CIVIL PROCEDURE: CASES, QUESTIONS, AND MATERIALS

Eighth Edition

2023 UPDATE MEMORANDUM

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We are delighted to offer this Memorandum Update for professors and students using the eighth edition of the casebook. Page numbers in this Memorandum are to that edition of the casebook.

There are several added notes throughout. There are three major case developments here, two of them from the Supreme Court dealing with personal jurisdiction. First, we include *Ford Motor Company* as a principal case. Second, *Mallory* is covered though an extensive note on corporate registration statutes. Third, we add the *Mata* case in the Rule 11 materials; it deals with use of Chat GPT.

Permission is hereby granted to distribute copies of this Update Memorandum free of charge to students using the book in their class.

Thank you for adopting our casebook. As always, we welcome any feedback, questions, or suggestions you may have about the casebook.

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2023 Amendments to the Federal Rules of Civil Procedure

The Supreme Court has sent to Congress a set of amendments to the Federal Rules of Civil Procedure. Barring congressional action, these amendments will go into effect December 1, 2023.

Rule 6(a)(6), which defines "Legal Holiday," is amended to add "Juneteenth National Independence Day."

Rule 15(a)(1), concerning amendment of pleadings as a matter of course, is amended to change "within" to "no later than."

The present version allows amendment of right once "within" 21 days of service of the document or, if the document is one to which a responsive pleading is required, "within" 21 days after service of a responsive pleading or motion under Rule 12(b), (e), or (f). In cases in which a responsive pleading is required but is not served, the right to amend would lapse 21 days after the pleading is served. "No later than" makes clear that the right to amend remains effective, without interruption, until 21 days after the earlier of service of a responsive pleading or service of a specified Rule 12 motion.

Rule 72(b)(1), regarding findings by magistrate judges on dispositive motions and prisoner petitions, is amended to provide "[t]he clerk, must immediately serve a copy on each party as provided in Rule 5(b)." Presently, the Rule provides "[t]he clerk must promptly mail a copy to each party." The amendment therefore broadens the means by which the clerk may provide notice to the parties of a magistrate judge's recommended disposition.

Rule 87 is a new provision, added in the wake of the pandemic and addressing the possibility that extraordinary circumstances may interfere substantially with the ability of a court to perform its functions or of parties to comply with various rules. It provides in full:

Rule 87. Civil Rules Emergency

(a) Conditions for an Emergency. The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) Declaring an Emergency.

(1) Content. The declaration:

(A) must designate the court or courts affected;

(B) adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them; and

(C) must be limited to a stated period of no more than 90 days.

(2) Early Termination. The Judicial Conference may terminate a declaration for one or more courts before the termination date.

(3) Additional Declarations. The Judicial Conference may issue additional declarations under this rule.

(c) Emergency Rules.

(1) Emergency Rules 4(e), (h)(1), (i), and (j)(2), and for serving a minor or incompetent person. The court may by order authorize service on a defendant described in Rule 4(e), (h)(1), (i), or (j)(2)—or on a minor or incompetent person in a judicial district of the United States—by a method that is reasonably calculated to give notice. A method of service may be completed under the order after the declaration ends unless the court, after notice and an opportunity to be heard, modifies or rescinds the order.

(2) Emergency Rule 6(b)(2).

(A) Extension of Time to File Certain Motions. A court may, by order, apply Rule 6(b)(1)(A) to extend for a period of no more than 30 days after entry of the order the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(B) Effect on Time to Appeal. Unless the time to appeal would otherwise be longer:

(i) if the court denies an extension, the time to file an appeal runs for all parties from the date the order denying the motion to extend is entered;

(ii) if the court grants an extension, a motion authorized by the court and filed within the extended period is, for purposes of Appellate Rule 4(a)(4)(A), filed "within the time allowed by" the Federal Rules of Civil Procedure; and

(iii) if the court grants an extension and no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.

(C) Declaration Ends. An act authorized by an order under this emergency rule may be completed under the order after the emergency declaration ends.

2022 Amendments to the Federal Rules of Civil Procedure

Two amendments to the Federal Rules went into effect on December 1, 2022. The amendment to Rule 7.1 requires disclosure, in diversity of citizenship cases, of the citizenship of every individual or entity whose citizenship is attributed to that party in a pending case. It also requires a disclosure statement from a nongovernmental corporation that seeks to intervene into a case.

The second set of changes regard amendments to the Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g).

Chapter 2: Personal Jurisdiction

B. Constitutional Limits on Personal Jurisdiction

5. Specific Jurisdiction in the Era of Limited General Jurisdiction

At page 115, before section 6, please add:

Ford Motor Co. v. Montana Eighth Judicial District

592 U.S. ___, 141 S. Ct. 1017 (2021)

JUSTICE KAGAN delivered the opinion of the Court.

In each of these two cases, a state court held that it had jurisdiction over Ford Motor Company in a products liability suit stemming from a car accident. The accident happened in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State—among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective. Still, Ford contends that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there. We reject that argument. When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.

I

Ford is a global auto company. It is incorporated in Delaware and headquartered in Michigan. But its business is everywhere. Ford markets, sells, and services its products across the United States and overseas. In this country alone, the company annually distributes over 2.5 million new cars, trucks, and SUVs to over 3,200 licensed dealerships. Ford also encourages a resale market for its products: Almost all its dealerships buy and sell used Fords, as well as selling new ones. To enhance its brand and increase its sales, Ford engages in wide-ranging promotional activities, including television, print, online, and direct-mail advertisements. No matter where you live, you've seen them: "Have you driven a Ford lately?" or "Built Ford Tough." Ford also ensures that consumers can keep their vehicles running long past the date of sale. The company provides original parts to auto supply stores and repair shops across the country. (Goes another slogan: "Keep your Ford a Ford.") And Ford's own network of dealers offers an array of maintenance and repair services, thus fostering an ongoing relationship between Ford and its customers.

Accidents involving two of Ford's vehicles—a 1996 Explorer and a 1994 Crown Victoria—are at the heart of the suits before us. One case comes from Montana. Markkaya Gullett was driving her Explorer near her home in the State when the tread separated from a rear tire. The vehicle spun out, rolled into a ditch, and came to rest upside down. Gullett died at the scene of the crash. The representative of her estate sued Ford in Montana state court, bringing claims for a design defect, failure to warn, and negligence. The second case comes from Minnesota. Adam Bandemer was a passenger in his friend's Crown Victoria, traveling on a rural road in the State to a favorite ice-fishing spot. When his friend rear-ended a snowplow, this car too landed in a ditch. Bandemer's air bag failed to deploy, and he suffered serious brain damage. He sued Ford in Minnesota state court, asserting products-liability, negligence, and breach-of-warranty claims.

Ford moved to dismiss the two suits for lack of personal jurisdiction, on basically identical grounds. According to Ford, the state court (whether in Montana or Minnesota) had jurisdiction only if the company's conduct in the State had given rise to the plaintiff 's claims. And that causal link existed, Ford continued, only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. Ford had designed the Explorer and Crown Victoria in Michigan, and it had manufactured the cars in (respectively) Kentucky and Canada. Still more, the company had originally sold the cars at issue outside the forum States—the Explorer in Washington, the Crown Victoria in North Dakota. Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota. That meant, in Ford's view, that the courts of those States could not decide the suits.

Both the Montana and the Minnesota Supreme Courts (affirming lower court decisions) rejected Ford's argument. The Montana court began by detailing the varied ways Ford "purposefully" seeks to "serve the market in Montana." 395 Mont. 478, 488 (2019). The company advertises in the State; "has thirty-six dealerships" there; "sells automobiles, specifically Ford Explorers[,] and parts" to Montana residents; and provides them with "certified repair, replacement, and recall services." Ibid. Next, the court assessed the relationship between those activities and the Gullett suit. Ford's conduct, said the court, encourages "Montana residents to drive Ford vehicles." Id., at 491. When that driving causes in-state injury, the ensuing claims have enough of a tie to Ford's Montana activities to support jurisdiction. Whether Ford "designed, manufactured, or sold [the] vehicle" in the State, the court concluded, is "immaterial." Ibid. Minnesota's Supreme Court agreed. It highlighted how Ford's "marketing and advertisements" influenced state residents to "purchase and drive more Ford vehicles." 931 N. W. 2d 744, 754 (2019). Indeed, Ford had sold in Minnesota "more than 2,000 1994 Crown Victoria[s]"—the "very type of car" involved in Bandemer's suit. Id., at 751, 754. That the "*particular vehicle*" injuring him was "designed, manufactured, [and first] sold" elsewhere made no difference. Id., at 753 (emphasis in original). In the court's view, Ford's Minnesota activities still had the needed connection to Bandemer's allegations that a defective Crown Victoria caused in-state injury. See id., at 754.

We granted certiorari to consider if Ford is subject to jurisdiction in these cases. We hold that it is.

II

A

The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. The canonical decision in this area remains *International Shoe Co. v. Washington*, 326 U. S. 310 (1945). There, the Court held that a tribunal's authority depends on the defendant's having such "contacts" with the forum State that "the maintenance of the suit" is "reasonable, in the context of our federal system of government," and "does not offend traditional notions of fair play and substantial justice." In giving content to that formulation, the Court has long focused on the nature and extent of "the defendant's relationship to the forum State." Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., 582 U. S. ___, ___ (2017) (citing

cases). That focus led to our recognizing two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction. See Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U. S. 915, 919 (2011).

[The Court noted that Ford was Ford was not subject to general jurisdiction in Montana or Minnesota because it was not "at home" in either state.]

Specific jurisdiction is different: It covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name "purposeful availment." Burger King Corp. v. Rudzewicz, 471 U. S. 462, 475 (1985). The defendant, we have said, must take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." Hanson v. Denckla, 357 U. S. 235, 253 (1958). The contacts must be the defendant's own choice and not "random, isolated, or fortuitous." Keeton v. Hustler Magazine, Inc., 465 U. S. 770, 774 (1984). They must show that the defendant deliberately "reached out beyond" its home—by, for example, "exploi[ting] a market" in the forum State or entering a contractual relationship centered there. Walden v. Fiore, 571 U. S. 277, 285 (2014). Yet even then—because the defendant is not "at home"—the forum State may exercise jurisdiction in only certain cases. The plaintiff 's claims, we have often stated, "must arise out of or relate to the defendant's contacts" with the forum. Bristol-Myers, 582 U. S., at ___ (quoting Daimler [AG v. Bauman], 571 U. S. [117], at 127[(2014)]). * * * Or put just a bit differently, "there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" Bristol-Myers, 582 U. S., at ___ (quoting Goodyear, 564 U. S., at 919).

These rules derive from and reflect two sets of values—treating defendants fairly and protecting "interstate federalism." World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286, 293[, 297-298] (1980). Our decision in *International Shoe* founded specific jurisdiction on an idea of reciprocity between a defendant and a State: When (but only when) a company "exercises the privilege of conducting activities within a state"—thus "enjoy[ing] the benefits and protection of [its] laws"—the State may hold the company to account for related misconduct. 326 U. S., at 319; see Burger King, 471 U. S., at 475−476. Later decisions have added that our doctrine similarly provides defendants with "fair warning"—knowledge that "a particular activity may subject [it] to the jurisdiction of a foreign sovereign." Id., at 472 (internal quotation marks omitted); World-Wide Volkswagen, 444 U. S., at 297 (likewise referring to "clear notice"). A defendant can thus "structure [its] primary conduct" to lessen or avoid exposure to a given State's courts. And this Court has considered alongside defendants' interests those of the States in relation to each other. One State's "sovereign power to try" a suit, we have recognized, may prevent "sister States" from exercising their like authority. The law of specific jurisdiction thus seeks to ensure that States with "little legitimate interest" in a suit do not encroach on States more affected by the controversy. Bristol-Myers, 582 U. S., at ___.[2]

[2] One of the concurrences here expresses a worry that our *International Shoe*-based body of law is not "well suited for the way in which business is now conducted," and tentatively suggests a 21st-century rethinking. (ALITO, J., concurring in judgment). Fair enough perhaps * * * but the concurrence then acknowledges that these cases have no distinctively modern features, and it decides them on grounds that (it agrees) are much the same as ours. The other concurrence proposes instead a return to the mid-19th century – a replacement of our current doctrine with the

B

Ford contends that our jurisdictional rules prevent Montana's and Minnesota's courts from deciding these two suits. * * * Ford does not contest that it does substantial business in Montana and Minnesota— that it actively seeks to serve the market for automobiles and related products in those States. * * * Ford agrees that it has "purposefully avail[ed] itself of the privilege of conducting activities" in both places. Hanson, 357 U. S., at 253. Ford's claim is instead that those activities do not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum States. In Ford's view, the needed link must be causal in nature: Jurisdiction attaches "only if the defendant's forum conduct *gave rise to* the plaintiff 's claims." Brief for Petitioner 13 (emphasis in original). And that rule reduces, Ford thinks, to locating specific jurisdiction in the State where Ford sold the car in question, or else the States where Ford designed and manufactured the vehicle. On that view, the place of accident and injury is immaterial. So (Ford says) Montana's and Minnesota's courts have no power over these cases.

But Ford's causation-only approach finds no support in this Court's requirement of a "connection" between a plaintiff 's suit and a defendant's activities. Bristol-Myers, 582 U. S., at ___. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit "arise out of *or relate to* the defendant's contacts with the forum." (quoting Daimler, 571 U. S., at 127; emphasis added; alterations omitted). The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff 's claim came about because of the defendant's in-state conduct. See also Bristol-Myers, 582 U. S., at ___, ___ (quoting Goodyear, 564 U. S., at 919) (asking whether there is "an affiliation between the forum and the underlying controversy," without demanding that the inquiry focus on cause). So the case is not over even if, as Ford argues, a causal test would put jurisdiction in only the States of first sale, manufacture, and design. A different State's courts may yet have jurisdiction, because of another "activity [or] occurrence" involving the defendant that takes place in the State. Bristol-Myers, 582 U. S., at ___, ___ (quoting Goodyear, 564 U. S., at 919).[3]

Fourteenth Amendment's original meaning respecting personal jurisdiction. (GORSUCH, J., concurring in judgment). But that opinion never reveals just what the Due Process Clause as understood at its ratification required, and its ground for deciding these cases is correspondingly spare. This opinion, by contrast, resolves these cases by proceeding as the Court has done for the last 75 years – applying the standards set out in International Shoe and its progeny, with attention to their underlying values of ensuring fairness and protecting interstate federalism.

[3] In thus reiterating this Court's longstanding approach, we reject JUSTICE GORSUCH's apparent (if oblique) view that a state court should have jurisdiction over a nationwide corporation like Ford on *any* claim, no matter how unrelated to the State or Ford's activities there. On that view, for example, a California court could hear a claim against Ford brought by an Ohio plaintiff based on an accident occurring in Ohio involving a car purchased in Ohio. Removing the need for any connection between the case and forum State would transfigure our specific jurisdiction standard as applied to corporations. "Case-linked" jurisdiction would then become not case-linked at all.

And indeed, this Court has stated that specific jurisdiction attaches in cases identical to the ones here—when a company like Ford serves a market for a product in the forum State and the product malfunctions there. In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma. 444 U. S., at 295. But in so doing, we contrasted the dealer's position to that of two other defendants—Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer (neither of which contested jurisdiction):

> "[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." Id., at 297.

Or said another way, if Audi and Volkswagen's business deliberately extended into Oklahoma (among other States), then Oklahoma's courts could hold the companies accountable for a car's catching fire there—even though the vehicle had been designed and made overseas and sold in New York. For, the Court explained, a company thus "purposefully avail[ing] itself " of the Oklahoma auto market "has clear notice" of its exposure in that State to suits arising from local accidents involving its cars. Ibid. And the company could do something about that exposure: It could "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are [still] too great, severing its connection with the State." Ibid.

Our conclusion in *World-Wide Volkswagen*—though, as Ford notes, technically "dicta," has appeared and reappeared in many cases since. So, for example, the Court in *Keeton* invoked that part of *World-Wide Volkswagen* to show that when a corporation has "continuously and deliberately exploited [a State's] market, it must reasonably anticipate being haled into [that State's] court[s]" to defend actions "based on" products causing injury there. 465 U. S., at 781; see Burger King, 471 U. S., at 472–473 (similarly citing World-Wide Volkswagen). On two other occasions, we reaffirmed that rule by reciting the above block-quoted language verbatim. See Goodyear, 564 U. S., at 927; Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty., 480 U. S. 102, 110 (1987) (opinion of O'CONNOR, J.). And in *Daimler*, we used the Audi/Volkswagen scenario as a paradigm case of specific jurisdiction (though now naming Daimler, the maker of Mercedes Benzes). Said the Court, to "illustrate[ ]" specific jurisdiction's "province[ ]": A California court would exercise specific jurisdiction "if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler [in that court] alleging that the vehicle was defectively designed." 571 U. S., at 127, n. 5. As in *World-Wide Volkswagen*, the Court did not limit jurisdiction to where the car was designed, manufactured, or first sold. Substitute Ford for Daimler, Montana and Minnesota for California, and the Court's "illustrat[ive]" case becomes . . . the two cases before us.

To see why Ford is subject to jurisdiction in these cases (as Audi, Volkswagen, and Daimler were in their analogues), consider first the business that the company regularly conducts in

Montana and Minnesota. Small wonder that Ford has here conceded "purposeful availment" of the two States' markets. By every means imaginable—among them, billboards, TV and radio spots, print ads, and direct mail— Ford urges Montanans and Minnesotans to buy its vehicles, including (at all relevant times) Explorers and Crown Victorias. Ford cars—again including those two models—are available for sale, whether new or used, throughout the States, at 36 dealerships in Montana and 84 in Minnesota. And apart from sales, Ford works hard to foster ongoing connections to its cars' owners. The company's dealers in Montana and Minnesota (as elsewhere) regularly maintain and repair Ford cars, including those whose warranties have long since expired. And the company distributes replacement parts both to its own dealers and to independent auto shops in the two States. Those activities, too, make Ford money. And by making it easier to own a Ford, they encourage Montanans and Minnesotans to become lifelong Ford drivers.

Now turn to how all this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in Montana's and Minnesota's courts. Each plaintiff 's suit, of course, arises from a car accident in one of those States. In each complaint, the resident-plaintiff alleges that a defective Ford vehicle—an Explorer in one, a Crown Victoria in the other—caused the crash and resulting harm. And as just described, Ford had advertised, sold, and serviced those two car models in both States for many years. (Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.) In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. Helicopteros, 466 U. S., at 414 (internal quotation marks omitted). That is why this Court has used this exact fact pattern (a resident-plaintiff sues a global car company, extensively serving the state market in a vehicle, for an in-state accident) as an illustration—even a paradigm example—of how specific jurisdiction works. See Daimler, 571 U. S., at 127, n. 5.[4]

The only complication here, pressed by Ford, is that the company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents. Because that is so, Ford argues, the plaintiffs' claims "would be precisely the same if Ford had never done anything in Montana and Minnesota." Of course, that argument merely restates Ford's demand for an exclusively causal test of connection— which we have already shown is inconsistent with our caselaw. And indeed, a similar assertion could have been made in *World-Wide Volkswagen*—yet the Court made clear that systematic contacts in Oklahoma rendered Audi accountable there for an in-state accident, even though it involved a car sold in New

[4] None of this is to say that any person using any means to sell any good in a State is subject to jurisdiction there if the product malfunctions after arrival. We have long treated isolated or sporadic transactions differently from continuous ones. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U. S. 286, 297 (1980). And we do not here consider internet transactions, which may raise doctrinal questions of their own. See Walden v. Fiore, 571 U. S. 277, 290, n. 9 (2014) ("[T]his case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State"). So consider, for example, a hypothetical offered at oral argument. "[A] retired guy in a small town" in Maine "carves decoys" and uses "a site on the Internet" to sell them. "Can he be sued in any state if some harm arises from the decoy?" Ibid. The differences between that case and the ones before us virtually list themselves. (Just consider all our descriptions of Ford's activities outside its home bases.) So we agree with the plaintiffs' counsel that resolving these cases does not also resolve the hypothetical.

York. So too here, and for the same reasons—even supposing (as Ford does) that without the company's Montana or Minnesota contacts the plaintiffs' claims would be just the same.

But in any event, that assumption is far from clear. For the owners of these cars might never have bought them, and so these suits might never have arisen, except for Ford's contacts with their home States. Those contacts might turn any resident of Montana or Minnesota into a Ford owner—even when he buys his car from out of state. He may make that purchase because he saw ads for the car in local media. And he may take into account a raft of Ford's in-state activities designed to make driving a Ford convenient there: that Ford dealers stand ready to service the car; that other auto shops have ample supplies of Ford parts; and that Ford fosters an active resale market for its old models. The plaintiffs here did not in fact establish, or even allege, such causal links. But cf. post, at 3–4 (ALITO, J., concurring in judgment) (nonetheless finding some kind of causation). Nor should jurisdiction in cases like these ride on the exact reasons for an individual plaintiff 's purchase, or on his ability to present persuasive evidence about them.[5] But the possibilities listed above—created by the reach of Ford's Montana and Minnesota contacts—underscore the aptness of finding jurisdiction here, even though the cars at issue were first sold out of state.

For related reasons, allowing jurisdiction in these cases treats Ford fairly, as this Court's precedents explain. In conducting so much business in Montana and Minnesota, Ford "enjoys the benefits and protection of [their] laws"— the enforcement of contracts, the defense of property, the resulting formation of effective markets. International Shoe, 326 U. S., at 319. All that assistance to Ford's instate business creates reciprocal obligations—most relevant here, that the car models Ford so extensively markets in Montana and Minnesota be safe for their citizens to use there. Thus our repeated conclusion: A state court's enforcement of that commitment, enmeshed as it is with Ford's government-protected in-state business, can "hardly be said to be undue." Ibid.. And as *World-Wide Volkswagen* described, it cannot be thought surprising either. An automaker regularly marketing a vehicle in a State, the Court said, has "clear notice" that it will be subject to jurisdiction in the State's courts when the product malfunctions there (regardless where it was first sold). Precisely because that exercise of jurisdiction is so reasonable, it is also predictable—and thus allows Ford to "structure [its] primary conduct" to lessen or even avoid the costs of state-court litigation.

Finally, principles of "interstate federalism" support jurisdiction over these suits in Montana and Minnesota. Those States have significant interests at stake— "providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors," as well as enforcing their own safety regulations. Burger King, 471 U. S., at 473; see Keeton, 465 U. S., at 776. Consider, next to those, the interests of the States of first sale (Washington and North Dakota)—which Ford's proposed rule would make the most likely forums. For each of those States, the suit involves all out-of-state parties, an out-of-state accident, and out-of-state injuries; the suit's only connection with the State is that a former owner once (many years earlier) bought the car there. In other words, there is a less significant "relationship among the defendant, the forum, and the litigation." Walden, 571 U. S., at 284 (internal quotation marks omitted). So by

[5] It should, for example, make no difference if a plaintiff had recently moved to the forum State with his car, and had not made his purchasing decision with that move in mind—so had not considered any of Ford's activities in his new home State.

channeling these suits to Washington and North Dakota, Ford's regime would undermine, rather than promote, what the company calls the Due Process Clause's "jurisdiction-allocating function."

C

Ford mainly relies for its rule on two of our recent decisions—*Bristol-Myers* and *Walden*. But those precedents stand for nothing like the principle Ford derives from them. If anything, they reinforce all we have said about why Montana's and Minnesota's courts can decide these cases.

Ford says of *Bristol-Myers* that it "squarely foreclose[s]" jurisdiction. In that case, non-resident plaintiffs brought claims in California state court against Bristol-Myers Squibb, the manufacturer of a nationally marketed prescription drug called Plavix. The plaintiffs had not bought Plavix in California; neither had they used or suffered any harm from the drug there. Still, the California Supreme Court thought it could exercise jurisdiction because Bristol-Myers Squibb sold Plavix in California and was defending there against identical claims brought by the State's residents. This Court disagreed, holding that the exercise of jurisdiction violated the Fourteenth Amendment. In Ford's view, the same must be true here. Each of these plaintiffs, like the plaintiffs in *Bristol-Myers*, alleged injury from a particular item (a car, a pill) that the defendant had sold outside the forum State. Ford reads *Bristol-Myers* to preclude jurisdiction when that is true, even if the defendant regularly sold "the same kind of product" in the State.

But that reading misses the point of our decision. We found jurisdiction improper in *Bristol-Myers* because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims. See 582 U. S., at ___ ("What is needed—and what is missing here—is a connection between the forum and the specific claims at issue"). The plaintiffs, the Court explained, were not residents of California. They had not been prescribed Plavix in California. They had not ingested Plavix in California. And they had not sustained their injuries in California. See ibid. (emphasizing these points). In short, the plaintiffs were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State. See id., at ___ (distinguishing the Plavix claims from the litigation in Keeton, see supra, at 10, because they "involv[e] no in-state injury and no injury to residents of the forum State"). That is not at all true of the cases before us. Yes, Ford sold the specific products in other States, as Bristol-Myers Squibb had. But here, the plaintiffs are residents of the forum States. They used the allegedly defective products in the forum States. And they suffered injuries when those products malfunctioned in the forum States. In sum, each of the plaintiffs brought suit in the most natural State—based on an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place" there. Bristol-Myers, 582 U. S., at ___. So *Bristol-Myers* does not bar jurisdiction.

Ford falls back on *Walden* as its last resort. In that case, a Georgia police officer working at an Atlanta airport searched, and seized money from, two Nevada residents before they embarked on a flight to Las Vegas. The victims of the search sued the officer in Nevada, arguing that their alleged injury (their inability to use the seized money) occurred in the State in which they lived. This Court held the exercise of jurisdiction in Nevada improper even though "the plaintiff[s] experienced [the] effect[s]" of the officer's conduct there. 571 U. S., at 290. According to Ford,

our ruling shows that a plaintiff 's residence and place of injury can never support jurisdiction. And without those facts, Ford concludes, the basis for jurisdiction crumbles here as well.

But *Walden* has precious little to do with the cases before us. In *Walden*, only the plaintiffs had any contacts with the State of Nevada; the defendant-officer had never taken any act to "form[ ] a contact" of his own. The officer had "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." Id., at 289. So to use the language of our doctrinal test: He had not "purposefully avail[ed himself] of the privilege of conducting activities" in the forum State. Hanson, 357 U. S., at 253. Because that was true, the Court had no occasion to address the necessary connection between a defendant's in-state activity and the plaintiff 's claims. But here, Ford has a veritable truckload of contacts with Montana and Minnesota, as it admits. The only issue is whether those contacts are related enough to the plaintiffs' suits. As to that issue, so what if (as *Walden* held) the place of a plaintiff's injury and residence cannot create a defendant's contact with the forum State? Those places still may be relevant in assessing the link between the defendant's forum contacts and the plaintiff 's suit—including its assertions of who was injured where. And indeed, that relevance is a key part of *Bristol-Myers*' reasoning. See 582 U. S., at ___ (finding a lack of "connection" in part because the "plaintiffs are not California residents and do not claim to have suffered harm in that State"). One of Ford's own favorite cases thus refutes its appeal to the other.

* * *

Here, resident-plaintiffs allege that they suffered in-state injury because of defective products that Ford extensively promoted, sold, and serviced in Montana and Minnesota. For all the reasons we have given, the connection between the plaintiffs' claims and Ford's activities in those States— or otherwise said, the "relationship among the defendant, the forum[s], and the litigation"—is close enough to support specific jurisdiction. Walden, 571 U. S., at 284. The judgments of the Montana and Minnesota Supreme Courts are therefore affirmed.

It is so ordered.

JUSTICE BARRETT took no part in the consideration or decision of these cases.

ALITO, J., concurring in the judgment.

These cases can and should be decided without any alteration or refinement of our case law on specific personal jurisdiction. To be sure, for the reasons outlined in JUSTICE GORSUCH's thoughtful opinion, there are grounds for questioning the standard that the Court adopted in *International Shoe Co. v. Washington*, 326 U. S. 310 (1945). And there are also reasons to wonder whether the case law we have developed since that time is well suited for the way in which business is now conducted. But there is nothing distinctively 21st century about the question in the cases now before us, and the answer to that question is settled by our case law.

. . .

Ford . . . asks us to adopt an unprecedented rule under which a defendant's contacts with the forum State must be proven to have been a but-for cause of the tort plaintiff 's injury. The Court properly rejects that argument, and I agree with the main thrust of the Court's opinion. My only quibble is with the new gloss that the Court puts on our case law. Several of our opinions have said that a plaintiff 's claims "'must arise out of or relate to the defendant's contacts'" with the forum. The Court parses this phrase "as though we were dealing with language of a statute," Reiter v. Sonotone Corp., 442 U. S. 330, 341 (1979), and because this phrase is cast in the disjunctive, the Court recognizes a new category of cases in which personal jurisdiction is permitted: those in which the claims do not "arise out of " (i.e., are not caused by) the defendant's contacts but nevertheless sufficiently "relate to" those contacts in some undefined way.

This innovation is unnecessary and, in my view, unwise. To say that the Constitution does not require the kind of proof of causation that Ford would demand—what the majority describes as a "strict causal relationship"— is not to say that no causal link of any kind is needed. And here, there is a sufficient link. It is reasonable to infer that the vehicles in question here would never have been on the roads in Minnesota and Montana if they were some totally unknown brand that had never been advertised in those States, was not sold in those States, would not be familiar to mechanics in those States, and could not have been easily repaired with parts available in those States. See ante, at 13–14 (describing this relationship between Ford's activities and these suits). The whole point of those activities was to put more Fords (including those in question here) on Minnesota and Montana roads. The common-sense relationship between Ford's activities and these suits, in other words, is causal in a broad sense of the concept, and personal jurisdiction can rest on this type of link without strict proof of the type Ford would require. When "arise out of " is understood in this way, it is apparent that "arise out of " and "relate to" overlap and are not really two discrete grounds for jurisdiction. The phrase "arise out of or relate to" is simply a way of restating the basic "minimum contacts" standard adopted in *International Shoe*.

Recognizing "relate to" as an independent basis for specific jurisdiction risks needless complications. The "ordinary meaning" of the phrase "relate to" "is a broad one." Morales v. Trans World Airlines, Inc., 504 U. S. 374, 383 (1992). Applying that phrase "according to its terms [is] a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc., 519 U. S. 316, 335 (1997) (SCALIA, J., concurring). . . . [W]hat limits the potentially boundless reach of "relate to" is just the sort of rough causal connection I have described.

I would leave the law exactly where it stood before we took these cases, and for that reason, I concur in the judgment.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in the judgment.

Since *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), this Court's cases have sought to divide the world of personal jurisdiction in two. A tribunal with "general jurisdiction" may entertain any claim against the defendant. But to trigger this power, a court usually must ensure the defendant is "'at home'" in the forum State. Daimler AG v. Bauman, 571 U. S. 117, 137 (2014). Meanwhile, "specific jurisdiction" affords a narrower authority. It applies only when the defendant "'purposefully avails'" itself of the opportunity to do business in the forum State

and the suit "'arise[s] out of or relate[s] to'" the defendant's contacts with the forum State. Burger King Corp. v. Rudzewicz, 471 U. S. 462, 472, 475 (1985).

While our cases have long admonished lower courts to keep these concepts distinct, some of the old guardrails have begun to look a little battered. . . .

. . . Until now, many lower courts have proceeded on the premise that specific jurisdiction requires two things. First, the defendant must "purposefully avail" itself of the chance to do business in a State. Second, the plaintiff 's suit must "arise out of or relate to" the defendant's in-state activities. Typically, courts have read this second phrase as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff 's injuries. E.g., Tamburo v. Dworkin, 601 F. 3d 693, 708–709 (CA7 2010) (collecting cases); see also Burger King, 471 U. S., at 475 (discussing "proximate[] results"). As every first year law student learns, a but-for causation test isn't the most demanding. At a high level of abstraction, one might say any event in the world would not have happened "but for" events far and long removed.

Now, though, the Court pivots away from this understanding. . . . In particular, the majority zeros in on the disjunctive conjunction "or," and proceeds to build its entire opinion around that linguistic feature. The majority admits that "arise out of" may connote causation. But, it argues, "relate to" is an independent clause that does not.

Where this leaves us is far from clear. For a case to "relate to" the defendant's forum contacts, the majority says, it is enough if an "affiliation" or "relationship" or "connection" exists between them. But what does this assortment of nouns mean? Loosed from any causation standard, we are left to guess. The majority promises that its new test "does not mean anything goes," but that hardly tells us what does. In some cases, the new test may prove more forgiving than the old causation rule. But it's hard not to wonder whether it may also sometimes turn out to be more demanding. Unclear too is whether, in cases like that, the majority would treat causation and "affiliation" as alternative routes to specific jurisdiction, or whether it would deny jurisdiction outright.

For a glimpse at the complications invited by today's decision, consider its treatment of North Dakota and Washington. Those are the States where Ford first sold the allegedly defective cars at issue in the cases before us. The majority seems to suggest that, if the plaintiffs had sought to bring their suits in those States, they would have failed. The majority stresses that the "only connection" between the plaintiffs' claims and North Dakota and Washington is the fact that former owners once bought the allegedly defective cars there. But the majority never tells us why that "connection" isn't enough. Surely, North Dakota and Washington would contend they have a strong interest in ensuring they don't become marketplaces for unreasonably dangerous products. Nor is it clear why the majority casts doubt on the availability of specific jurisdiction in these States without bothering to consider whether the old causation test might allow it. After all, no one doubts Ford purposefully availed itself of those markets. The plaintiffs' injuries, at least arguably, "arose from" (or were caused by) the sale of defective cars in those places. Even if the majority's new affiliation test isn't satisfied, don't we still need to ask those causation questions, or are they now to be abandoned?

Consider, too, a hypothetical the majority offers in a footnote. The majority imagines a retiree in Maine who starts a one-man business, carving and selling wooden duck decoys. In time, the man sells a defective decoy over the Internet to a purchaser in another State who is injured. [Citing footnote 4 of the majority opinion.] We aren't told how. (Was the decoy coated in lead paint?) But put that aside. The majority says this hypothetical supplies a useful study in contrast with our cases. On the majority's telling, Ford's "continuous" contacts with Montana and Minnesota are enough to establish an "affiliation" with those States; by comparison, the decoy seller's contacts may be too "isolated" and "sporadic" to entitle an injured buyer to sue in his home State. But if this comparison highlights anything, it is only the litigation sure to follow. For between the poles of "continuous" and "isolated" contacts lie a virtually infinite number of "affiliations" waiting to be explored. And when it comes to that vast terrain, the majority supplies no meaningful guidance about what kind or how much of an "affiliation" will suffice. Nor, once more, does the majority tell us whether its new affiliation test supplants or merely supplements the old causation inquiry.

Not only does the majority's new test risk adding new layers of confusion to our personal jurisdiction jurisprudence. The whole project seems unnecessary. Immediately after disavowing any need for a causal link between the defendant's forum activities and the plaintiffs' injuries, the majority proceeds to admit that such a link may be present here. The majority stresses that the Montana and Minnesota plaintiffs before us "might" have purchased their cars because of Ford's activities in their home States. They "may" have relied on Ford's local advertising. And they "may" have depended on Ford's promise to furnish in-state servicers and dealers. If the majority is right about these things, that would be more than enough to establish a but-for causal link between Ford's in-state activities and the plaintiffs' decisions to purchase their allegedly defective vehicles. Nor should that result come as a surprise: One might expect such causal links to be easy to prove in suits against corporate behemoths like Ford. All the new euphemisms—"affiliation," "relationship," "connection"—thus seem pretty pointless.[1]

With the old *International Shoe* dichotomy looking increasingly uncertain, it's hard not to ask how we got here and where we might be headed.

Before *International Shoe*, it seems due process was usually understood to guarantee that only a court of competent jurisdiction could deprive a defendant of his life, liberty, or property. In turn, a court's competency normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction. But once a plaintiff was able to "tag" the defendant with process in the jurisdiction, that State's courts were generally thought competent to render judgment on any claim against the defendant, whether it involved events inside or outside the State. Pennoyer v. Neff, 95 U. S. 714, 733 (1878); Burnham v. Superior Court of Cal., County of Marin, 495 U. S. 604, 610–

[1] The majority says personal jurisdiction should not turn on a plaintiff's ability to "allege" or "establish" his or her reasons for doing business with the defendant. But the implicit assumption here—that the plaintiff bears the burden of proving personal jurisdiction—is often mistaken. Perhaps because a lack of personal jurisdiction is a waivable affirmative defense, some States place the burden of proving the defense on the defendant. Even in places where the plaintiff bears the burden, I fail to see why it would be so terrible (or burdensome) to require an individual to plead and prove his or her reasons for purchase. Frequently, doing so may be simple—far simpler than showing how the defendant's connections with the jurisdiction satisfy a new and amorphous "affiliation" test.

611 (1990); J. Story, Commentaries on the Conflict of Laws 912–913 (3d ed. 1846); Massie v. Watts, 6 Cranch 148, 157, 161–162 (1810).[2]

International Shoe's emergence may be attributable to many influences, but at least part of the story seems to involve the rise of corporations and interstate trade. See Honda Motor Co. v. Oberg, 512 U. S. 415, 431 (1994). A corporation doing business in its State of incorporation is one thing; the old physical presence rules for individuals seem easily adaptable to them. But what happens when a corporation, created and able to operate thanks to the laws of one State, seeks the privilege of sending agents or products into another State?

Early on, many state courts held conduct like that renders an out-of-state corporation present in the second jurisdiction. And a present company could be sued for any claim, so long as the plaintiff served an employee doing corporate business within the second State. E.g., Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 413–415 (1905). Other States sought to obviate any potential question about corporate jurisdiction by requiring an out-of-state corporation to incorporate under their laws too, or at least designate an agent for service of process. Either way, the idea was to secure the out-of-state company's presence or consent to suit. E.g., Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U. S. 93, 95-96 (1917).

Unsurprisingly, corporations soon looked for ways around rules like these. No one, after all, has ever liked greeting the process server. For centuries, individuals facing imminent suit sought to avoid it by fleeing the court's territorial jurisdiction. But this tactic proved "too crude for the American business genius," and it held some obvious disadvantages. See Jackson, What Price "Due Process," 5 N. Y. L. Rev. 435, 436 (1927). Corporations wanted to retain the privilege of sending their personnel and products to other jurisdictions where they lacked a charter to do business. At the same time, when confronted with lawsuits in the second forum, they sought to hide behind their foreign charters and deny their presence. Really, their strategy was to do business without being seen to do business. Id., at 438 ("No longer is the foreign corporation confronted with the problem 'to be or not to be'—it can both be and not be!").

Initially and routinely, state courts rejected ploys like these. See, e.g., Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 796–799, 22 So. 53, 55–56 (Miss. 1897). But, in a series of decisions at the turn of the last century, this Court eventually provided a more receptive audience. On the one hand, the Court held that an out-of-state corporation often has a right to do business in another State unencumbered by that State's registration rules, thanks to the so-called dormant Commerce Clause. International Textbook Co. v. Pigg, 217 U. S. 91, 107–112 (1910). On the other hand, the Court began invoking the Due Process Clause to restrict the circumstances in which an out-of-state corporation could be deemed present. So, for example, the Court ruled that even an

[2] Some disagree that due process requires even this much. Recent scholarship, for example, contends *Pennoyer*'s territorial account of sovereign power is mostly right, but the rules it embodies are not "fixed in constitutional amber"—that is, Congress might be able to change them. Sachs, Pennoyer Was Right, 95 Texas L. Rev. 1249, 1255 (2017). Others suggest that fights over personal jurisdiction would be more sensibly waged under the Full Faith and Credit Clause. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 3 (1945). Whether these theories are right or wrong, they at least seek to answer the right question—what the Constitution as originally understood requires, not what nine judges consider "fair" and "just."

Oklahoma corporation purchasing a large portion of its merchandise in New York was not "doing business" there. Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516, 517–518 (1923). Perhaps advocates of this arrangement thought it promoted national economic growth. See Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427, 444–445 (1929). But critics questioned its fidelity to the Constitution and traditional jurisdictional principles, noting that it often left injured parties with no practical forum for their claims too. Jackson, 5 N. Y. L. Rev., at 436–438.

In many ways, *International Shoe* sought to start over. The Court "cast . . . aside" the old concepts of territorial jurisdiction that its own earlier decisions had seemingly twisted in favor of out-of-state corporations. Burnham, 495 U. S., at 618. At the same time, the Court also cast doubt on the idea, once pursued by many state courts, that a company "consents" to suit when it is forced to incorporate or designate an agent for receipt of process in a jurisdiction other than its home State. Ibid.[3] In place of nearly everything that had come before, the Court sought to build a new test focused on "'traditional notions of fair play and substantial justice.'" International Shoe, 326 U. S., at 316 (quoting Milliken v. Meyer, 311 U. S. 457, 463 (1940)).

It was a heady promise. But it is unclear how far it has really taken us. Even today, this Court usually considers corporations "at home" and thus subject to general jurisdiction in only one or two States. All in a world where global conglomerates boast of their many "headquarters." The Court has issued these restrictive rulings, too, even though individual defendants remain subject to the old "tag" rule, allowing them to be sued on any claim anywhere they can be found. Burnham, 495 U. S., at 610–611.[4] Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why.

Maybe, too, *International Shoe* just doesn't work quite as well as it once did. For a period, its specific jurisdiction test might have seemed a reasonable new substitute for assessing corporate "presence," a way to identify those out-of-state corporations that were simply pretending to be absent from jurisdictions where they were really transacting business. When a company "purposefully availed" itself of the benefits of another State's market in the 1940s, it often involved sending in agents, advertising in local media, or developing a network of on-the-ground dealers, much as Ford did in these cases. But, today, even an individual retiree carving wooden decoys in Maine can "purposefully avail" himself of the chance to do business across the continent after drawing online orders to his e-Bay "store" thanks to Internet advertising with global reach. A test once aimed at keeping corporations honest about their out-of-state operations now seemingly risks hauling individuals to jurisdictions where they have never set foot.

Perhaps this is the real reason why the majority introduces us to the hypothetical decoy salesman. Yes, he arguably availed himself of a new market. Yes, the plaintiff 's injuries arguably arose from (or were caused by) the product he sold there. Yes, *International Shoe*'s old causation

[3] It is unclear what remains of the old "consent" theory after *International Shoe*'s criticism. Some courts read *International Shoe* and the cases that follow as effectively foreclosing it, while others insist it remains viable. Compare Lanham v. BNSF R. Co., 305 Neb. 124, 130–136, 939 N. W. 2d 363, 368–371 (Neb. 2020), with Rodriguez v. Ford Motor Co., 2019-NMCA-023, ¶12–¶14, 458 P. 3d 569, 575–576 (N. M. Ct. App. 2018).

[4] Since *Burnham*, some courts have sought to revive the tag rule for artificial entities while others argue that doing so would be inconsistent with *International Shoe*. Compare First Am. Corp. v. Price Waterhouse LLP, 154 F. 3d 16, 20–21 (CA2 1998), with Martinez v. Aero Caribbean, 764 F. 3d 1062, 1067–1069 (CA9 2014).

test would seemingly allow for personal jurisdiction. But maybe the majority resists that conclusion because the old test no longer seems as reliable a proxy for determining corporate presence as it once did. Maybe *that's* the intuition lying behind the majority's introduction of its new "affiliation" rule and its comparison of the Maine retiree's "sporadic" and "isolated" sales in the plaintiff 's State and Ford's deep "relationships" and "connections" with Montana and Minnesota.

If that is the logic at play here, I cannot help but wonder if we are destined to return where we began. Perhaps all of this Court's efforts since *International Shoe*, including those of today's majority, might be understood as seeking to recreate in new terms a jurisprudence about corporate jurisdiction that was developing before this Court's muscular interventions in the early 20th century. Perhaps it was, is, and in the end always will be about trying to assess fairly a corporate defendant's presence or consent. *International Shoe* may have sought to move past those questions. But maybe all we have done since is struggle for new words to express the old ideas. Perhaps, too, none of this should come as a surprise. New technologies and new schemes to evade the process server will always be with us. But if our concern is with "'*traditional* notions of fair play and substantial justice,'" International Shoe, 326 U. S., at 316 (emphasis added), not just our personal and idiosyncratic impressions of those things, perhaps we will always wind up asking variations of the same questions.[5]

None of this is to cast doubt on the outcome of these cases. The parties have not pointed to anything in the Constitution's original meaning or its history that might allow Ford to evade answering the plaintiffs' claims in Montana or Minnesota courts. No one seriously questions that the company, seeking to do business, entered those jurisdictions through the front door. And I cannot see why, when faced with the process server, it should be allowed to escape out the back. Jackson, 5 N. Y. L. Rev., at 439. The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy. On those scores, I readily admit that I finish these cases with even more questions than I had at the start. Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history.

Notes and Questions

1. The majority opinion uses phrases that, before *Goodyear* and *Daimler,* were relevant to the assessment of general jurisdiction. It notes that Ford's business in the forum states was "continuous" and "systematic," and that Ford "extensively" and "regularly" marketed its vehicles in those states. Footnote 4 says "we have long treated isolated or sporadic transactions differently from continuous ones." Similarly, Justice Alito's concurrence refers to Ford's "heavy

[5] The majority worries that the thoughts expressed here threaten to "transfigure our specific jurisdiction standard as applied to corporations" and "return [us] to the mid-19th century." [Citing footnotes 2 and 3 from majority opinion.] But it has become a tired trope to criticize any reference to the Constitution's original meaning as (somehow) both radical and antiquated. Seeking to understand the Constitution's original meaning is part of our job. What's the majority's real worry anyway—that corporations might lose special protections? The Constitution has always allowed suits against individuals on any issue in any State where they set foot. Yet the majority seems to recoil at even entertaining the possibility the Constitution might tolerate similar results for "nationwide corporation[s]," whose "business is everywhere."

presence" in the two states. Is the defendant's *level* of activity in the forum relevant to the question of whether the plaintiff's claim is sufficiently related to it?

If so, does *Ford Motor* endorse a sliding scale approach, under which a greater level of activity will support specific jurisdiction based upon a less demanding "relate to" basis (rather than a more demanding "arises out of" basis)? Would such an approach contradict *Bristol-Myers Squibb* (in part III.A., on page 106 of the casebook), where the Court rejected a sliding scale approach that had been adopted by the California Supreme Court?

2. The Court obviously concluded that Ford Motor Company had purposefully availed itself of the two forum states and that the claims against them were sufficiently related to the forum states to support specific jurisdiction. Does the Court undertake an analysis of whether the exercise of jurisdiction would be fair or reasonable under the circumstances? If so, it certainly did not do so by listing the familiar "fairness factors" we saw in *World-Wide Volkswagen* (the factors were listed at page 51 of the casebook). Are those five fairness factors still relevant to assessing specific jurisdiction?

For example, before *Ford Motor*, such state interests were listed as one of the "fairness factors." In *Ford Motor*, the Court did address the forum state's interest – for example, in providing redress for its citizens and enforcing its regulations for motor safety. Is state's interest part of the assessment of contacts or relatedness or fairness?

3. Recall that Justice Alito wrote the majority opinion in *Bristol-Myers*, in which he saw no need to parse the phrase "arises out of or relates to." Is his concurring opinion in *Ford Motor* a defensive reaction to the majority's making a distinction he did not make (between "arises out of" and "relates to")? Or does he have a broader point?

4. Suppose Pressuer Tank Corporation (PTC) manufactures tanks in which paint is placed and put under pressure so the paint can be sprayed on surfaces to be painted. It makes two kinds of tanks: PTC-1 and PTC-2, which are different sizes and accommodate different amounts of pressure. Plaintiff is injured when a PTC-2 tank explodes while he is painting his house in State A. PTC routinely sells thousands of PTC-1 tanks to State A businesses and ships them directly to State A. But PTC has never marketed the PTC-2 tank in State A. It is unclear how the PTC-2 tank used by Plaintiff got into State A (except that PTC had no role in its being there). PTC is not incorporated in State A, nor does it maintain its principal place of business there. Would State A have personal jurisdiction over PTC for Plaintiff's claim? The fact pattern is suggested by *Buckeye Boiler Company v. Superior Court of Los Angeles County,* 71 Cal.2d 895 (1969), in which the California Supreme Court upheld jurisdiction.

5. Is Justice Gorsuch urging a return to *Pennoyer v. Neff*? If so, would that automatically result in narrowing personal jurisdiction from where it now stands? After all, the "traditional bases" recognized in *Pennoyer* all supported what today would be considered general jurisdiction. Under that regime, there was no need (except in implied consent cases like *Hess v. Pawloski*) to assess relatedness between the plaintiff's claim and the forum.

6. *Ford* is generating a good deal of scholarly attention. Professor Rhodes uses the decision as a lens through which to view the Roberts Court's fundamental transformation of personal jurisdiction doctrine. That transformation included the "new era" restriction of general jurisdiction, which required the Court to intervene to clarify the possibility that companies might be amenable to jurisdiction on tort claims in states other than those in which they are "at home" or to which they marketed the product that allegedly injured the plaintiff. Charles W. (Rocky) Rhodes, The Roberts Court's Jurisdictional Revolution within Ford's Frame, 51 Stetson L. Rev. 157 (2022). See also Scott Dodson, Personal Jurisdiction, Comparativism, and Ford, 51 Stetson L. Rev. 187 (2022) and Linda Sandstrom Simard, Charles W. (Rocky) Rhodes & Cassandra Burke Robertson, Ford Motor Co.: The Murky Doctrine of Personal Jurisdiction, 5 Am. Const. Soc'y Sup. Ct. Rev. 119 (2021).

Professor Borchers argues that concurring opinions by Justice Gorsuch (joined by Justice Thomas) and Justice Alito may signal that those jurists – and perhaps others – are contemplating a paradigm shift away from the *International Shoe* regime. In particular, he asserts that the requirement of purposeful contact is not rooted in history. Moreover, jurisdictional due process is an awkward fit for substantive due process and should be based in the "fair procedures" branch of due process jurisprudence. Patrick J. Borchers, Ford Motor Co. v. Montana Eighth Judicial District Court and "Corporate Tag" Jurisdiction in the Pennoyer Era, 72 Case W. Rsrv. L. Rev. 45 (2021).

Professor Borchers, joined by Professors Arthur and Freer, hails Ford as a welcome return to serious consideration of the fairness prong of personal jurisdiction analysis. The authors explore various questions left open by Ford, including the possibility that it has introduced a sliding scale approach to relatedness depending upon the level of contact between the defendant and the forum. Ford Motor Company v. Montana Eighth Judicial District: Some Answers, Lots of Questions, 71 Emory L.J. Online 1 (2021).

There is a symposium on the "new era" of personal jurisdiction, which commenced in 2011, at 73 Alabama L. Rev. 483 et seq. (2022), featuring articles by (1) Gardiner, Cookman, Bradt, Clopton & Rave, (2) Solum & Crema, (3) Lahav, (4) Freer, (5) Cook & D'Entrement, and (6) Wirtes & Rue.

9. Transient Presence ("Tag" Jurisdiction)

Jurisdiction Over Businesses

At pages 135-38, before Section C, please replace the "Jurisdiction over Businesses" Section with the following material:

Corporate Registration Statutes

All states require out-of-state businesses seeking to transact business within the state to register and to appoint an in-state agent for service of process. When a company complies with a "registration" statute and appoints an agent for service, jurisdiction based upon service on the agent is not rooted in presence or minimum contacts. Rather, it is rooted in consent. Specifically, by appointing an agent who has authority to accept service of process, the business "consents" to jurisdiction. Recall that prior to *International Shoe*, as states and courts struggled to establish grounds for which a forum state could exercise jurisdiction over an out-of-state corporation, the Supreme Court held that states could require a corporation to appoint an agent for service of

process as a condition for doing business in the state. Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917). In the minimum contacts era of broad general "doing business" jurisdiction discussed above in Section B.4, above, the doctrine fell into the shadows. The Supreme Court mentioned the issue only in passing in Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 891 (1988), where the Court struck down an Ohio law that tolled the statute of limitations for corporations that failed to appoint an in-state agent for service of process. The Court's analysis was premised on the assumption that appointing "operates as consent to the general jurisdiction of the Ohio courts." This left state and lower courts to interpret corporate registration statutes and evaluate their constitutional reach with little higher court guidance.

The constitutional issue raises the question of how broad such "consent" might be. In other words, does compliance with a registration statute subject the company to general jurisdiction or merely to specific jurisdiction? (If the former, the company can be sued in the forum for a claim that arose anywhere in the world. If the latter, the company can be sued in the forum only for a claim that arose from its activities in the forum.) The starting point is the statutory language. Surprisingly, though, most statutes are not clear about the scope of jurisdiction.[*] Professor Tanya Monestier conducted an exhaustive study of state registration statutes and concluded that

> Courts generally fall within three broad camps in interpreting the jurisdictional reach of corporate registration statutes: (i) corporate registration confers general jurisdiction over a defendant; (ii) corporate registration confers specific jurisdiction over a defendant in respect of its in-state business activities; or (iii) corporate registration is a procedural mechanism for ensuring service of process but has no independent jurisdictional effect. For those courts that subscribe to the view that corporate registration amounts to general jurisdiction, the reasoning usually focuses on the issue of consent — that by registering to do business pursuant to the state registration statute, a corporation has expressly consented to jurisdiction. Since consent is an independent basis for jurisdiction, separate and apart from minimum contacts, no additional due process analysis is necessary. The corporation's consent, in itself, satisfies due process.
>
> Other courts hold that a corporation's act of registering to do business amounts to its consent to jurisdiction for causes of action arising from the business that it actually conducts in the state. In effect, these courts view the act of registration as a form of consent to *specific* (rather than general) jurisdiction. Under this view, the consent would essentially be co-extensive with the minimum contacts standard for jurisdiction.
>
> Finally, some courts do not ascribe any particular substantive jurisdictional significance to the act of registering to do business or appointing an agent for service of process. Under this view, the appointment of an agent is simply a way to effectuate service of process and thereby perfect jurisdiction. The appointment of an agent does not in any way obviate the need to independently establish a constitutionally acceptable basis for jurisdiction.
>
> Not only are courts divided on *whether* registration confers general jurisdiction over a corporation, but they are also divided on *why* registration confers general jurisdiction

[*]. Only Pennsylvania has clear statutory language granting general jurisdiction for foreign corporations registered to do business in the state. 42 PA. CONS. STAT. ANN. § 5301(a)(2)(i)–(ii) (West 2013).

> over a corporation. The overwhelming majority of courts that view registration as conferring general jurisdiction justify their conclusion on the basis of consent — i.e., by taking steps to register under a state statute, the corporation has manifested its express consent to general jurisdiction. Some courts, however, justify the assertion of general jurisdiction on the basis of either "presence" or "minimum contacts." Moreover, it is important to note that these three rationales — consent, presence, and minimum contacts — are often advanced in concert with one another to support the exercise of general jurisdiction over a corporation.

Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1369–71 (2015).

The issue took on renewed importance in the wake of *Daimler*. Some defendants argued that *Daimler* (which permits general jurisdiction where the defendant is "at home") rules out the possibility of general jurisdiction in any other way, including consent under a registration statute. Some courts cited *Daimler* as turning point for a new approach to the constitutionality of using registration statutes as a basis for consent to general jurisdiction. Other courts held that *Daimler* did not "abdicate or overrule" earlier precedent, and thus a corporation that applies for and receives a certificate of authority to do business in a forum state consents to that general jurisdiction in that forum.

The Supreme Court addressed the constitutionality of corporate registration statutes in Mallory v. Norfolk Southern Railway, 143 S. Ct. 2028 (2023). Mr. Mallory, a Virginia resident, worked for the defendant railway (headquartered and incorporated in Virginia) in Ohio and Virginia. He sued the railway in Pennsylvania state court for negligence in exposure to substances that he alleged caused his cancer. Mallory served Norfolk Southern under a Pennsylvania statute that required registered foreign corporations to appoint an agent for service of process in the state, and that such an appointment constituted consent to general jurisdiction in the state of Pennsylvania. In a fractured opinion, the Supreme Court upheld the constitutionality of the Pennsylvania statute. Writing for the five-justice majority, Justice Gorsuch leaned on stare decisis to hold that

> Pennsylvania Fire controls this case. Much like the Missouri law at issue there, the Pennsylvania law at issue here provides that an out-of-state corporation "may not do business in this Commonwealth until it registers with" the Department of State. 15 Pa. Cons. Stat. § 411(a). As part of the registration process, a corporation must identify an "office" it will "continuously maintain" in the Commonwealth. § 411(f); see also § 412(a)(5). Upon completing these requirements, the corporation "shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties ... imposed on domestic entities." § 402(d). Among other things, Pennsylvania law is explicit that "qualification as a foreign corporation" shall permit state courts to "exercise general personal jurisdiction" over a registered foreign corporation, just as they can over domestic corporations. 42 Pa. Cons. Stat. § 5301(a)(2)(i).

Id. at 2037. Despite the apparent simplicity of this holding, the Court could not command a majority for a particular theory of consent to jurisdiction that would explain the deeper roots of its constitutionality. In his plurality opinion, Justice Gorsuch emphasized that consent is an *additional* path to constitutional personal jurisdiction, not a basis that, like in rem jurisdiction after *Shaffer*, requires minimum contacts analysis. Id. at 2039. According to Justice Gorsuch, Norfolk Southern complied knowingly with the Pennsylvania law, and this consent satisfies due process. Justice Jackson agreed, noting that there

> is no question that Norfolk Southern waived its personal-jurisdiction rights here. As the Court ably explains, Norfolk Southern agreed to register as a foreign corporation in Pennsylvania in exchange for the ability to conduct business within the Commonwealth and receive associated benefits. Moreover, when Norfolk Southern made that decision, the jurisdictional consequences of registration were clear.

Id. at 2046. Justice Jackson also stressed the importance of understanding consent to jurisdiction as a feature of the fact that personal jurisdiction is a waivable, individual liberty right, writing that waiver is

> a critical feature of the personal jurisdiction analysis. * * * A defendant can waive its rights by explicitly or implicitly consenting to litigate future disputes in a particular State's courts. A defendant might also fail to follow specific procedural rules, and end up waiving the right to object to personal jurisdiction as a consequence. Or a defendant can voluntarily invoke certain benefits from a State that are conditioned on submitting to the State's jurisdiction.

Id. at 2045. Do you agree that waiver should be such a powerful procedural tool? How much bargaining power does a foreign corporation have vis a vis the state in which it wishes to register to do business? While a corporation could always choose to avoid doing the sort of business in a state that would require registration, this refusal might be impractical or even impossible? Consider the defendant in *Mallory*: as a railroad that serviced and connected several states such as Virginia and Ohio, refusal to do business in Pennsylvania might defeat the purpose of its business in the first place. Justice Alito, motivated by concerns such as this, wrote a length concurring opinion in which he agreed that *Pennsylvania Fire* controlled the facts of this case in which Norfolk Southern had a substantial business presence in Pennsylvania, but that other constitutional concerns beyond the Due Process Clause might limit the exercise of corporate registration statutes in different factual scenarios that do not have a "clear overlap with the facts of this case." Id. at 2049. Justice Alito's primary concern is that some of corporate registration jurisdiction would strain territorial limitations on the exercise of state power, even when the defendant has consented to jurisdiction. According to Justice Alito, limitations on the exercise of state territorial power here are limited by the so-called "dormant commerce clause:"

> The federalism concerns that this case presents fall more naturally within the scope of the Commerce Clause. * * * But this Court has long held that the Clause includes a negative component, the so-called dormant Commerce Clause, that "prohibits state laws that unduly restrict interstate commerce." *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S.Ct. 2449, 2459, (2019). While the notion that the Commerce Clause restrains States has been the subject of "thoughtful critiques," the concept is "deeply rooted in our case law," *Id.* at 2460, and vindicates a fundamental aim of the Constitution: fostering the creation of a national economy and avoiding the every-State-for-itself practices that had weakened the country under the Articles of Confederation. * * *
>
> In its negative aspects, the Commerce Clause serves to "mediate [the States'] competing claims of sovereign authority" to enact regulations that affect commerce among the States. * * * It is especially appropriate to look to the dormant Commerce Clause in considering the constitutionality of the authority asserted by Pennsylvania's registration scheme. Because the right of an out-of-state corporation to do business in another State is based on the dormant Commerce Clause, it stands to reason that this doctrine may also limit a State's authority to condition that right. This Court and other courts have long

> examined assertions of jurisdiction over out-of-state companies in light of interstate commerce concerns. * * *
>
> In my view, there is a good prospect that Pennsylvania's assertion of jurisdiction here—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause. Under our modern framework, a state law may offend the Commerce Clause's negative restrictions in two circumstances: when the law discriminates against interstate commerce or when it imposes "undue burdens" on interstate commerce. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2091 (2018). Discriminatory state laws are subject to " 'a virtually *per se* rule of invalidity.' " *Ibid*. * * *
>
> There is reason to believe that Pennsylvania's registration-based jurisdiction law discriminates against out-of-state companies. But at the very least, the law imposes a "significant burden" on interstate commerce by "[r]equiring a foreign corporation ... to defend itself with reference to all transactions," including those with no forum connection. Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 893 (1988).
>
> The foreseeable consequences of the law make clear why this is so. Aside from the operational burdens it places on out-of-state companies, Pennsylvania's scheme injects intolerable unpredictability into doing business across state borders. Large companies may be able to manage the patchwork of liability regimes, damages caps, and local rules in each State, but the impact on small companies, which constitute the majority of all U. S. corporations, could be devastating. Large companies may resort to creative corporate structuring to limit their amenability to suit. Small companies may prudently choose not to enter an out-of-state market due to the increased risk of remote litigation. Some companies may forgo registration altogether, preferring to risk the consequences rather than expand their exposure to general jurisdiction. * * *
>
> Given these serious burdens, to survive Commerce Clause scrutiny under this Court's framework, the law must advance a " 'legitimate local public interest' " and the burdens must not be " 'clearly excessive in relation to the putative local benefits.' " *Wayfair*, 138 S.Ct., at 2091. But I am hard-pressed to identify any *legitimate local* interest that is advanced by requiring an out-of-state company to defend a suit brought by an out-of-state plaintiff on claims wholly unconnected to the forum State. A State certainly has a legitimate interest in regulating activities conducted within its borders, which may include providing a forum to redress harms that occurred within the State. A State also may have an interest "in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King*, 471 U.S. at 473. But a State generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State. With no legitimate local interest served, "there is nothing to be weighed ... to sustain the law." And even if some legitimate local interest could be identified, I am skeptical that any local benefits of the State's assertion of jurisdiction in these circumstances could overcome the serious burdens on interstate commerce that it imposes.

Id. at 2051-54. Under Justice Alito's framework, how should courts evaluate whether an application of a state's corporate registration statute is constitutional? Should the analysis be driven by an analogy to the old "doing business" jurisdiction that governed general jurisdiction pre-*Goodyear*? Or is the focus closer to something resembling specific jurisdiction?

Justice Barrett, writing for the dissenters, rejected these approaches altogether cautioning that, while the Court's "approach does not formally overrule our traditional contacts-based approach to jurisdiction, [it] might as well. By relabeling their long-arm statutes, States may now manufacture 'consent' to personal jurisdiction. Because I would not permit state governments to circumvent constitutional limits so easily, I respectfully dissent." Id. at 2055. The dissenters also questioned whether consent itself was an adequate theory to ground Pennsylvania's exercise of jurisdiction:

> The Court short-circuits this precedent by characterizing this case as one about consent rather than contacts-based jurisdiction. * * * This argument begins on shaky ground, because Pennsylvania itself does not treat registration as synonymous with consent. Section 5301(a)(2)(i) baldly asserts that "qualification as a foreign corporation" in the Commonwealth is a sufficient hook for general jurisdiction. The *next* subsection (invoked by neither Mallory nor the Court) permits the exercise of general jurisdiction over a corporation based on "[c]onsent, to the extent authorized by the consent." § 5301(a)(2)(ii). If registration were actual consent, one would expect to see some mention of jurisdiction in Norfolk Southern's registration paperwork—which is instead wholly silent on the matter. What Mallory calls "consent" is what the Pennsylvania Supreme Court called "compelled submission to general jurisdiction by legislative command." Corporate registration triggers a statutory repercussion, but that is not "consent" in a conventional sense of the word.
>
> To pull § 5301(a)(2)(i) under the umbrella of consent, the Court, following Mallory, casts it as setting the terms of a bargain: In exchange for access to the Pennsylvania market, a corporation must allow the Commonwealth's courts to adjudicate any and all claims against it, even those (like Mallory's) having nothing to do with Pennsylvania. Everyone is charged with knowledge of the law, so corporations are on notice of the deal. By registering, they agree to its terms.
>
> While this is a clever theory, it falls apart on inspection. The Court grounds consent in a corporation's choice to register with knowledge (constructive or actual) of the jurisdictional consequences. But on that logic, *any* long-arm statute could be said to elicit consent. Imagine a law that simply provides, "any corporation doing business in this State is subject to general jurisdiction in our courts." Such a law defies our precedent, which, again, holds that "in-state business ... does not suffice to permit the assertion of general jurisdiction." *BNSF*, 137 S.Ct. 1549. Yet this hypothetical law, like the Pennsylvania statute, gives notice that general jurisdiction is the price of doing business. And its "notice" is no less "clear" than Pennsylvania's. So on the Court's reasoning, corporations that choose to do business in the State impliedly consent to general jurisdiction. The result: A State could defeat the Due Process Clause by adopting a law at odds with the Due Process Clause.
>
> That makes no sense. If the hypothetical statute overreaches, then Pennsylvania's does too.

Id. at 2057.

Has *Mallory* effectively authorized a new form of general jurisdiction? Remember that, before a plaintiff can take advantage of the *Mallory* holding, a state must have a corporate registration statute *and* that statute must state or be interpreted to mean that the registration of the foreign corporation operates as consent to general jurisdiction.

Chapter 3: Notice and Opportunity to be Heard

B. Notice

2. Statutory Requirements

At page 163, before the *National Development Co.* case, please add:

Service of process remains the classic method by which a defendant is notified that she has been sued. This is not to say, however, that due process requires service of process to perform that function. A less formal method of imparting notice (such as mail or electronic transmission) might suffice constitutionally. Still, the applicable statutes and rules today continue to require formal service of process to serve the function of providing the initial notice to a defendant of the suit against her. *See* Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction,* 74 N.Y.U. ANN. SURV. AM. LAW 23 (2018).

Chapter 4: Subject Matter Jurisdiction

C. Federal Courts and Limited Subject Matter Jurisdiction

3. Diversity of Citizenship and Alienage Jurisdiction

a. Introductory Note

At page 180, at the bottom of the page, please add:

Historically, diversity jurisdiction under § 1332(a)(1) accounted for between 20 and 25 percent of the federal civil docket. In 2001, only 19.5 percent of civil cases filed in federal court were based upon diversity jurisdiction. The percentage of diversity cases has increased in recent years, possibly because of Congress's refusal to increase the amount-in-controversy requirement for diversity jurisdiction. For fiscal year 2020, 470,581 civil cases were commenced in the federal district courts. Of these, 284,603 (60.4 percent) invoked diversity of citizenship jurisdiction. *See* uscourts.gov, Statistics, Table C-2. Both numbers are aberrational; the number of cases filed increased a stunning 58 percent from the previous year, which is attributable almost entirely to over 200,000 product liability cases in Florida concerning allegedly defective earplugs provided to military personnel. More typical are the numbers from 2019: 286,289 cases filed, of which 94,206 (32.9 percent) invoked diversity jurisdiction. These numbers are higher than the historical average.

In a recent article, the author argues that the traditional justification for diversity jurisdiction – a fear of local bias in state courts – understates the value of this branch of federal jurisdiction. He argues that diversity jurisdiction is part of a carefully constructed constitutional plan intended to promote the free flow of commerce and a national identity. Efforts to abolish diversity jurisdiction in the last half of the twentieth century overlooked this broader vision and the elaborate legal culture that has emerged with state and federal courts applying state law. Richard D. Freer, The Political Reality of Diversity Jurisdiction*,* 94 S. Cal. L. Rev. 1083 (2021).

6. Removal Jurisdiction

At page 239, after Note 9, please add:

10. Recent years have brought increased invocation of what has become known as "snap" removal of diversity cases. The instate defendant rule limitation on removal of diversity cases applies only if one of the defendants who has been joined *and served with process* is a citizen of the state in which the case is pending. Suppose that D-1 and D-2 have been named as co-defendants but have not yet been served with process. They learn about the case through the state court's online judicial portal and file notice of removal in federal court. Literally, the instate defendant rule does not apply. After all, D-2 is an instate defendant, but she was not *served* with process. Can D-1 effect removal in this situation? Three courts of appeals have concluded that the answer is yes. Texas Brine Co. v. Am. Arbitration Ass'n, 955 F.3d 482, 487 (5th Cir. 2020); Gibbons v. Bristol-Myers Squibb Co., 919 F.3d 699, 704–07 (2d Cir. 2019); Encompass Ins. Co. v. Stone Mansion Restaurant Inc., 902 F.3d 147, 153 (3d Cir. 2018). If the practice is to be ended, it seems likely that Congress will be required to act. *See generally* Arthur Hellman et al., *Neutralizing the Stratagem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 THE FED. COURTS L. REV. 103 (2016) (discussing divergent judicial approaches to "snap" removal and proposing legislation to address them conflict).

Chapter 5: Venue

F. Forum Non Conveniens

At page 275, at the end of the text, please add:

Note on "Boomerang" Litigation

In some cases, an American court's dismissal under forum non conveniens does not spell defeat for the plaintiff. Plaintiffs sometimes sue successfully in the foreign tribunal, which may lead to "boomerang" litigation, which consists of three steps. First, a foreign plaintiff sues an American defendant in an American court concerning an event in the foreign country. The American court dismisses for forum non conveniens. Second, the plaintiff sues the American in the foreign court and wins a substantial judgment. The plaintiff is unable to enforce the judgment in the foreign country, however, because the American defendant lacks substantial assets there. Third, the plaintiff sues in the United States, seeking to enforce the foreign judgment where the American defendant has assets.

"Boomerang," then, refers to the fact that litigation that started in the U.S. ends up back in the U.S. This time, though, the case is not in American courts for litigation on the merits, but to enforce a foreign judgment. Suppose now the American defendant argues that the foreign judgment should not be enforced by the American court because the procedures in the foreign tribunal were not fair. In such a case, the same defendant who moved to dismiss under forum non conveniens by arguing that the foreign court would be adequate now claims that that court was inadequate. See generally Alexander F. Moss, Comment, Bridging the Gap: Addressing the Doctrinal Disparity Between Forum Non Conveniens and Judgment Recognition Enforcement in Transnational Litigation, 106 Geo. L.J. 209 (2017).

The issue of whether a foreign judgment is entitled to enforcement in an American court is beyond our scope. Suffice to say that the procedures followed in some cases litigated in foreign courts are so lacking in fundamental fairness as to preclude enforcement in this country. A well-known example is litigation against Chevron for alleged contamination of land in Ecuador. Plaintiffs won a judgment in that country of nearly $18,000,000,000. In 2018, the Permanent Court of Arbitration in The Hague concluded unanimously, however, that the Ecuadorean judgment was fraudulent and corrupt and "should not be recognized or enforced by the courts of other States." Among other things, according to its decision, the plaintiffs blackmailed an Ecuadorean judge and bribed experts. See Karen Nagarkatti and Gary McWilliams, International tribunal rules in favor of Chevron in Ecuador Case, REUTERS, Sept. 7, 2018, https://www.reuters.com/article/us-chevron-ecuador-idUSKCN1LN1WS. See also Patrick Radden Keefe, Reversal of Fortune, THE NEW YORKER, Jan. 12, 2012, https://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe.

Chapter 7: Pleading and Judgments Based on Pleadings
G. Veracity in Pleading: Rule 11 and Other Devices
1. Rule 11

At page 375, please add:

Mata v. Avianca, Inc.,
---F.Supp.3d--- (S.D.N.Y. 2023)

[*Roberto Mata filed a complaint in February 2022, alleging that he was injured when a metal serving cart struck his knee during a flight from El Salvador to John F. Kennedy Airport. Avianca, the airline defendant, removed the case to federal court, citing jurisdiction under the Montreal Convention, an international agreement governing certain aspects of air travel. Initially, Steven A. Schwartz of the Levidow Firm represented Mata, but Peter LoDuca later filed a notice of appearance on Mata's behalf. Schwartz continued to perform the substantive legal work despite not being admitted to practice in the district court.*

Avianca filed a motion to dismiss in January 2023, asserting that Mata's claims were time-barred under the Montreal Convention. In response, LoDuca filed an "Affirmation in Opposition" (opposition to the motion) on March 1, 2023. This document contained citations and quotes from purported judicial decisions that were said to be published in reputable legal sources such as the Federal Reporter and the Federal Supplement. However, it was later revealed that Schwartz had used an AI language model, ChatGPT, to fabricate these cases. One quote from a fake case contained internal citations to several other non-existent cases. It also emerged that LoDuca had signed the Affirmation without any meaningful involvement or knowledge of its accuracy.

Avianca, in its reply memorandum, pointed out that the cited cases could not be located and that the few cases found did not support the propositions for which they were cited. The court, conducting its own search, confirmed the absence of multiple authorities cited in the Affirmation in Opposition. The court issued orders directing LoDuca to provide copies of the cited decisions. In response, LoDuca filed an affidavit on April 25, 2023, attaching only purported copies or excerpts of the requested decisions.

The court made extensive findings of fact. It detailed the fabrication of each fake case and the Levidow firm's use of ChatGPT. It also documented the lawyers' failure to research the fabricated decisions, the making of false statements to the court to procure extra time to respond and the repeated instances in which the lawyers "doubled down." Finally, the court made factual findings the nature of the fake cases and their detectability as fabrications. Schwartz testified that he simply did not believe that ChatGPT was capable of fabricating legal decisions, and that he did not find it concerning that he could not find some of the citations in a free legal search engine that he used because the firm did not subscribe to Westlaw or Lexis. But the court found that, beyond the inability to locate the cases themselves, the cases ought to have been detectable as fabrications. For example, that one of the fabricated cases "shows stylistic and reasoning flaws that do not generally appear in decisions issued by United States Courts of Appeals. Its legal analysis is gibberish."

The court concluded its findings of fact by noting that Schwartz had presented the court with a series of "shifting and contradictory explanations, submitted even after the Court raised the possibility of Rule 11 sanctions" and noted that "[a]t no time has [any member of the Levidow

firm] written to this Court seeking to withdraw the March 1 Affirmation in Opposition or advise the Court that it may no longer rely upon it."]

CASTEL, U.S.D.J.

OPINION AND ORDER ON SANCTIONS

In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis. Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings. Rule 11, Fed. R. Civ. P. Peter LoDuca, Steven A. Schwartz and the law firm of Levidow, Levidow & Oberman P.C. (the "Levidow Firm") (collectively, "Respondents") abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.

Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.

* * * *

Rule 11(b)(2) states: "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." . . . "Under Rule 11, a court may sanction an attorney for, among other things, misrepresenting facts or making frivolous legal arguments." *Muhammad v. Walmart Stores East, L.P.*, 732 F.3d 104, 108 (2d Cir. 2013) (per curiam).

A legal argument may be sanctioned as frivolous when it amounts to an "'abuse of the adversary system . . . .'" *Salovaara v. Eckert*, 222 F.3d 19, 34 (2d Cir. 2000). * * * "The fact that a legal theory is a long-shot does not necessarily mean it is sanctionable." *Fishoff v. Coty Inc*., 634 F.3d 647, 654 (2d Cir. 2011). A legal contention is frivolous because it has "no chance of success" and there "is no reasonable argument to extend, modify or reverse the law as it stands." *Id*. * * * The filing of papers "without taking the necessary care in their preparation" is an "abuse of the judicial system" that is subject to Rule 11 sanction. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990). Rule 11 creates an "incentive to stop, think and investigate more carefully before serving and filing papers." Id. "Rule 11 'explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed.'" *AJ Energy LLC v. Woori Bank*, 829 Fed. App'x 533, 535 (2d Cir. 2020). * * * The Court has described Respondents' submission of fake cases as an unprecedented circumstance. A fake opinion is not "existing law" and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law. An attempt to

persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system.

An attorney's compliance with Rule 11(b)(2) is not assessed solely at the moment that the paper is submitted. The 1993 amendments to Rule 11 added language that certifies an attorney's Rule 11 obligation continues when "later advocating" a legal contention first made in a written filing covered by the Rule. Thus, "a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." Rule 11, advisory committee's note to 1993 amendment. The failure to correct a prior statement in a pending motion is the later advocacy of that statement and is subject to sanctions. *Galin v. Hamada*, 283 F. Supp. 3d 189, 202 (S.D.N.Y. 2017) ("[A] court may impose sanctions on a party for refusing to withdraw an allegation or claim even after it is shown to be inaccurate."); *Bressler v. Liebman*, 1997 U.S. Dist. LEXIS 11963, at *8 (S.D.N.Y. Aug. 14, 1997) (an attorney was potentially liable under Rule 11 when he "continued to press the claims . . . in conferences after information provided by opposing counsel and analysis by the court indicated the questionable merit of those claims.")

Rule 11(c)(3) states: "On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)." "If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." Rule 11(c)(1). Any Rule 11 sanction should be "made with restraint" because in exercising sanctions powers, a trial court may be acting "as accuser, fact finder and sentencing judge." *Storey v. Cello Holdings*, L.L.C., 347 F.3d 370, 387 (2d Cir. 2003). * * * Mr. Schwartz is not admitted to practice in this District and did not file a notice of appearance. However, Rule 11(c)(1) permits a court to "impose an appropriate sanction on any attorney . . . that violated the rule or is responsible for the violation." The Court has authority to impose an appropriate sanction on Mr. Schwartz for a Rule 11 violation.

When, as here, a court considers whether to impose sanctions sua sponte, it "is akin to the court's inherent power of contempt," and, "like contempt, sua sponte sanctions in those circumstances should issue only upon a finding of subjective bad faith." Muhammad, 732 F.3d at 108. By contrast, where an adversary initiates sanctions proceedings under Rule 11(c)(2), the attorney may take advantage of that Rule's 21-day safe harbor provision and withdraw or correct the challenged filing, in which case sanctions may issue if the attorney's statement was objectively unreasonable. Subjective bad faith is "a heightened mens rea standard" that is intended to permit zealous advocacy while deterring improper submissions. Id. at 91. A finding of bad faith is also required for a court to sanction an attorney pursuant to its inherent power. "Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc*., 501 U.S. 32, 44-45 (1991). "[B]ad faith may be inferred where the action is completely without merit." *In re 60 E. 80th St. Equities, Inc*., 218 F.3d 109, 116 (2d Cir. 2000). Any notice or warning provided to the attorney is relevant to a finding of bad faith. See id. ("Here, not only were the claims meritless, but [appellant] was warned of their frivolity by the Bankruptcy Court before he filed the appeal to the District Court.").

The Second Circuit has most often discussed subjective bad faith in the context of false factual statements and not unwarranted or frivolous legal arguments. Subjective bad faith includes the knowing and intentional submission of a false statement of fact. An attorney acts in subjective bad faith by offering "essential" facts that explicitly or impliedly "run contrary to statements" that the attorney made on behalf of the same client in other proceedings. *Revellino & Byzcek, LLP v. Port Authority of N.Y. & N.J.*, 682 Fed. App'x 73, 75-76 (2d Cir. 2017) (affirming Rule 11 sanctions where allegations in a federal civil rights complaint misleadingly omitted key facts asserted by the same attorney on behalf of the same client in a related state criminal proceeding) (summary order). An assertion may be made in subjective bad faith even when it was based in confusion. *United States ex rel. Hayes v. Allstate Ins. Co.*, 686 Fed. App'x 23, 28 (2d Cir. 2017) ("[C]onfusion about corporate complexities would not justify falsely purporting to have personal knowledge as to more than sixty defendants' involvement in wrongdoing.").

A false statement of knowledge can constitute subjective bad faith where the speaker "'knew that he had no such knowledge . . . .'" Id. at 27. "[K]nowledge may be proven by circumstantial evidence and conscious avoidance may be the equivalent of knowledge." *Cardona v. Mohabir*, 2014 U.S. Dist. LEXIS 35624, 2014 WL 1804793, at *3 (S.D.N.Y. May 6, 2014). The conscious avoidance test is met when a person "consciously avoided learning [a] fact while aware of a high probability of its existence, unless the factfinder is persuaded that the [person] actually believed the contrary." *United States v. Finkelstein*, 229 F.3d 90, 95 (2d Cir. 2000). "The rationale for imputing knowledge in such circumstances is that one who deliberately avoided knowing the wrongful nature of his conduct is as culpable as one who knew." Id. It requires more than being "merely negligent, foolish or mistaken," and the person must be "aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Svoboda*, 347 F.3d 471, 481-82 (2d Cir. 2003).

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Here, Respondents advocated for the fake cases and legal arguments contained in the Affirmation in Opposition after being informed by their adversary's submission that their citations were non-existent and could not be found. Mr. Schwartz understood that the Court had not been able to locate the fake cases. Mr. LoDuca, the only attorney of record, consciously avoided learning the facts by neither reading the Avianca submission when received nor after receiving the Court's Orders of April 11 and 12. "In considering Rule 11 sanctions, the knowledge and conduct of each respondent lawyer must be separately assessed and principles of imputation of knowledge do not apply." *Weddington v. Sentry Indus. Inc.*, 2020 U.S. Dist. LEXIS 9159 at *7 (S.D.N.Y. Jan. 17, 2020).

The Court concludes that Mr. LoDuca acted with subjective bad faith in violating Rule 11 in the following respects:

a. Mr. LoDuca violated Rule 11 in not reading a single case cited in his March 1 Affirmation in Opposition and taking no other steps on his own to check whether any aspect of the assertions of law were warranted by existing law. An inadequate or inattentive "inquiry" may be unreasonable under the circumstances. But signing and filing that affirmation after making no "inquiry" was an act of subjective bad faith. This is especially so because he knew of Mr. Schwartz's lack of familiarity with federal law, the Montreal Convention and bankruptcy stays, and the limitations of research tools made available by the law firm with which he and Mr. Schwartz were associated.

b. Mr. LoDuca violated Rule 11 in swearing to the truth of the April 25 Affidavit with no basis for doing so. While an inadequate inquiry may not suggest bad faith, the absence of any

inquiry supports a finding of bad faith. Mr. Schwartz walked into his office, presented him with an affidavit that he had never seen in draft form, and Mr. LoDuca read it and signed it under oath. A cursory review of his own affidavit would have revealed that (1) "Zicherman v. Korean Air Lines Co., Ltd., 516 F.3d 1237 (11th Cir. 2008)" could not be found, (2) many of the cases were excerpts and not full cases and (3) reading only the opening passages of, for example, "Varghese", would have revealed that it was internally inconsistent and nonsensical.

c. Further, the Court directed Mr. LoDuca to submit the April 25 Affidavit and Mr. LoDuca lied to the Court when seeking an extension, claiming that he, Mr. LoDuca, was going on vacation when, in truth and in fact, Mr. Schwartz, the true author of the April 25 Affidavit, was the one going on vacation. This is evidence of Mr. LoDuca's bad faith.

The Court concludes that Mr. Schwartz acted with subjective bad faith in violating Rule 11 in the following respects:

a. Mr. Schwartz violated Rule 11 in connection with the April 25 Affidavit because, as he testified at the hearing, when he looked for "Varghese" he "couldn't find it," yet did not reveal this in the April 25 Affidavit. He also offered no explanation for his inability to find "Zicherman". Poor and sloppy research would merely have been objectively unreasonable. But Mr. Schwartz was aware of facts that alerted him to the high probability that "Varghese" and "Zicherman" did not exist and consciously avoided confirming that fact.

b. Mr. Schwartz's subjective bad faith is further supported by the untruthful assertion that ChatGPT was merely a "supplement" to his research, his conflicting accounts about his queries to ChatGPT as to whether "Varghese" is a "real" case, and the failure to disclose reliance on ChatGPT in the April 25 Affidavit.

The Levidow Firm is jointly and severally liable for the Rule 11(b)(2) violations of Mr. LoDuca and Mr. Schwartz. Rule 11(c)(1) provides that "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." The Levidow Firm has not pointed to exceptional circumstances that warrant a departure from Rule 11(c)(1). Mr. Corvino has acknowledged responsibility, identified remedial measures taken by the Levidow Firm, including an expanded Fastcase subscription and CLE programming, and expressed his regret for Respondents' submissions.

* * *

Each of the Respondents is sanctioned under Rule 11 and, alternatively, under the inherent power of this Court. A Rule 11 sanction should advance both specific and general deterrence. *Cooter & Gell*. "A sanction imposed under [Rule 11] must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Rule 11(c)(4). "The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc." Rule 11, advisory committee's note to 1993 amendment. "'[B]ecause the purpose of imposing Rule 11 sanctions is deterrence, a court should impose the least severe sanctions necessary to achieve the goal.'" *(RC) 2 Pharma Connect, LLC v. Mission Pharmacal Co.*, 2023 WL 112552, at *3 (S.D.N.Y. Jan. 4, 2023). "[T]he Court has 'wide discretion' to craft an appropriate sanction, and may consider the effects on the parties and the full knowledge

of the relevant facts gained during the sanctions hearing." *Heaston v. City of New York*, 2022 U.S. Dist. LEXIS 10776, 2022 WL 182069, at *9 (E.D.N.Y. Jan. 20, 2022).

The Court has considered the specific circumstances of this case. The Levidow Firm has arranged for outside counsel to conduct a mandatory Continuing Legal Education program on technological competence and artificial intelligence programs. The Levidow Firm also intends to hold mandatory training for all lawyers and staff on notarization practices. Imposing a sanction of further and additional mandatory education would be redundant. Counsel for Avianca has not sought the reimbursement of attorneys' fees or expenses. Ordering the payment of opposing counsel's fees and expenses is not warranted.

In considering the need for specific deterrence, the Court has weighed the significant publicity generated by Respondents' actions. The Court credits the sincerity of Respondents when they described their embarrassment and remorse. The fake cases were not submitted for any respondent's financial gain and were not done out of personal animus. Respondents do not have a history of disciplinary violations and there is a low likelihood that they will repeat the actions described herein.

There is a salutary purpose of placing the most directly affected persons on notice of Respondents' conduct. The Court will require Respondents to inform their client and the judges whose names were wrongfully invoked of the sanctions imposed. The Court will not require an apology from Respondents because a compelled apology is not a sincere apology. Any decision to apologize is left to Respondents.

An attorney may be required to pay a fine, or, in the words of Rule 11, a "penalty," to advance the interests of deterrence and not as punishment or compensation. The Court concludes that a penalty of $5,000 paid into the Registry of the Court is sufficient but not more than necessary to advance the goals of specific and general deterrence.

* * *

SO ORDERED.

Chapter 9: Adjudication With and Without a Trial or Jury

D. Controlling and Second-Guessing Juries

4. Motions to Set Aside a Judgment or Order (Rule 60)

At page 559, at the end of the text, please add:

In Kemp v. United States, 142 S. Ct. 1856 (2022), the Supreme Court held that "mistake," as used in Rule 60(b)(1), "includes legal errors made by judges." *Id.* at 1862. The Court rejected the argument that such legal errors must be "obvious" or involve "failure to apply unambiguous law to record facts." Any legal error by the district court can satisfy Rule 60(b)(1). The Court declined to address whether a judicial decision rendered erroneous by later change of law or fact would constitute a "mistake" under the Rule. *Id.* at 1862 n.2. Ultimately, because the motion to reopen the judgment was based upon a legal error, it fell within Rule 60(b)(1) and not Rule 60(b)(6). As a consequence, it was barred because made more than one year after entry of the judgment.

For years, lower courts disagreed on whether a judge's mistake of law (or a change of law after entry of judgment) constituted "mistake" for purposes of Rule 60(b)(1). The Supreme Court resolved much of the uncertainty in Kemp v. United States, 142 S. Ct. 1856, 1862 (2022) by holding that "mistake," as used in Rule 60(b)(1), "includes legal errors made by judges." The Court rejected the argument that such legal errors must be "obvious" or involve "failure to apply unambiguous law to record facts." Any legal error by the district court can be the basis of Rule 60(b)(1) motion. The Court declined to address whether a judicial decision rendered erroneous by later change of law or fact would constitute a "mistake" under the Rule. *Id.* at 1862 n.2.

Chapter 10: What Law Applies in Federal Court

B. Determining What Law Applies

3. The Federal Rules of Civil Procedure

At page 595, before section b., please add:

Concern with the breadth of rulemaking authority is rooted in constitutional principles of separation of powers. If the judicial rulemaking authority can stray into matters of substantive law and policy, it could usurp legislative authority. If the federal government wishes to affect substantive and policy changes, it must do so through the politically accountable branches: Congress must pass a law and the president sign it. Federal rulemaking, then, potentially, poses a threat to democratic theory. Professor Vitiello has urged a more active congressional role in the rulemaking process. Michael Vitiello, Revising the Federal Rules of Civil Procedure: Carving Out a More Active Role for Congress, 35 Notre Dame J.L. Ethics & Pub. Pol'y 147 (2021).

Chapter 13: Special Multi-Party Litigation

B. Interpleader

2. The Two Types of Interpleader in Federal Court

At page 770, at the end of Note 4, please add:

See Kristen DeWilde, Comment, *Catch Rule 22: When Interpleader Actions Violate Statutory and Constitutional Diversity Jurisdiction Requirements,* 168 U. Pa. L. Rev. 467, 487-504 (2020)(arguing that Article III requires diversity among the claimants, rather than between the stakeholder and the claimants, in interpleader cases in which the stakeholder does not claim to own the property).

Chapter 14: Appellate Review

B. Appellate Jurisdiction in the Federal Courts

3. The Collateral Order Doctrine

At page 848, please replace Note 3 with the following:

3. The denial of a motion for summary judgment is an interlocutory order and is immediately appealable only in the relatively rare circumstance that it meets the criteria of the collateral order doctrine. If the denial of a motion for summary judgment can't be appealed immediately, can it be appealed after a trial on the merits? In Ortiz v. Jordan, 562 U.S. 180 (2011), the defendants moved for summary judgment; the motion was denied because the court found there were disputes of material fact. (Remember: for summary judgment, there must be no dispute of material fact and the moving party must be entitled to judgment as a matter of law. Chapter 9.C.) The case then went to trial, resulting in a final judgment against the defendants. On appeal, the defendants asked for review of the denial of their motion for summary judgment – specifically, of the district court's conclusion that there were material disputes of fact. The Court held that once a case proceeds to trial, a party cannot appeal the denial of her motion for summary judgment on this ground. The proper course would be to preserve that issue for appeal by moving for judgment as a matter of law under Rule 50(a) and renewing it after entry of judgment under Rule 50(b). See Chapter 9.D.1.

Ortiz did not address cases in which a motion for summary judgment is denied on purely legal grounds – that is, where the facts are undisputed and the sole question is what result the law requires on those facts. In that situation, must the appealing party preserve the legal question by moving for judgment as a matter of law after trial? The answer is no. In Dupree v. Younger, 143 S.Ct. 1382, 1388-91 (2023), the Court noted that pure questions of law resolved in denying summary judgment are not superseded by developments at trial. The Court explained that "[a] reviewing court does not benefit from having a district court reexamine a purely legal pretrial ruling after trial, because nothing at trial will have given the district court any reason to question its prior analysis."

Chapter 15: Alternative Models of Dispute Resolution

B. Models of Non-Judicial Resolution

2. Arbitration

At pages 877-78, please replace Note 1 with the following two Notes and renumber the remaining Notes accordingly:

1. In the years after *Concepcion*, the Supreme Court reaffirmed and deepened its commitment to restrictions on the availability of classwide arbitration. In American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013), the Supreme Court upheld an arbitration clause with a classwide arbitration waiver when the plaintiffs, merchants who had to pay credit card fees to American Express, alleged antitrust violations. The plaintiffs claimed that individual arbitration of the antitrust claims would be prohibitive given the cost of litigating such claims in comparison to the expected individual recovery of an individual plaintiff. The Court, in an opinion by Justice Scalia, reiterated the primacy of enforcing arbitration agreements and held that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Id. at 233. Do you think that Justice Blackmun anticipated this trajectory when he penned the *Mitsubishi Motors* opinion discussed above?

The Court's broad interpretation of the FAA to preempt state law continued in several subsequent cases. See Kindred Nursing Centers, Ltd. v. Clark, 581 U.S. 246 (2017) (Kentucky law requiring that a power of attorney expressly state that the person designated has the power to enter an arbitration provision violated the FAA by singling out arbitration provisions for special treatment); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1621–24 (2018) (enforcing a class action waiver and requiring individual arbitration of claims under the Fair Labor Standards Act); DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015) (plaintiffs could not avoid classwide waiver by incorporating a reference to California's otherwise invalid anti-waiver rule). Then, in 2019, the Supreme Court barred classwide arbitration, even when it had not been explicitly waived by the parties. In a unanimous decision in Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019), the Court held that a court may not compel classwide arbitration when an arbitration clause is silent on the matter, because "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." Id. at 1419.

What if a state provides a form of aggregate litigation that is not a class action, but allows a private citizen to act as a "private attorney general" and bring a representative suit against an employer in that capacity? The Supreme Court has held that the FAA does not preclude this type of suit altogether, but that employers could still use arbitration clauses that compel an employee to arbitrate such a claim on an individual basis and that this contractual waiver could bar her from bringing the representative claims. See Viking River Cruises, Inc. v. Moriana, 142 S.Ct. 1906 (2022).

Do these decisions pave an effective path by which corporations may avoid class actions altogether? See Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223, 2227–29 (2018).

2. Will these rules always favor employers or large corporations? With the right resources and coordination, a large number of people subject to arbitration clauses can file individual arbitration demands against the same defendant. Recently, law firms have begun processing "mass arbitrations" – that is, filing thousands of individual claims on behalf of clients. See J. Maria Glover, *Mass Arbitration*,74 STAN. L. REV. 1283 (2022). In essence, these firms are calling the

bluff of the companies that insert arbitration clauses and class action waivers in their contracts. Under the rules of the major arbitration providers, the company is required to pay processing fees for each arbitration filed. In a recent example, over 30,000 individual claims were filed against Uber, which resulted in the American Arbitration Association's billing Uber for $92 million in fees. The New York Appellate Division rejected Uber's efforts to block collection of those fees. Uber Technologies, Inc. v. American Arbitration Assn., 204 A.D.3d 506, 510 (App. Div. 2022)("While Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision.").