jurisdiction, not only would the out-of-state defendant need to engage in continuous and systematic activities in the forum state, but those activities would need to be so substantial and of such a nature as "to render them essentially at home in the forum State."<sup>148</sup> The Court stated that for a corporation to be considered "at home" in a jurisdiction, except for "exceptional case[s],"<sup>149</sup> "the place of incorporation and the principal place of business are 'paradigm[m] . . . bases for general jurisdiction.'"<sup>150</sup> Since Daimler AG was neither incorporated nor had its principal place of business in California, the Court concluded that California courts lacked personal jurisdiction.

*Daimler* effectively limited international human rights abuse victims' access to US courts, a main criticism of human rights

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141. *Id.*

142. *See id.* at 924 ("[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home"); *see also* Borchers, *supra* note 2, at 12–13 (addressing some of the shortcomings of the "essential at home" test).

143. *Goodyear*, 564 U.S. at 919.

144. *See generally* Reynolds & Zimmer, *supra* note 2; Zekoll & Schulz, *supra* note 2; Migliorini, *supra* note 2.

145. *Daimler AG v. Bauman*, 571 U.S. 117, 121 (2014).

146. *Id.* at 122.

147. *Id.* at 122–23.

148. *Id.* at 122.

149. *Id.* at 139 n.19.

150. *Id.* at 136.

advocates and commentators, from the United States and abroad.<sup>151</sup> However, the decision was well received by foreign businesses and private international law scholars, because it finally put an end to the perceived US “hegemony” in international jurisdiction and curbed US jurisdiction from becoming the “Shangri-La of class-action litigation” for plaintiffs from around the world.<sup>152</sup>

In *Goodyear* and *Daimler*, the Supreme Court arguably attempted to adjust its due process standards as developed in *International Shoe* and *World-Wide* to match an era in which corporations almost *always* operate at a global scale, and territorial boundaries are increasingly disappearing.<sup>153</sup> Thus, the decisions are less revolutionary than some may think.<sup>154</sup> They rather merely translate the minimum contacts test to new economic realities. In a volatile economic environment, predictability becomes as—if not more—important as justice.<sup>155</sup> Uncertainty creates costs that companies need to hedge for—and many do so through legal means.<sup>156</sup> The growing use of predictive analytics for legal purposes evidences this trend.<sup>157</sup> Hence, the Supreme Court’s rulings respond to companies’ increased need for legal certainty.<sup>158</sup> One could argue that *International Shoe* has “fallen out-of-date” as a result of changed economic realities, just as *Pennoyer* had by 1945.<sup>159</sup>

In order for globally operating companies that are exposed to lawsuits basically anywhere in the world to be able to “structure their

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151. See generally Skinner, *supra* note 2.

152. See Morrison et al. v. National Australia Bank Ltd. et al., 561 U.S. 247, 270 (2010) (“some fear that [the United States] has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets”); see also *Daimler*, 571 U.S. at 142 (invoking “considerations of international rapport”). See generally Mathias Reimann, *Rückzug der “Rechtsweltmacht”? Neo-Territorialismus im US-Supreme Court*, in Festschrift für Rolf Stürner zum 70. Geburtstag 1779 (2013) (Ger.).

153. On the difficulties of adapting personal jurisdiction rules to the Internet age, see generally Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs”*, 100 CORNELL L. REV. 1029 (2015). For recent attempts by the ECJ to adapt tort jurisdiction under art. 7 (2) of the Brussels Regulation to cases of online violation of personality rights, see Case C-194/16, *Ingrid Ilsjan v. Svensk Handel AB*, 2016/C 211/45.

154. See generally sources cited *supra* note 34 and accompanying text.

155. On the importance of predictability in the legal system see generally P. S. Atiyah, *Justice and Predictability in the Common Law*, 15 U. NEW SOUTH WALES L.J. 448 (1992).

156. Ilan Benshalom, *Rethinking International Distributive Justice: Fairness as Insurance*, 31 B.U. INT’L L.J. 267, 304 (2013) (pointing towards the impact of global external shocks such as the food or financial crisis of 2008, which are largely out of corporations’ control).

157. See generally *Predictive Justice: When Algorithms Pervade the Law*, PARIS INNOVATION REV. (June 9, 2017), <http://parisinnovationreview.com/articles-en/predictive-justice-when-algorithms-pervade-the-law> [https://perma.cc/C6G6-5HM3] (archived Sept. 3, 2018).

158. See *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)) (“[s]imple jurisdictional rules . . . promote greater predictability.”).

159. See *supra* text accompanying note 108.

primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit,” the Supreme Court in *Daimler* introduced a comparative contacts analysis.<sup>160</sup> The analysis would require a court, in determining if a corporation was “at home” in the forum state, to review a corporation’s contacts as a whole, and determine the proportion of those contacts with the forum state.<sup>161</sup> It thus follows that the larger the corporation and the more extensive its contacts, the fewer forums exist where jurisdiction is present.<sup>162</sup>

Not only does the test one-sidedly favor large corporations,<sup>163</sup> it also is somewhat counterproductive. By requiring a comparative analysis at the jurisdiction stage, the Court asks for a substantial analysis, including pre-trial discovery at a very early stage in the process.<sup>164</sup> It is questionable if the new rules are successful in achieving their goal of making jurisdiction more predictable or whether alternative solutions would be better suited to adapt jurisdictional rules to today’s global economic environment including balancing the interests of plaintiffs, defendants, and sovereign states.<sup>165</sup>

### 3. Territoriality, Federalism, and Authority

Despite the Supreme Court’s recent focus on defendant interests, the power relationship between the defendant and the court remains a distinctive feature of US jurisdiction rules and is reflected in recent Court decisions in the requirement of a direct connection between the defendant and the forum. Hence, such decisions could evidence a revival of territoriality à la *Pennoyer* rather than a “major change” in the Supreme Court’s approach to personal jurisdiction.<sup>166</sup> How did we get here?

In *Pennoyer*, the Court reasoned that a tribunal, in attempting to assert extraterritorial jurisdiction over a person or property, would violate the principle that “every State possesses exclusive jurisdiction

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160. See *Daimler*, 571 U.S. at 139; see also *id.* at 149 (Sotomayor, J., concurring) (noting that the Court prior to *Daimler* never focused on “the relative magnitude of [defendant’s] contacts in comparison to the defendant’s contacts with other States”).

161. See *id.* n.20 (“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.”).

162. See *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., dissenting in part); *Daimler*, 571 U.S. at 157 (Sotomayor, J., concurring).

163. See *Daimler*, 571 U.S. at 157 (Sotomayor, J., concurring) (criticizing the test for “treat[ing] small businesses unfairly”).

164. See *id.* at 153–56; see also *infra* Part III.C.3.

165. See *Daimler*, 571 U.S. at 156–59; see also *infra* Part III.C.3.

166. See Robertson & Rhodes, *supra* note 2, at 782 (calling the Supreme Court’s decision in *Daimler* a “major change” requir[ing] “re-writing every first-year Civil Procedure casebook”).

and sovereignty over persons and property within its territory.”<sup>167</sup> At the time, personal jurisdiction mainly was a question of a court’s power over a defendant,<sup>168</sup> and the emphasis was on limiting jurisdiction to a state’s territory in the interest of reciprocating sister states’ right to sovereignty.<sup>169</sup> In *International Shoe*, the focus pivoted to due process and the undue burden a distant forum would place on the defendant.<sup>170</sup>

Finally, in *World-Wide*, the Court stated “that due process limitations on personal jurisdiction reflect both the right of the defendant to a fair proceeding *and* territorial limitations on state power.”<sup>171</sup> The Court advanced federalism, meaning territorial limitations on state sovereignty due to a sister state’s interest in the case, to justify “that a state may assert jurisdiction only over nonresidents who have liability-related contacts with state territory,” even if asserting jurisdiction over them would put no undue burden on them.<sup>172</sup> The Court’s use of the Due Process Clause “as an instrument of interstate federalism” has been criticized as theoretically flawed.<sup>173</sup> However, the fact that the Court bases jurisdictional limitations on federalism and not due process alone explains why it has been so reluctant to use only foreseeability as a criterion for personal jurisdiction.<sup>174</sup>

Federalism and its inherent vertical power relationship between the court and the defendant also provides an explanation as to why fairness in litigation between the plaintiff and the defendant is relatively unimportant to the Supreme Court.<sup>175</sup> In *McIntyre* the Court conceded “[t]here may be exceptions” to the rule that a defendant needs to purposefully avail itself of the forum state—for example, in

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167. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

168. See Michaels, *supra* note 8, at 1030 (“The power theory focuses on the power relation between court and defendant, both in its actual and its hypothetical form.”).

169. See *Pennoyer*, 95 U.S. at 722 (stating “[t]he several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others”).

170. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (holding that the “primary concern” is “the burden on the defendant”); see also *supra* Part III.B.

171. Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 377 (1985).

172. See *id.* at 379–80.

173. See Vitiello, *supra* note 8, at 214, 230 (criticizing the Court’s “underlying theory—that the Fourteenth Amendment protected one ‘sovereign’ state’s power from overreaching by another state—[as] analytically jarring”). See generally Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on International Shoe and Its Progeny*, 28 U.C. DAVIS L. REV. 965 (1995).

174. See Weisburd, *supra* note 171, at 379 (“A simple reference to the efficient functioning of the institution whose authority is in issue cannot answer questions of the limits of authority, unless efficiency is demonstrated to be a source of authority for that institution.”).

175. See Michaels, *supra* note 8, at 1030–31 (arguing the vertical relationship explains why the Supreme Court considers whether asserting jurisdiction in a particular forum is fair to the defendant rather than the plaintiff).

intentional tort cases.<sup>176</sup> However, invoking “judicial power,” it ultimately concluded, “it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.”<sup>177</sup>

Arguments for restricting a court’s jurisdiction over a foreign defendant in line with the theory of federalism also serve to justify looking exclusively at the defendant’s relationship with the particular forum state, not other states or the United States as a whole.<sup>178</sup> The Supreme Court in *McIntyre* reasoned accordingly: “[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States,” thus rebuking the aggregate contacts test.<sup>179</sup>

Finally, federalism and its inherent power relationship between a court and a defendant explains why the Supreme Court, contrary to European jurisdictions (including the UK common law system) continues to allow jurisdiction established on service of process.<sup>180</sup> Arguably not fair to the foreign defendant, service of process jurisdiction is based on “authority” alone,<sup>181</sup> and is thus highly criticized by foreign and domestic commentators alike as a means of exorbitant jurisdiction.<sup>182</sup>

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176. *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U.S. 873, 877–88 (2011).

177. *See id.* at 883; *see also* *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (“As we have put it, restrictions on personal jurisdiction ‘are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.’”).

178. *McIntyre*, 564 U.S. at 884 (“personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis”); *see also* *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930–31 (2011) (“Neither below nor in their brief in opposition to the petition for certiorari did respondents urge disregard of petitioners’ discrete status as subsidiaries and treatment of all Goodyear entities as a ‘unitary business,’ so that jurisdiction over the parent would draw in the subsidiaries as well. Respondents have therefore forfeited this contention, and we do not address it.”). *But see* *Goodyear*, 564 U.S. at 930 (noting “[r]espondents belatedly assert a ‘single enterprise’ theory, asking us to consolidate petitioners’ ties to North Carolina with those of Goodyear USA and other Goodyear entities,” but ultimately this was not decided by the Court).

179. *McIntyre*, 564 U.S. at 884.

180. *See* Borchers *General Jurisdiction*, *supra* note 101, at 123 (“To Europeans, . . . transient jurisdiction no longer comports with contemporary standards of due process (or its equivalent) and therefore had to be abandoned in English and Irish practice.”).

181. *McIntyre*, 564 U.S. at 883 (“The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* ‘conducted no independent inquiry into the desirability or fairness’ of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant.”).

182. *See* Stürner, *supra* note 6, at 20 (critiquing service of process in airplane while in US territory); *see also* Borchers *General Jurisdiction*, *supra* note 101, at 123 n.27 (calling it “notoriously unfair” and “noting that tag jurisdiction subjects travelers to sham suits, courts in jurisdictions with no connection with the facts of the case, and the prospect of defending in a place where he has no familiarity”). *See generally* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36

### C. Recent Developments

The aforementioned principles influenced the Supreme Court's most recent line of cases regarding jurisdiction over out-of-state corporate defendants.

#### 1. *BNSF Railway Co. v. Tyrrell* and *Bristol-Myers Squibb Co. v. Superior Court*

In *BNSF*, two nonresidents and employees of BNSF brought a suit in a Montana state court against the petitioner for injuries sustained outside of the state.<sup>183</sup> The Montana Supreme Court held that it could exercise general jurisdiction because, under state law, personal jurisdiction could be asserted over “persons found within . . . Montana,”<sup>184</sup> contending that, while BNSF was incorporated in Delaware with its principal place of business in Texas, it had:

2,061 miles of railway tracks in Montana (about 6% of its total track mileage of 32,500), employs some 2,100 workers there (less than 5% of its total work force of 43,000), generates less than 10% of its total revenue in the State, and maintains one of its 24 automotive facilities in Montana (4%).<sup>185</sup>

Further, pursuant to § 56 of the Federal Employers' Liability Act (FELA), the state supreme court concluded, a state court could exercise personal jurisdiction over any federal businesses, including railroads, “doing business” in the state.<sup>186</sup> As BNSF was both “found” and “doing business” within the state of Montana, the state courts could exercise personal jurisdiction over the corporation.

The Supreme Court rejected this holding, finding that § 56 of FELA confers venue jurisdiction in its first relevant section and subject-matter jurisdiction in the second.<sup>187</sup> The Court went on to hold that the lower court's decision to allocate personal jurisdiction over an out-of-state defendant did not comply with the limitations imposed by the Due Process Clause of the Fourteenth Amendment, nor with the Supreme Court's previous holdings.<sup>188</sup> Because the injury did not occur

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CARDOZO L. REV. 1343 (2015) (discussing the broadening of a court's jurisdiction through the mandatory appointment of an agent for service of process when a business registers under state law).

183. *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1553 (2017).

184. *Id.* at 1554 (citing MONT. R. CIV. P. 4(b)(1) (2015)).

185. *Id.*

186. *Id.*

187. *Id.* at 1555; *see also* *Iselin v. La Coste*, 147 F.2d 791, 795 (5th Cir. 1945) (“Jurisdiction is the power to adjudicate and is granted by Congress. Litigants may not confer this power on the court by waiver or consent, but the place where the power to adjudicate is to be exercised is venue, not jurisdiction. The venue has relation to the convenience of the litigants and may be waived or laid by consent of the parties.”).

188. *BNSF*, 137 S. Ct. at 1558–59.

in Montana, nor in relation to any continuous contacts that BNSF had with Montana, nor was it in any way related to Montana, specific jurisdiction was not at issue.<sup>189</sup> In the matter of general jurisdiction, the Court relied on *Daimler*, holding that BNSF's contacts were in no way substantial enough to form an "exceptional case," nor were they "of such a nature as to render the corporation at home in that State."<sup>190</sup> The Montana Supreme Court did not correctly identify the contacts that BNSF had within Montana; one may not focus "solely on the magnitude of the defendant's in-state contacts,"<sup>191</sup> but instead must "apprais[e] . . . a corporation's activities in their entirety, nationwide and worldwide," as "[a] corporation that operates in many places can scarcely be deemed at home in all of them."<sup>192</sup> This—against all criticism<sup>193</sup>—confirmed the "comparative contacts" analysis first discussed in *Daimler*,<sup>194</sup> and the Supreme Court's attempt to limit general jurisdiction over corporations to a limited number of places.<sup>195</sup>

Most recently, the Supreme Court was faced with the question in *Bristol-Myers Squibb Co.* as to whether California state law regarding the authority of a state court to hail an out-of-state defendant through specific jurisdiction was compatible with the Due Process Clause of the Fourteenth Amendment.<sup>196</sup> In that case, the defendant was pharmaceutical giant Bristol-Myers Squibb (BMS), incorporated in Delaware with substantial operations in both New Jersey as well as New York, where its headquarters was located.<sup>197</sup> The extent of BMS's contacts with the state of California included: five research and laboratory facilities staffed with around 160 employees, approximately 250 sales representatives, "a small-scale state government advocacy office in Sacramento," and the aggregate sale of nearly 187 million Plavix pills worth more than \$900 million.<sup>198</sup> The plaintiffs represented 678 patients prescribed Plavix, of which eighty-six were California residents.<sup>199</sup> The California Supreme Court unanimously found general jurisdiction lacking but was split on the finding of specific jurisdiction.<sup>200</sup> "The majority applied a 'sliding scale approach to specific jurisdiction,'" concluding that "the more wide-ranging the

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189. *Id.* at 1559.

190. *Id.* at 1558.

191. *Id.* at 1559 (concluding "[o]therwise, 'at home' would be synonymous with 'doing business' tests").

192. *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.20 (2014).

193. *BNSF*, 137 S. Ct. at 1560–62 (Sotomayor, J., concurring in part and dissenting in part).

194. See sources cited *supra* note 160 and accompanying text.

195. See sources cited *supra* note 142 and accompanying text.

196. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779 (2017).

197. *Id.* at 1777–78.

198. *Id.* at 1778.

199. *Id.*

200. *Id.*

defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim."<sup>201</sup>

The Supreme Court, however, reversed: "[i]n order for a state court to exercise specific jurisdiction, 'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the forum.'"<sup>202</sup> The fact that other plaintiffs, who resided in California, "sustained the same injuries as did the nonresidents . . . does not allow the State [of California] to assert specific jurisdiction over the nonresidents' claims."<sup>203</sup> The California "sliding scale approach" lacked precedent, as the defendant's unconnected activities (sales, laboratories, etc.), even if extensive, had never before been enough for specific jurisdiction to stick.<sup>204</sup> Finding that there was no direct link between the state and the nonresidents' claims, the Court concluded that specific jurisdiction did not exist.<sup>205</sup>

In *BNSF* the Supreme Court squarely applied its precedent set forth in *Goodyear*, *McIntyre*, *Walden*, and *Daimler*. *Bristol-Myers* was a more challenging case and has already spurred considerable debate.<sup>206</sup> That the Supreme Court granted certiorari to decide two additional personal jurisdiction cases shortly after issuing its controversial 2011 and 2014 decisions could indicate that the Court was determined to end the decade-old debate over personal jurisdiction. If such were true, however, the two new cases contribute little in the way of clarifying its doctrine.<sup>207</sup> Contrary to *Daimler*, *McIntyre*, and *Goodyear*, both *BNSF* and *Bristol-Myers* involved domestic parties, signaling that the Supreme Court continues to apply identical rules to domestic and international cases and that the limited jurisdiction rules, which it developed in its previous decisions, were in no way meant to apply exclusively in international cases.

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201. *Id.*

202. *Id.* at 1780.

203. *Id.* at 1781.

204. *Id.* See also *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (explaining for a court to exercise specific jurisdiction over a claim, there must be an "affiliatio[n] between the forum and the underlying controversy,' principally, [an] activity or an occurrence that takes place in the forum State"). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. See *id.* at 930 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

205. *Bristol-Myers*, 137 S. Ct. at 1779 ("The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims . . . [A] defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.").

206. See generally *Bradt & Rave*, *supra* note 31.

207. See *id.* at 1254 (arguing *Bristol-Myers* in fact "had little to do with the traditional concerns underlying limitations on personal jurisdiction" but is better understood as part of "the chess match going on in mass-torts . . .").

## 2. Parent-Subsidiary Corporate Structures

The Supreme Court, prior to *Daimler*, had not had the opportunity to address whether a foreign corporation could be subjected to a state's general jurisdiction based solely on the contacts of one of its subsidiaries.<sup>208</sup>

On the matter, the Ninth Circuit rejected *Daimler's* argument that such contacts should only be assigned to a parent corporation when the parent dominates its subsidiary such that the latter may only be described as the former's alter ego.<sup>209</sup> Instead, the circuit adopted a less rigorous test, allowing such contacts to be assigned in instances of the existence of an agency relationship.<sup>210</sup> While agency relationships had been, in the past, relevant to a query of specific jurisdiction,<sup>211</sup> they had not been found as the basis of general jurisdiction, as agents may have complete authority in certain business aspects, but that “does not make him or her an agent for every [business] purpose.”<sup>212</sup>

The Ninth Circuit relied on the observation that the subsidiary, MBUSA, had conducted important services, concluding that *Daimler* would be hypothetically ready to perform those services itself should MBUSA not exist.<sup>213</sup> However, such a holding would allow for too broad an extension of jurisdiction, allowing courts to exert jurisdiction for “[a]nything a corporation does through an independent contractor, subsidiary, or distributor,” as it would be “presumably something that the corporation would do ‘by other means’ if the independent contractor, subsidiary, or distributor did not exist.”<sup>214</sup>

The Supreme Court rejected the Ninth Circuit's agency approach to establishing general jurisdiction, calling it far too broad, as it would “subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the ‘sprawling view of general jurisdiction’ . . . rejected in *Goodyear*.”<sup>215</sup> To assign MBUSA's California contacts to *Daimler* would also assign MBUSA's similar contacts in every other state with sizeable sales, undercutting the long-held principle that an out-of-state defendant, to satisfy the Due Process Clause of the Fourteenth Amendment, should be provided some minimum assurances as to

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208. *Daimler AG v. Bauman*, 571 U.S. 117, 134 (2014). The Court in *International Shoe* had addressed derivative jurisdiction—jurisdiction based on the contacts of a third party—in a specific jurisdiction case. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (holding that “the commission of some single or occasional acts of the corporate agent in a state . . . may be deemed sufficient to render the corporation liable to suit”).

209. *Daimler*, 571 U.S. at 135.

210. *Id.*

211. *Id.* at 136 n.13.

212. *Id.* at 135.

213. *Id.* at 135–36.

214. *Id.* at 136.

215. *Id.*

where it is and is not liable for suit.<sup>216</sup> The Court did not rule on whether such a relationship could be used in assigning the contacts of a subsidiary to a parent for the establishment of specific jurisdiction.<sup>217</sup> Some lower courts, such as the Fifth Circuit, have used agency theory to establish specific jurisdiction over foreign parent corporations.<sup>218</sup>

The Court has, in the past, used dicta as the basis for future rulings, and a potential approach to the issue of assigning contacts from a subsidiary to a parent might be found in the opinion on *Bristol-Myers Squibb*. In that case, respondents attempted to assign personal jurisdiction to BMS through its contracting with a California company, McKesson.<sup>219</sup> But the Court rejected this approach, stating that “[t]he requirements of *International Shoe* must be met as to each defendant over whom a state court exercises jurisdiction.”<sup>220</sup> “[A] defendant’s relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.”<sup>221</sup> While the Court was not presented with a question as to whether BMS engaged in relevant acts with McKesson, nor whether BMS was derivatively liable for McKesson’s conduct, prevailing law remains that a defendant must purposefully avail itself of a forum, and cannot be “haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts”<sup>222</sup> or the “unilateral activity of another party or third person.”<sup>223</sup> Against this background, it remains uncertain if, in the future, the Court will allow the actions of a third party, including a subsidiary not completely dominated by its out-of-state parent corporation, to be transposed to the defendant who has not purposefully availed itself of that forum.

### 3. Public Policy Concerns

Justice Sotomayor raised compelling points on public policy in her various separate opinions to the majority’s opinions. This Part outlines

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216. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (“The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”).

217. *Daimler*, 571 U.S. at 135 n.13 (2014).

218. *See Celgard, LLC v. SK Innovation Co., Ltd.*, 792 F.3d 1373, 1379 (Fed. Cir. 2015) (holding “[i]n order to establish jurisdiction under agency theory, the plaintiff must show that the defendant exercises control over the activities of the third-party”); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 531 (5th Cir. 2014) (holding that “*Daimler* therefore embraces the significance of a principal-agent relationship to the specific-jurisdiction analysis, though it suggests that an agency relationship alone may not be dispositive,” before looking to five factors to determine if agency could be assigned).

219. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783 (2017).

220. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

221. *Id.*; *see also Walden v. Fiore*, 571 U.S. 277, 286 (2014).

222. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)).

223. *Id.*

her concerns as expressed in *Daimler*, *BNSF*, and finally *Bristol-Myers*.

Starting with *Daimler*, Justice Sotomayor raised an issue with the majority's "comparative contacts" analysis.<sup>224</sup> Justice Sotomayor agreed that the Due Process Clause restricted the suit being brought in California, but not because of insufficient contacts; rather, "the case involve[d] foreign plaintiffs suing a foreign defendant based on foreign conduct, and . . . a more appropriate forum [was] available."<sup>225</sup> First, Justice Sotomayor predicted that the majority's approach will lead to unwieldy and unnecessary discovery to determine if jurisdiction exists, as a court will need to look past the corporation's contacts with the forum state alone and take into account the business activities the corporation engages in worldwide, and then compare.<sup>226</sup> In a world where it is "increasingly common [that] a corporation 'divides its command and coordinating functions among officers who work at several different locations,'"<sup>227</sup> the majority's approach, she concluded, will limit a "State[s] sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries," and that the majority's approach will result in "the State . . . los[ing] that power."<sup>228</sup>

Next, Justice Sotomayor warned that the majority's comparative contacts analysis will lead to an undue burden on small businesses in comparison with multinational corporations.<sup>229</sup> A small business that targets principally one state that amounts to a fraction of a large-scale operation like *Daimler* would nevertheless be subject to suit in that state on a claim resulting anywhere in the world.<sup>230</sup> Comparatively, *Daimler*, far more pervasive than its small competitor, might actually have operations in those parts of the world, and yet a claim predicated on general jurisdiction could not be brought in the California court system, for example, because *Daimler*'s contacts are so widely dispersed that they are not necessarily concentrated in California.<sup>231</sup>

Perhaps most important, however, is Justice Sotomayor's issue that, in protecting the due process rights of a business defendant, the majority has taken away the rights of the individuals harmed by their actions.<sup>232</sup> Under the new rules, as *Daimler* effectively illustrates, plaintiffs could be deprived of the forum most favorable to them,

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224. See *Daimler AG v. Bauman*, 571 U.S. 117, 143 (2014) (Sotomayor, J., concurring) (criticizing the majority for "deem[ing] *Daimler* 'too big for general jurisdiction'").

225. *Id.* at 143–44.

226. *Id.* at 153–54.

227. *Id.* at 157.

228. *Id.*

229. *Id.* at 158.

230. *Id.*

231. *Id.*

232. *Id.* at 158–59.

especially since the Supreme Court has not only limited general but also specific jurisdiction.<sup>233</sup> Additionally, there is a similar cost to a domestic, in-state business that might enter into a contract with an out-of-state foreign corporation abroad; that business would be unable to use the US court system to obtain relief for any breach, as no US court would have jurisdiction over that corporation.<sup>234</sup>

In her dissent in *BNSF*, Justice Sotomayor called the ruling a “jurisdictional windfall” for large multistate or multinational corporations, and said that “individual plaintiffs, harmed by the actions of a farflung [sic] corporation . . . will bear the brunt of the majority’s approach and be forced to sue in distant jurisdictions with which they have no contacts or connection.”<sup>235</sup> In her criticism of the majority’s comparative contacts analysis, she opined that a corporation that becomes large enough, with widely enough dispersed contacts, would never be subject to suit in any jurisdiction other than its place of incorporation or principal places of business, as it would have no particular forum where its contacts were more substantial than in another even if, standing on their own, those contacts would be enough for general jurisdiction to be found.<sup>236</sup> Justice Sotomayor extended a strong public policy argument in favor of the injured plaintiffs; a farflung corporation that does harm in a particular jurisdiction would be granted due process rights at the expense of the injured party, who would have to bear the burden of bringing a suit in an unfamiliar and distant jurisdiction.<sup>237</sup> She claimed that the relative percentage of contacts<sup>238</sup> should be irrelevant; instead, the analysis should focus on the quantity and quality of the contacts with the potential forum state as they stand alone.<sup>239</sup>

In *Bristol-Myers*, the final case of the triad, Justice Sotomayor fully dissented with the majority’s approach to determine if specific jurisdiction were present.<sup>240</sup> In her dissent, she reminded us of settled principles of personal jurisdiction law she found the majority

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233. *Id.*; see also sources cited *supra* note 138 and accompanying text. Human rights-related cases such as *Daimler* or *Kiobel* have forcefully illustrated that the United States, in the past, sometimes was the only forum where victims effectively could seek relief. See generally Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in A New (Post-Kiobel) World*, 46 COLUM. HUM. RTS L. REV. 158 (2014) (outlining the barriers human rights victims face in seeking access to justice in the United States and abroad).

234. *Daimler*, 571 U.S. at 159 (Sotomayor, J., concurring).

235. *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1560–61 (2017) (Sotomayor, J., dissenting in part).

236. *Id.* at 1560.

237. *Id.* at 1560–61.

238. See, e.g., *id.* at 1554 (presenting Montana-specific contacts as a percentage of the whole of BNSF’s US operations).

239. *Id.* at 1561 (Sotomayor, J., dissenting in part).

240. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1784 (2017) (Sotomayor, J., dissenting).

disregarded in denying jurisdiction over BMS in the California courts.<sup>241</sup> Given MBS's extensive contacts in California, including Plavix sales, which "account[ed] for a significant portion of its revenue," she concluded that BMS "purposefully avail[ed] itself . . . of California and its substantial pharmaceutical market."<sup>242</sup> As to the connection between the claim and the forum necessary to establish specific jurisdiction, the California court could have had jurisdiction even over the out-of-state plaintiffs, Justice Sotomayor opined, as their claims could relate to the advertising efforts that took place in California, which were identical to the advertising efforts that took place in their home states.<sup>243</sup> Lastly, Justice Sotomayor argued that BMS would be more heavily burdened if it had to defend claims in each of the separate forum states, rather than in a consolidated action in one state, as is the case presently.<sup>244</sup> The plaintiffs also benefit in a consolidated action, which allows minimization of costs and maximization of recoveries under one claim where, by contrast, the individual claims standing alone might be too small to receive relief.<sup>245</sup> The public policy concerns raised by Justice Sotomayor could serve as a future point of contention on the Court and suggest that the question of personal jurisdiction over foreign corporate defendants before US courts is far from being resolved.

#### IV. PERSONAL JURISDICTION IN THE EUROPEAN UNION

Many of the issues raised by Justice Sotomayor are potentially solved, or at least addressed, in the European approach to jurisdiction over foreign corporate defendants, but pursuant to European legal traditions, these issues are addressed in different ways. The following Part outlines personal jurisdiction rules in the European Union. Further, it examines if these rules may provide alternative solutions for some of the public policy concerns mentioned above and to what extent they are compatible with current American jurisprudence.

##### A. *European Sources*

In the European Union, there are two distinct sets of sources for determining personal jurisdiction, or, to use civil law terminology, international competence. The Brussels Regulation (the Regulation), part of the Brussels Regime, harmonizes rules on jurisdiction among

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241. *Id.* at 1785–86.

242. *Id.* at 1786.

243. *Id.*

244. *Id.* at 1786–87.

245. *Id.*

European Union member states in civil or commercial matters,<sup>246</sup> while the individual member states' domestic laws provide jurisdictional rules for international cases outside of the sphere of application of the Brussels Regime.<sup>247</sup> Perhaps surprising to the US observer, constitutional law plays a relatively insignificant role in European jurisdiction law.<sup>248</sup> Jurisdictional rules have been left to the national and European legislators<sup>249</sup> and have rarely been challenged on constitutional grounds.<sup>250</sup>

### 1. The Brussels Regime

Unlike US law, the Brussels Regulation provides detailed, codified rules for when a court in an EU member state is competent to judge a case. The Brussels Regulation contains eighty-one articles and forty-one recitals in its preamble, which explains the legislative intent behind the Regulation.<sup>251</sup> Articles 4 to 26 enumerate the applicable jurisdiction rules in the European Union. These rules exhaustively regulate jurisdiction within the European Union. Hence, the

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246. See generally Brussels Regulation, *supra* note 39. As of January 10, 2015, the Regulation replaced Council Regulation 44/2001, 2000 O.J. (L 012) (EC) [hereinafter Brussels I Regulation], on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See Brussels Regulation, *supra* note 39, art. 66. In addition to common jurisdictional rules, the Regulation provides that a judgment issued in an EU member state shall be recognized in another member state without any special recognition procedure. See *id.* art. 36, ¶ 1.

247. On the relationship between Brussels Regulation and third countries, see *infra* pp. 1283–84 and accompanying footnotes.

248. Legal scholars have invoked constitutional law to invalidate the concept of forum non conveniens, and exorbitant national jurisdiction rules, but not to define the contours of general or specific personal jurisdiction. See Cohen, *La Convention europeenne des droit de l'homme et le droit international privé francais*, 78 REV. CRIT. D.I.P. 451, 454–63 (1989); Courbe, Note, 1996 D.S. JUR. 472, 473–74; Friedrich K. Juenger, *Constitutionalizing German Jurisdictional Law*, 44 AM. J. COMP. L. 521, 521–22 (1996); Commentators disagree on the relevance of art. 6 (1) of the ECHR for international jurisdiction rules. See Haimo Schack, *Vermögensbelegenheit als Zuständigkeitsgrund--Exorbitant oder sinnvoll?*, § 23 ZPO in *Rechtsvergleichender Perspektive*, 97 ZEITSCHRIFT FÜR ZIVILPROZESS 46, 60 (1984) (Ger.). *Contra* THOMAS PFEIFFER, INTERNATIONALE ZUSTÄNDIGKEIT UND PROZESSUALE GERECHTIGKEIT 583–84 (1995).

249. The German Constitutional Court in *National Iranian Oil Company* explicitly stated that it is for the legislator, not the Constitutional Court, to decide if the exorbitant German jurisdiction rule in section 23 ZPO (jurisdiction based on defendant's assets in the forum state) is too far reaching. See Bundesverfassungsgericht [BVerfG] [Constitutional Court] Apr. 12, 1983, 64 BVERFG 1 (20) (Ger.).

250. See Juenger, *supra* note 248, at 525 (pointing towards a controversial decision by the highest German Court in Civil matters (BGH) attempting to introduce a minimum contacts requirement into sec. 23 of the ZPO).

251. See Tadas Klimas & Jurate Vaičiukaite, *The Law of Recitals in European Community Legislation*, 15 ILSA J. INT'L & COMP. L. 1, 15–16 (2008), <https://ssrn.com/abstract=1159604> [<https://perma.cc/Y28M-53V8>] (archived Aug. 28, 2018) (discussing the effect of recitals according to the doctrine of the ECJ).

Regulation replaces the member states' domestic rules;<sup>252</sup> it is for the European Court of Justice (ECJ) to ensure consistent interpretation throughout the Union.<sup>253</sup>

The Brussels Regulation applies whenever the defendant is domiciled in a member state of the European Union, independent of the defendant's nationality.<sup>254</sup> This provision extends the Regulation's sphere of application beyond intra-European cases. If, for example, a US plaintiff sues a company incorporated or headquartered in the European Union before a court in an EU member state, the Regulation will determine if the court is competent to judge the case.<sup>255</sup> The plaintiff's domicile or nationality is irrelevant. As an example, the Regulation does not apply if a European plaintiff sues a US defendant nowhere domiciled in the European Union before a domestic court in a European member state.

Moreover, the Regulation's jurisdictional rules apply exclusively to international cases.<sup>256</sup> If a German sues another German before a German court, national German jurisdiction rules will apply. In this regard, contrary to existing rules in the United States, the European regime clearly distinguishes between international and domestic personal jurisdiction. The Brussels Regulation unifies jurisdictional rules for international cases, but it does not (yet) create a uniform European law of jurisdiction.<sup>257</sup>

In addition to the Brussels Regulation, the so-called Lugano Convention applies between the EU member states and those European countries that are not members of the Union, such as Switzerland, Norway, and Iceland.<sup>258</sup> The Lugano Convention has mirrored past versions of the Brussels Regulation. Together, the Brussels Regulation and the Lugano Convention have commonly been

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252. EU regulations are directly binding without additional domestic legislation, while EU directives require local legislation in each member state. *See European Union, Regulations, Directives and Other Acts*, EUROPEAN UNION, [http://europa.E.U./european-union/law/legal-acts\\_en](http://europa.E.U./european-union/law/legal-acts_en) (last visited Feb. 21, 2017) [<https://perma.cc/F47G-HVNN>] (archived Aug. 25, 2018).

253. *See* Giulio Itzcovich, *The Interpretation of Community Law by the European Court of Justice*, 10 GER. L.J. 537, 545 (2009) (explaining the preliminary ruling procedure in EU law and the ECJ's role in ensuring that EU law is interpreted uniformly throughout the Union).

254. Brussels Regulation, *supra* note 39, art. 4.

255. *See id.* art. 4(1), pmb. Recital 13. In case a US defendant is being sued before a court in an EU member state, the court generally will apply "the national rules of jurisdiction applicable in the territory of the Member State of the court seised." *Id.* pmb. Recital 14; *see also id.* art. 6.

256. *See id.* pmb. Recital 4.

257. Although the European Commission ultimately seems to seek harmonization of European civil procedure, *see* Richard Fentiman, *Brussels I and Third States: Future Imperfect*, 13 CAMBRIDGE Y.B. EUR. LEGAL STUD. 65, 68 (2010–11).

258. Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 2007 O.J. (L339/3) art. 1(3) [hereinafter Lugano Convention].

referred to as the Brussels regime.<sup>259</sup> With the current regulation implementing significant changes to its predecessors, the uniformity between the Lugano Convention and Brussels Regulation desists. As of now, it is unclear if there are plans to revise the Lugano Convention to continue this consistency.<sup>260</sup>

## 2. Domestic Jurisdictional Rules

Alongside the EU regime, EU member states continue to use their own national rules for domestic cases, as well as when the defendant is domiciled in a non-EU country.<sup>261</sup> It is beyond the scope of this Article to describe each EU member state's national jurisdictional rules in detail; therefore, the following analysis will focus on the Brussels Regulation, but it will take into account some underlying characteristics of European civil law countries' domestic civil procedure rules.

Unlike the United States, some European countries, such as Belgium, the Netherlands, Spain, and Italy, use distinctive provisions to determine international competence when foreign parties are involved.<sup>262</sup> To the chagrin of third-state defendants, these provisions sometimes lead to rules that are just as, and sometimes more, exorbitant than the US minimum contacts rule, such as jurisdiction based on the nationality of the plaintiff or the presence of the defendant's property in certain European countries.<sup>263</sup> In one particularly infamous case, a paternity suit was brought against French Alpine skier, Jean-Claude Killy, based on undergarments left

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259. See, e.g., Giesela Rühl, *Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?*, 67 INT'L & COMP. L.Q. 99, 125 (2018) (discussing application of the Lugano Convention in the UK following Brexit).

260. See Peter Gottwald, *Europäisches Zivilprozessrecht*, in 3 MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG 1930 (Wolfgang Krüger & Thomas Rauscher eds., 2016) (Ger.) (saying the Lugano Convention's revision seems uncertain).

261. On the unsuccessful attempt to extend the Regulation's jurisdiction rules to non-EU member states, see Baumgartner, *supra* note 32, at 38 (noting "it is not surprising that one argument against unilaterally limiting [th[e] effects [of exorbitant jurisdiction rules] by the European Union has been to retain this bargaining chip for negotiations with the United States"); see also *Commission Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters*, COM (2010) (Dec. 14, 2010) [hereinafter *Commission Proposal*], <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010PC0748> [<https://perma.cc/J4QS-6ACN>] (archived Aug. 25, 2018); Pietro Franzina, *The Recast of the Brussels I Regulation: Old and New Features of the European Regime on Jurisdiction and the Recognition of Judgements*, LETTERS BLOGATORY (June 27, 2013), <https://lettersblogatory.com/author/pfranzina/> [<https://perma.cc/W3JS-VQNV>] (archived Aug. 25, 2018).

262. See SCHACK, *supra* note 61, at 180.

263. For a list of exorbitant rules of jurisdiction provided by the EU Member States according to the Brussels Regulation, see Brussels Regulation, *supra* note 39, art. 76(1)(a).

in Austria.<sup>264</sup> This and other exorbitant grounds of jurisdiction have been extensively criticized, particularly by US scholars.<sup>265</sup> Still, some European authors defend them as necessary to provide effective access to justice for plaintiffs, regardless as to whether they are domestic or foreign, such as by basing jurisdiction on the place where the defendant's assets can be seized.<sup>266</sup> Among EU member states, the Brussels Regulation explicitly excludes these exorbitant grounds of jurisdiction, such as those based on the nationality of the plaintiff or the localization or detention of property within the forum state.<sup>267</sup>

The European Commission in its draft proposal for the Brussels Regulation Recast (the Recast) had envisioned abolishing exorbitant jurisdiction rules, not only among EU member states, as stipulated in Article 5(2) of the current Regulation, but also in relation to nonmember countries.<sup>268</sup> The extension of the Regulation's general rules of personal jurisdiction to third-state defendants was one of the most controversial aspects of the Recast. It was ultimately abandoned because a majority of stakeholders during the Regulation's consultation process favored leaving recognition and enforcement of

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264. See Stanley E. Cox, *Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177, 1186 (1998) (summarizing the case). It is noteworthy that Austria since 1983 requires that the asset's value must be proportionate to the claim. SCHACK, *supra* note 61, at 145.

265. See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 138–43 (1992) [hereinafter Borchers *Comparing*] (criticizing some aspects of the Brussels Convention, but still proposing it as a model preferable to American constitutionalizing of jurisdiction); see also Cox, *supra* note 264, at 1184 n. 28. See generally Kevin M. Clermont & John R. B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474 (2006) (discussing the exorbitant power exercised by the United States, France, and most of the rest of the world).

266. See Patzina, *supra* note 51, at 250 (arguing against proposals to exclude jurisdiction based on assets of minimal value from sec. 23 ZPO); see also SCHACK, *supra* note 61, at 147 (pointing towards cases, where US and British companies were able to successfully seize assets of the National Iranian Oil Company in German banks based on the German exorbitant jurisdiction rule based on localization of property in sec. 23 ZPO).

267. See Brussels Regulation, *supra* note 39, art. 5(2), art. 76(1)(a); see also 2015 O.J. (L C 4/2) (listing the exorbitant rules of jurisdiction provided by the Member States according to art. 76(1)(a)).

268. See *Commission Proposal*, *supra* note 261 (proposing to abolishing exorbitant jurisdictional rules). Ironically, the positions of third country defendants under the Regulation recast is now even worse than under its predecessor. The abolition of the exequatur requirement among Member States in the recast magnifies the negative effect of domestic exorbitant jurisdiction rules for third party defendants. See Borchers, *supra* note 2, at 9–10 (“A United States or Canadian defendant being sued in an EU court invoking an exorbitant jurisdictional basis could have, at one time, simply ignored the proceeding as long as the defendant did not have any assets in the forum nation, because other nations would likely have refused to recognize such a judgement. However, a similarly situated defendant no longer has that luxury unless the defendant does not have any assets in the EU because such judgements now circulate even more freely among the Member States.”). *But see* SCHACK, *supra* note 61, at 42 (noting in practice no such case has occurred yet).

third-state judgments and related questions to a multilateral framework, the reasons for which included—not least of all—the strengthening of the European Union’s position at the negotiating table.<sup>269</sup> In light of the Supreme Court’s revised minimum contacts test, the EU member states might be willing to reconsider their exorbitant jurisdiction rules with regard to third-party states.<sup>270</sup>

Those EU countries that do not have specific rules for international cases typically use the same jurisdiction rules for domestic and international cases.<sup>271</sup> On its face, this seems identical to the US approach to personal jurisdiction, where the same rules determine personal jurisdiction over foreign and domestic out-of-state defendants.<sup>272</sup> However, the principle of dual-functionality in some European domestic codifications recognizes that the international character of a case may require applying the internal rules differently in an international context.<sup>273</sup> The rationale behind the differentiation is evocative of some of the criticism that has been expressed about the application of the US minimum contacts rule to alien corporations. Requiring a defendant to stand trial in a different court while nevertheless within his “home” jurisdiction may still be inconvenient or impractical as a matter of law. Therefore, the territorial distribution of jurisdiction within the same country—much like that between courts within any US state—is a question of venue rather than personal jurisdiction.<sup>274</sup> Facing a lawsuit in a foreign country, however, has far-reaching consequences on the outcome of the case past inconvenience. Not only will the defendant have to deal with unfamiliar procedural rules, the forum state’s conflict of law rules will also determine the material law applicable to the case.<sup>275</sup>

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269. See Baumgartner, *supra* note 32, at 38 (noting “it is not surprising that one argument against unilaterally limiting [th[e] effects [of exorbitant jurisdiction rules] by the European Union has been to retain this bargaining chip for negotiations with the United States”); see also *Commission Proposal*, *supra* note 261 (proposing to abolish exorbitant jurisdiction rules); Franzina, *supra* note 261 (stating the Parliament and the majority of Member States favored pursuing further harmonization through negotiation of a global regime, “along the lines of the (unsuccessful, but recently revived) Judgment Project of the Hague Conference on Private International Law”).

270. See Baumgartner, *supra* note 32, at 38 (stating that because of the changed “transnational litigation landscape . . . , Europeans should now have . . . less of an interest in limiting the judicial jurisdiction of U.S. courts”).

271. This is so-called dual-functionality. See SCHACK, *supra* note 61, at 182 (referencing German, Greek, Italian, Portuguese, French and Austrian codifications).

272. See *supra* Part III.A.

273. See SCHACK, *supra* note 61, at 102–03. German personal jurisdiction rules have a dual functionality. If according to the domestic rules a local court is competent to judge a case, this generally indicates the court’s international competence. However, the specific circumstances of the international case may lead a court to acknowledge or deny jurisdiction. *Id.*

274. See sources cited *supra* note 47 and accompanying text.

275. See SCHACK, *supra* note 61, at 104 (pointing towards the different interests at stake in international and domestic personal jurisdiction cases).

Moreover, unlike in inter-European cases with reciprocal recognition of judgments under the Brussels Regulation,<sup>276</sup> and different still from judgment recognition between US states under the Full Faith and Credit Clause, the recognition of a foreign judgment from a third-country court is not always guaranteed.<sup>277</sup> Although generally applied restrictively, dual-functionality can lead a local court to acknowledge its international competence even if it would deny personal jurisdiction in a purely domestic case. A German court, for example, declared that it was competent to judge a case between a plaintiff and defendant, both domiciled in Germany, regarding a rental property located in Serbia. Though German procedural rules in domestic disputes concerning lease relationships provide exclusive jurisdiction to the court “in the jurisdiction of which the spaces are situate[d],”<sup>278</sup> the German court found it had international competence because a judgment by the Serbian court (at the time of the dispute Yugoslavian) would not have been recognized in Germany due to lack of reciprocity.<sup>279</sup>

The denial of international jurisdiction despite territorial competence is unlikely, since it would amount to *forum non conveniens*—a concept largely rejected by European civil law countries—or would overlap with lack of judicial power.<sup>280</sup> Whether special jurisdiction rules, or an adapted version of dual-functionality for international cases, are a viable option under the US paradigm of personal jurisdiction is an open question. The following subparts examine the degree of convergence between the US and European approaches and discuss if under the renovated US and EU paradigms there is an increased prospect for harmonization of US and EU rules,

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276. Brussels Regulation, *supra* note 39, art. 36(1) stipulates: “A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required.”

277. See Baumgartner, *supra* note 32, at 7–9 (“U.S. judgments do not always fare well abroad” while “[i]n the United States, on the other hand, courts long ago developed a liberal regime for the recognition and enforcement of foreign judgments.”); see also Feldman, *supra* note 17, at 2207–14 (describing the current state of review of foreign judgements by US courts under the mirror-image rule); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 50 (2014) (noting “the current U.S. approach to recognition and enforcement of foreign judgments involves a great deal of cost, complexity, and uncertainty, which creates numerous problems for both U.S. and foreign parties.”).

278. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 29a, translation at [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.pdf](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.pdf).

279. SCHACK, *supra* note 61, at 267.

280. See Patzina, *supra* note 51, at 210; see also Wendy Kennett, *Forum Non Conveniens in Europe*, 54 CAMBRIDGE L.J. 552, 574–75 (1995) (pointing to a French case, where the court refused to apply art. 14 Code civil [Civil Code] (Fr.) “based on an unusual conception of fraudulent evasion of the law”); *infra* pp. 1291–93 and accompanying footnotes.

or whether—despite the Supreme Court’s increased consideration for other nations’ laws—the differences are still too big.<sup>281</sup>

### B. Characteristics

The following subparts identify the Brussels Regulation’s characteristics and the underlying systemic differences between personal jurisdiction in the European Union and the United States. They analyze how the EU approach compares to the US rules and how far it could be made useful to address some of the shortcomings of the current US regime.

#### 1. Harmonization and Right to a Fair Trial

Contrary to the US system with its emphasis on constitutional due process and “traditional notions of fair play and substantial justice,”<sup>282</sup> the Brussels Regulation provides a uniform set of detailed rules, which not only limits but also replaces domestic jurisdiction rules.<sup>283</sup> In accordance with the overall goals of the European Union, the Brussels Regulation aims at overcoming “[c]ertain differences between ‘national rules governing jurisdiction and recognition of judgments’<sup>284</sup> in order to create a common European market and enhance access to justice for European citizens.”<sup>285</sup>

As one commentator observed, the U.S. Constitution and the Brussels Regulation operate on different functional levels.<sup>286</sup> Setting jurisdictional rules like those that the Brussels Regulation provides is a function of state or federal law in the United States, while limitations on jurisdiction originate in the U.S. Constitution.<sup>287</sup> In the European Union, constitutional limitations are a matter of the member state’s constitutional law or the European Convention on Human Rights (ECHR).<sup>288</sup> Article 6 of the ECHR guarantees the right to a fair trial,<sup>289</sup>

281. See *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014) (referencing EU rules to support its restrictions on US rules of general jurisdiction).

282. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

283. See sources cited *supra* note 248 and accompanying text.

284. Brussels Regulation, *supra* note 39, pmbl. Recital 4.

285. See *id.* pmbl. Recital 1 & 2.

286. See Michaels, *supra* note 8, at 1017–18 (arguing that Brussels Regulation and U.S. Constitution operate on two different functional levels and therefore cannot be compared).

287. See Feldman, *supra* note 17, at 105 (arguing that the “constitutionalization” of personal jurisdiction is the biggest difference between US and EU jurisdiction law and “restricts the American’s ability to ‘treatify’ it”); see also Michaels, *supra* note 8, at 1019.

288. See generally CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Sept. 3, 1953, 213 U.N.T.S. 221 [hereinafter ECHR] (providing fundamental freedom and human rights protections submitted by the Council of Europe).

289. See Andreas Fisahn, *Hierarchy or Network—On the Relationship of the National to the European Legal System*, 21(1) EUROPEAN J. CURRENT LEGAL ISSUES

but as mentioned above, has played an insignificant role in limiting jurisdiction over foreign defendants thus far.<sup>290</sup>

These functional differences do not mean that the Brussels Regulation and U.S. Constitution could not be compared regarding personal jurisdiction,<sup>291</sup> or that personal jurisdiction in the European Union lacks constitutional control as some commentators claim.<sup>292</sup> Differences are subtle and there is significant overlap between the two functional levels.

First, the European Court of Justice (ECJ) applies the Brussels Regulation in accordance with the standards set forth in the ECHR and thus incidentally examines compliance with the fundamental rights codified in the ECHR.<sup>293</sup>

Second, in the United States, as a federal system there is a “perceived need to prevent one state from encroaching on the prerogatives of another,”<sup>294</sup> which, according to the Supreme Court, is a requirement stemming from constitutional due process.<sup>295</sup> In the European Union, the Brussels Regulation, coordinating jurisdictional power among the sovereign member states, fulfills this need.<sup>296</sup>

Third, the scope of constitutional due process rights in the United States differs considerably from those in European member states protected under both the ECHR and each state’s national constitution. The Fourteenth Amendment’s Due Process Clause is significantly broader than the so-called “right to a fair trial” in Article 6(1) of the ECHR or domestic constitutional laws of European member states.<sup>297</sup>

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(2015), [http://webjcli.org/article/view/413/527#\\_ftnref18](http://webjcli.org/article/view/413/527#_ftnref18) [https://perma.cc/KHN7-2WAM] (archived Aug. 25, 2018) (stating European law has precedence over basic German laws, but not over German constitutional laws); Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 383–84 (2009) (explaining the relationship between protection of constitutional rights under the domestic constitutions of EU Member States and EU standards for the protection of individual rights).

290. See Michaels, *supra* note 8, at 1018 (noting art. 6(1) ECHR “has the potential to perform the same functions as the Due Process Clause in the United States”).

291. *But see id.* at 1018 (“[F]or Nuyts, it follows that the U.S. Constitution and the Brussels Regulation cannot be meaningfully compared, because they are not functionally equivalent. A proper approach must compare rules serving the same functions.”).

292. *See id.* (“It is often claimed that . . . constitutional control of jurisdiction is absent or at least deficient in the European context.”).

293. See Ulrich Magnus, *Introduction*, in 1 EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW 47 (Ulrich Magnus & Peter Mankowski eds., 2016) [hereinafter ECPII].

294. Juenger, *supra* note 248, at 527.

295. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 289, 294 (1980) (referring to “the Due Process Clause . . . as an instrument of interstate federalism”).

296. See sources cited *supra* note 252 and accompanying text.

297. ECHR, *supra* note 288, art. 6(1) (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law[.]”); see GRUNDGESETZ [GG] [BASIC LAW], art. 103(1) (Ger.) (“In the courts every person shall be entitled to a hearing in accordance with law.”).

Article 6 expressly distinguishes between a civil (subarticle 1) and criminal (subarticles 2 and 3) limb. In civil cases, Article 6(1) primarily guarantees a right of access to a court. In the words of the ECHR, the right to a fair trial “requires that litigants should have an effective judicial remedy enabling them to assert their civil rights.”<sup>298</sup> The ECHR has acknowledged “that the requirements inherent in the concept of a ‘fair hearing’ are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge.”<sup>299</sup> While the criminal limb focuses on protecting the accused’s procedural rights, the civil limb tends to impose positive rights. It includes the principle of legal certainty and a right to a fair hearing as reflected in the Brussels Regulation.<sup>300</sup> Article 6(1) has also been used as a basis to argue for a *forum necessitatis* under the Brussels Regulation in cases where the plaintiff would not be able to effectively bring his claim otherwise.<sup>301</sup>

The Fourteenth Amendment of the U.S. Constitution, in contrast, is commonly understood as applying a negative right to limit governmental overreach in both criminal and civil matters.<sup>302</sup> This explains why the Brussels Regulations focuses on access to justice and predictable rules as expression of a fair trial, while the Supreme Court, through the Fourteenth Amendment’s Due Process Clause, focuses increasingly on limiting overly broad personal jurisdiction rules at the state level in the sole interest of the defendant. Though nothing prevents the Supreme Court from adjusting its minimum contacts test to also account for plaintiffs’ interests,<sup>303</sup> due to the functional

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298. EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 18 (Dec. 31, 2017) [hereinafter ECtHR].

299. *See id.* at 45 (“The Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.”).

300. *See id.*; *see also supra* Part IV.B.2. & IV.B.3.

301. *See Gottwald, supra* note 260, at 1952 (arguing for *forum necessitates* in cases where a plaintiff will not be able to execute a decision from a competent court based on the executing state’s order public).

302. *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 888 (1986) (concluding that the U.S. Constitution, “unlike the German, is a constitution of negative rather than positive liberties”); *see also* Gerda Kleijkamp, *Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 307, 318 (2002) (suggesting that the different approaches may stem from the fact “that the international law of human rights explicitly recognizes positive obligations of national governments to promote the general social welfare of their citizens; a doctrine to which the European Court, as an international judicial body protecting human rights, obviously adheres. American constitutional rights, on the other hand, are negative, at least according to the more conservative interpreters of the meaning of the Constitution, and provide protection against abuse by the government, without imposing affirmative obligations on the government to guarantee each individual’s basic human needs.”).

303. *See generally* R. D. Rees, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U. L. REV. 405 (2003).

differences, the Supreme Court is unlikely to develop a system of detailed jurisdiction rules providing positive rights similar to those in the Brussels Regulation. This would require action from either Congress at the federal level or its state-level counterparts.<sup>304</sup> Proposals have been made in literature and commentary, but thus far have not gained much traction.<sup>305</sup>

## 2. Predictability, Legal Certainty, and Judicial Discretion

Under the Brussels Regulation, the general rule of jurisdiction is that a court may impose personal jurisdiction if the forum includes the defendant's domicile.<sup>306</sup> Under the principle of *actor sequitur forum rei*, and in the interest of defendant protection, the plaintiff generally has to sue the defendant in the latter's domicile.<sup>307</sup> Departure from this general rule under settled EU law requires "well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor."<sup>308</sup> This has led to an exhaustive list of carefully defined special heads of jurisdiction in the Brussels Regulation, and predictability has developed into a distinctive feature of EU jurisdiction rules.

Despite the obvious appeal of predictable rules,<sup>309</sup> the Brussels regime is not without criticism. In particular, commentators from common law jurisdictions have criticized it for favoring harmonization and predictability without providing an "optimal solution of practical problems."<sup>310</sup> Static jurisdiction rules that point to a single forum to resolve disputes between parties from two different states or countries, like those in the Brussels Regulation, seem incompatible with traditional common law notions of judicial discretion, allowing a court

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304. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (noting that "assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts").

305. See Borchers, *supra* note 2, at 20 (stating, "[f]ederal legislation might well be able to overcome the *J. McIntyre* decision").

306. Brussels Regulation, *supra* note 39, art. 4(1).

307. See Case C-412/98, *Group Josi Reinsurance Company SA v Universal General Insurance Company*, 2000 E.C.R. I-5925, ¶ 35 (arguing that jurisdiction at the defendant's domicile "makes it easier, in principle, for a defendant to defend himself"); P. Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, OJ C 59/1 18 (1979).

308. Brussels Regulation, *supra* note 39, pmb. Recital 15; see Case C-412/98, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, 2000 E.C.R. I-5925, ¶ 36 ("It is only by way of derogation from that fundamental principle, that the courts of the Contracting State in which the defendant has its domicile or seat are to have jurisdiction, that the Convention provides, . . . for the cases, exhaustively listed . . .").

309. See *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) ("[s]imple jurisdictional rules . . . promote greater predictability.").

310. See Fentiman, *supra* note 257, at 84 (criticizing the EU Commission's approach as "harmonizing for its own sake").

to determine jurisdiction on an *ad hoc* basis for fairness at the expense of predictability.<sup>311</sup> In line with this, the Supreme Court in *McIntyre* stated, “The defendant’s conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.”<sup>312</sup>

While the Brussels Regulation’s pragmatic approach is axiomatic to civil law jurists,<sup>313</sup> it can appear insufficiently “flexible to respond to the complexity of cross-border litigation” from a common law perspective.<sup>314</sup> As a result, the Regulation reflects an overall rejection of judicial discretion, which, while deeply rooted in common law, runs counter to civil law tradition as well as the constitutional law of civil law countries and their concern for legal certainty.<sup>315</sup> European reservation about judicial discretion is exemplified in the European attitude to *forum non conveniens*. German constitutional law provides, “No one may be removed from the jurisdiction of his lawful judge.”<sup>316</sup> This provision is understood to bar German courts from declining jurisdiction in cases where, if appearing in a common law court, a judge could invoke *forum non conveniens* because he or she considers another forum more appropriate to decide the case.<sup>317</sup>

The ECJ’s jurisprudence reflects this view. In a decision on the interpretation of the Brussels Convention, the Brussels Regulation’s predecessor, the court decided:

[T]he Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting

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311. See Silberman *Impact*, *supra* note 32, at 333 (stating while European jurisdiction rules, apart from jurisdiction at the domicile of the defendant, try to provide a single forum to the plaintiff, “a defendant is often amenable to specific jurisdiction in a number of places”).

312. *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U.S. 873, 885 (2011).

313. See James R. Maxeiner, *Imagine Judges that Apply Law: How They Might Do It*, 114 PENN ST. L. REV. 469, 471–73 (2009) (contrasting American judicial lawmaking to the way German judges apply law to facts, requiring a system of precise legal rules).

314. Fentiman, *supra* note 257, at 86.

315. See generally James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?* 15 TUL. J. INT’L & COMP. L. 541 (2006–07).

316. Grundgesetz [GG] [Basic Law], art. 101(1)2, translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html); see also Kennett, *supra* note 280, at 560 (noting in other European legal systems “the constitutional imperative is stressed less . . . but disapproval of a discretion in relation to jurisdiction is widespread”).

317. See GEIMER, *supra* note 48, at 136–37 (noting that *forum non conveniens* is unconstitutional under German law); see also Strauss, *supra* note 37, at 383 n.33 (“‘Convenience’ factors include the private interests of the litigants, ease of access to sources of proof, ease and expense of compelling reluctant witnesses to attend proceedings, expense of transporting willing witnesses, and the enforceability of judgment once it is obtained.”).

State is in issue or the proceedings have no connecting factors to any other Contracting State.<sup>318</sup>

Thus, within the sphere of application of the Convention, the ECJ excludes recourse to *forum non conveniens* by courts in EU member states—including those in common law countries, which normally would apply the doctrine.<sup>319</sup> During the overhaul of the Regulation, the European Parliament had advocated for a rule that would have allowed a court in a European member state to decline jurisdiction if it considered that the courts of another member state were better placed to rule on the dispute in question.<sup>320</sup> The final version of the Regulation's Recast did not, however, retain this proposition.<sup>321</sup>

Although common law EU member states made concessions during the initial negotiations, it seems less certain, when judgment treaty negotiations resume with the United States and other non-EU common law countries on one side of the table and civil law countries on the other, whether negotiators will be able to overcome this fundamentally different attitude toward judicial discretion. However, US commentators have already suggested “retiring *forum non conveniens*.”<sup>322</sup> Against the backdrop of recent restrictions on personal jurisdiction by the Supreme Court, there is less need, they have argued, to revert to *forum non conveniens* for US courts.<sup>323</sup> As a result, the concessions made by common law countries in the European Union could serve as another argument that *forum non conveniens* may be less entrenched in common law jurisprudence than many assume and that differences between civil and common law, in this respect, are not unsurmountable.<sup>324</sup>

While US and European rules are arguably moving closer towards harmonization on predictability and judicial discretion, subtle differences remain. For example, look to the Supreme Court's “at home test” to establish general jurisdiction over foreign corporate defendants

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318. Case C-281/02, *Owusu v. Jackson*, 2005 E.C.R. I-1383, ¶ 46.

319. See Jan Wouters & Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 GEO. WASH. INT'L L. REV. 939, 961 (2009) (“ . . . on the ground that another forum, either in another EU member state or in a non-member state, is more appropriate . . . ”).

320. A similar provision is part of Regulation (EU) No 650/2012, 2012 O.J. (L 201/107) (Succession Regulation), sec. 6.

321. See Gottwald, *supra* note 260, at 1952.

322. See generally Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390 (2017).

323. See *id.* at 291 (suggesting a diminished need for *forum non conveniens*); see also Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U. J. INT'L L. & POL. 1063, 1074 (2013) (concluding that *forum non conveniens* “would [now] appear to be of limited use to foreign defendants who already have firmer protections as a result of *Goodyear* and *Nicastro*”).

324. See Gardner, *supra* note 322, at 398 (“*Forum non conveniens* does not have the deep historical roots that many—including the Supreme Court—seem to have assumed.”).

as compared to the Brussels Regulation's rules for general jurisdiction over corporations or other legal persons. The Supreme Court in *Goodyear* stated, "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."<sup>325</sup> The Court continued: "With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'"<sup>326</sup> This sounds strikingly similar to Article 4(1) of the Brussels Regulation: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."<sup>327</sup> For corporations, Article 63(1) specifies:

- . . . a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
- (a) statutory seat;
  - (b) central administration; or
  - (c) principal place of business.<sup>328</sup>

"Statutory seat" means the place where a company is incorporated or registered.<sup>329</sup> Central administration is the criterion most commonly used in the domestic conflict of law rules of individual EU member states to determine the law applicable to corporations.<sup>330</sup> Accordingly, though interpretations under the Brussels Regulation need to be autonomous, central administration is commonly referred to as the place where the company effectively is managed and controlled.<sup>331</sup> A corporation's principal place of business is where the main business activities are located.<sup>332</sup> According to a decision by the ECJ, a branch,

325. *Daimler AG v. Bauman*, 571 U.S. 117, 136–37 (2014).

326. *Id.*

327. Brussels Regulation, *supra* note 39, art. 4(1).

328. *See id.* Since the term "statutory seat" is used in most EU member states, but not in Ireland, Cyprus, or the United Kingdom, art. 63(2) specifies: "For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place." *Id.* art. 63(2).

329. *See* Paul Vlas, *Article 63*, in *ECPIIL* 993, 994–95.

330. *See generally* Werner F. Ebke, *The Real Seat Doctrine in the Conflict of Corporate Laws*, 36 *INT'L L.* 1015 (2002). While the common law member states and the Netherlands follow the incorporation theory, i.e., the nationality of a company is determined based on the place where it is registered, other member states follow what is called the "real seat" theory, i.e., the law of the country where the company is actually managed. *Id.*

331. *See* Vlas, *supra* note 329, at 995 (stating the term should not be "treated identical to the concepts of the national systems of private international law").

332. *Id.* at 995; *see also* Notice of Proposed Amendment (NPA) No 09/2005, Draft Opinion of the European Safety Agency (Dec. 6, 2005), <https://www.easa.europa.eu/sites/default/files/dfu/NPA-09-2005.pdf> [<https://perma.cc/Z5BF-GASG>] (archived Aug. 25, 2018) ("[I]t is a general understanding that the concept of principal place of business should be construed to mean a permanent and regular place of transacting of general

agency, or other establishment does not qualify as a corporation's domicile under Article 63.<sup>333</sup> Article 63(1) does not permit "piercing the jurisdictional veil" to establish general jurisdiction over the parent via its dependent branch in a European Union member state.<sup>334</sup> In this regard, the Brussels Regulation differentiates between general jurisdiction, which, according to Articles 4(1) and 63, is limited to the corporation's domicile, and specific jurisdiction—special jurisdiction in the terms of the Regulation—at the place where the dependent establishment is located.<sup>335</sup> Thus, a company headquartered in the United States with a branch in Germany would not be subject to general jurisdiction in the European Union, but could be sued in Germany for a specific claim related to the operations of the branch based on special jurisdiction according to domestic German law of civil procedure.<sup>336</sup>

If a corporation's statutory seat, central administration, and principal place of business are located in different EU member states, the plaintiff has the choice between all of them.<sup>337</sup> All three potentially connecting factors need to be decided by the forum.<sup>338</sup> The statutory seat is easy to determine, but central administration and principle place of business can raise factual issues.<sup>339</sup> Thus, even the allegedly predictable EU rules carry some inherent uncertainty. Nevertheless, under the Brussels Regulation a potential defendant corporation is

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business, and would not include a temporary place of sojourn during ad hoc negotiations. It should as well indicate where is the seat of the management of the interests of the organization or its guiding activity.”).

333. Case 33/78, *Somafur SA v. Saar-Ferngas*, 1978 E.C.R. 2183–93.

334. That follows from art. 7 (5). See Brussels Regulation, *supra* note 39; see also Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 14, 10, 25 (1986) (noting merging parent and subsidiary for jurisdictional purposes requires an inquiry “comparable to the corporate law question of piercing the corporate veil”).

335. See Vlas, *supra* note 329, at 995 (pointing to the difference between art. 63 and 7(5) and referencing an erroneous decision by Court d'Appel [Court of Appeals] [CA] Versailles, Sept. 26, 1991, *Revue Critique de Droit International Privé* [RCDP] (1992)).

336. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 23, translation at [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.pdf](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.pdf); see also Peter Mankowski, *Article 7*, in ECPII 121, 353 [hereinafter Mankowski *Article 7*] (“The principal place of business of a company [here, the independent subsidiary] already constitutes a general jurisdiction and can thus, by the very logic and the opening words of [a]rt. 5, not be used in order to establish special jurisdiction.”).

337. See Gottwald, *supra* note 260, at 2147 (noting that if a plaintiff were to bring suit based on these three alternative grounds of jurisdiction in multiple fori, the second court seized would have to stay its proceedings according to Brussels Regulation, art. 29(1)).

338. *Id.*

339. See Vlas, *supra* note 329, at 995 (Principal place of business “means the place where the main business activities are located. This notion is also factual and could give rise to problems, which have to be solved by the forum.”).

assured that the three connecting factors stipulated in Article 63(1) are exhaustive and fairly predictable.<sup>340</sup>

In the United States, it remains unclear how “principal place of business” is defined and how the notion relates to a corporation’s “home.”<sup>341</sup> Three out of the four relevant general jurisdiction cases the Supreme Court has decided to date—*Perkins*, *Helicopteros*, and *Daimler*—presented unique circumstances.<sup>342</sup> They are “limited by their facts” and are “poor case[s] from which to generalize.”<sup>343</sup> The “at home” test introduced in *Goodyear* and reaffirmed in *Daimler* remains open to interpretation. In fact, the Supreme Court’s reasoning is somewhat circular. In *Daimler* the Court stated, “A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations” when the corporation is “essentially at home in the forum State.”<sup>344</sup> With reference to an individual’s domicile, the Court then went on to explain that the “paradigm forum for the exercise of general jurisdiction” is a place “in which the corporation is fairly regarded as at home”<sup>345</sup> and “the place of incorporation and principal place of business are ‘paradig[m] . . . bases for general jurisdiction.’”<sup>346</sup> Should this lead to conclude that a corporation has its principal place of business where it is at home?

Though the Court rejected the Ninth Circuit’s agency approach to establishing general jurisdiction in *Daimler*,<sup>347</sup> it did not expressly exclude other ways of establishing derivative jurisdiction over the foreign parent through an independent subsidiary in the forum state.<sup>348</sup> Under the “at home test,” it seems perfectly conceivable for a court in the United States to establish general personal jurisdiction over a foreign parent based on its in-state subsidiary, if, for example, decision-makers in both companies were identical or the parent in fact

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340. See Brussels Regulation, *supra* note 39, pmb. Recital 15 (“The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.”).

341. See *Hertz Corp. v. Friend*, 559 U.S. 77, 92–93 (2010) (holding that for diversity jurisdiction purposes, “principal place of business” is the “nerve center” of a corporation, “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities”).

342. See *Daimler AG v. Bauman*, 571 U.S. 117, 142 (2014) (Sotomayor, J., concurring) (agreeing “with the Court’s conclusion that the Due Process Clause prohibits the exercise of personal jurisdiction over *Daimler* in light of the unique circumstances of this case”) (emphasis added).

343. Borchers *General Jurisdiction*, *supra* note 101, at 124–25.

344. *Daimler*, 571 U.S. at 122.

345. *Id.* at 137.

346. *Id.*

347. *Id.* at 135.

348. *Id.* at 137.

controlled the legally independent subsidiary.<sup>349</sup> Under European rules, such a *de facto* branch could establish special jurisdiction over the parent at the place where the dependent establishment is situated,<sup>350</sup> but not general jurisdiction over the parent at the place where the dependent entity is situated as the “at home test” suggests.<sup>351</sup>

Finally, the Supreme Court in *Daimler*, despite advocating for more predictable rules, provides ample room for exceptions to its rule: “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.”<sup>352</sup> This remark, once again, evidences the Court’s attachment to judicial discretion.<sup>353</sup> While such uncertainty is inconceivable under the exhaustive enumeration of connecting factors in Article 63(1) of the Brussels Regulation, it opens the door to inconsistent interpretation and application by lower courts in the United States. The definitional uncertainty justifies why foreign defendants continue to worry about the reach of long-armed jurisdiction in the United States, and feeds international commentators’ skepticism regarding the Supreme Court’s retrenchment from overly broad general jurisdiction.<sup>354</sup>

### 3. Efficiency, Access to Justice, and Balancing Competing Interests

As discussed in the previous subpart, both Supreme Court precedent as of *Goodyear* and *Daimler* and the Brussels Regulation in Article 4(1) limit general jurisdiction over foreign corporate defendants to the corporation’s domicile, though the way they identify that domicile differs, adding to legal uncertainty and leading to slightly different results between civil and common law legal systems.<sup>355</sup> Differences become even more pronounced when it comes to specific jurisdiction. In order to establish the link between the claim and the forum necessary to establish what is now known as specific jurisdiction under US law, the Supreme Court in *International Shoe* referred to “obligations [that] arise out of or are connected with the activities

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349. The issue was raised in *Daimler*, but ultimately not decided, because plaintiffs never “maintained that MBUSA was an alter ego of Daimler.” *Id.* at 134.

350. Brussels Regulation, *supra* note 39, art. 7(5) (stating “as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated”).

351. See Mankowski *Article 7*, *supra* note 336.

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

353. See Silberman *Impact*, *supra* note 32; see also text accompanying note 312.

354. See Zekoll & Schulz, *supra* note 2, at 328 (pointing towards remaining uncertainty about what constitutes an “exceptional case” and ways to establish derivative jurisdiction over a foreign parent company, which have not expressly been excluded in *Daimler*).

355. See *supra* Part IV.B.2.

within the state . . .” and has provided little by way of definition ever since.<sup>356</sup>

The Brussels Regulation, by contrast, in typical civil law fashion and its quest for predictability,<sup>357</sup> does not employ “a close connection per se” as the criterion of choice to establish specific or, in the terms of the Regulation, “special jurisdiction.”<sup>358</sup> In Articles 7 to 22, the Regulation provides a detailed list of special heads of jurisdiction in matters relating to general contracts, torts, insurance, and consumer and employment contracts, to name just a few. It is beyond the scope of this Article to analyze each individual head of special jurisdiction, each of which has spurred a litany of commentary by European legal scholars. The goal of European special jurisdiction rules, like those of its US counterpart, specific jurisdiction, is to provide the plaintiff with an alternative forum to the defendant’s domicile in cases that involve a particularly close connection between the case and the location of the court deciding the matter.<sup>359</sup> While the Supreme Court in *Worldwide*, and even more so in *McIntyre* and *Walden*, has interpreted specific jurisdiction restrictively by limiting its application to cases where the defendant “purposefully availed himself” of the forum where the court entertaining jurisdiction is,<sup>360</sup> the Brussels Regulation’s list of heads of special jurisdiction is extensive though, for the sake of clarity, exhaustive.<sup>361</sup> To this aim, it incorporates the main objectives of the Regulation, which is to enhance access to justice for European citizens while simultaneously protecting defendants’ expectations in an easily predictable forum.<sup>362</sup>

A closer look at the Brussels Regulation’s special jurisdiction requirements reveal that the European approach is not about predictability or hard and fast rules alone as a cursory examination of

356. See Borchers *General Jurisdiction*, *supra* note 101, at 126 (noting that neither the term “connected with, nor ‘arising out of’ are ‘self-defining, nor are they necessarily interchangeable’”); see also Feldman, *supra* note 17, at 2200 (“[T]he 2011 decision in *J. McIntyre Machinery, Ltd. v. Nicastro* blurred the parameters of ‘minimum contacts’ even further.”).

357. See Brussels Regulation, *supra* note 39, pmb. Recital 15 & 16 (“[T]he rules of jurisdiction should be highly predictable.”).

358. Mankowski *Article 7*, *supra* note 336, at 143 (citing Case C-288/92, *Custom Made Commercial Ltd v. Stawa Metallbau GmbH*, 1994 E.C.R. I-2913) (arguing that this would run counter the regulation’s principle of legal certainty).

359. See Brussels Regulation, *supra* note 39, pmb. Recital 16 (“[T]here should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice.”).

360. See *supra* Part III.B.2.

361. See Mankowski *Article 7*, *supra* note 336, at 144.

362. See Brussels Regulation, *supra* note 39, pmb. Recital 2 & 15; see also Mankowski *Article 7*, *supra* note 336, at 144 (“[W]ith the exception of (6) all heads of special jurisdiction contained in art. 7 vest jurisdiction in a certain court, not only in the courts of a state. Hence, art. 7, with the exception of (6), does not only regulate international jurisdiction, but also local jurisdiction or venue.”).

Articles 4 to 35 may suggest.<sup>363</sup> On the contrary, some of the special jurisdiction rules, such as those contained in Article 7(1), (2), or (5)—which is discussed in more detail below—are rather complex and have given rise to extensive scholarly commentary and ECJ case law. The Regulation focuses on the relationship between the court and the claim in order to find the most appropriate forum as suggested by the term “international competence.”<sup>364</sup> Evocative of Justice Sotomayor’s policy concerns,<sup>365</sup> the European special jurisdiction rules seek to balance the interests of plaintiffs and defendants. This is evidenced, as an example, in Article 7(1), which provides detailed rules in contractual matters to balance Article 4(1), which, standing alone, would otherwise one-sidedly favor the debtor in a contractual relationship.<sup>366</sup> Other special jurisdiction rules aim to protect the supposedly weaker party in a contractual relationship, such as Articles 17 to 19 (jurisdiction over consumer contracts) or Articles 20 and 21 (contracts of employment).<sup>367</sup> Other heads of special jurisdiction try to improve the sound administration of justice and efficiency of court proceedings by providing a forum that is closely connected to the claim, such as by making it easier for the court to hear evidence.<sup>368</sup> Some special heads of jurisdiction, like jurisdiction *in rem*,<sup>369</sup> even attempt to achieve synchronization between international jurisdiction and choice of law rules, thus avoiding the scenario where the designated judge may have

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363. See Michaels, *supra* note 8, at 1008, 1039–52 (“European law . . . uses hard and fast rules that are easier to apply and therefore more predictable.”).

364. See sources cited *supra* note 45 and accompanying text; see also Ronald A. Brand, *Access to Justice on a Due Process Platform*, 112 COLUM. L. REV. SIDEBAR 76, 78–79 (2012) [hereinafter Brand *Access to Justice*] (“[T]he rules of special jurisdiction found in the Brussels I Regulation of the European Union rely on a two-way nexus between the court and the claim.”); see also Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT’L L. 125, 154–55 (1998) (suggesting that a tort jurisdiction may build on similarities of language and concepts between the US due process analysis for jurisdictional purposes and the ECJ’s interpretation of Article 5(3) of the Brussels convention); Silberman *Impact*, *supra* note 32, at 331 (explaining that the European system focuses “on the connection between the dispute and the forum state,” rather than “the relationship between the individual defendant and the forum state”).

365. See *supra* Part III.C.3.

366. See SCHACK, *supra* note 61, at 111 (noting that without special jurisdiction in contractual matters, the defendant could hamper the enforcement of plaintiff’s rights by subsequent changes of domicile).

367. See Silberman *Impact*, *supra* note 32, at 332 (suggesting that though state statutes in the United States “have not generally included special jurisdictional provisions with respect to actions relating to employment and consumer contracts; however, it would be in keeping with the jurisdictional standard of reasonableness for courts to take into account at the constitutional level such factors as the relative strength of the parties’ bargaining positions”).

368. See Brussels Regulation, *supra* note 39, pmb. Recital 2–16 (“[T]here should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice.”).

369. *Id.* art. 24(1).

to apply a different body of law than the one he or she is familiar with.<sup>370</sup>

While efficiency is not exactly a characteristic of the US justice system,<sup>371</sup> these other objectives are not alien to the reasoning of the Supreme Court, which, in *International Shoe*, relied on “the relationship among the defendant, the forum, and the litigation” to decide if jurisdiction was present and appropriate.<sup>372</sup> In *Worldwide*, it stated that due process limitations on personal jurisdiction reflect both the right of the defendant to a fair proceeding *and* territorial limitations on state power.<sup>373</sup> However, in subsequent decisions, the Supreme Court’s focus has shifted to the power relationship between the court and the defendant and balancing these competing interests, thus focusing on protecting defendants’ due process rights at the expense of other factors.<sup>374</sup> The result is that US jurisdiction rules—against common belief—are inherently defendant-friendly.<sup>375</sup> The defendant’s right to due process limits any jurisdictional rule, which would otherwise provide plaintiffs access to a wider array of courts in the United States.<sup>376</sup> With the Supreme Court’s recent line of cases, this protection for defendants has significantly increased. US courts continue to be attractive for plaintiffs for multiple reasons, but not because of plaintiff-friendly jurisdiction rules.<sup>377</sup>

Some of the special jurisdiction rules in the Brussels Regulation, in contrast, clearly favor the plaintiff. Article 7(2) allows tort victims to sue in the courts at the place where the harmful event occurred. That place has been interpreted broadly as both the place where the harmful event giving rise to the damage occurred, and the place where the damage occurred. If these places are located in different member

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370. See SCHACK, *supra* note 61, at 94, 97 (noting that the proximity of the forum to the case will allow the court to avoid legal aid, accelerate the process, and usually lead to a more accurate decision as the judge will be able to apply a familiar law).

371. See generally, e.g., Robert W. Emerson, *The French Constat: Discovering More Efficient Discovery*, 36 B.U. INT’L L.J. 1, 25 (2018) (describing the inefficiency of the US civil justice system and comparing it with the French); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 825 (1985) (comparing the American and German system of civil litigation).

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

373. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 289, 294 (1980) (“Due Process Clause ensures not only fairness, but also the ‘orderly administration of the laws.’”).

374. See sources cited *supra* note 170 and accompanying text.

375. *Brand Access to Justice*, *supra* note 364, at 79 (noting the US system is defendant-protective, while the “rest of the world’s” jurisdictional rules are plaintiff-protective).

376. See *id.* at 78 (“[T]he major difference between the United States and other countries (particularly civil law countries) on jurisdictional analysis comes in how countries conceptualize jurisdiction itself.”).

377. See *id.* at 79 (arguing that US jurisdiction rules do not account for the attractiveness of US courts).

states, the plaintiff has the privilege of choice.<sup>378</sup> The European principle of ubiquity is widely discussed in the comparative procedural law literature. US commentators have concluded that it might not hold up under the Due Process Clause.<sup>379</sup> From a European perspective, the defendant's right to a fair trial is respected because the exhaustive list of heads of special jurisdiction enables the defendant to reasonably foresee where he may have to stand trial.<sup>380</sup> It should also be noted, that according to the ECJ in *Fiona Shevill et al. v. Presse Alliance SA*, Article 7(2) is understood as limiting the claim to the place where the damage occurred and to the proportion of the damage sustained in that place.<sup>381</sup> Thus, under Article 7(2), the plaintiff cannot sue in the forum most favorable to him for damages sustained somewhere else—let alone worldwide. This limits forum shopping and rebalances plaintiff and defendant interests.<sup>382</sup> This so-called “mosaic principle” could offer a remedy against the Supreme Court's far-reaching restrictions on specific jurisdiction created from cases like *McIntyre*.<sup>383</sup> It could give victims back some of their rights, which, as Justice Sotomayor notes in her dissenting opinions, the Supreme Court takes away in the interest of defendants' due process protection.<sup>384</sup>

In addition to heads of special jurisdiction, the Brussels Regulation provides grounds for exclusive jurisdiction in Article 24, meaning *only* the courts at the place designated in Article 24 are competent to judge the case. Hence, exclusive jurisdiction excludes general jurisdiction at the defendant's domicile as well as heads of special jurisdiction and prorogation.<sup>385</sup> According to Article 24, courts have exclusive international jurisdiction: (1) “in proceedings which have as their object rights *in rem* in immovable property . . .”; (2) in

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378. See Case 21-76, *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA*, 1976 E.C.R. 1747.

379. See Feldman, *supra* note 17, at 2198 (“European courts can thus exercise jurisdiction at the place of injury whether or not the defendant purposefully directed his conduct toward that place.”).

380. See Mankowski *Article 7*, *supra* note 336, at 144.

381. Case C-68/93, *Fiona Shevill et al. v. Presse Alliance SA*, 1995 E.C.R. I-415 (holding that courts competent under Brussels Convention, art. 5(3) “have jurisdiction to rule solely in respect of the harm caused in the State of the court seized”).

382. See Jan Oster, *Rethinking Shevill: Conceptualising the EU Private International Law of Internet Torts against Personality Rights*, 26 INT'L REV. L. COMPUTERS & TECH. 113, 115 (2012) (explaining the mosaic principle and noting that “[t]he Shevill doctrine therefore considers the necessity to concentrate lawsuits aiming at full compensation to just one—or maximally two—jurisdiction(s)”). *But see* Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 695 (1999) (suggesting “tort jurisdiction under Brussels Article 5(3) (as currently interpreted) appears to be broader than U.S. due process analysis would allow”).

383. See Borchers, *supra* note 2, at 16–17 (suggesting this solution “would provide a sensible and clear answer to a case such as *J. McIntyre*”).

384. See *Daimler AG v. Bauman*, 571 U.S. 117, 147 (2014) (Sotomayor, J., concurring).

385. Brussels Regulation, *supra* note 39, art. 25(4), 26(1).

matters of “validity of the constitution, the nullity or the dissolution of companies or other legal persons”; (3) “the validity of entries in public registers”; and (4) cases relating to the “registration or validity of patents, trademarks, designs, or other similar rights.”<sup>386</sup>

Each of these factors commonly involves registration in public national registers or is subject to other mandatory rules in the forum state where, for example, the property is located, or the company in question is registered. Connecting jurisdiction to these criteria assures application of the mandatory rules in the interest of third parties for legal clarity, independent of the interests of the plaintiff *and* defendant.<sup>387</sup>

The different approaches also become evident in the treatment of foreign entities for the purpose of establishing specific jurisdiction over foreign corporate defendants at issue in *Bristol-Myers*. Article 7(5) of the Brussels Regulation stipulates that “a dispute arising out of the operations of a branch, agency[,] or other establishment” can be brought “in the courts for the place where the branch, agency[,] or other establishment is situated.” If a sufficient nexus between the parent and the acting entity in question has been established as to qualify as a “branch, agency[,] or establishment” under Article 7(5), the plaintiff will be able to obtain relief against the foreign parent corporation in the forum where he or she was harmed by the dependent subsidiary’s operations. As a result, Article 7(5) balances the interest of plaintiffs for a convenient forum with the defendant’s desire for predictability as suggested by Justice Sotomayor in her concurring opinion in *Daimler*.<sup>388</sup>

While Article 7(5) only applies to corporate defendants domiciled in an EU member state, it was modeled after similar provisions in the domestic civil procedure law of its member states.<sup>389</sup> As a result, a US company that is sued in an EU member state based on the activities of its European branch or subsidiary is likely to be exposed to similar jurisdiction rules, but should be wary of national differences.<sup>390</sup>

According to the ECJ’s jurisprudence regarding Article 7(5) and similar provisions in the Regulation’s predecessors, an establishment is “an entity capable of being the primary, or even exclusive, interlocutor for third parties in the negotiation of contracts.”<sup>391</sup> “A

386. *Id.* art. 24.

387. See Luís de Lima Pinheiro, *Article 24, in* ECPII 561.

388. See *Daimler*, 571 U.S. at 147 (Sotomayor, J., concurring) (“[T]hat considerable burden runs headlong into the majority’s recitation of the familiar principle that [s]imple jurisdictional rules...promote greater predictability.”).

389. See Gottwald, *supra* note 260, at 1981.

390. *E.g.*, JURISDIKTIONSNORM [JN] [JURISDICTION ACT] REICHSGESETZBLATT [RGL] No. 111/1895, § 87(1) (Austria) (providing that a manufacturing facility is sufficient to establish specific jurisdiction in Austria).

391. Case C-439/93, *Lloyd’s Register of Shipping v. Société Campenon Bernard*, 1995 E.C.R. I-00961.

degree of permanence is required, and a mere transitory presence does not suffice.”<sup>392</sup> The principal does not need to own the branch, agency, or establishment, but it needs to be “subject to the direction and control of the parent body.”<sup>393</sup> In other words, it needs to act “as the decentralized and prolonged arm of the principal.”<sup>394</sup> However, if an independent subsidiary behaves like a dependent branch, substance prevails over form.<sup>395</sup> In this case, the subsidiary will be treated as a dependent entity for jurisdictional purposes. Article 7(5) applies independently from the formal legal status of the branch, agency, or establishment.<sup>396</sup>

Whether an entity qualifies as an independent establishment is a factual question and needs to be determined on a case-by-case basis.<sup>397</sup> As a result, Article 7(1) does not remove all uncertainty as to the foundation of derivative jurisdiction. However, derivative special jurisdiction is limited to dependent establishments, and the enumeration of entities that qualify is exhaustive. While the Supreme Court in *Worldwide, McIntyre*, and their progeny looked at the parent’s purposeful availment in the forum state, the Brussels Regulation focuses on the relationship between parent and subsidiary as a dependent entity. This makes consideration of other potential connecting factors between the parent and the forum, such as advertisements, sales, operating facilities, or research labs (at issue in *Bristol-Myers*) obsolete.<sup>398</sup>

Under the Brussels Regulation, an independent subsidiary generally does not qualify as an establishment and therefore does not establish jurisdiction over the parent company under Article 7(5). This

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392. Mankowski *Article 7*, *supra* note 336, at 359.

393. Case C-14/76, A. De Bloos, SPRL v. Société en commandite par actions Bouyer, Tomblaine (Meurthe-et-Moselle), 1976 E.C.R. 1497.

394. Mankowski *Article 7*, *supra* note 336, at 351.

395. *See id.* at 354 (“Substance over form should prevail as the leading maxim if a formally independent entity is in fact functionally operated like a dependent branch.”); *see also* Case 218/86, SAR Schotte GmbH v. Parfums Rothschild SARL, 1987 E.C.R. 4905 (holding third parties must be able to rely on the appearance of a dependent establishment in the course of business).

396. The legal status of the branch, agency or establishment depends on national company law. Brussels Regulation, *supra* note 39, art. 7 (5) seeks to overcome national differences in the definition of dependent and independent establishments through autonomous interpretation. *See* Mankowski *Article 7*, *supra* note 336, at 354.

397. *See* Vlas, *supra* note 329, at 995. Principal place of business “means the place where the main business activities are located. This notion is also factual and could give rise to problems, which have to be solved by the forum.” *Id.*

398. Brussels Regulation art. 7(1) thus also eliminates the uncertainty involved with Justice Sotomayor’s reasonable test proposed in her dissent in *Bristol-Myers*, while still balancing plaintiffs’ and defendants’ interests. *See* *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1789 (2017) (Sotomayor, J., dissenting) (arguing for a court to have jurisdiction over an out-of-state defendant the “exercise of jurisdiction must be reasonable under the circumstances.”).

follows from Article 63(1)(c).<sup>399</sup> Thus, attempts to locate an independently operating non-European subsidiary of a European company—such as the subsidiaries party to *Goodyear*—in the European Union by way of interpreting Article 63 seem misguided.<sup>400</sup> The defendant, in order to establish jurisdiction for a claim resulting out of the subsidiary's actions at the parent company's domicile cannot argue that the subsidiary actually was controlled and managed at the parent company's headquarters in the European Union. This argument would requalify the subsidiary as a dependent establishment, which, according to Article 7(5), establishes special jurisdiction over the parent at the place where the establishment is situated but, by implication, not over the subsidiary at the parent's domicile.<sup>401</sup>

Though not at issue in any of the cases decided by the Supreme Court thus far, the outcome of the scenario described above is less clear under Supreme Court precedent. A plaintiff who was harmed by an independent subsidiary's actions under the "purposeful availment" criterion could likely argue that a court at the place where the parent corporation is located has personal jurisdiction over the parent corporation, if the parent in fact completely controlled the decisions of the legally independent subsidiary for the issue in question in the particular claim against it.

Finally, the Brussels Regulation in Article 8(1) provides plaintiffs who seek to combine identical claims against the parent and the dependent entity, or against multiple branches in multiple states/countries, with a unique forum against the parent and the subsidiary or multiple dependent establishments.<sup>402</sup> Article 8(1) is

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399. See Mankowski *Article 7*, *supra* note 336, at 353 ("The principal place of business of a company [here, the independent subsidiary] already constitutes a general jurisdiction and can thus, by the very logic and the opening words of [a]rt. 5, not be used in order to establish special jurisdiction.").

400. *Contra* Marta Requejo Isidro, *Business and Human Rights Abuses: Claiming Compensation under the Brussels I Recast*, HUM. RTS. & INT'L LEGAL DISCOURSE 72, 78–79 (2016) (noting that the ECJ's jurisprudence so far has focused on domicile of natural persons and suggesting "to locate the domicile of the (non-European) subsidiary of a European company in the EU, by way of interpreting art. 63"). See generally Matthias Weller & Alexia Pato, *Local Parents As 'Anchor Defendants' in European Courts for Claims Against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends*, UNIFORM L. REV. (forthcoming 2018), <https://ssrn.com/abstract=3134361> [<https://perma.cc/U3CZ-PT75>] (archived Aug. 25, 2018).

401. Because substance prevails over form, see Mankowski *Article 7*, *supra* note 336.

402. Brussels Regulation art. 8(1) provides: "A person domiciled in a Member State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings." See Brussels Regulation, *supra* note 39, art. 8(1). See also *Daimler AG v. Bauman*, 571 U.S. 117, 142 (2014) (Sotomayor, J., concurring) (criticizing the majority opinion for burdening plaintiffs and defendants by requiring suits in different forum states).

another example of the Regulation's quest for efficiency and its objective to enhance access to justice for the plaintiff.

The European emphasis on efficiency also becomes evident in the Brussels Regulation's rule on *lis alibi pendens*.<sup>403</sup> Under the Regulation, if multiple European courts in different member states are being seized for the same cause of action, any subsequent court seized "shall . . . stay its proceedings."<sup>404</sup> While American law does not recognize a formal theory of *lis pendens* for parallel proceedings, US courts in international cases may stay their action based on international comity. Thus, the American *lis pendens* is a counterpart to *forum non conveniens* and, like the former, merely discretionary; by comparison, the European version—reflecting adherence to the principle of legal certainty—is mandatory.<sup>405</sup>

## V. CONCLUSION

The Supreme Court's emphasis on predictability in its recent line of personal jurisdiction cases could lead the casual observer to the conclusion that the United States and the European Union are about to overcome their disagreement on how to determine jurisdiction over foreign corporate defendants—a rapprochement that seemed unlikely prior to 2011.<sup>406</sup> Arguably, any presuppositions for an international treaty on jurisdiction and recognition of judgments are better today than they were at the time of the failed negotiations at The Hague.<sup>407</sup> The Supreme Court in *McIntyre, Goodyear*, and their progeny curtailed the "minimum contacts" rule, thus mitigating the "justice conflict" between the United States and European civil law countries. In *Daimler*, following one year after the decision in *Kiobel v. Royal Dutch Petroleum Co. (Kiobel)*, the Court also limited extraterritorial application of the Alien Tort Statute—another point of contention during the failed 1999 negotiations.<sup>408</sup> This Article has argued that

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403. Brussels Regulation, *supra* note 39, art. 29 ("[W]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first sei[z]ed shall of its own motion stay its proceedings until such time as the jurisdiction of the court first sei[z]ed is established.").

404. *Id.*

405. See Silberman *Impact*, *supra* note 32, at 340 ("Like the related common law doctrine of *forum non conveniens*, the standard for this type of 'international abstention' is a discretionary one.").

406. See Michaels, *supra* note 8, at 1068 (concluding in an article from 2006—prior to the U.S. Supreme Court's latest retrenchment—that different underlying paradigms of the US and European regime will make any international effort to unify jurisdiction rules very difficult).

407. See Borchers, *supra* note 2, at 18.

408. See Baumgartner, *supra* note 32, at 24–25 (discussing *Kiobel* and its impact on "the underlying negotiating interests at The Hague").

because jurisdiction is inherently international, harmonization through internationally agreed-upon norms should remain a priority. Such norms help fight forum shopping, avoid conflict, and could resolve such pressing questions as to which country's courts should judge multinational companies (MNCs) for human rights violations—a main point of contention in *Daimler* as well as *Kiobel*.<sup>409</sup>

Proponents of an international agreement should refrain from preemptively celebrating, though: the analysis of US and EU jurisdiction rules also has shown that differences between the US and EU regimes remain significant. Not only do the U.S. Supreme Court and EU legislature operate and enforce at different levels, the characteristics of American and European jurisdiction rules are often diametrically opposed, despite the latest considerations of international comity by the Supreme Court. Where US law heavily emphasizes the need for judicial discretion, European rules aim at legal certainty and efficiency. Where the U.S. Supreme Court protects defendants' due process rights and the sovereignty of US states, the Brussels Regulation strives for harmonization of jurisdictional rules between member states and access to justice for the plaintiff. These fundamental differences help explain why further harmonization of US jurisdiction rules with EU law remains difficult even though the Supreme Court in *Daimler* seems desirous of achieving just that.<sup>410</sup>

Maybe most importantly, predictability, though the only characteristic on which US and EU rules seem to converge, means different things for the EU legislator and the Supreme Court. For the Supreme Court it means restricting both general and specific jurisdiction in order to expose the alien defendant to fewer potential forums. The European regime shows that predictability does not necessarily equal restriction. The Brussels Regulation provides a rather lengthy but exhaustive list of special heads of jurisdiction, thereby significantly extending what US law would call specific jurisdiction and taking into account the interests of both defendants and plaintiffs as well as public policy concerns. It is clearly defined connecting factors in lieu of imprecise legal terms that make the European rules predictable, not the limitation of circumstances under which a domestic court can claim personal jurisdiction over a foreign corporate defendant.

In short, in the absence of internationally agreed-upon norms, the Brussels Regulation could serve as a model to address the

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409. See also *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 671, 675 (2013) (addressing the related issue of federal court jurisdiction under the Alien Tort Statute); see also Baumgartner, *supra* note 32, at 24–25 (noting “*Goodyear* and *Daimler* are in line with other recent decisions in which the Court has put the brakes on long-standing lower court practices that asserted U.S. court jurisdiction and applied U.S. law to matters with strong connections to other countries”).

410. See *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014) (referencing EU rules of general jurisdiction).

shortcomings of the current US personal jurisdiction regime. The criteria used in the Brussels Regulation to determine special jurisdiction and relevant European case law interpreting such rules could help further refine the contours of specific jurisdiction under Supreme Court precedent or serve as a blueprint for the state or federal legislature, at least to develop special international jurisdiction rules. However, to achieve truly predictable and more equitable rules, any change may require concessions with regard to judicial discretion, which, alongside the strong focus on defendant protection in current Supreme Court precedent, appears as the main roadblock to further harmonization of US and European jurisdiction rules.