Realism, Formalism, and Personal Jurisdiction: Due Process After *Mallory* and *Ford Motor*

James E. Pfander* & Jackie O'Brien**

In such widely noted decisions as Ford Motor (2021) *and* Mallory (2023)*, the Supreme Court has opened the door to a serious re-evaluation of the due process limits on state court assertions of personal jurisdiction. First, the* Ford Motor *Court clarified that the category of specific jurisdiction includes the defendant's actions "relating to" the cause of action, extending relevant contacts beyond those recognized in* Nicastro (2011)*. Second, in* Mallory*, the Court recognized the continuing vitality of a form of general jurisdiction in state registration statutes that many thought foreclosed under the at-home test of* Daimler (2014) *and* Goodyear (2011)*. Finally, some members of the Court have displayed a healthy interest in the historical origins of personal jurisdiction law, one reflected both in the originalist impulses of Justice Gorsuch and in the deference to an elderly precedent on display in his recent opinion for the Court in* Mallory*. Indeed, some jurists and scholars actively support a restoration of the rule-based formalism of the* Pennoyer *regime.*

In this Article, we consider and reject the historical argument for Pennoyer*'s restoration. On the one hand, we reach the counterintuitive and novel conclusion that* Pennoyer*'s territorial formalism better ensured litigation in an interested forum than critics often admit. The plaintiff's desire for a convenient forum tended to restrict forum choice to states with a legitimate interest in the parties and the litigation. On the other hand, the plaintiff's incentives no longer restrict forum choice. Changes in the market for plaintiff-side legal representation have fundamentally altered the forum-selection calculus. Instead of returning to* Pennoyer*'s formal territorial rules, we urge a renewed focus on the interest of the forum state in providing a suitable venue for the litigation. Once a part of the* International Shoe *evaluation of fair play and substantial justice, forum interest factors have disappeared from an analysis dominated by a focus on defendant contacts. By rebalancing the due process*

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* Pfander: Owen L. Coon Professor of Law, Northwestern University Pritzker School of Law.

** O'Brien: J.D. 2023, Northwestern University Pritzker School of Law. For comments and suggestions, we thank Zach Clopton, Allan Erbsen, Maggie Gardner, Rick Marcus, Marty Redish, Larry Solum, and participants in a series of workshops. For support with the project, we thank Northwestern Law and its faculty research and senior research programs, both of which lent a hand. For help with the historical sources, we thank the Pritzker Legal Research Center, especially Tom Gaylord, and Daniel Faichney, a Northwestern Law graduate who graciously made available his archival research on *Grace v. MacArthur* as reproduced in Appendix A.

inquiry, the Court might reclaim the hidden functionality of Pennoyer *without reinstating a set of outmoded formal rules.*

Introduction

Students of the law of judicial jurisdiction have often contrasted the rule-based formalism of the *Pennoyer v. Neff*[1] regime with the functional balancing of interests that began with the decision in *International Shoe Co. v. Washington*.[2] On this standard account, *Pennoyer* relied on a series of territorial rules largely drawn from the public law of the nineteenth century. Under pressure from the rise of a national market economy, cracks began to appear in the formal façade.[3] In time, the *International Shoe* Court reconstructed its law of judicial jurisdiction along more realist or functional lines, ruling that strict territoriality should give way to a focus on the significance of the defendant's forum contacts.[4]

Today, following a series of widely noted decisions, the Supreme Court has embarked on a new phase of doctrinal reconstruction that builds on three uneven foundations. First, the *Ford Motor*[5] Court broadened the category of specific jurisdiction beyond that recognized in *Nicastro*,[6] a decision it pointedly declined to cite. Second, in *Mallory*,[7] the Court recognized the continuing vitality of a form of general jurisdiction that many thought foreclosed under the at-home test of *Daimler*[8] and *Goodyear*.[9] Finally, some members of the Court have displayed a healthy interest in the historical origins of personal jurisdiction law, one reflected both in the originalist impulses of Justice Gorsuch and in the deference to an elderly precedent on

1. 95 U.S. 714 (1878).

2. 326 U.S. 310 (1945); Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 657–58 (1959) ("However tardy, *International Shoe* significantly released state courts from the territorial power concept of jurisdiction, which generated conflicts. It shifted the emphasis to jurisdiction based on minimum contacts with the state, fair notice and opportunity to be heard."); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 624 (1993).

3. Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1591 (2018) ("[A] myth persists in personal jurisdiction scholarship that *Shoe* represented the ushering in of a more flexible jurisdictional test that was more appropriate for the realities of America's changing economy . . . .").

4. *See* Edward D. Cavanagh, *General Jurisdiction 2.0: The Updating and Uprooting of the Corporate Presence Doctrine*, 68 ME. L. REV. 287, 294–95 (2016) (describing the Court as rejecting "the formalistic standards enunciated in *Pennoyer* . . . in favor of a more flexible standard based on the defendant's 'minimum contacts' with the state and fairness."); *see also* Michael E. Solimine, *Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, 42 (1998) (describing the Court's current approach as imposing a standard, not a rule, to assess personal jurisdiction); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEXAS L. REV. 1249, 1251 (2017) (noting that *Pennoyer* is seen by some "as a relic, long ago cast aside by *International Shoe*").

5. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

6. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

7. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (plurality opinion).

8. Daimler AG v. Bauman, 571 U.S. 117 (2014).

9. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011); *see* Mallory, 143 S. Ct. at 2037 (holding that a consent-based theory of general jurisdiction, originally endorsed in *Pennsylvania Fire*, controls this case). For the doubts, and an argument that *Pennsylvania Fire* contradicts the precedent set in *Daimler*, see *id.* at 2055 (Barrett, J., dissenting).

display in his recent opinion for the Court in *Mallory*.[10] Indeed, some jurists and scholars have expressed continuing interest in the possibility of restoring the rule-based formalism of the *Pennoyer* regime.[11]

One can see these factors at play in the Court's on-again, off-again approach to jurisdictional problems. Consider first the rule-based territorialism in such familiar cases as *Daimler* and *Goodyear*, where the Court defined general jurisdiction by reference to the place where a defendant corporation has its corporate home.[12] The Court's two accepted measures of "at-homeness"—principal place of business and place of incorporation—were thought to displace the weighing of contacts that informed earlier

10. In offering this historical account of the way practical considerations moderated the strict territorialism of the *Pennoyer* regime, we seek to understand the past on its own terms as we work to address current problems of judicial jurisdiction within the evolving due process tradition. In doing so, we understand that our work may implicate an ongoing originalist debate about the meaning of due process and the proper judicial role in overseeing the exercise of personal jurisdiction. *Compare* Sachs, *supra* note 4, at 1252 (defending *Pennoyer* as building on a general law conception of the limits of a state's adjudicative authority) *with* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447, 508–09 (2022) (concluding after a survey of founding-era usage that "due process of law" had a narrow original public meaning and cannot support much of the modern law based on its authority). Beneath the surface of the debate over due process lies a much broader methodological debate between the public meaning and intent schools of originalist thought and the legitimacy of broad conceptions of constitutional construction. *Compare* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709 (2009) (emphasizing "the meaning that textual language had for the relevant enactors when they approved the text in question" (citation omitted)) *with* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009) (emphasizing public meaning and urging use of then-current modes of interpretation as a limit on unbridled construction of controlling texts). *See also* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810 (2019) (upholding a positivist view of originalism as founders' law as lawfully changed over time). For a critique of the enterprise, see JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024) (disputing originalists' fundamental assumptions about the role of a written text in fixing and constraining meaning). Accepting that the Court has a legitimate role to play in checking the exorbitant exercise of state court power, both as a matter of constitutional structure and long-standing precedent, we do not enter the debate over originalist methodology or application. We would observe, though, that some originalist methods may make it difficult to afford due consideration to important changes in the market for plaintiff-side legal representation that have occurred in the century and a half since *Pennoyer* was decided.

11. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring) ("Maybe, too, *International Shoe* just doesn't work quite as well as it once did."); Sachs, *supra* note 4, at 1326. As Professor Sachs concludes:

> That *Pennoyer* got it right is more than a historical debating point. The American law of personal jurisdiction is an intellectual shambles. If there's a half-coherent alternative, defensible on original grounds, that should be seen as good news. If this alternative is moderately helpful in achieving other goals, like modernizing jurisdictional doctrine by statute, so much the better.

Id.; *cf.* Allan Erbsen, *Personal Jurisdiction's Moment of Opportunity: A Reform Blueprint for Originalists and Nonoriginalists*, 75 FLA. L. REV. 415, 478 (2023) (describing Justice Gorsuch's call for a return to jurisdictional originalism as one that holds "both peril and promise").

12. *Daimler*, 571 U.S. at 127; *Goodyear*, 564 U.S. at 919.

assessments of whether the defendant was "doing business" in the forum state.[13] Yet the *Mallory* decision sidesteps the new *Daimler/Goodyear* framework, concluding that state statutory schemes requiring defendant corporations to consent to service of process in the state, as part of the corporation's submission to the state's regulatory authority, comports with due process.[14] The Court's conclusion was based at least in part on the *Pennoyer*-era idea that tag jurisdiction, as reaffirmed in *Burnham*,[15] subjects individuals to jurisdiction wherever they have been served with process.[16]

If *Mallory* portends some expansion of the general jurisdiction category, other decisions contest the boundaries of specific jurisdiction. Consider *Ford Motor*, which broadly defined specific jurisdiction to include claims that arise out of or *relate to* the defendant's forum-specific activities.[17] Justice Kagan's opinion for the Court acknowledged that Ford had not designed or built or sold the allegedly defective automobile in the forum state(s). But the claim that Ford was liable for the vehicle's defects was thought to "relate to" the company's substantial footprint in the forum state. That doctrinal turn incorporates some consideration of a defendant's presence in the forum state that cases such as *Nicastro* and *Bristol-Myers Squibb*[18] had previously found insufficiently targeted to support a finding of specific jurisdiction.[19] Anticipating the turn to history in *Mallory*, Justice Gorsuch's separate

13. *Daimler*, 571 U.S. at 137–38.

14. The plurality did not address whether consent by registration schemes violate the Dormant Commerce Clause, a question highlighted by Justice Alito's concurrence. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2052 (2023) (Alito, J., concurring). The Dormant Commerce Clause question has generated considerable scholarly debate and discussion. *E.g.*, Brief for Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168); Brief of Scholars on Corp. Registration & Jurisdiction as Amici Curiae in Support of Neither Party, Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023) (No. 21-1168); John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121 (2016); Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999 (2012); Stephen E. Sachs, *Dormant Commerce and Corporate Jurisdiction*, 2023 SUP. CT. REV. 213 (2024). The plurality maintained that the Due Process Clause is the operative constitutional provision for personal jurisdiction, *Mallory*, 142 S. Ct. at 2032–33, so that remains the key area for investigation in this Article as we focus on specific jurisdiction. However, this argument has important implications for consent by registration frameworks, specifically its intersection with interstate federalism, which was acknowledged by Justice Alito in concurrence and Justice Barrett in dissent. *Mallory*, 143 S. Ct. at 2050–51 (Alito, J., concurring in part and concurring in the judgment); *id.* at 2058 (Barrett, J., dissenting).

15. Burnham v. Superior Ct. of Cal., 495 U.S. 604 (1990) (plurality opinion).

16. *Mallory*, 143 S. Ct. at 2041 ("This Court has previously cautioned litigants and lower courts against (mis)reading *Shaffer* as suggesting that *International Shoe* discarded every traditional method for securing personal jurisdiction that came before." (citing *Burnham*, 495 U.S. at 620–22)).

17. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021).

18. Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773 (2017).

19. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883–84 (2011) (describing jurisdiction "in the first instance" as "a question of authority rather than fairness"); *Bristol-Myers*, 137 S. Ct. 1773 at 1781–82.

opinion in *Ford Motor* invoked originalist themes in urging renewed consideration of the text and history of jurisdictional rules as they operated before *International Shoe* was decided.[20] The Court's challenge lies in deciding how to integrate these various elements into a coherent doctrine.

This Article proposes to lend a hand with the Court's project of doctrinal integration by distilling two important lessons from jurisdiction's past for use in the modern day. First, we find, just beneath the surface of the *Pennoyer* era's formal rules, that a surprising and heretofore unremarked functionalism tended to ensure adjudication in an interested forum.[21] Second, we find that with changes in litigation finance and the expansion of a nationwide market for plaintiff-side legal representation, the old rules can no longer reliably assure forum interest today. We conclude that the law of personal jurisdiction can best rebalance the many factors that inform the due process of law analysis by taking greater account of the plaintiffs' connection to the forum state. That factor was virtually, if implicitly, assured during the horse-and-buggy days of *Pennoyer*, but no longer controls forum selection in a world of planes, trains, automobiles, and the highly mobile packets that move along what was once prosaically called the information superhighway.[22]

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20. *Ford Motor Co.*, 141 S. Ct. at 1038–39 (Gorsuch, J., concurring).

21. This Article is not the first effort to examine the original underpinnings of personal jurisdiction law, but it is the first to uncover the case-specific factual histories that provide support for our theory that *Pennoyer*'s rule-based approach was capable of exacting such sensible results in a bygone era. *See, e.g.*, Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956) (contesting the historical narrative that *Pennoyer*'s rigid rules governed personal jurisdiction in early American courts and instead describing the *Pennoyer* decision as a drastic recharacterization of the rules governing jurisdiction); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981) (rejecting the Due Process Clause as a limit on state jurisdictional power and proposing a simplified test to evaluate personal jurisdiction); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479 (1987) (outlining the underlying constitutional justifications for the *Pennoyer* decision and the subsequent impact of that framework on modern law); Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990) (describing personal jurisdiction law as a forum for the development and conceptualization of American federalism with respect to state power and individual civil liberties); Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990) (advocating for the abandonment of *Pennoyer*'s holding that personal jurisdiction is a matter of constitutional law and proposing instead that state and federal legislatures intervene in regulating personal jurisdiction); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006) (unpacking the meaning of the Due Process Clause for personal jurisdiction as a guarantee of jurisdiction and notice, and rejecting the additional protections against defendant inconvenience); Sachs, *supra* note 4 (explaining that *Pennoyer* was correct to identify due process as a limit on assertions of state jurisdiction); Jacobs, *supra* note 3 (defending the territorial model of *Pennoyer* and advocating for a return to that model of personal jurisdiction); Erbsen, *supra* note 11 (identifying issues in the current personal jurisdiction doctrine and suggesting a variety of reforms to rectify those concerns).

22. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 n.5 (1994) (citing scholarly reference to the First Amendment issues presented by the "information superhighway").

We begin with two forms of rule-based jurisdiction from the *Pennoyer* era: jurisdiction over persons "found" (i.e., served with process) in the forum state[23] and jurisdiction over property seized or garnished at the outset of litigation as the basis for the adjudication of a possibly unrelated claim.[24] Procedure scholars have derided extreme versions of both forms of tag jurisdiction, poking fun at such cases as *Grace v. MacArthur*[25] and *Harris v. Balk*.[26] In *Grace*, the defendant was tagged on an airplane, while flying over the forum state;[27] in *Harris*, a North Carolina defendant's intangible "property" was found and attached in Maryland.[28] Requiring only the defendant's transient presence in the forum state, tag jurisdiction provides little assurance of forum interests and fair play and substantial justice, the *International Shoe* touchstone; similar fairness concerns led the Court in *Shaffer v. Heitner*[29] to curtail property-based tag jurisdiction.[30]

Taking a closer look at the facts underlying those famous tag cases, we find a surprising functionality. In *Grace*, for example, the state chosen as the forum, Arkansas, had a substantial connection to the parties and their underlying dispute.[31] Similarly, in *Harris*, the dispute arose from a commercial relationship between parties in Maryland, the forum state, and North Carolina, the defendant's place of business.[32] Intrigued, we collected nineteenth-century cases in which plaintiffs invoked jurisdiction over tagged persons and property. Acknowledging the limits of the collection,[33] we found that the forum state typically had a more substantial connection to the parties and the dispute than merely the presence of the defendant's person or property. To be sure, a very small number of tag-based jurisdictional

23. Burnham v. Superior Ct. of Cal., 495 U.S. 604, 610 (1990) (plurality opinion).

24. *See* Harris v. Balk, 198 U.S. 215, 226 (1905) ("The case recognizes the right of the creditor to sue in the State where the debtor may be found, even if but temporarily there, and upon that right is built the further right of the creditor to attach the debt owing by the garnishee to his creditor.").

25. 170 F. Supp. 442 (E.D. Ark. 1959).

26. Sarah DeBruin, Burnham v. Superior Court*: The Fate of Transient Jurisdiction Decided at Last?*, 20 CAP. U. L. REV. 241, 247, 277 (1991) (describing *Grace* as involving an "inadvertent and fortuitous presence"); Stephan Wilske & Todd J. Fox, *The So-Called 'Judicial Hellholes' in US Jurisdictions and Possible Means to Avoid Them*, 2 DISP. RESOL. INT'L 235, 246 n.68 (2008) (citing *Grace* as an "extreme" example of transient jurisdiction). *See generally* Jeffrey W. Stempel, *The Irrepressible Myth of* Burnham *and Its Increasing Indefensibility After* Goodyear *and* Daimler, 15 NEV. L.J. 1203 (2015) (tracking the development of tag jurisdiction from *Grace* to *Burnham* and arguing that the doctrine has become untenable).

27. *Grace*, 170 F. Supp. at 443.

28. *Harris*, 198 U.S. at 216.

29. 433 U.S. 186 (1977).

30. *Id.* at 216–17.

31. *See infra* section II(A)(1).

32. *See infra* section II(B)(2).

33. Appendices B and C collect appellate decisions available through searches in electronic databases. They thus omit the many cases in which tag and garnishment jurisdiction failed to occasion any legal dispute yielding appellate litigation.

assertions seem to have been initiated in forum states that had few if any contacts with the dispute. But in those cases, the state courts in question appear to have given some consideration to the fairness of tag-based jurisdiction, balancing the interests of the plaintiff and defendant in evaluating the propriety of the forum.

We think the fairness-based consequences of *Pennoyer*'s formal rules were no accident. Plaintiffs in such cases were taking account of their own convenience and interests in choosing to lodge the litigation in their own preferred forum, a forum that almost by definition had a substantial connection to the dispute. That was true in *Grace*, where the plaintiff sued in his home state of Arkansas and had the defendant tagged on an airplane flying overhead.[34] It was also true in the *Burnham* case, where the California-based plaintiff tagged her New Jersey-based spouse for litigation in California.[35] Notably, the plaintiff in both cases picked a personally convenient and jurisdictionally plausible forum. In neither case did the plaintiff attempt to have the defendant tagged in some outlandish forum, such as Alaska or Florida. While tag jurisdiction in such distant and disinterested states would have inconvenienced the defendant, it would have also placed significant burdens on the plaintiff.

Generalizing from the cases, we conclude that plaintiff convenience coupled with the rules governing the initiation of litigation moderated the nominal unfairness of *Pennoyer*-era tag jurisdiction. In most states, as in the federal system, the procedural rules specify that litigation begins with the filing of a complaint.[36] Upon filing, the plaintiff can secure a summons from the court clerk, and then work to effect service of the summons and complaint on the defendant.[37] A plaintiff must therefore initiate suit and invoke the power of a specific state court before serving process and securing tag jurisdiction. To effectuate tag jurisdiction in a distant and inconvenient forum, the plaintiffs in *Grace* and *Burnham* would have had to commit to litigation in those states by hiring a lawyer and instituting a suit there. That explains why plaintiffs in the nineteenth century typically chose convenient (and substantially interested) forums at the outset and then proceeded to tag the defendant there.[38]

Today, changes in the market for litigation have altered the forum-selection calculus of the plaintiffs' bar in complex multi-state litigation. For one thing, the likelihood that the plaintiffs must bring witnesses to the forum

34. *See infra* section II(A)(1).

35. Burnham v. Superior Ct. of Cal., 495 U.S. 604, 608 (1990) (plurality opinion).

36. FED. R. CIV. P. 3.

37. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1084 (4th ed. 2024).

38. *See* Appendix B (compiling pre-*International Shoe* cases where courts sustained the exercise of transient jurisdiction over claims with a connection to the forum state).

state for trial on the merits is vanishingly small; jury trials have all but disappeared in civil litigation and in complex mass tort litigation.[39] For another thing, plaintiffs may prefer to retain nationally prominent counsel instead of local practitioners in complex products liability litigation.[40] Such counsel may have strong strategic reasons to prefer a particular forum other than the plaintiff's home or place of injury. Especially in the context of mass tort litigation, where the stakes support sophisticated forum-selection decisions, the better-resourced plaintiffs' bar can afford to conduct litigation in essentially any forum across the country—the longstanding preference for the client's home court no longer holds.[41]

We can see the new plaintiff mobility reflected in recent cases. The plaintiff in *Mallory* filed suit in Pennsylvania, apparently to secure a more favorable jury pool than was available at his home in Virginia.[42] Similarly, in *Daimler* and *Bristol-Myers Squibb*, cases that refined and relied upon the at-home standard for the assertion of general jurisdiction, the Court described the plaintiffs as animated by forum-shopping incentives.[43] In both cases, the plaintiffs were drawn to California, from around the country (*Bristol-Myers*) and around the world (*Daimler*).[44] Just as Daimler was at home in Germany and thus immune from unrelated litigation in California, so too was Bristol-Meyers at home in New York and New Jersey, but not in California. Concerns for their own litigation convenience may no longer impose a substantial moderating influence on where plaintiffs choose to file suit.

The changing market for litigation casts doubt on the wisdom of a return to the formalism of the *Pennoyer* regime. In a modern world where tag jurisdiction on persons or property or registered corporations could expand forum choice considerably without unduly burdening the plaintiff, some moderating consideration of fairness and forum interest makes sense.

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39. Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 482 (1998) ("The vast majority of mass tort claims never reach a jury, as they are either dropped or settled. This is hardly surprising; approximately 95% of *all* tort cases are resolved short of trial." (citations omitted)).

40. As repeat players in the complex litigation landscape nationally prominent counsel often appear as lead lawyers in multi-district litigation. *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1459 (2017) (stating that "[r]epeat players are especially likely to occupy these [lead lawyer] positions" in multi-district litigation).

41. *See infra* section III(A).

42. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2032–33 (2023) (plurality opinion).

43. *See* Daimler, AG v. Bauman, 571 U.S. 117, 121 (2014) ("The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint."); Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1778 (2017) (detailing that the plaintiffs filed suit in California despite a majority of the plaintiffs not having connection to the state, either through their residence, place of treatment, or place of injury).

44. *Bristol-Myers*, 137 S. Ct. at 1778; *Daimler*, 571 U.S. at 120–21.

Although plaintiffs' forum ties were part of the *International Shoe* calculus, especially in cases such as *McGee*, the Court's recent decisions tend to undervalue the forum state's interest as a part of the personal jurisdiction inquiry, focusing instead on the defendant's contacts with the forum. To realign personal jurisdiction doctrine with its functionalist roots, while also accounting for changes in the national market for litigation, the Court should more actively consider the interests of the plaintiff and the forum state as part of its due process analysis.

This Article develops its argument in four parts. Part I describes the doctrinal tensions in such recent cases as *Mallory*, *Ford Motor*, and *Daimler*, tensions that will doubtless inform the Court's ongoing search for a coherent approach to due process. History will seemingly play an important role in that endeavor. After all, *Mallory* based its approval of the Pennsylvania registration statute on the lessons of history. In reaffirming both consent-based general jurisdiction over corporations and tag jurisdiction over individuals, Justice Gorsuch's plurality opinion invites renewed attention to the *Pennoyer*-era due process framework.[45]

Responding to that invitation, Part II explores *Pennoyer*'s rules in operation. After reviewing the leading cases and our new collection of tag-based jurisdictional assertions, Part II reveals the role of plaintiff incentives in ensuring the hidden functionality of *Pennoyer*'s formal regime. Part III, however, will show that the *Pennoyer* rules can no longer assure fair outcomes; changes in the market for litigation have boosted the resources and changed the incentives of the plaintiffs' bar. Lacking any assurance that the incentives of plaintiffs and their lawyers will ensure the selection of an interested forum, Part IV suggests the revival of a portion of the *International Shoe* test that has gone missing in some recent applications of the doctrine. Instead of a relentless focus on defendant's contacts with the forum state, the Court should reintegrate the interest of the plaintiff and the forum state into its personal jurisdiction calculus.

I. *Ford Motor*, *Mallory*, and the Unsettled State of Personal Jurisdiction

We may be approaching a turning point in the law of personal jurisdiction, or what one prominent commentator has termed a "moment of opportunity."[46] The *Ford Motor* decision, two Terms ago, marked a change, moving away from the single-minded focus on defendant's forum-directed activities on display in *Nicastro*.[47] Ford had moved to dismiss products

45. *Mallory*, 143 S. Ct. at 2045.

46. Erbsen, *supra* note 11, at 418.

47. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) ("The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the

liability claims that arose from accidents in the plaintiffs' state of residence.[48] Based on the Court's prior precedents, Ford argued that it was immune from suit in the forum states so long as its allegedly tortious conduct (the design, manufacture, and sale of the product) took place elsewhere.[49] In rejecting Ford's argument, the Court reasoned that specific jurisdiction extends to claims that "arise out of" or "relate to" the defendant's in-state conduct.[50] Refusing to require proof of a causal link between forum conduct and injury, the Court asked instead whether the defendant would have "'clear notice' of its exposure in that State to suits arising from local accidents involving its cars."[51]

Even though the outcome was unanimous, Justice Gorsuch concurred separately to express concern with the clarity of the "relates to" or "arises out of" distinction and to call for a more straightforward approach to personal jurisdiction.[52] Justice Gorsuch attributed *International Shoe*'s decision to abandon *Pennoyer* and adopt the fair play standard to the "rise of corporations and interstate trade."[53] Acknowledging the admirable desire to build "a new test focused on 'traditional notions of fair play and substantial justice,'" Justice Gorsuch expressed doubts about how far this framework "has really taken us" and an openness to exploring other approaches.[54]

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jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."); Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in* J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341, 370 (2012); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 481, 492 (2012).

48. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1022–23 (2021).

49. *Id.* at 1023. Ford's argument rested on the fact that the plaintiffs could not show the causal link between the allegedly tortious conduct and the injury:

> 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 [sic] 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.

Id. Based on the Court's prior precedents, Ford had a notably strong claim for dismissal based on lack of personal jurisdiction. Erbsen, *supra* note 11, at 447 ("The Court's unanimity on the judgment also provided cover for Justice Gorsuch by making his doubts about *Shoe* seem less disruptive."); *see also* Robert Ellis Stengel, *Boeing, Boeing, Gone: General Jurisdiction over Corporations, Principal Place of Business, and a Second Look at the Total Activities Test*, 88 BROOK. L. REV. 275, 301 (2022) ("*Ford* was the first time a plaintiff prevailed in a personal jurisdiction case before the Supreme Court since the 1980s.").

50. *Ford Motor Co.*, 141 S. Ct. at 1026 (citing Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 137 S. Ct. 1773, 1776 (2017)).

51. *Id.* at 1027. The majority failed to cite *Nicastro*, 564 U.S. 873 (2011), a fractured decision more fully discussed below that accorded little weight to the plaintiff's evident interest in a convenient forum. *See infra* subpart IV(A).

52. *Id.* at 1034–35 (Gorsuch, J., concurring).

53. *Id.* at 1036.

54. *Id.* at 1038 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

Justice Alito, in a separate concurrence, mirrored Justice Gorsuch's concern that the Court's current approach may not be "well suited for the way in which business is now conducted."[55]

The Court's decision this past Term upholding Pennsylvania's jurisdictional registration scheme in *Mallory* reveals the transformative potential of the Court's willingness to rethink *International Shoe*. In *Mallory*, a Virginia resident filed suit in Pennsylvania, seeking compensation for injuries said to have resulted from exposure to asbestos and carcinogenic chemicals during his twenty years of employment with Norfolk Southern in Ohio and Virginia.[56] With other modes of personal jurisdiction seemingly foreclosed, the plaintiff invoked defendant's compliance with Pennsylvania's business registration statute as consent to jurisdiction in that state.[57] On review of a state court decision that rejected plaintiff's theory,[58] the Supreme Court reversed, holding that consent by registration had survived the minimum contacts revolution and was still good due process law.[59] Along the way, a plurality rejected Norfolk Southern's challenge to the fairness of suit in Pennsylvania—a state where it maintains 2,400 miles of track and nearly 5,000 employees.[60]

The four-Justice dissent underscored the degree to which the majority's approval of consent by registration departed from settled law. Justice Barrett, joined by Chief Justice Roberts, Justice Kagan, and Justice Kavanaugh, could not reconcile the plurality's approach with earlier decisions deeming "doing business" jurisdiction a violation of the Due Process Clause.[61] For the dissent, consent by registration "flies in the face" of *Daimler* and *Goodyear*, which made clear that "simply doing business is *insufficient*."[62] More broadly, the dissent saw the plurality's reasoning as a misrepresentation of the Court's precedents and history. In the dissent's view, the minimum contacts approach completely changed the analytical framework of personal

55. *Id.* at 1032 (Alito, J., concurring).

56. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2032 (2023).

57. *Id.* at 2033.

58. *See* Mallory v. Norfolk S. Ry. Co., 266 A.3d 542, 567 (Pa. 2021) ("[W]e are unpersuaded by Plaintiff's reliance upon Supreme Court cases decided during the *Pennoyer* era, when courts applied a territorial approach to general jurisdiction, as opposed to analyzing the foreign corporation's affiliations with the forum State as mandated by *International Shoe*." (citing Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95 (1917))), *rev'd*, 143 S. Ct. 2028 (2023).

59. *Mallory*, 143 S. Ct. at 2038.

60. *Id.* at 2042–43. The *Mallory* plurality opinion by Justice Gorsuch was joined by Justices Thomas, Sotomayor, and Jackson. Justice Alito concurred in the judgment but reserved the question whether consent by registration violates the Dormant Commerce Clause. *Id.* at 2052.

61. *Id.* at 2055 (Barrett, J., dissenting).

62. *Id.* at 2055–56.

jurisdiction and thereby abandoned "'ancient' bases of jurisdiction for incompatibility with *International Shoe*."[63]

Just beneath the surface of the conflict over jurisdiction in *Mallory*, one can see a methodological division between Justice Gorsuch's historically inflected rationale and the dissent's commitment to the preservation of the *International Shoe* framework.[64] Indeed, some originalist-minded scholars have portrayed the debate as one between the originalist formalism of *Pennoyer* and the more open-textured balancing approach of *International Shoe*.[65] Rather than choose sides on this methodological question, we explore the history of prominent *Pennoyer*-era cases.[66] We find a surprising functionality in those cases, one that has largely eluded most commentators. That functionality, in turn, allows us to offer a new synthesis of personal jurisdiction law that connects the past and present by focusing on changes in the way plaintiffs go about choosing the forum for litigation.[67] We begin in the next Part with a re-evaluation of *Pennoyer*'s reliance on rule-based territorialism.

63. *Id.* at 2063.

64. Erbsen, *supra* note 11, at 447 ("Ford's position was so aggressive that it raised a question of how doctrine evolved to a point where Ford thought it could win. Moreover, Ford's contacts with Montana were so extensive that the case seemed easier under *Pennoyer v. Neff*'s one-factor presence test than *Shoe*'s multi-factor 'minimum contacts' test."); Richard D. Freer, *From Contacts to Relatedness: Invigorating the Promise of "Fair Play and Substantial Justice" in Personal Jurisdiction Doctrine*, 73 ALA. L. REV. 583, 601 (2022); Patrick J. Borchers, Richard D. Freer & Thomas C. Arthur, Ford Motor Company v. Montana Eighth Judicial District Court*: Lots of Questions, Some Answers*, 71 EMORY L.J. ONLINE 1, 19 (2021); 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, 90 (2021) ("While *Ford* handed corporate defendants a rare defeat in the Supreme Court, the minimum-contacts test has worked to protect corporate defendants even at the expense of giving an individual plaintiff any realistic access to justice.").

65. *E.g.*, Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 536–37 (2022) ("[T]he *International Shoe* approach to personal jurisdiction is based on living constitutionalism and is inconsistent with the original meanings of the Fifth and Fourteenth Amendment Due Process of Law Clauses. That fact demands attention from scholars who work on personal jurisdiction and lawyers who litigate personal jurisdiction issues . . . ."). Some of this scholarship was done prior to the *Ford Motor* decision. *E.g.*, Jacobs, *supra* note 3, at 1624 (explaining that a return to "the Territorial model would solve many of the problems currently plaguing personal jurisdiction doctrine" because "the Territorial Model would be much more predictable for litigants than the vague minimum contacts test and would empower potential defendants to exercise greater control over their exposure to liability in particular forums"); Sachs, *supra* note 4, at 1326.

66. Although this Article does not take a position on *Mallory*'s treatment of consent-by-registration jurisdiction, viewing it as more properly characterized as a form of general jurisdiction, the *Mallory* decision illustrates the Court's interest in using a historical lens to examine personal jurisdiction issues.

67. *Mallory*, 143 S. Ct. at 2049 (Alito, J., concurring) ("[I]t is hard to see Mallory's decision to sue in Philadelphia as anything other than the selection of a venue that is reputed to be especially favorable to tort plaintiffs.").

II. The Hidden Functionality of *Pennoyer*

Many have restated the familiar territorial rules of the *Pennoyer* era. Writing in the immediate aftermath of the Fourteenth Amendment's ratification, the Court upheld in personam jurisdiction over anyone found (i.e., served with process) in the state; in rem jurisdiction over property located in the state (provided it was first brought before the court through some form of legal process); and quasi in rem jurisdiction over property in the state provided that the plaintiff seize the property at the outset and provide appropriate notice to the owners of the property, inviting them to contest the underlying legal claim.[68] Many, including the Court itself in *Shaffer*, have criticized the territorial formalism of the *Pennoyer* regime, arguing that it sets the stage for dysfunctional results.[69]

In this Part, we test that claim by examining the law in action. We find that during the nineteenth and early twentieth centuries, territorial jurisdiction almost always produced functional results in practice. subpart A examines cases in which jurisdiction was based on service of process in the forum state. In such proceedings, plaintiffs generally must pre-commit to a forum at the outset of the litigation and then seek to perfect jurisdiction by tagging the defendant in the forum. subpart B describes a set of quasi in rem cases in which jurisdiction was based on the presence of property in the state. Many of the suits we found were brought by creditors in which the object was to secure priority in a race to the debtors' assets. In both instances, the plaintiffs' incentives helped to ensure selection of an interested forum.

It may not be amiss to explain what we mean by forum interests. We define that concept largely by reference to such traditional considerations as the convenience of the parties and the witnesses and the interests of the forum state. As for the parties, connections to the forum state as revealed in the facts giving rise to the dispute will often help to assure that the chosen forum offers a fair and relatively convenient location for litigation. Such connections also give rise to forum interests: the state's interest in providing a forum to resolve a dispute that implicates its law and policy;[70] and the state's interest in

68. Pennoyer v. Neff, 95 U.S. 714, 733–34 (1878).

69. Shaffer v. Heitner, 433 U.S. 186, 201 (1977) ("*Pennoyer* itself recognized that its rigid categories, even as blurred by the kind of action typified by *Harris*, could not accommodate some necessary litigation."); Sachs, *supra* note 4, at 1251–52 (describing *Pennoyer*'s "bad rap" among scholars).

70. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. . . . It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."); *see* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 (1981) (explaining that "there is 'a local interest in having localized controversies decided at home'" (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947))).

applying its own law to the resolution of the dispute.[71] True, these factors overlap to some extent with those that govern the choice-of-law process.[72] We do not argue that courts should limit jurisdiction to cases in which their own law would apply but suggest only that considerations of forum interest should inform a due process inquiry into the locus of the litigation.

To clarify our point, we do not undertake this analysis to defend territorial jurisdiction or advocate for its revival. To the contrary, our historical account might serve to complicate the view of some who seek to reinstate a *Pennoyer*-like set of formulaic rules to govern personal jurisdiction. As an initial matter, Part III makes clear that the social and economic realities that produced functional outcomes in the past no longer ensure functional results today. Further, the courts tasked with applying these rules did not conduct a territorial analysis in a vacuum; instead, as others have shown, the courts employed a set of judicial "escape devices," such as forum non conveniens,[73] and the Dormant Commerce Clause,[74] when a functional outcome would not result from adherence to these jurisdictional rules.

A. Tag Jurisdiction and the Interests of the Plaintiff

Predicated on *Pennoyer* and reaffirmed in *Burnham* and *Mallory*, tag jurisdiction has been long criticized as an outdated and formalistic method of asserting jurisdiction, divorced from the due process considerations driving modern personal jurisdiction law.[75] Perhaps no decision appears to illustrate

71. Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 441 (2015) (describing a forum state's regulatory interest as varying based on "the extent to which local effects [of a defendant's conduct]: (1) frustrate state regulatory objectives; (2) burden state institutions; (3) consume state resources; and (4) injure the state's economy").

72. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."); *see also* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985) (citing the above-quoted language from *Allstate*, 449 U.S. at 312–13).

73. *E.g.*, William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163, 1195 (2023) (describing forum non conveniens as an issue within the tort reform movement).

74. Preis, *supra* note 14, at 132 (describing that before the Court's decision in *International Shoe*, the Dormant Commerce Clause regularly factored into the Court's jurisdictional analyses).

75. *See* Ehrenzweig, *supra* note 21, at 295 (describing the "functional inadequacy of the transient rule"); Daniel O. Bernstine, Shaffer v. Heitner*: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 68 (1980) ("*Shaffer*'s pronouncement of new standards for quasi in rem jurisdiction and the existing *International Shoe* standards which apply to defendants not physically present in the state, also render continued application of the transient rule unfair and unnecessary."); Stempel, *supra* note 26, at 1207 (describing tag jurisdiction as "seemingly out of place with the *International Shoe* decision"); Kevin M. Clermont & John R.B.

these criticisms better than *Grace v. MacArthur*, the infamous case upholding transient jurisdiction based on process served on board an airplane flying over Pine Bluff, Arkansas. But these criticisms omit a crucial factor: the plaintiff's interest in choosing a forum for convenient litigation at the outset of the litigation. In this section, we explore how the plaintiff's interest introduces a surprising functionality into tag jurisdiction.

1. The Story of Tag Jurisdiction in Grace *and* Burnham.*—Grace v. MacArthur* arose from a commercial dispute involving John D. MacArthur, the well-to-do Chicago businessman who later endowed the foundation now best known for its genius awards.[76] The plaintiff initiated the litigation in the federal district court in Arkansas, invoking diversity jurisdiction.[77] One of the defendants, an associate of MacArthur, was served while on a "non-stop flight" from Memphis to Dallas at a time when the airplane was "directly above Pine Bluff, Arkansas."[78] Reasoning that the airspace above Pine Bluff was "within the 'territorial limits' of the State of Arkansas" and therefore the defendant was properly tagged, the district court denied the motion to quash service.[79] Partly due to a lack of detail in the district court opinion, many observers have assumed that the defendant's airplane trip was his only connection to the state of Arkansas.[80]

Our review of the factual background of the dispute reveals a much more substantial connection to the state. The plaintiff, Preston W. Grace, was an Arkansas resident who entered into a deal with Ronnie B. Smith, a

Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 473, 478 (2006) ("Given transient jurisdiction's overall lack of utility and dubious propriety, the United States should accept its prohibition as the price for a general jurisdiction-and-judgments treaty, and it appears willing to do so.").

76. John D. MacArthur, the defendant named in the caption of the case, was a billionaire and sole owner of the nation's largest privately held insurance company before his death in 1978. The MacArthur Foundation, founded in his name, funds and advances projects in the areas of climate change, criminal legal reform, and nuclear risk. *Our History*, MACARTHUR FOUND., https://www.macfound.org/about/our-history/about-the-macarthurs [https://perma.cc/6YAH-AQFV]; *About the John D. and Catherine T. MacArthur Foundation*, MACARTHUR FOUND., https://www.macfound.org/about/ [https://perma.cc/FGR8-GUQJ].

77. Grace v. MacArthur, 170 F. Supp. 442, 443 (E.D. Ark. 1959).

78. *Id.*

79. *Id.* at 447.

80. Due to the opinion's lacking discussion of the facts that gave rise to the underlying cause of action, the *Grace* decision has produced a fruitful ground for scholars to attack the transient rule of jurisdiction. *See, e.g.*, Bernstine, *supra* note 75, at 65 ("In *Grace v. MacArthur* . . . the only basis for asserting in personam jurisdiction over one of the defendants was that he was served while flying over . . . Arkansas. The defendant's 'presence' in Arkansas, though apparently unrelated to . . . the litigation, was deemed a sufficient basis to deny his motion to quash . . . ." (citation omitted)); Stempel, *supra* note 26, at 1228 ("[T]he *MacArthur* court . . . takes as a given that service of process on state soil gives the state in personam jurisdiction over the defendant . . . even in situations such as the defendant briefly stepping over a state line once in his life to purchase an ice cream cone.").

Tennessee resident, for an investment in Grace's Arkansas-based company.[81] Smith, who occasionally investigated potential acquisitions on behalf of MacArthur, met with Grace in Little Rock to discuss exchanging Grace's interests in White River for stock in Automatic Washer, a company owned by MacArthur.[82] After reaching an agreement, Grace signed the deal in Little Rock and the parties continued to meet on numerous occasions in Arkansas.[83] Elements of the deal soured when Automatic Washer took a "financial nose-dive,"[84] leading Grace to initiate an action for breach of contract.[85]

Taking account of the facts on the ground, we find substantial evidence of Arkansas connections, both as to Grace's presence there and as to the defendants' many Arkansas contacts as they negotiated and consummated the deal. Indeed, one would be hard pressed to argue that an alternative forum, such as Tennessee or Illinois, would provide a more appropriate venue for resolution of the dispute. Nonetheless, Smith, the Tennessee-based defendant served with summons while at flying altitude, challenged the service of process on the basis that Arkansas did not possess power over him while in the air.[86] Grace responded that "the function of today's summons is notice," citing to *International Shoe*, so temporary physical presence should pass constitutional muster.[87] The district court sided with Grace, holding that Smith's temporary presence while on the plane from Memphis to Dallas qualified to sustain tag jurisdiction. However well documented in the district court opinion, it would appear that the defendant in question had more than enough contacts with Arkansas to satisfy the minimum contacts jurisdictional standard.[88]

Much the same thing might be said about California's interest in *Burnham*, the decision that ultimately reaffirmed the constitutionality of tag jurisdiction in a post-*International Shoe* world. *Burnham* arose from the

81. Daniel I. Faichney, *infra* Appendix A at 120–21. Daniel I. Faichney researched and uncovered the original documents and primary record of Grace v. MacArthur as part of a research project in collaboration with Pfander. Faichney's original work and the corresponding citations to the *Grace* case record are included in Appendix A at the end of this Article. We attempted to retrieve the same primary source documentation but learned that the case file no longer exists in any form. We initially approached the clerk for the Eastern District of Arkansas and learned that the case file had been transferred to the national archives. We requested access to the file in the archives but learned that the records had been destroyed due to the age of the case. The law firms that represented the parties in the original litigation did not retain any record of the case.

82. *Id.* at 109.

83. *Id.* at 109–10.

84. *Id.* at 110–11.

85. Grace v. MacArthur, 170 F. Supp. 442, 443 (E.D. Ark. 1959).

86. Faichney, *infra* Appendix A, at 121.

87. *Id.*

88. *Cf.* Burger King v. Rudzewicz, 471 U.S. 462, 487 (1985) (upholding judicial jurisdiction over the non-resident parties to a commercial dispute on the basis of fewer forum-specific contacts).

breakdown of a marital relationship based in New Jersey.[89] The couple originally agreed that the wife, Francie, would move to California with their two children and file for divorce, but Dennis, the husband, disregarded this agreement and filed for divorce in New Jersey, citing "desertion."[90] Francie subsequently filed for divorce in California.[91] Later that same month, Dennis came to southern California and visited their children. After returning the children to Francie's home, Dennis was served with a California summons and a copy of Francie's petition for divorce.[92] Dennis argued that he did not have sufficient contacts with California, traveling to the state only a few times for business or to visit his children. On review of a state court decision finding that personal service of process in the forum state was a valid predicate for in personam jurisdiction,[93] the Supreme Court affirmed.[94]

Writing for a plurality, Justice Scalia upheld jurisdiction on the theory that physical presence represents "one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"[95] Justice Scalia's opinion reviewed the use of tag jurisdiction in early American history, concluding that physical presence supplied an accepted predicate for jurisdiction in most states.[96] On that basis, Justice Scalia found it sensible to distinguish between assertions of jurisdiction over an absent defendant and cases where a defendant was found within the state.[97] Justice Brennan, writing for three other justices, concurred in the result but rejected Scalia's reliance on tradition. Applying the framework established in *International Shoe*,[98] Brennan concluded on the facts that the assertion of jurisdiction conformed to the requirements of "fair play and substantial justice."[99]

89. Burnham v. Superior Ct. of Cal., 495 U.S. 604, 607 (1990) (plurality opinion).

90. *Id.* at 607.

91. *Id.* at 608.

92. *Id.*

93. *Id.*

94. *Id.* at 628.

95. *Id.* at 619.

96. *Id.* at 612–13.

97. *Id.* at 620–21.

98. *Id.* at 629 (Brennan, J., concurring).

99. *Id.* at 635–37. It is worth noting that the Supreme Court, just over a decade earlier, in *Kulko v. Superior Court of California*, ruled that California could not exercise specific jurisdiction over a defendant in a case with very similar facts. 436 U.S. 84, 101 (1978). The defendant, a New York resident, challenged the California court's exercise of jurisdiction over him in relation to a child custody and divorce dispute where his ex-wife resided in California and his children had recently relocated to California. *Id.* at 86–88. The Court held that California could not exercise jurisdiction over the defendant because his decision to send his child to California to live with the child's mother did not lead to the conclusion that he purposely availed himself of the forum. *Id.* at 94. Justice Brennan dissented in that case, writing that the "appellant's connection with the State of California was not too attenuated, under the standards of reasonableness and fairness implicit in the Due

As in *Grace*, the interest of the plaintiff in securing a convenient forum for litigation resulted in the choice of an interested forum for resolution of a contested divorce proceeding. Facing a choice between litigation in one of two states, the plaintiff obviously preferred California, just as the defendant obviously preferred New Jersey. While New Jersey, as the state of the marital domicile, has an interest in the matter, California was the home of both the wife and the children at the time suit was brought. California has an interest in providing a forum for its residents and in applying its own law as the measure of the proper level of support payable to its domiciliaries.[100] Given the parties' agreement that the plaintiff would move to California with the children and file for divorce there, jurisdiction in California does not appear to present serious due process concerns (as Justice Brennan's concurrence confirms).[101]

A common thread connects the two cases. In both, the plaintiff made an initial commitment to a forum of choice before seeking to secure personal jurisdiction through service of process. In making that initial choice, both plaintiffs consulted their own convenience, the location of witness, and the cost of litigation and chose the forum that worked best for them, given the array of options available. While both cases landed in a court less attractive to the defendants, and while both the *Grace* decision and Justice Scalia's plurality opinion in *Burnham* have attracted a range of scholarly criticism, [102] the plaintiffs' ultimate selection of a forum with a solid connection to the dispute makes the assertion of jurisdiction defensible on functional grounds.[103] But one might wonder how often the plaintiffs' incentives will

Process Clause, to require him to conduct his defense in the California courts." *Id.* at 102 (Brennan, J., dissenting).

100. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 285 (AM. L. INST. 1971) ("The state of a person's domicil [sic] has the dominant interest in that person's marital status and therefore has judicial jurisdiction to grant him a divorce."); *e.g.*, Sinha v. Sinha, 834 A.2d 600, 606 (Pa. Super. Ct. 2003) (holding that Pennsylvania law applied to adjudicate a divorce action because it is the law of the parties' domicile).

101. *Burnham*, 495 U.S. at 636–37 (Brennan, J., concurring).

102. *See, e.g.*, Barbara Surtees Goto, International Shoe *Gets the Boot:* Burnham v. Superior Court *Resurrects the Physical Power Theory*, 24 LOY. L.A. L. REV. 851, 866 (1991) ("[T]he Court ignores the core issue of unfairness inherent in the transient jurisdiction rule by failing to acknowledge the different types of presence embraced by the 'physical power theory.'"); Andrea Coles-Bjerre, *A Linguistic Critique of Tag Jurisdiction: Justice Scalia and the Zombie Metonymy*, 68 AM. U. L. REV. 1, 55 (2018) (describing the "presence for contacts" rule as dead and therefore "wreak[ing] destruction on innocent defendants").

103. Lower courts interpreted *Burnham* narrowly, limiting tag jurisdiction to apply only to individual defendants who are physically present in the state, not to corporations or agents of corporations. Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 180 (5th Cir. 1992); James v. Illinois Cent. R.R. Co., 965 S.W.2d 594, 600 (Tex. App. 1998) ("[W]e refuse to extend the logic of *Burnham* to the facts before this Court. . . . *Burnham* involved a non-resident *individual*, and the Court specifically omitted any reference of personal jurisdiction regarding corporations."); Martinez v. Aero Caribbean, 764 F.3d 1062, 1067–68 (9th Cir. 2014) ("Physical presence is a

produce functional forum selection. To get at that question, the next section examines the history of service of process at common law and then compiles cases from the nineteenth century in which American courts upheld assertions of tag jurisdiction.

2. The Common Law Tradition and History of Tag Jurisdiction.—The history and practice of tag jurisdiction in the nineteenth century reflect much of the same functionality evidenced in the *Grace* and *Burnham* decisions. Of course, when the practice emerged as part of the English common law's insistence on the assertion of judicial power over the persons of defendants, service of process was not necessarily operating to confer personal jurisdiction as we understand that concept today. Instead, defendants were served with the original writ by the sheriff's messengers, in an effort to compel their appearance in court.[104] If the defendant did not obey the summons, then the court would issue a writ of attachment, "commanding the sheriff to seize goods of the defendant," in an attempt to compel the defendant's appearance.[105] If this failed, then a plaintiff could resort to a distringas, where the sheriff seized the defendant's goods or profits to be forfeited to the King if the defendant did not appear, or outlawry, where the defendant was declared an "outlaw" rendering him subject to arrest and the confiscation of his property.[106] In a later addition to these more severe procedures, the Frivolous Arrest Act of 1725 permitted plaintiffs to enter common bail on behalf of the defendant without their consent in those cases where the defendant has been served with process.[107] According to Professor Levy, the Frivolous Arrest Act "marked the raising of summons to jurisdictional efficacy in England," in that it required "the plaintiff to 'catch' his defendant in England in a very tangible sense."[108]

The practice of transient jurisdiction was subsequently adopted by the American courts. Though some scholars, such as Professor Ehrenzweig, have cast doubt on the prevalence and utilization of transient jurisdiction by American courts prior to the *Pennoyer* decision, our survey of the case law identifies several cases where state and federal courts relied on physical presence at the time of service of process to affirm jurisdiction.[109] However, our assessment of the case law also supports Professor Ehrenzweig's

simple concept for natural persons, who are present in a single, ascertainable place. This is not so for corporations, which can only act through their agents and can do so in many places simultaneously.").

104. Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 60 (1968).

105. *Id.*

106. *Id.* at 60, 81.

107. *Id.* at 69.

108. *Id.* at 79.

109. Ehrenzweig, *supra* note 21, at 295; *see infra* Appendix B at 124–31.

understanding that transient jurisdiction in the American context commonly supported creditor actions against foreign defendants or cases where the "forum in fact had contacts with either the case or a party."[110]

Based on this review of the case law, tag jurisdiction was typically used in cases that arose from facts connecting the dispute to the forum state. In fact, in many cases, the state where the plaintiff filed suit had the clearest connection to the underlying dispute.[111] In the relatively few cases without this clear forum connection, tag jurisdiction could provide the only opportunity for the plaintiff to assert jurisdiction over the defendant and resolve the dispute in the American court system, ultimately furthering a functional result.

Hart v. Granger,[112] a state court decision, illustrates the way tag jurisdiction often served to bring a defendant before a forum that had strong underlying connections to the dispute. Hart, a resident of Connecticut, served Granger, a resident of Washington, D.C., with service of process while he was in Connecticut.[113] The suit concerned a contract dispute over a tract of land called the "Western Reserve," which is now located in Ohio, but was originally claimed by Connecticut. In 1795, Connecticut sold part of the lands in the Western Reserve to a group of investors, primarily Connecticut residents, who formed the Connecticut Land Company.[114] A contract dispute arose between investors in the Company. When the contract was made, both Hart and Granger lived in Connecticut, and they executed the contract there, but Granger subsequently moved to Washington, D.C.[115]

The Connecticut Supreme Court ultimately rejected Granger's argument that the suit should be dismissed for a lack of jurisdiction, describing it as a "universal practice" that jurisdiction is sustained "where both parties belong out of the state, provided the defendant can be caught and service can be made on him here."[116] Although the land in question was later deemed part of Ohio, after Connecticut sold the Western Reserve, most investors in the Connecticut Land Company were Connecticut residents and the contract was executed in Connecticut. And the party contesting

110. Ehrenzweig, *supra* note 21, at 303–04.

111. Some scholars have already noted that "transient jurisdiction" and the power theory more generally may have actually been a proxy or "metonymy" for nineteenth-century courts to evaluate the same issues of fairness and notice that courts consider today in conducting a personal jurisdiction analysis. *See* Coles-Bjerre, *supra* note 102, at 41, 46–47 ("The application of this pattern, too, to PRESENCE FOR CONTACTS is clear. The jurisdiction of the early judge articulating the service-while-present rule is the place, used as the vehicle. The defendant's contacts with that place are, I argue, the target.").

112. 1 Conn. 154 (1814).

113. *Id.* at 157.

114. GEORGE W. KNEPPER, THE OFFICIAL OHIO LANDS BOOK 23 (2002).

115. *Hart*, 1 Conn. at 155.

116. *Id.* at 165, 169–70.

jurisdiction in this case was originally from Connecticut. Tag jurisdiction, in this case, would have facilitated the resolution of the dispute in a forum state that had a well-developed understanding of the underlying facts and where many other interested parties continued to live.[117]

In another early example of apparently functional results, in *Reed v. Browning*, [118] the Indiana Supreme Court affirmed the assertion of jurisdiction over an Illinois resident who was served with process while in Indiana. The plaintiff, an employee of the defendant and an Indiana resident, was permanently injured on the job when a supervisor directed him to work in a dangerous area of the defendant's stone quarry.[119] The defendant was served with process while he was in Indiana, "giving personal attention to his interests in the stone quarry."[120] The decision here, as in *Hart*, made sense. The defendant regularly engaged in business in Indiana, where he owned and operated the stone quarry,[121] and the plaintiff resided in the state. The cause of action also arose in Indiana, where the plaintiff was injured. The Indiana courts were seemingly the most appropriate venue for resolution of the claim.

In other early tag cases, courts went further, exercising jurisdiction where both the non-resident defendant and the cause of action lacked a connection to the forum state. In these cases, some courts applied an interest balancing approach, much like that later adopted in *International Shoe*.[122] Thus, in *Barrell v. Benjamin*,[123] the Massachusetts Supreme Judicial Court weighed the interests of the plaintiff, Barrell, a resident of Connecticut, who brought suit in Massachusetts state court, and the defendant, Benjamin, a United States citizen then domiciled in Demerara. The plaintiff sought to recover a debt incurred in connection with a business venture in Demerara, but Benjamin was tagged while he was in Boston, awaiting passage back to

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117. Importantly, the court also considered whether the Connecticut suit had to be dismissed in order to grant full faith and credit to a pending lawsuit filed by the defendant against the plaintiffs in Ohio, alleging breach of contract based on the same cause of action. On that claim, the court held that the Connecticut lawsuit must defer to the Ohio judgment because a determination in the Ohio case "would end the controversy." *Id.* at 172.

118. 30 N.E. 704 (Ind. 1892).

119. *Id.* at 704.

120. *Id.* at 705.

121. *Id.* at 704.

122. For an example, see Roberts v. Knights, 89 Mass. 449 (1863). The *Roberts* court noted:

> It is extremely inconvenient to one who is temporarily in a foreign country to be sued by a fellow-countryman in its courts. But it is met by an argument of equal force on the other side. If the plaintiff had no such remedy, he would often be subjected to great hardships. On the whole, it is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits.

Id. at 452.

123. 15 Mass. 354 (1819).

Demerara.[124] In upholding jurisdiction, the court considered both the defendant's convenience and the plaintiff's interest in a forum.[125] In approving tag jurisdiction, cases like *Barrell* facilitated the resolution of claims in what might be best termed the "court of last resort."

Other *Pennoyer*-era courts recognized the importance of tag jurisdiction for this purpose. In *Hagen v. Viney*,[126] for example, the Supreme Court of Florida affirmed the exercise of personal jurisdiction over a layabout ex-husband who had consistently defaulted on alimony obligations to his former wife.[127] Though the couple originally resided in New Jersey, and were only "sojourners in the State of Florida" at the time this suit was brought, the court upheld its jurisdiction over the wife's claim, noting that the defendant "was going constantly from state to state and country to country, secreting himself and property and making it difficult if not impossible at times to be reached by legal process."[128] The court's decision to exercise jurisdiction was not automatic; the court acknowledged what has now been termed the doctrine of "forum non conveniens," stating that its decision to exercise jurisdiction over a case "between nonresidents arising in other jurisdictions" was one governed by "the rule of comity rather than that of strict right."[129]

These cases, and those cataloged in Appendix B, paint a new picture of tag jurisdiction as a functional device by which plaintiffs could access courts and facilitate litigation of complex interstate transactions against the backdrop of rigid territorial rules. But why the functionality? We think the answer lies in the requirement that plaintiffs must generally retain a lawyer and pre-commit to a forum of choice before initiating suit and securing the summons that brings service of process and tag jurisdiction into play.[130] Required pre-commitment narrowed the options to a forum in which the lawyer was admitted to practice law and was reasonably convenient for the plaintiff and reasonably likely to lead to some prospect of service of process on the defendant.[131] Tag jurisdiction also facilitated the resolution of disputes in so-called "courts of last resort," providing a forum for plaintiffs who might

124. *Id.* at 354.

125. *Id.* at 357–58 (noting that though it may be inconvenient for the debtor to answer to suit in a foreign country, "the creditor may also be put to inconvenience if he should be denied the privilege of suing in a foreign court; for the debtor may withdraw his person and effects from the place of his business").

126. 169 So. 391 (Fla. 1936).

127. *Id.* at 392, 395.

128. *Id.*

129. *Id.* at 392; Dodge et al., *supra* note 73, at 1179–81 (charting the development of forum non conveniens in several state courts).

130. *See, e.g.*, Grace v. MacArthur, 170 F. Supp. 442, 443 (E.D. Ark. 1959) ("The complaint was filed on July 21, 1958, and summons was issued on the same day.").

131. Recall that in *Burnham*, the plaintiff filed a petition for divorce in California prior to serving the defendant with process. Of course, if the stakes warrant such tactics, plaintiffs can file suits in more than a single forum and later seek consolidation of the litigation.

otherwise be left without an available remedy. In circumstances where the assertion of jurisdiction imposed genuine burdens on the defendant in a forum with little connection to the dispute, the nascent body of forum non conveniens law and reliance on the Dormant Commerce Clause served to moderate exorbitant forum selection.[132] In the next subpart, we find that much the same dynamic helped ensure reasonably functional forum selection where jurisdiction over property was predicated on the use of quasi in rem jurisdiction.

B. Quasi in Rem Jurisdiction and Creditor–Debtor Disputes

Alongside its approval of tag jurisdiction, *Pennoyer* upheld what we have come to know as quasi in rem jurisdiction. Long a confusing source of power to adjudicate, quasi in rem jurisdiction has been displaced by the minimum contacts regime of *International Shoe*. In *Shaffer v. Heitner*, the Court declared that the mere seizure of property would no longer support the exercise of jurisdiction over the owners of that property. Instead, the Court explained, all assertions of jurisdiction must satisfy the minimum contacts standard of *International Shoe*. The decision does not necessarily abrogate quasi in rem jurisdiction so much as require that we evaluate its assertion for compliance with fair play and substantial justice.

In this subpart, we examine *Pennoyer*-era decisions upholding the exercise of quasi in rem jurisdiction and ask if they enjoy the same functional support that we found in the tag cases. Our analysis begins with a brief history of garnishment, a source of jurisdiction over property owned by the defendant. Then we examine perhaps the best-known and most widely ridiculed garnishment decision of the *Pennoyer* era, *Harris v. Balk*. Finally, we examine a few representative examples of garnishment jurisdiction, explaining the role it played in creditor relations. As with tag jurisdiction, we find that litigation realities and legal restrictions often moderated the scope of garnishment jurisdiction to ensure functional outcomes.

1. The Historical Development of Quasi in Rem Jurisdiction.— Developed by the Mayor's Court in London, the use of garnishment or foreign attachment arose as a customary form of creditor protection and was eagerly embraced by the American colonies and incorporated into the

132. For a review of what Dodge et al. term the "twentieth-century phenomenon" of forum non conveniens and its development in the state courts, see generally Dodge et al., *supra* note 73. For an evaluation of pre-*International Shoe* courts resolving jurisdictional challenges by reference to the Dormant Commerce Clause and for an argument of its relevance for the present day, see generally Preis, *supra* note 14.

practice of eighteenth- and nineteenth-century adjudication.[133] In effect, the practice enabled creditors to pursue the debtor's property before having secured an in personam judgment against the debtor. If successful in proving the debt, the creditors gained title to the property. Defendants were entitled to appear and contest the debt; creditors were required to post a bond at the outset, thereby assuring a fund from which a wrongful seizure might be compensated. By requiring such "credible commitments" at the outset of the litigation,[134] the practice of foreign attachment, at least in theory, reduced the number of wrongful attachments and protected garnishees.

In pursuing the property, rather than the defendant, foreign attachment allowed the creditor to pursue the defendant's assets "in the hands" of a third-party or garnishee. That property could take a number of forms, including intangible debts, as well as any real or personal property of the defendant that a garnishee might possess.[135] Once the suit attached the property of the defendant debtor "'in the hands' of the garnishee," the garnishee could raise several defenses to the attachment of the debt.[136] While he was not permitted to argue that the defendant was not actually indebted to the plaintiff, the garnishee could argue that he was not indebted to the defendant or that there was a prior lien on the attached property.[137] If judgment was entered against the garnishee, the garnishee could raise the "payment under compulsion of execution" as a defense to a later action by the original debtor.[138]

As a form of "quasi in rem jurisdiction which was unknown to the common law," foreign attachment allowed a creditor to locate and access the assets needed to satisfy a debt.[139] Attachment procedure allowed a plaintiff

133. Interestingly, Professor Levy notes that foreign attachment was first established "by custom and later by settled law" to support the interests of creditors seeking to enforce debts against absent defendants. The practicality of the remedy is evidenced by its development through "custom," before its codification in law. Nathan Levy, Jr., *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in Light of the English Experience*, 5 CONN. L. REV. 399, 405, 409 (1972) [hereinafter Levy, *Attachment*].

134. Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1190 ("The maintenance and securing of credit arrangements . . . still required that a creditor have the right to seize, as a basis for adjudicating and collecting a debt, property of the debtor that might be located in the creditor's home state or wherever the creditor might chance to locate it."); Michael B. Mushlin, *The New Quasi In Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1067 (1990) (noting that when long-range transportation and communication remained difficult, "quasi in rem jurisdiction provided an important and practical procedural recourse for creditors who otherwise would have been unable to find a forum for their claims" and that "[t]hese conditions were so common that every state passed a law providing for quasi in rem jurisdiction").

135. *See* Levy, *Attachment*, *supra* note 133, at 409 (observing that "debt" should not be read "in the narrowest modern-day sense," since actions recovered both money and specific chattels).

136. *Id.*

137. *Id.* at 413.

138. *Id.* at 415.

139. *Id.* at 423.

to garnish the defendant's debts with the "pledge to make restitution if the defendant should appear and disprove the debt within a year and a day."[140] Although this procedure was specifically designed to address the problem of mobile debtors in a society that increasingly relied on the security of credit transactions,[141] use of the procedure by unscrupulous creditors led to reforms, both in England,[142] where the practice arose, and in the United States, where the Supreme Court imposed limits to protect consumers' pre-seizure right to notice and a hearing.[143]

2. The Story of Harris v. Balk.—The Supreme Court's decision in *Harris v. Balk*, the leading post-*Pennoyer* quasi in rem case, has been the subject of widespread scholarly derision. Some have described *Harris* as a case where the Court affirmed jurisdiction "over a nonresident whose only contact with the state was a visit there by his debtor."[144] Others have explained the Court's holding as based on the quaint notion that a debt "clings to and accompanies [the debtor] wherever he goes."[145] *Harris* initially survived the changing tides of personal jurisdiction, though the decision has been roundly criticized by legal scholars as "harsh,"[146] "antiquated,"[147] and perpetuating "a revolving door"[148] of personal jurisdiction. As with *Grace v. MacArthur*, scholars treat *Harris* as a monument to the dysfunctional formalism of the *Pennoyer* regime.

Like *Grace*, however, *Harris* may not, on closer inspection, deserve such monumental status. The basics of the case are well-known and easily

140. Paul D. Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303, 304 (1962).

141. Levy, *Attachment*, *supra* note 133, at 405.

142. In 1867, the House of Lords heard *The Mayor and Alderman of the City of London v. Cox*. Levy, *Attachment*, *supra* note 133, at 421. In *Cox*, a foreign plaintiff brought a foreign attachment against a foreign defendant on a foreign cause of action and attached the debt of a foreign garnishee, temporarily in London. *Id.* Denying the attachment, the court imposed three new requirements on the custom: "(1) A debt accrued by the defendant in London; (2) A garnishee resident in London; (3) Prior notice and an opportunity to the defendant to contest the debt." *Id.* at 421–22.

143. *See, e.g.*, Sniadach v. Fam. Fin. Corp., 395 U.S. 337, 341–42 (1969) (holding that prejudgment garnishment of wages without notice and prior hearing violates due process); Fuentes v. Shevin, 407 U.S. 67, 96 (1972) (holding that due process is violated when property is seized without a prior opportunity to be heard).

144. Mushlin, *supra* note 134, at 1071.

145. Harris v. Balk, 198 U.S. 215, 222 (1905).

146. Carrington, *supra* note 140, at 308.

147. Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1914 n.163 (2009).

148. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281 ("The *Pennoyer* system, in addition to its other defects, is thus a revolving door as applied in quasi in rem situations; where you come out in analyzing the jurisdictional problem depends on where you decide to stop.").

recited. Epstein, a Baltimore, Maryland resident, claimed that Balk, a North Carolina resident, owed him $344.[149] Harris, also from North Carolina, owed Balk $180.[150] While Harris was in Baltimore, Epstein issued a writ of attachment to attach Balk's assets "in the hands" of Harris, in the form of the $180 debt.[151] The Maryland court entered a default judgment in favor of Epstein, and Harris paid $180 to Epstein's attorney.[152] On learning of these developments, Balk initiated an action in North Carolina seeking to recover his $180 debt from Harris.[153] Harris argued that he had paid Balk's debt to Epstein under a Maryland judgment that was entitled to full faith and credit in North Carolina.[154] On review, the Supreme Court agreed, upholding the Maryland court's jurisdiction over Balk's assets in the hands of Harris.[155]

Admittedly, the Court's decision appears maddeningly formalistic. By treating the debt to Balk as a form of intangible property that was subject to seizure through the arrest of Harris, the Court seemingly authorized suits against Balk in any state Harris might choose to visit. But as Professor Lowenfeld makes clear in a careful reconstruction of the matter, the underlying commercial relationships reveal much that helps to explain the choice of the Maryland forum. Balk, a retailer in North Carolina, regularly purchased goods from Epstein, an importer in Baltimore.[156] The two had an established business relationship. The $344 debt in question arose from a series of transactions between Epstein and Balk after Balk paid only a portion of his balance.[157] The third character in this story, Harris, was a dry goods merchant in North Carolina who commonly borrowed money from Balk in small increments, explaining the $180 debt.[158] Epstein was using Harris to settle accounts with Balk.

As with tag jurisdiction over persons in *Grace*, tag jurisdiction over property in *Harris* reveals the significance of the plaintiff's implicit preference for a convenient forum. For Epstein, the alternative to suing Harris/Balk in Maryland was to hire a lawyer in North Carolina and pursue the claim against Balk directly before a North Carolina jury.[159] If successful, Epstein might have been forced to bring a second suit or an ancillary

149. *Harris*, 198 U.S. at 216, 228.

150. *Id.* at 216.

151. *Id.*

152. *Id.*

153. *Id.* at 217.

154. *Id.*

155. *Id.* at 226.

156. Andreas F. Lowenfeld, *In Search of the Intangible: A Comment on* Shaffer v. Heitner, 53 N.Y.U. L. REV. 102, 104 (1978).

157. *Id.*

158. *Id.* at 106.

159. *Pennoyer* would apparently foreclose an in personam suit in Maryland unless Balk was served personally with process there.

enforcement proceeding to secure the proceeds of a sheriff's sale of Balk's property in North Carolina.[160] The cost of pursuing such a relatively modest claim would have cut deeply into the value of any judgment Epstein might have obtained. Use of garnishment thus enabled Epstein to pursue a relatively cheap and effective form of collection, one that moderated the *Pennoyer* regime by extending jurisdiction to some debts owed by non-residents.[161] While Maryland offered Epstein a cost-effective alternative to North Carolina, one cannot easily see why or how Epstein could pursue Balk in a disinterested forum, like New York or Massachusetts. As a practical matter, Epstein would lack knowledge of Harris's movements through those states and could not cost-effectively pursue garnishment there.

So long as garnishment was used by forum-state creditors on parties like Harris and Balk, the existence of an ongoing commercial relationship would moderate much potential unfairness. Indeed, on the facts of *Harris*, Maryland might well claim personal jurisdiction over Balk under the minimum contacts standard articulated in the Court's decision in *Shaffer*. If Balk originally traveled or sent orders to Maryland,[162] those purposeful contacts with the forum state would seem to bring the case within the logic of *Burger King v. Rudzewicz*.[163] In *Burger King*, the Court acknowledged that where an interstate contractual relationship creates "continuing relationships and obligations with citizens of another state," as was the case between Epstein and Balk, such individuals may be "subject to regulation and sanctions in the other State for the consequences of their activities."[164] Like the parties in *Burger King*, Epstein and Balk were engaged in an ongoing business relationship that crossed state lines.[165] Therefore, regardless of his physical

160. Carrington, *supra* note 140, at 305 ("Where the defendant or his domicile cannot be found by the process server, the plaintiff can direct the sheriff to attach his property or summon his debtors; if the defendant then fails to appear, his assets are liquidated to satisfy the resulting default judgment."); Kalo, *supra* note 134, at 1162 ("Although the adoption of the United States Constitution and the existence of the full faith and credit clause provided greater enforceability of personal judgments in sister states, mobility of debtors, difficulties of travel and similar problems necessitated the continued use of quasi in rem jurisdiction when suing individual defendants.").

161. Mushlin, *supra* note 134, at 1068 (describing quasi in rem jurisdiction as an escape from the strictures of *Pennoyer*'s territorial regime, sparing "many plaintiffs the burden of a difficult and costly, if not impossible, trip to commence the action in the nonresident's state"); Joseph P. Zammit, *Quasi-in-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 ST. JOHN'S L. REV. 668, 670 (1975) ("[Q]uasi-in-rem attachment constituted a partial escape from the strictures of the territorial theory of jurisdiction."); Kalo, *supra* note 134, at 1190 (detailing how the difficulty of pursuing an out-of-state debtor at the time *Harris* was decided meant that in order for credit arrangements to be worthwhile, creditors must "have the right to seize, as a basis for adjudicating and collecting a debt, property of the debtor that might be located in the creditor's home state or wherever the creditor might chance to locate it").

162. Lowenfeld, *supra* note 156, at 104–05.

163. 471 U.S. 462, 473 (1985).

164. *Id.* (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950)).

165. *Id.* at 467; Harris v. Balk, 198 U.S. 215, 216 (1905).

presence in the state, Balk might today be subject to jurisdiction in Maryland for disputes arising from his business with Epstein.[166]

3. The Practical Use of Quasi in Rem Jurisdiction.—The logic of debt collection suggests that basing jurisdiction on the presence of property in the forum state will often yield functional results as a more general matter. Consider the category of cases, apparently like *Harris v. Balk* itself, where the debtor admittedly owes the money and refuses to pay. In such cases of clear contractual obligation, a forum state can reasonably exercise jurisdiction based on the presence of the debtor's property alone without establishing a strong connection to the witnesses and the parties to the contract (as modern jurisdictional analysis requires). After all, once the debt has been liquidated and agreed upon, the dispute narrows to such questions as who owns the property, whether the property (like a debtor's homestead, for example) has been placed beyond the reach of creditors, and whether the debtor has otherwise satisfied the obligation. The forum state with power over the property in question can sensibly address all such questions. Indeed, the Court signaled in *Shaffer* that once the plaintiff has secured a judgment, any state where the debtor's property can be found has jurisdiction over a claim to that property to satisfy the judgment.[167]

To be sure, the pre-*Shaffer* jurisdictional rules did not limit use of quasi in rem jurisdiction to plaintiffs with airtight claims on the merits. But procedure on foreign attachment included safeguards to protect the interests of debtors.[168] For example, at the outset of the litigation, the creditor was obliged to post a bond, to secure payment of costs in the event the claim was unsuccessful.[169] Such bonds can operate as credible commitments, helping to ensure the validity of the claim. In addition, the practice on foreign attachment required notice, thereby providing the debtor with an opportunity to contest the merits.[170] Finally, the practice authorized the debtor to post a bond and secure the release of the property; such bonds allowed the debtor to regain the use of essential property while creating a fund from which the creditor, if successful, could secure payment.

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166. Levy, *Attachment*, *supra* note 133, at 448–49. As Professor Levy explains:

> In every case, *the plaintiff probably was a domiciliary of the forum state*, giving that state a legitimate interest in the action. . . . [T]he forum state's interest in the protection of its own may be, *constitutionally*, sufficient to overcome such objections as inconvenience to the other parties and the possible—but seldom actual—loss of defenses by the garnishee or by the defendant.

Id. (citation omitted); *see also* Carrington, *supra* note 140, at 308 (noting that Balk had "voluntary contact with the forum state").

167. Shaffer v. Heitner, 433 U.S. 186, 200, 208 (1977).

168. 7 C.J.S. *Attachment* § 29 (1936).

169. *Id.* § 145.

170. *Id.* § 481.

Hoping to test the intuition that quasi in rem jurisdiction often resulted in the functional exercise of jurisdiction to resolve creditor–debtor disputes, we found confirmation in a collection of actions from the nineteenth and early twentieth centuries. In what one might describe as pure debtor–creditor matters, the state and federal courts appear to have treated the presence of property as a sufficient basis on which to allow the litigation to proceed. For example, in *Grizzard v. Brown*,[171] the Texas court allowed a non-resident creditor to pursue a claim to a non-resident debtor's Texas-based property.[172] The property's location in Texas was enough. Rhode Island announced a similar view in *Cross v. Brown*,[173] exercising jurisdiction over a garnishee in the state who owed a debt to several non-resident defendants.[174] Since those non-residents could sue the garnishee in Rhode Island, Rhode Island was entitled in turn to assert jurisdiction to the extent of the garnishee's obligation.

Claims sounding in tort triggered at least two restrictions that limited plaintiffs' ability to base jurisdiction on the presence of property. For one thing, the states sometimes limited the use of garnishment to disputes over contract debts, rather than allowing them to be used as the predicate for the imposition of tort-based liability.[175] In *Suksdorff v. Bigham*,[176] the Supreme Court of Oregon dismissed a claim where jurisdiction was quasi in rem because the Oregon attachment statute only permitted attachment for actions "upon contract, express or implied, for the direct payment of money," and the plaintiff's complaint was better described as an action in tort.[177] This sensible restriction confined garnishment to contract debt, where the creditor seized property to pay an existing obligation rather than as a basis for claims that might require witnesses and parties to appear in a forum far from the events giving rise to the suit. Had a limitation to claims sounding in contract taken hold, it might have foreclosed the seizure of Delaware stock in *Shaffer* and barred some of the aggressive tactics that later led the Supreme Court to block pre-judgment garnishment on procedural due process grounds.[178]

171. 22 S.W. 252. (Tex. Civ. App. 1893).

172. *Id.* at 252–53.

173. 33 A. 147 (R.I. 1895).

174. *Id.* at 147, 150–51.

175. *See, e.g.*, H.L. Griffin Co. v. Howell, 113 P. 326, 328 (Utah 1911) (describing a Utah statute as permitting "an attachment of property to satisfy an indebtedness or demand on contract only, and not in tort").

176. 12 P. 818 (Or. 1886).

177. *Id.* at 819 ("No attachment against the property of another can legally issue in this state in any action except an action upon contract, expressed or implied, for the direct payment of money . . . .").

178. Shaffer v. Heitner, 433 U.S. 186, 191–92 (1976); Fuentes v. Shevin, 407 U.S. 67, 84–85 (1972); Connecticut v. Doehr, 501 U.S. 1, 22–24 (1991). Courts understood quasi in rem as an

A second and perhaps more revealing limiting principle emerged in tort-based litigation against foreign corporations. At the time, corporations were viewed as present for *Pennoyer* purposes only in their state of incorporation and in those states in which they were "doing business."[179] Quasi in rem jurisdiction could expand the number of available forums to some extent.[180] If the defendant had significant assets in the forum state, as was commonly the case in industries like manufacturing and transportation, a plaintiff might attach those assets to obtain jurisdiction over an unrelated claim.[181] For example, in *Canadian Pacific Railway Co. v. Sullivan*,[182] the U.S. Court of Appeals for the First Circuit affirmed the exercise of quasi in rem jurisdiction over a Canadian railroad for a wrongful death in Canada.[183] There, plaintiffs garnished an intangible obligation owed to the Canadian firm by a Massachusetts-based railroad to obtain jurisdiction in that state.[184]

"extraordinary" method of obtaining jurisdiction, specifically designed for disputes arising from the breakdown of a business relationship. Green v. Snyder, 84 S.W. 808, 808 (Tenn. 1905) ("Attachment of property is not the ordinary mode of obtaining jurisdiction, but it is extraordinary, and not to be resorted to when personal service can be had in order to obtain such jurisdiction.").

179. Kalo, *supra* note 134, at 1166 ("In post-revolutionary America, the prevailing jurisdictional rule was that a corporation could be sued in personam only in the courts of the state in which it was chartered."). Notably, corporate defendants were sometimes subject to suit based on continuous business contacts with the forum state, expanding the number of available forums beyond the place of incorporation. *See* Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 579, 585–86 (1914) (holding that the corporation was subject to jurisdiction in Kentucky, outside of its place of incorporation, because agents of the corporation engaged in continuous business, receiving payment and processing payment in Kentucky banks and shipping machines to the state); *see also* Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 517–18 (1923) (holding that the corporation was not present in New York at the time of service of process because it did not conduct regular business within the state or hold property in the state to qualify as "doing business" for the purposes of in personam jurisdiction).

180. *See* Jacobs, *supra* note 3, at 1598–99 (explaining that "plaintiffs could turn to quasi in rem jurisdiction" when other options were unavailable); Kalo, *supra* note 134, at 1170 ("Therefore, residents who had dealt with the corporation and had a claim against it were relegated to suing in the state of its incorporation, unless the foreign corporation had sufficient assets within the forum state to warrant quasi in rem jurisdiction.").

181. *See* Kalo, *supra* note 134, at 1170–71 (suggesting that quasi in rem jurisdiction would have been more likely available to plaintiffs dealing with manufacturing and transportation corporations); Jacobs, *supra* note 3, at 1598–99 (explaining that it was often easy to find and attach a railroad's in-state assets and thereby exercise quasi in rem jurisdiction). Jacobs cites to several examples in the early twentieth century where quasi in rem jurisdiction facilitated the suits against out-of-state corporations. *Id.*; *see* Bos. & Me. R.R. v. Gokey, 210 U.S. 155, 156, 168 (1908) (affirming the use of quasi in rem jurisdiction, attaching two trains located in Vermont, to permit a plaintiff to sue his former employer in Vermont for injuries sustained while he was on the job in Vermont, even though the corporation was located in Massachusetts); Davis v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co., 217 U.S. 157, 165, 179 (1910) (affirming the Iowa court's jurisdiction over an Ohio corporation where the plaintiff attached railroad cars located in Iowa, though the cause of action arose in Illinois).

182. 126 F.2d 433 (1st Cir. 1942).

183. *Id.* at 435.

184. *Id.* at 435 n.1.

Yet property in the forum state was not viewed as a sufficient basis for jurisdiction over all claims. In *Davis v. Farmers Co-Operative Equity Co.*,[185] the Supreme Court refused to allow jurisdiction in Minnesota over suit for grain lost during a shipment that began and ended in the state of Kansas and had no connection to Minnesota.[186] Minnesota's assertion of quasi in rem jurisdiction was said to burden interstate commerce.[187] By contrast, in *Missouri ex rel. St. Louis, Brownsville & Mexico Railway Co. v. Taylor*,[188] the Court allowed the assertion of property-based jurisdiction over tort claims against a foreign corporation in a forum state where the plaintiff resided and the negligence occurred.[189] The Court thus moderated quasi in rem jurisdiction to consider the nature of the forum state's interest in the plaintiff and the underlying dispute. Those interests were often virtually, if implicitly, assured by the nature of contract disputes, but less well protected in tort litigation, where the unliquidated nature of the claim could necessitate witness and party participation at the chosen forum.

III. *Pennoyer* and the Rise of National Markets

Conventional wisdom correctly traces the *International Shoe* decision to the inability of *Pennoyer* to adapt to an expanding national economy. Corporations operated throughout the country, incurring tax obligations and inflicting harm in states that lacked power to adjudicate under *Pennoyer*'s conception of corporate presence.[190] *International Shoe* broadened the states' power to adjudicate claims against foreign corporations, asking not whether the defendant was present in the state (for *Pennoyer*-style general jurisdiction) but whether the exercise of specific jurisdiction would "offend 'traditional notions of fair play and substantial justice.'"[191] Soon the analysis came to focus on the defendants' contacts with the forum, as the Court

185. 262 U.S. 312 (1923).

186. *Id.* at 314, 317.

187. *Id.* at 317. For another perspective, *see* Sachs, *supra* note 14, at 223 (explaining that the Court subsequently backed off from its enforcement of the Dormant Commerce Clause as a limit on personal jurisdiction).

188. 266 U.S. 200 (1924).

189. *Id.* at 207.

190. The *Pennoyer* framework provided for a very narrow set of avenues to obtain jurisdiction over out-of-state corporations, namely implied consent doctrine and state statutes authorizing service of process on corporate agents, resulting in plaintiffs often being forced to sue in the state of incorporation. *See* Kalo, *supra* note 134, at 1170–73, 1176; St. Clair v. Cox, 106 U.S. 350, 360 (1882) ("The state may . . . impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that . . . in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated . . . .").

191. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

insisted that the claims arise from conduct in which non-resident defendants "purposefully avail" themselves of forum benefits and protections.[192]

In this Part, we argue that a similar change in the market for the representation of plaintiffs in mass tort and other aggregate litigation has made further inroads on the *Pennoyer* regime. As we saw in Part II, during the nineteenth and much of the twentieth centuries, plaintiffs selected a forum from a limited set of options. Because of constraints inherent in the one-to-one litigation model, many plaintiffs filed suit in their home state or the defendant's state.[193] Those forum choices, in turn, tended to assure functional jurisdictional outcomes in a world where the formal rules of tag and property-based jurisdiction could have considerably broadened the array of options. But with the rise of a national plaintiffs' bar and the prevalence of mass and aggregate litigation, plaintiff forum choices no longer predictably operate to ensure litigation in an interested state. Plaintiffs and the lawyers that represent them may have much to gain from steering litigation to a favorable state court.[194]

This Part explains why the formal categories of general jurisdiction made available under *Pennoyer* cannot easily coexist with the new market for plaintiff-side legal representation. We begin with a brief overview of modern forum selection incentives, showing how and why current law encourages plaintiffs to steer litigation to a preferred venue. We then explain how the market for plaintiffs' representation has changed in the last generation, enabling well-resourced lawyers to exploit forum-selection opportunities. We conclude by explaining why the recognition and expansion of *Pennoyer*'s formal categories of general jurisdiction tend to encourage forum shopping, often with the result that litigation proceeds in states that have little concrete interest in the resolution of the disputes brought to them. That conclusion sets the stage for our argument against the restoration of *Pennoyer* and in favor of a more plaintiff-centric approach to specific jurisdiction.

192. Kulko v. Superior Ct. of California, 436 U.S. 84, 92 (1978); Shaffer v. Heitner, 433 U.S. 186, 207 (1977); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 880 (2011).

193. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1281 (2018) ("Most plaintiffs in one-off cases are probably content to file at home or in the state where they suffered injury (if the two forums are even different).").

194. This dynamic has been termed "the agency problem" in mass litigation. *See* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1275, 1275 n.3 (2012) ("The problem, in part, is that plaintiffs' attorneys play two, often conflicting roles: They serve as both financiers and agents. These dual roles can pull attorneys in divergent directions.").

A. Plaintiff-Side Forum Selection and Mass Litigation

In general, the law does not much concern itself with the assertion of personal jurisdiction over the plaintiffs who initiate litigation. As explained in *Phillips Petroleum Co. v. Shutts*,[195] the Court effectively treats the plaintiff's initiation of suit in the forum state as consent to jurisdiction and entry of a judgment binding on the plaintiff.[196] That treatment, in turn, means that plaintiffs have relatively unfettered access to any state court in the country. Such an approach has predictably encouraged aggressive forum selection by the plaintiffs.[197] We briefly sketch the *Shutts* litigation and its forum-selection implications and then document the rise of mass litigation of which *Shutts* forms a part.[198]

The *Shutts* litigation began when a group of investors in oil-and-gas-producing properties brought a class action in Kansas state court to collect interest on delayed royalty payments from the defendant, Phillips Petroleum.[199] Today, it seems doubtful that Phillips would be subject to general jurisdiction in Kansas; under the at-home test of *Daimler* and *Goodyear*, Phillips had its place of incorporation in Delaware and its principal place of business in Oklahoma.[200] But at the time, Phillips likely assumed that its substantial business presence in the state would make personal jurisdiction proper in Kansas on a doing-business theory. As a result, the defendant argued that Kansas could not assert jurisdiction over the 28,000 absent class action members, 97% of whom had no connection to Kansas.[201]

The Court's rejection of this argument distinguished between plaintiffs and defendants. As Justice Rehnquist explained, writing for a unanimous

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195. 472 U.S. 797 (1985).

196. *Id.* at 808–09, 811–14 (holding that absent class action plaintiffs need not specifically opt in to be subject to a binding judgment, in part, on the basis that "[a]ny plaintiff may consent to jurisdiction" (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779–81 (1984) (holding that plaintiffs need not have minimum contacts with the forum state))).

197. *See* Ferens v. John Deere Co., 494 U.S. 516, 531 (1990) (holding that the original forum state's statute of limitations controls following a plaintiff's successful motion to transfer venue pursuant to 28 U.S.C. § 1404(a)).

198. To be clear, this Article is not intended to add to the cacophony of voices criticizing plaintiffs' lawyers' forum shopping efforts for two reasons. First, it makes rational sense to engage in forum shopping to some degree as it contributes to the potential for client success. Second, both plaintiffs and defendants regularly engage in forum shopping efforts, whether that be with the initial decision of where to file suit or in moving for a change of venue. *See* Tex. Instruments, Inc. v. Micron Semiconductors, Inc., 815 F. Supp. 994, 996 (E.D. Tex. 1993) ("In reality, every litigant who files a lawsuit engages in forum shopping when he chooses a place to file suit."). Instead, this Article hopes to illuminate the driving forces behind forum shopping considerations today and the impact of those considerations on the development of personal jurisdiction law.

199. *Shutts*, 472 U.S. at 799.

200. *Id.*

201. *Id.* at 799, 815–16.

Court, unlike defendants, "the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment."[202] True, the Court acknowledged that the vast majority of these class members had done nothing to consent to Kansas's jurisdiction. But the Court explained that they are "not required to do anything."[203] Instead, absent class members may "sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for [their] protection."[204] Those safeguards included a right to opt out of the litigation and pursue the claim separately; the Court found consent to jurisdiction in the failure of the absentees to opt out of the Kansas class action after notice of the pendency of the claim.

The holding in *Shutts*, allowing class action lawyers to proceed based on the plaintiffs' presumed consent to jurisdiction,[205] ultimately set the stage for nationwide forum shopping. In fact, just after the Court's decision in *Shutts*, Kansas seemingly became the preferred forum for oil royalties class actions, leading to the follow-on litigation against such oil companies as Sun Oil Company and others.[206] Choice of the Kansas forum for follow-on royalty litigation made perfect sense; Kansas had adopted favorable interpretations of the state-law entitlement to repayment of royalty interest and a favorable interpretation of the statute of limitations to provide plaintiffs with a long look-back period for the collection of interest. While the *Shutts* Court ultimately declined to permit Kansas to apply its substantive law to the royalty interest claims of those plaintiffs with no ties to Kansas, a subsequent decision involving a suit against Sun Oil allowed Kansas to apply its limitation period to all such claims.[207]

The Kansas petroleum litigation was part of an explosion in mass and aggregate litigation that began in the 1960s. Prior to this period, mass litigation was virtually nonexistent.[208] When Epstein sued Balk, for example, the law afforded limited opportunities for joinder of separate claims. But that changed with the passage of the Multidistrict Litigation (MDL) Act of 1968 and the amendments to Rule 23, creating a viable class action device for money claims.[209] Even so, the period following the creation of the MDL and modern class action devices was not characterized by transformative changes in the plaintiffs' bar. These changes began when plaintiffs' lawyers took aim

202. *Id.* at 809.

203. *Id.* at 810.

204. *Id.*

205. *Id.* at 811.

206. Sun Oil Co. v. Wortman, 486 U.S. 717, 729 (1988) (holding that Kansas can apply its own statute of limitations to the plaintiffs' claims for choice-of-law purposes because statutes of limitations are properly regarded as procedural, not substantive, rules).

207. *Id.* at 730.

208. Bradt & Rave, *supra* note 193, at 1261.

209. *Id.* at 1262–63.

at the tobacco industry and asbestos manufacturers.[210] Armed with telling scientific studies, plaintiffs and their lawyers began to experience notable success just as changes in lawyer advertising and mass communication altered the way consumers connect with lawyers.[211]

B. A Changing and Dynamic Plaintiffs' Bar

With success in mass litigation, the plaintiffs' bar attracted new resources and developed a litigation prowess that matches some of the top litigation teams employed by corporate defendants. This subpart outlines several factors that help to explain this shift in the litigation landscape, namely the increased availability of litigation funding, increased coordination among plaintiffs' lawyers, and directed or targeted advertising to identify potential claimants in favorable forums.

1. Litigation Finance.—At risk of stating the obvious, the cost of pursuing litigation influences the decision about where to file a lawsuit. Those who contemplate litigation outside the lawyer's home jurisdiction must consider the cost of travel, making court appearances, conducting discovery, retaining local counsel, and covering witness expenses. For personal injury lawyers whose compensation depends on contingency fees payable for successful litigation, the obligation to front these costs may effectively foreclose out-of-state litigation.[212] Indeed, for much of the twentieth century, the plaintiffs' bar lacked the resources to practice on a national or regional scale.[213] But the world looks very different today. Apart from the wealth of the members of the plaintiffs' bar (attributable in part to success in tobacco and asbestos claims),[214] alternative litigation finance

210. Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENV'T L. & POL'Y REV. 123, 124 (2001) [hereinafter Erichson, *Defendant Advantage*].

211. *Id.*; Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387, 389–90 (1999).

212. *See* Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISCOURSE 110, 113–14 (2013) ("Lawyers might hit a dry patch where cases would not settle, experience a string of bad luck when the other side unexpectedly prevailed, or take on a case that met stiffer resistance and required more expensive inputs than they had reasonably anticipated.").

213. *See* Erichson, *Defendant Advantage*, *supra* note 210, at 125 (describing the relationship between plaintiffs and defense lawyers as that of David versus Goliath).

214. *Id.* at 129; Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 964 (1993) ("The specialized mass tort plaintiffs' bar that emerged during the 1980s has accumulated capital as a result of its success in litigating earlier mass claims, and is skillful and aggressive in identifying new investment opportunities.").

arrangements allow plaintiffs' lawyers to pursue more complex claims in favorable forums—despite the expense of doing so.[215]

Before the rise of third-party litigation finance, plaintiffs' lawyers first sought funding from other well-financed practitioners in the field, increasing coordination and expanding the availability of resources to conduct large-scale litigation.[216] Because this strategy was limited by the financial capacity of other plaintiffs' lawyers and firms, lawyers sought funding from third parties, including banks, that offered litigation loans secured by a lawyer's personal assets and, more significantly, lawyer lending groups specifically designed to finance litigation costs.[217] These litigation funding firms most commonly provide non-recourse loans, which are contingent on case success, meaning that a party must repay the loan with interest only if they succeed in the litigation.[218] In the first wave of third-party funding, loans were traditionally limited to one-off, single plaintiff cases, often personal injury claims.[219] Now, litigation funding has expanded to the commercial market and taken on a new character focused on financing a portfolio of matters for "corporate litigants, including corporate *defendants*, classes (in class action cases), and individual plaintiffs in non-personal injury cases."[220]

These new financial tools have markedly altered the market for plaintiff-side litigation. One hundred years ago, in Professor Yeazell's telling, a plaintiff "would almost certainly have sought a lawyer engaged in solo practice," the lawyer might agree to handle the case on a contingency fee basis, and the lawyer's practice would be "thinly capitalized."[221] On account of minimal resources and funding, a plaintiff's lawyer would only pursue suit if the defendant had "significant independent means" or

215. Alec J. Manfre, *The Debate Over Disclosure in Third-Party Litigation Finance: Balancing the Need for Transparency with Efficiency*, 86 BROOK. L. REV. 561, 562–63 (2021); Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J. L. ECON. & POL'Y 613, 621 (2012) ("The problem is that in a zero-financing world, financial barriers exclude based on socioeconomic status, not on the strength of litigants' claims."); Joshua G. Richey, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489, 500 (2013) ("Third-party financing permits plaintiffs to off-load risk onto third-party funders, which could allow plaintiffs to test nonmeritorious claims.").

216. Erichson, *Defendant Advantage*, *supra* note 210, at 129 (describing the coordination among plaintiff law firms to finance successive mass torts in the 1970s and 1980s).

217. Engstrom, *supra* note 212, at 116.

218. *Id.* at 117; Burch, *supra* note 194, at 1301–02; *e.g.*, *Portfolio Litigation Finance*, BURFORD CAP., https://www.burfordcapital.com/how-we-work/expertise/portfolio-finance/ [https://perma.cc/4UFM-5P27].

219. Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277 (2011).

220. *Id.*; U.S. GOV'T ACCOUNTABILITY OFF., THIRD-PARTY LITIGATION FINANCING 12 (2022) ("Westfleet Advisors reported that in 2021, 59 percent of new capital commitments for the funders that provided data went to portfolio agreements.").

221. Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 184–85 (2001).

insurance, which naturally limited the number of suits filed and where they were filed.[222] Put simply, neither plaintiffs, nor their lawyers, had the resources to file suits in faraway forums to gain a competitive advantage over the defendant.

That has changed, at least for members of the national plaintiffs' bar.[223] For one thing, plaintiffs' lawyers can seek out potential plaintiffs through improved advertising and communication methods.[224] Further, the ability to pursue a case to trial, especially with a non-recourse loan that is contingent on case success, expands the range of matters available to plaintiffs' lawyers. As a result, plaintiffs may bring suit in courts of states that have no connection to the underlying litigation or cause of action but have a reputation for jury generosity to personal injury claimants. Mallory may have filed suit in Pennsylvania to secure a more generous jury; Madison County, Illinois similarly attracts litigation due to its reputation as a "jackpot jurisdiction."[225]

Alternative litigation finance (ALF) arrangements can shift the distribution of power in mass litigation. A defendant may be more willing to engage in settlement discussions where the plaintiff's attorney has the capacity to continue the costly litigation process.[226] These funding arrangements also empower plaintiffs to reject settlement offers that are not representative of the merit of the underlying claim.[227] In this way, alternative

222. *Id.* at 185.

223. It remains undetermined whether the availability of alternative litigation financing will actually lead to an increase in the number of lawsuits filed by plaintiffs' lawyers and what that increase will look like. As Steven Garber notes, "To the degree that these funds are used to take on more clients than they otherwise would, this will tend to increase the volume of litigation. Other uses of loans from ALF suppliers imply, however, no effect on the number of lawsuits filed." STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS 30 (2010).

224. Plaintiffs' lawyers commonly outsource advertising and marketing to identify potential plaintiffs to marketing and other third-party agencies. *See* Sohom Mukherjee & Chintan Zalani, *The Current State of Legal Marketing: Statistics 2024*, ON THE MAP LEGAL MKTG. (July 18, 2024), https://www.onthemap.com/law-firm-marketing/stats/ [https://perma.cc/6E3K-KMAT] (stating that 83% of law firms hire external marketing firms to handle advertising and marketing).

225. Victor E. Schwartz, Mark A. Behrens & Kimberly D. Sandner, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J. L. & POL'Y 235, 235 (2004). In addition to being perceived as a generally favorable jurisdiction for plaintiff's claims, plaintiffs might seek out specific forums for a number of more specific reasons. For example, plaintiffs will often seek out jurisdictions that apply the *Frye* test for experts, rather than *Daubert*, because it is seen as a lower standard for the admission of scientific testimony. *See* Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 472 (2005) (describing the *Daubert* test as a "potent weapon of tort reform").

226. GARBER, *supra* note 223, at 32 ("[A] defendant who knows that the plaintiff has ALF might perceive a consequent decrease in the defendant's bargaining power . . . and as a result be more prone to settling.").

227. Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J. L. & SOC. PROBS. 451, 466 (2012).

financing schemes not only empower plaintiffs' lawyers to pursue riskier and more complex cases, but they also contribute to the growing accumulation of wealth and resources on the plaintiffs' side by expanding their capacity to assume litigation risk.[228]

2. Increased Coordination.—At the beginning of the twentieth century, the vast majority of plaintiffs' lawyers were solo practitioners, responsible for finding and funding their own cases.[229] Though this still remains a dominant model of practice for plaintiffs' lawyers, there has been a significant shift toward firm practice, whether in the form of small or mid-sized firms.[230] By combining forces with other lawyers, plaintiffs' lawyers "hedge their bets" with complex challenging cases while also pursuing more run-of-the-mill litigation that keeps the practice afloat.[231] Although firm practice increases overhead costs, it does allow for plaintiffs' lawyers to engage in different types of litigation, including litigation that might occur outside their immediate geographic market.

Before litigation begins, plaintiffs' lawyers coordinate with one another at the referral stage. For example, one 2004 study of a state found that almost 20% of law firm business came from referrals of other lawyers.[232] Though referrals often came with a fee, many did not require a payment but "simply reflect[ed] one lawyer's desire to direct potential clients to another lawyer who might be able to handle the matter in question."[233] These referral

228. *See id.* at 467 (explaining how ALF resolves the issue that unsuccessful litigation might lead to an attorney unethically coercing a client into an unfavorable settlement to cover the cost of attorneys).

229. Yeazell, *supra* note 221, at 199 n.51 ("In 1971, 52% of U.S. lawyers were solo practitioners. By 1980, 49% were solo practitioners, and in 1995 (the most recent data available), 47% of all lawyers were solo practitioners."). One notable exception to this general principle is the FELA plaintiffs' bar of the early twentieth century. As discussed by Dodge et al., the 1908 Federal Employers Liability Act permitted railroad workers to sue their employer for workplace injuries in any state where the railroad operated. Dodge et al., *supra* note 73, at 1181. This flexibility, in conjunction with "rapid communications [and] speedy travel," led to a significant increase in forum shopping and the development of a specialized plaintiffs' bar to handle FELA cases. *Id.* at 1183–84 (quoting Mooney v. Denver & Rio Grande W. R.R. Co., 221 P.2d 628, 646 (Utah 1950)) (discussing how injured employees were funneled to specific law firms and that the plaintiffs' bar attempted to consolidate FELA cases to particular jurisdictions in a need for geographical concentration). This dynamic is what led, in part, to the development of the doctrine of forum non conveniens in state courts; often employed in situations where out-of-state plaintiffs sued for an injury sustained in another forum. *Id.* at 1181–85.

230. Yeazell, *supra* note 221, at 199; Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing with the Possible but Not Certain*, 60 DEPAUL L. REV. 337, 361 (2011).

231. Yeazell, *supra* note 221, at 200.

232. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 58 (2004).

233. *Id.* at 59. Some scholars have raised the question of whether the collegiality and coordination in plaintiff referral networks may decrease in light of the increased availability of non-

relationships transfer representation to another lawyer with the capacity and financial resources necessary to see the litigation through.[234] Referral networks are especially important given the increased specialization of plaintiffs' lawyers, allowing for coordination across lawsuits.[235]

Apart from combining within law firms and through referral processes, plaintiffs' lawyers have also increased coordination across firms, joining forces to advance specific legal theories and win cases. For example, in the asbestos litigation context, a small group of plaintiff law firms essentially cornered the market, working with one another to develop a coordinated and cohesive litigation strategy.[236] And in the tobacco context specifically, a group of plaintiffs' lawyers formed the *Castano* group, comprising over sixty law firms, "each of which contributed at least $100,000 toward expenses."[237] Though the action was ultimately unsuccessful, these significant efforts in coordination facilitated the filing of one of the largest nationwide class actions.

Coordination among plaintiffs' lawyers and firms includes the exchange of information via "information clearinghouses." In these litigation industry

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recourse litigation finance, allowing plaintiffs' lawyers who may not otherwise specialize in a particular area to take on increasingly complex and risky litigation. *See* Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 380–81 (2014). It is also important to note that some plaintiffs' lawyers express ambivalence and hostility toward referral efforts, especially those that come with high referral fees and little collaboration on the part of the referring attorney. For example, one plaintiffs' lawyer reported:

> I think referring attorney fees are a disaster. I hate them. They are typically not earned. It is a ruse to pretend that they are earned. I do have lawyers, no question about it, who really do a big service to me in the handling, the co-counseling, the co-mutual professional responsibility of a client, but they are the exception, they are not the norm . . . .

Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 253 (2007).

234. Engstrom, *supra* note 233, at 380 ("Over the past half-century, plaintiffs' lawyers have increasingly joined together in order to finance big-ticket litigation. They have also developed sophisticated referral networks to channel complex cases to other more experienced, better financed practitioners."); Parikh, *supra* note 233, at 261 ("[A]ttorneys practicing in the high-end sector often secure larger, more complex cases from low-end attorneys who do not feel comfortable, or do not have the resources to handle larger cases.").

235. Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 897 ("[P]laintiffs' attorneys often specialize in a particular mass tort. For example, fewer than fifty law firms specialize in asbestos litigation, and only a few are dominant."); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–89 (2000) [hereinafter Erichson, *Informal Aggregation*]; Yeazell, *supra* note 221, at 199.

236. STEPHEN J. CARROLL, DEBORAH HENSLER, JENNIFER GROSS, ELIZABETH M. SLOSS, MATTHIAS SCHONLAU, ALLAN ABRAHAMSE & J. SCOTT ASHWOOD, ASBESTOS LITIGATION 23 (2005) ("By 1985, ten firms represented one-quarter of the annual filings against major defendants. By 1992—about 20 years after the landmark *Borel* decision—just ten firms represented half of the annual filings against major defendants.").

237. Erichson, *Defendant Advantage*, *supra* note 210, at 131.

groups, lawyers pool resources to develop specific theories, exchange medical and scientific information, conduct legal research, and share information on general strategies for success.[238] In addition to cooperation at the litigation stage, plaintiffs' lawyers also coordinate by separating tasks and splitting fees. For example, in some mass tort litigation, one firm will handle the "national litigation issues," like discovery and proving liability, while another firm deals with "plaintiff-specific issues," like damages and causation.[239]

3. Advertising: Identifying Potential Claimants.—One hundred years ago, injured victims sought representation in face-to-face conversations that they initiated. Of course, this still happens and accounts for a significant portion of plaintiff-side work. But another strategy has developed, tailored for use in mass litigation: lawyers use advertising to seek out the ideally situated plaintiff. Since the Supreme Court struck down restrictions on attorney advertising in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*[240] as an unlawful abridgment of commercial speech,[241] attorney advertising has skyrocketed, with $971.6 million spent on television advertising alone in 2021.[242] And now, with increased access to sustainable capital from prior litigation success and third-party funding, plaintiffs' lawyers can engage in targeted advertising for the perfect plaintiff in a specific jurisdiction, a type of forum shopping that occurs well before litigation begins.[243]

238. Hensler & Peterson, *supra* note 214, at 1026; Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365, 390 (2006) (finding that asbestos plaintiffs were 30% more likely to win at trial in West Virginia than in Pennsylvania, for example); Erichson, *Informal Aggregation*, *supra* note 235, at 394 n.41 ("Each month, ATLA publishes classified advertisements in which lawyers seek to contact lawyers handling related cases. One recent notice, for example, sought 'info re Slim Fast causing diabetes/gall bladder problems,' and another sought 'information regarding [driving range] patrons being injured by ricocheting golf balls.'").

239. Stier, *supra* note 235, at 899.

240. 471 U.S. 626 (1985).

241. *Id.* at 638.

242. *Study: Trial Lawyers Spent $1.4 Billion on Advertising in 2021*, AM. TORT REFORM ASS'N (Feb. 22, 2022), https://www.atra.org/2022/02/22/study-trial-lawyers-spent-1-4-billion-on-advertising-in-2021/ [https://perma.cc/3HTQ-4JTS].

243. Tiger Joyce, *INSIGHT: Advertising by Plaintiffs' Firms Driving High Class Action Settlement Rate*, BLOOMBERG L. (Apr. 19, 2019, 3:01 AM), https://news.bloomberglaw.com/us-law-week/insight-advertising-by-plaintiffs-firms-driving-high-class-action-settlement-rate [https://perma.cc/RU7X-4DZG] ("Plaintiffs' lawyers also are strategic in the placement of their advertisements. They target jurisdictions with plaintiff-friendly judges, where they know their lawsuits will be allowed to proceed—what we refer to as 'Judicial Hellholes.'"); AM. TORT REFORM ASS'N, *supra* note 242 (finding that six of the top ten states for money spent in attorney advertising in 2021 were also considered "judicial hellholes" by the American Tort Reform Foundation).

With the ability to advertise for potential claimants, plaintiffs' lawyers can now amass a large portfolio of claims and then negotiate with the defendant across all of those claims, increasing their bargaining power.[244] As a general matter, modern mass litigation and some prolific mass torts—like asbestos, the Dalkon Shield, and tobacco—are entirely dependent on the ability of lawyers to advertise to millions of potential plaintiffs.

As the economy has grown and corporations now market products throughout the country, plaintiffs' lawyers have far more available forums. Indeed, lawyers can target specific forums at the outset of a new mass tort by choosing where to advertise and what plaintiffs to represent.[245] Groups known as aggregators often perform this work, recruiting potential plaintiffs before directing them to the law firm that will conduct the actual litigation.[246] Law firms can also serve as "referring lawyers," signing up plaintiffs who respond to their advertising efforts, and then referring those claims to the law firm that will eventually conduct the litigation for a share of the fee.[247]

C. Consequences for Plaintiff Forum Shopping Determinations

As Professor Yeazell's analysis of the historical context makes clear, much has changed between the turn of the twentieth century and the modern era for plaintiffs' lawyers.[248] In the way that they find and fund cases, coordinate with one another to assure the greatest chance for success, and seek out specific plaintiffs to represent, plaintiffs' lawyers have the resources and the incentives to select favorable litigation venues. Prior to the influx of capital and ease of coordination that shapes forum selection decisions today, plaintiffs in the *Pennoyer* era were naturally limited in their forum selections. For example, in the nineteenth and early twentieth centuries, the prospect of conducting a trial in a forum removed from the place where the events occurred might have appeared to threaten prohibitive expense. Not so today.

One can see these forces at work in such recent cases as *Bristol-Myers Squibb Co. v. Superior Court of California*. In *Bristol-Myers*, a group of

244. CARROLL ET AL., *supra* note 236, at 23 (noting that in addition to common advertising practices, "plaintiff law firms began to promote mass screenings of asbestos workers at or near their places of employment"); Joyce, *supra* note 243 (noting that "the sheer volume of cases that a defendant faces . . . now drives corporate litigation strategy").

245. *See* Joyce, *supra* note 243 (finding that plaintiffs' lawyers "target jurisdictions with plaintiff-friendly judges").

246. AM. TORT REFORM ASS'N, LEGAL SERVICES ADVERTISING: CALIFORNIA, QUARTERS 1-2, at "Introduction & Background" (2022), https://www.atra.org/white_paper/legal-services-advertising-spending-california-quarters-1-2-2022/ [https://perma.cc/LSW3-9W93] ("Much of this advertising is conducted by aggregators: businesses that recruit potential plaintiffs and then sell their information to law firms.").

247. Hensler & Peterson, *supra* note 214, at 1025–26.

248. *See supra* notes 221–22 and accompanying text.

plaintiffs sued a pharmaceutical company (BMS) in California state court.[249] The plaintiffs brought a products liability claim, alleging that BMS's drug, Plavix, a prescription blood thinner, was harmful to their health.[250] BMS had sold Plavix in California, but its development, manufacturing, and marketing efforts all took place outside the state.[251] Among the 678 plaintiffs, only eighty-six were California residents. The nonresidents did not allege that they obtained Plavix as a result of BMS's limited activities in California, only that they suffered a similar injury to the resident class members.[252] The Supreme Court concluded that California courts could not assert personal jurisdiction over BMS, at least as to the claims by plaintiffs with no affiliating ties to the state.[253] The decision thus reflects both the capacity of a well-financed plaintiffs' bar to steer litigation to a favored forum and the Court's use of personal jurisdiction constructs to constrain such forum selection.[254] Intriguingly, though, the Court framed its analysis as designed to ward off undue burdens on the defendant.

In sum, the choices available to lawyers today differ markedly from the lawyering and forum choices common during the *Pennoyer* regime. As Part II demonstrated, the *Pennoyer* era relied on formal, territorial rules that could facilitate widespread forum shopping. But lawyers tended to choose forums with a connection to the dispute or the plaintiff's residence. Plaintiffs were constrained by limited resources and often sought out local lawyers to file a complaint before serving the defendant with process. Now, due to a variety of factors, plaintiffs' lawyers face fewer constraints about where they choose to file suit. In mass tort litigation, where the stakes are high and plaintiffs' lawyers have the resources to manage litigation in a distant forum, lawyers rationally pursue claims in the states that have favorable law and jury pools. Whatever functionality *Pennoyer* may have offered through the

249. Bristol Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255, 258 (2017). In *Bristol-Meyers*, the Court sought to close the door it opened for the proliferation of multi-state mass actions in *Shutts*. *See* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. REV. 1313, 1323 (2005) ("*Shutts* removed the doubt about the propriety of jurisdiction over absent class members in damages class actions under Rule 23(b)(3), the primary form of multi-state class actions."); Bradt & Rave, *supra* note 193, at 1284 ("[A]fter *Bristol-Myers*, it is difficult to see how the Kansas court could have had personal jurisdiction over Phillips Petroleum for the vast majority of the class members' claims.").

250. *Bristol-Myers*, 582 U.S. at 259.

251. *Id.*

252. *Id.*

253. *Id.* at 265.

254. Case documents reveal that BMS was concerned less with the burden of litigation in California than with its "plaintiff-friendly" courts. Bradt & Rave, *supra* note 193, at 1278. For example, in its initial petition for a writ of certiorari, BMS cautioned the Court that leaving the California decision intact would "result in California state courts becoming even more of a destination for plaintiffs looking to shop suits to friendlier forums." Petition for Writ of Certiorari at 28, *Bristol-Myers*, 582 U.S. 255 (2017) (No. 16-466).

implicit constraint of limited forum selection, it can no longer assure the choice of an interested forum.

IV. Toward a Renewed Focus on Plaintiff's Connection to an Interested Forum

In *International Shoe*, the Court expanded the power of the states to exercise jurisdiction over corporations engaged in a national market economy. But the minimum contacts and at-home standards that now govern these assertions of jurisdiction have come to focus almost entirely on the defendant's affiliation with the forum state. Sensing that something has been lost, some members of the Court and some commentators have argued for a return to the *Pennoyer* regime of fixed and presumedly predictable territorial categories. But as Part III demonstrates, making a return to *Pennoyer*-era territorialism is unrealistic.

We propose instead that the Court restore a more meaningful evaluation of the plaintiff's connection to the forum state in the specific jurisdiction analysis. We begin in subpart A by showing that modern assertions of specific jurisdiction have come to emphasize the defendant's purposeful contacts with the forum state to the exclusion of the forum state and plaintiff interests. After demonstrating the way the Court's threshold requirement of purposeful availment came to dominate its personal jurisdiction analysis, we propose to recenter the Court's focus on the forum-interest factors originally identified in *International Shoe* and implicitly present in *Pennoyer*'s territorial approach to personal jurisdiction.[255] subpart B proposes a new framework to evaluate assertions of personal jurisdiction—one which better accounts for the forum state interests that favor jurisdiction. subpart C describes how this new test might work in practice.

A. The Problem: A Disappearance of the State Interest

Although the *Pennoyer* regime relied on geographic constraints and a local market for plaintiff-side representation that often assured an interested forum, *International Shoe* made the forum's interest an explicit part of its analysis. Writing for the Court, Chief Justice Stone loosened jurisdictional constraints by recognizing that a broader range of contacts with the forum state might help satisfy the "traditional notions of fair play and substantial justice" on which jurisdiction was thought to rest.[256] Under this more flexible

255. Jacobs, *supra* note 3, at 1624 ("The Territorial Model, contrary to the views of critics, is not one focused on 'accentuating the defendant's interests' but instead is focused on accentuating the interests of states in protecting and regulating the people and property within their borders." (citation omitted)).

256. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

approach, an array of factors aside from strict corporate "presence" in the forum state would inform the due process calculus. Even where the corporate defendant did not maintain systematic contacts with the forum state, rising to the level of corporate presence, the state could still assert an interest in adjudicating disputes that arose from corporate activities that invoke "the benefits and protection of the laws of that state."[257] *International Shoe* did not abandon *Pennoyer*'s conception of limited state power but moderated those limits by taking account of forum-state interest.

The importance of the state interest was reiterated a decade later in *McGee v. International Life Insurance Co.*,[258] where the Court upheld the exercise of jurisdiction over an out-of-state corporation that contracted a single life insurance policy within the forum state.[259] After entering into an agreement to assume Empire Mutual's insurance obligations, International Life mailed a reinsurance certificate to Ms. McGee's son in California, offering to insure him under the same policy he previously held with Empire Mutual.[260] When her son passed away, McGee sent proof of death, but International Life Insurance refused to pay out on the policy. McGee sued in California to collect the proceeds of her son's life insurance policy,[261] ultimately securing a default judgment.[262]

McGee sought to enforce the judgment in the defendant's home, but the Texas state courts denied full faith and credit to the California judgment for want of personal jurisdiction.[263] McGee's son was International's only California client, and the company did not conduct any other business in the state.[264] Despite the singular nature of the defendant's connection to California, the Supreme Court reversed, upholding jurisdiction in part because "California [had] a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[265] California residents would be at a disadvantage if they were forced to "follow the insurance company to a distant State" in order to recover on a policy.[266] So although International's contacts with California were fairly minimal, "[i]t is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State."[267]

257. *Id.* at 319.
258. 355 U.S. 220 (1957)
259. *Id.* at 223–24.
260. *Id.* at 221.
261. *Id.* at 221–22.
262. *Id.* at 221.
263. *Id.*
264. *Id.* at 222.
265. *Id.* at 223.
266. *Id.*
267. *Id.*

Later that same term, however, the Court in *Hanson v. Denckla*[268] disregarded forum state interests while emphasizing defendant's contacts.[269] In a complicated dispute over succession, Chief Justice Warren held that the "territorial limitations on the power of the respective States" deprived the Florida court of personal jurisdiction over the Delaware trustee and vitiated the Florida judgment.[270] The Court explained that the Delaware trustee had no purposeful contacts with the state of Florida aside from the settlor's residence in the state; "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[271] Distinguishing *McGee* as a case in which California enacted special legislation to carry out its "'manifest interest' in providing effective redress for citizens" injured by these insurance companies, the Court found no similar "manifest interest" on the part of Florida.[272]

As others have observed, whereas in *McGee*, the Court "focused on the *relationship* between the defendant, the plaintiff, and the forum,"[273] the Court narrowed its analysis in *Hanson*, disregarding the interests of the other parties and only "considering the acts of the trustee."[274] The *Hanson* Court made the defendant's contacts a necessary condition for the assertion of jurisdiction, rather than one factor to be considered alongside forum state interest.[275] Subsequent cases confirm this emphasis on defendant's contacts. Thus, in *World-Wide Volkswagen Corp. v. Woodson*,[276] the Court acknowledged forum interest as a relevant factor but one that comes into play only after a finding that the defendants' forum contacts pass the purposeful-availment threshold.[277] The mere foreseeability that an automobile purchased on the East coast might find its way into an accident in Oklahoma did not meet this threshold inasmuch as the dealer and distributor in question did not seek to serve the Oklahoma market. Neither defendant delivered "its products into the stream-of-commerce" with the expectation they would be purchased and

268. 357 U.S. 235 (1958).

269. *See id.* at 252 (distinguishing *McGee* because the agreement was entered without any connection to the forum state, and because none of the acts "bear the same relationship").

270. *Id.* at 251.

271. *Id.* at 253.

272. *Id.* at 252.

273. Freer, *supra* note 64, at 587.

274. *Hanson*, 357 U.S. at 254.

275. *Id.* at 251 ("However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him.").

276. 444 U.S. 286 (1980).

277. *Id.* at 292.

utilized in Oklahoma, so Oklahoma could not assert jurisdiction over the parties.[278]

By centering the defendant in its personal jurisdiction inquiry, the Court has reached some dubious results. In *J. McIntyre Mach. v. Nicastro*, for example, the Court held that New Jersey lacked personal jurisdiction over a foreign defendant, despite the fact that the plaintiff lived in the forum state, the plaintiff's injury occurred in the forum state, and the product that caused the injury was purchased in the forum state.[279] Though the plurality opinion acknowledged New Jersey's interest in this case as "strong," that factor was irrelevant unless the defendant had sufficiently substantial contacts with the forum state.[280] The plurality opinion confused the stream-of-commerce question it had agreed to resolve.[281] As Justice Ginsburg noted in dissent, New Jersey's assertion of jurisdiction did not threaten to intrude upon the sovereignty of its sister States, as "the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim."[282]

Forum interests also go missing in the analysis of various forms of general jurisdiction. Thus, in both *Goodyear* and *Daimler*, the determination of a corporation's at-home status turns entirely on the nature of the defendant's contacts with the forum state. The Court deems a corporation at home only in its principal state of business and its state of incorporation;

278. *Id.* at 298.

279. J. McIntyre Mach., Ltd v. Nicastro, 564 U.S.873, 886 (2011).

280. *Id.* at 887.

281. In *Nicastro*, the defendant manufacturer had surely targeted the entire United States for sales of its scrap metal machines, thus bringing it squarely within the framework of *Worldwide*'s apparent approval of jurisdiction over foreign manufacturers who sell products in the United States. Earlier cases, addressing the stream of commerce theory, had done so in connection with claims against component manufacturers (not final manufacturers, like *J. McIntyre*). *See* Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 106 (1987) (rejecting jurisdiction over a defendant corporation that manufactured tire valves for sale to tire manufacturers); Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 767 (Ill. 1961) (upholding jurisdiction over an out-of-state corporation who manufactured the safety valve that was ultimately installed in a water heater that harmed the plaintiff). Some characterize the *Nicastro* decision as "an open invitation to defense interests to exploit" the formal distinction between the contacts of the manufacturer and those of the distributor. *See* Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 475–76 (2011) ("It now appears that a corporate defendant may be able to structure its distribution system and send products to all fifty states, while avoiding the reach of any, or almost any, individual state's courts."); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 389 (2012) ("The Court's controlling opinions thus remained mired in the past instead of acknowledging that prior jurisdictional doctrine should be interpreted to accommodate underlying federalism policies in a globally interconnected world."); Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 UNH L. REV. 65, 116–17 (2015) ("Clearly, McIntyre (UK) did not affirmatively choose to submit itself to New Jersey's adjudicatory authority. Then again, the same could be said of pretty much all of the defendants since *International Shoe* over whom the Court found personal jurisdiction.").

282. *Nicastro*, 564 U.S. at 899 (Ginsburg, J., dissenting).

forum interests related to the nature of the plaintiff's claim play no part in the analysis. Similarly, in the recent decision in *Mallory*, the Court focused on the nature of the defendant railroad's consent to jurisdiction as part of its registration to do business in the state. Its analogy to tag jurisdiction over individual defendants, which the plurality restated in defense of a territorial approach to evaluating jurisdiction, confirms the *Mallory* Court's emphasis on the defendant.

To be sure, the states in which firms incorporate, register to do business, and establish their principal place of business can surely assert regulatory interests in relation to those firms. To that extent, forum interest still has some explanatory power as to the scope of general jurisdiction. But the absence of any inquiry into the forum's interest in the plaintiff's specific claim (inherent in any assertion of general jurisdiction) sets the stage for the sort of forum selection that plaintiffs can now exploit for strategic advantage. In *Mallory* itself, a Virginia resident sued in Pennsylvania apparently to take advantage of the hospitality of Pennsylvania courts and juries. It was precisely with a view toward limiting the ability of the plaintiffs to make these forum choices that the Court chose to narrow the doctrine of general jurisdiction in *Goodyear* and *Daimler*. Even as narrowed, however, the nature of the defendant's connection to the forum state has come to play a central role in assessing both general and specific jurisdiction.

B. A Path Forward: Reinvigorated Emphasis on Forum State Interest

In our view, jurisdictional law should recenter the forum state's interest in the adjudication of the plaintiff's claim. Such an approach would help ward off some aggressive forms of forum selection and ensure that plaintiffs like Nicastro have a convenient forum in which to adjudicate their claims. We do not believe the law can restore forum interest through a return to the territorial formalism of *Pennoyer*. As we demonstrated in Part II, forum interest was an implicit feature of the *Pennoyer* regime due in part to the geography of an essentially local market for plaintiff-side representation. But *Pennoyer*'s territorial rules of general jurisdiction offer no assurance of forum interest in today's legal market; to the contrary, expanded general jurisdiction leads to more aggressive forum choice, as *Mallory* and *Daimler* confirm. We thus conclude that the *International Shoe* test, with a renewed focus on forum interest, offers the best framework for evaluating a state court's exercise of specific jurisdiction.[283]

283. Some scholars have argued that the Court's decision in *Ford Motor* is a return to the original full-fledged fairness analysis from *International Shoe* that this Article supports. For example, Professor Richard Freer argued:

Turning then to the particulars, we propose a test of specific jurisdiction that combines elements of *McGee* and *International Shoe*:

> To determine whether an assertion of specific jurisdiction is proper, a court must consider two factors without according dispositive weight to either one. First, does the claim have a "substantial connection with [the forum state]" such that the state may be considered to have a "manifest interest" in the litigation? [284] And second, does the defendant have contacts with the forum state, such that the exercise of jurisdiction would not be so inconvenient to offend "traditional notions of fair play and substantial justice"?[285]

Such a renewed focus on forum interests would take a more explicit account of the plaintiff's role in forum selection and the nature of the forum's interest in the adjudication of the dispute. It would accord greater weight to forum interests in cases like *Nicastro* and enable courts to moderate jurisdictional assertions to adjust to a dynamic and increasingly mobile plaintiffs' bar.

A balancing test combines the virtue of identifying salient considerations with the vice of risking some uncertainty in result. In the procedural due process context, for example, the Court has long adhered to the tripartite balancing test established in *Mathews v. Eldridge*, [286] considering the private interest to be affected, the risk of erroneous deprivation of a protected interest through the current procedures used and the value of additional procedural safeguards, and the government's interest in maintaining the status quo.[287] Because personal jurisdiction poses issues of due process that implicate individual liberty and property interests, as the Court explained in *Ford* and *Mallory*, a balancing test that considers the true range of factors at play may lead to more functional results. The challenge lies in offering clarity about how to strike the proper balance, such that

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> Methodology aside, the important point in *Ford* is that the fairness factors were on the table—not to defeat specific jurisdiction but as arguing in favor of its exercise. Remarkable to say, *Ford* is the first decision since *McGee*—sixty-three years earlier—in which the Court relied upon fairness factors to *support* jurisdiction. And the classic list of fairness factors was on display.

Freer, *supra* note 64, at 603.

284. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

285. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *McGee*, 355 U.S. at 224 ("Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process."). While we do not analyze at-home jurisdiction at length, we observe that the states in question tend to have substantial regulatory interests in at-home corporate entities. In addition, at-home jurisdiction provides a forum of last resort somewhat comparable to what courts viewed as important in the *Pennoyer* era.

286. 424 U.S. 319 (1976).

287. *Id.* at 335.

litigation over personal jurisdiction does not occasion the sort of case-by-case interest balancing that critics of the *Mathews* test have decried.

To achieve these goals of clarity and simplicity, our proposal to return forum state interests to the center of specific jurisdictional analysis draws on prior cases, including *McGee* and *International Shoe*.[288] But while forum interests continue to play a significant role in motions to transfer litigation to a more convenient forum,[289] in the choice of applicable law,[290] and in evaluations of the constitutionality of such choices of law, they no longer play a consistent role in assessments of personal jurisdiction.[291] Our proposal would address that failure, helping to ensure a consistent focus on the place where the claim arose, the domicile or residence of the plaintiff, and the location of witnesses and documents—all factors that inform the forum state's interest in adjudication.

The plaintiff's domicile may deserve special weight, having been regarded since the dawn of the *Pennoyer* regime as "a fact of high significance."[292] Citizens of the forum state rightly claim access to a convenient forum for the vindication of their claims and states have an obvious interest in providing a forum for such purposes. Indeed, the

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288. *McGee*, 355 U.S. at 223; *Int'l Shoe*, 326 U.S. at 316.

289. 28 U.S.C. § 1404(a); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947). In *Gilbert*, the Court noted:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Gilbert, 330 U.S. at 508–09.

290. *See, e.g.*, Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1013 (Mont. 2000) ("[I]t appears that Montana, as the domicile of the Byrds, has a significant relationship to the issues raised by this dispute. This is because, in general, the purpose of a state's product liability law is to regulate purchases made within its borders and to protect and compensate its residents."). On the use of forum interest as the measure of a state's constitutional power to assert legislative jurisdiction under the Due Process and Full Faith and Credit clauses, see Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 815–18 (1985).

291. *See* Allan Erbsen, Wayfair *Undermines* Nicastro*: The Constitutional Connection Between State Tax Authority and Personal Jurisdiction*, 128 YALE L.J.F. 724, 737–38 (2019) (describing the Court's inconsistent consideration of state interests between its decisions in *Nicastro*, where the Court found that the defendant's liberty interest outweighed the state's regulatory interest, and South Dakota v. Wayfair, 138 S. Ct. 2080, 2099 (2018), where the Supreme Court upheld a state statute requiring internet sellers to collect and remit sales tax on purchases made by in-state residents).

292. *See, e.g.*, Canadian Pac. Ry. Co. v. Sullivan, 126 F.2d 433, 439–40 (1st Cir. 1942) (holding that the residence of the plaintiff is "a fact of high significance" (quoting Int'l Mining Co. v. Columbia Transp. Co., 292 U.S. 511, 520 (1934))).

expansion of long-arm jurisdiction through the adoption of state statutes in the latter half of the twentieth century clearly expresses the importance of forum state interests. To be sure, plaintiffs must often leave home to litigate, especially when they pursue the defendant for injuries they sustained outside their state of residence. We do not mean to rule out personal jurisdiction in those cases. But when plaintiffs stay home to litigate claims against non-resident defendants, their claim implicates both the interest of the plaintiff in a convenient forum and the interest of the forum state.

Weighing those factors, *International Shoe* and *McGee* upheld jurisdiction over defendants with less substantial forum-related contacts than *Pennoyer* had required. When plaintiffs stray far from home, by contrast, the argument for the functionality of their forum selections becomes harder to sustain. Returning to the more holistic *International Shoe* approach, both the defendant's contacts and the plaintiff's contacts with the forum state deserve consideration in the evaluation of jurisdiction.[293]

This proposed test better accounts for the practical decisions that drive modern forum determinations, while still staying true to the Court's original principle of fundamental fairness in *International Shoe*. To ensure that functional forum choices are affirmed, without narrowing the inquiry to a formalistic evaluation of the defendant's contacts with the forum state, courts should balance the identifiable and concrete forum state interests against the defendant's interest in avoiding baseless and inconvenient assertions of jurisdiction. This will avoid those cases where the plaintiff has filed suit in a forum with no discernable connection to the underlying dispute and still provide courts with the necessary flexibility to account for the forces driving modern forum determinations.

C. Incorporating the Forum State Interest in Practice

Here's how this approach might work in familiar cases. In *Nicastro*, for example, the foreign corporate defendant may have had somewhat attenuated contacts with the state of New Jersey, but the plaintiff had an established domicile and workplace in the state, giving rise to substantial state interests.[294] Allowing the plaintiff to pursue the claim in the state of injury thus made eminent good sense. Whatever burden the defendant manufacturer confronted would result from its decision to market its scrap metal machines

293. Interestingly, prior to 1954, no state permitted dismissal under forum non conveniens if at least one of the parties was an in-state resident. Dodge et al., *supra* note 73, at 1185 (describing the turning point in forum non conveniens when New Jersey "explicitly permit[ed] forum non conveniens dismissals of cases involving in-state defendants"). This seems to suggest, at least to some degree, a recognition by post-*International Shoe* courts that the in-state status of either party conferred upon the forum state some degree of interest in the litigation.

294. J. McIntyre Mach., Ltd v. Nicastro, 564 U.S. 873, 878 (2011).

in the United States. Firms buy liability insurance to cover the entirely predictable cost of such jurisdictional assertions.

In *Bristol-Myers*, by contrast, many plaintiffs had little connection to the state of California, lessening the argument for the propriety of their forum selection. Within the meaning of *International Shoe* and *McGee*, the absence of any substantial state interest undercut the reasonableness of the assertion of jurisdiction. Of those represented in the mass action, only eighty-six plaintiffs were from California—the other 592 were from thirty-three different states.[295] The non-resident plaintiffs could offer no basis for bringing their claims in California, apart from the courts being generally favorable to their claim. Although it might be argued that California has an admonitory interest in adjudicating claims that defective products were sold within its borders, this interest can be adequately vindicated through suits brought by those who suffer injury in California.

A similar outcome should be reached in *Asahi Metal Industry v. Superior Court of California*.[296] There, California's assertion of jurisdiction over Asahi, a Japanese corporation responsible for manufacturing a valve that made its way into a California resident's motorcycle purchased from a separate maker, failed to implicate any substantial California interest.[297] The plaintiff had already settled his product defect claim with another foreign manufacturer who created the tube that he claimed caused the accident.[298] So, unlike the situation in *Nicastro*, California's interest in a dispute over contribution between two foreign manufacturers was negligible at best.[299] We thus agree with the Court's unanimous view that jurisdiction was properly denied for lack of any continuing state interest.[300]

Our suggested approach helps to clarify the decision to uphold jurisdiction in *Ford Motor*. First, the plaintiffs in both consolidated cases were residents of the states in which they filed suit against Ford.[301] Second, the accidents that led to these lawsuits occurred in the forum states where the plaintiffs filed suit.[302] Both factors strongly support the exercise of specific jurisdiction. As the Court noted in *McGee*, the state has a reasonable interest in providing protection for its citizens against defective and dangerous

295. Bristol-Myers Squibb Co. v. Superior Ct. of Cal., 582 U.S. 255, 259 (2017).
296. 480 U.S. 102 (1987).
297. *Id.* at 114–16.
298. *Id.* at 106.
299. *Id.* at 114.
300. *Id.* at 104, 116.
301. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1028 (2021).
302. *Id.*

products.[303] And third, Ford already operates and engages in regular business within each state, so there is no genuine argument that being sued there would create a significant inconvenience for the defendant.[304]

Conclusion

The decision in *Mallory* reveals a Court divided about the best solution to the confounding nature of personal jurisdiction doctrine. Some Justices would preserve the *International Shoe* framework and the sharp limits on general jurisdiction that have emerged in the past decade. Others would strike off in new directions, possibly informed by an originalism-inspired emphasis on the territorial formalism of the *Pennoyer* regime. *Mallory* itself nicely illustrates these divergent pathways, with some Justices looking for solutions in the more formalistic doctrine as it had developed before *International Shoe* and others content to work within the *International Shoe* paradigm.

In proposing to lend a hand, we offer suggestions to a divided Court. First, we show that *Pennoyer* achieved surprisingly functional results, both because the local market for legal representation naturally restricted forum selection and because the courts often moderated their nominally formal categories to take account of such factors as fairness, forum interest, and litigation convenience. Second, we show that changes in the market for plaintiff-side representation have largely removed the economic barriers that tended to ensure the choice of an interested forum in *Pennoyer*'s heyday. Third, we have suggested that the Court should take a page from *McGee* and restore a more direct assessment of plaintiff and forum-state interests into a test that has come to focus too rigidly on the nature of the defendant's purposeful contacts with the forum.

We acknowledge the allure of the clarity, predictability, and uniformity that courts and commentators often ascribe to regimes with formal rules. One can find that allure reflected in Justice Gorsuch's invocation of the good old days, both in *Ford Motor* and in *Mallory*. But too much has changed to restore the *Pennoyer* regime; plaintiffs' lawyers can exploit any available sources of general jurisdiction, whether they be predicated on the presence of persons, property, or corporate entities. Meanwhile, even the *Pennoyer* Court did not fully embrace the logic of its formalism; property-based quasi in rem jurisdiction was often limited with good reason to contract claims and was otherwise checked through the operation of such doctrines as forum inconvenience and the dormant commerce clause. Restoring the *Pennoyer* regime, in short, would continue to require fine distinctions and a weighing

303. *Cf.* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.").

304. *Ford Motor Co.*, 141 S. Ct. at 1028.

of competing interests, it would stray far from the more familiar doctrinal framework of *International Shoe*, and it would require a significant investment of the Court's time and attention The values of clarity, predictability, and uniformity will be better served through the modest restoration of forum state interests as an important factor in the jurisdictional balance than through the revolutionary restoration of *Pennoyer*-era jurisdictional constructs.

Appendix A: *Grace v. MacArthur* Case Materials

Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959). Review of the Archival Case Materials (2013–2014)*** By Daniel I. Faichney[305]

Many procedure scholars illustrate the implications of tag jurisdiction by pointing to *Grace v. MacArthur*, a diversity action in which an Arkansas district court upheld a summons served on a defendant while he traveled over the forum state on an airplane from Memphis to Dallas.[306] Commentators have called *Grace* "astonishing,"[307]and "extreme."[308] A leading casebook has long described the decision as a "*reductio ad absurdum*" of *Pennoyer*'s rule that personal service in the forum is both sufficient and necessary for personal jurisdiction, notwithstanding the convenience or acquiescence of the defendant.[309] In its analysis on this point, the *Grace* court focused on the question of whether the mid-flight service of process occurred "within the 'territorial limits'" of Arkansas within the meaning of then-current Federal Rule of Civil Procedure 4(f).[310]

But serendipitous presence on a flight over Arkansas was not the defendant's only connection to the state. Indeed, the dispute that produced the *Grace* decision arose from a contract that was negotiated in Arkansas, that concerned both real and intangible property in Arkansas, and that identified Arkansas as one of its principal places of performance. Against this backdrop, Arkansas jurisdiction was far less arbitrary than the *Grace* opinion may suggest.

*** Editor's Note: In an effort to preserve the accuracy of this Review, we have done our best to minimize changes and retain as much of the original writing as possible. As such, some editorial conventions were waived for Appendix A.

305. Daniel I. Faichney, J.D. (cum laude) 2014, Northwestern University School of Law; Partner, Thompson Legal LLC, Chicago, Illinois.

306. Grace v. MacArthur, 170 F. Supp. 442, 443–44 (E.D. Ark. 1959).

307. Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 449 n.302 (2004).

308. Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 259 n.233 (2005); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 403 n.112 (1995); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory After* Burnham v. Superior Court, 22 RUTGERS L.J. 675, 677 n.15 (1991).

309. RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 580 (1st ed. 1989); *see also* RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN & JAMES E. PFANDER, CIVIL PROCEDURE: A MODERN APPROACH 688 (5th ed. 2009) ("A court can enter a valid judgment *in personam* . . . although it does not matter that the defendant was present in the state only briefly. The *reductio ad absurdum* on this score to date is Grace v. MacArthur . . . .").

310. *Grace*, 170 F. Supp. at 443–47.

In this appendix, I tell the story of *Grace v. MacArthur*, drawing on my own review of archival copies of the formal papers that were filed in the litigation (including the complaint, answer, depositions, motion papers, and supporting memoranda). I conducted this review in 2014 as part of a senior research collaboration with Professor James E. Pfander during my third year at Northwestern University School of Law. I reviewed these documents after having secured microfilm copies from the federal district court in Arkansas. I understand that those documents have now been destroyed and neither the National Archives nor the federal district court in Arkansas any longer retains copies of the case files. I made a contemporaneous record of the facts as they were set forth in the documents I reviewed. The account below provides a narrative account of that contemporaneous record and remains accurate to the best of my knowledge, information, and belief.

The Contract Dispute in Grace

That underlying dispute in *Grace* began with a meeting in Little Rock, Arkansas[311] between two businessmen, Preston W. Grace and Ronnie B. Smith. Grace, the founder of White River Propane Gas Company, lived in Arkansas.[312] Smith, a Tennessee resident with offices in Dallas, New York, and Los Angeles, held investments in oil-producing properties.[313] On a few occasions, Smith investigated prospective corporate acquisitions for John D. MacArthur. [314] He also engaged in some oil-related transactions with MacArthur and with Banker's Group (where MacArthur served as President and CEO).[315] In July 1956, Smith met with Grace in Little Rock to discuss the possibility of exchanging Grace's interests in White River Propane for stock in Automatic Washer, a company that MacArthur had recently purchased.[316]

Smith and Grace agreed to pursue the deal.[317] Soon afterward, they drafted a letter of intent to that same effect.[318] Smith then brought the letter from Little Rock to Chicago, where MacArthur executed it. [319] On

311. Transcript of Deposition of Ronnie Smith at 65–66, *Grace*, 170 F. Supp. 442 (Civ. No. B-306) (R.29).

312. Complaint, Exhibit A at 1, *Grace*, 170 F. Supp. 442 (Civ. No. B-306) (R.1); *see also Obituary: Preston W. Grace, Sr.*, ROLLER FUNERAL HOME http://www.rollerfuneralhomes.com /services.asp?page=odetail&id=2849&locid=# [https://perma.cc/GCG2-EZR7].

313. Transcript of Deposition of Ronnie Smith, *supra* note 311, at 8–10.

314. *Id.* at 9–10.

315. *Id.* at 27–30; Transcript of Deposition of John D. MacArthur at 8, 10, *Grace*, 170 F. Supp. 442 (Civ. No. B-306) (R.30).

316. Transcript of Deposition of Ronnie Smith, *supra* note 311, at 35.

317. *Id.* at 35–36.

318. Complaint, *supra* note 312, Exhibit A at 1; *id.* at 70; Transcript of Deposition of Ronnie Smith, *supra* note 311, at 78.

319. *Id.* at 69–71.

November 1, in Little Rock, Grace (and possibly Smith) signed a contract to effectuate the deal; Smith then brought that contract to MacArthur, and MacArthur signed it.[320] Smith and Grace then began to carry out the deal, sometimes by meeting in person in Arkansas. In December, for instance, Smith and Grace met in Little Rock.[321] At that meeting, Grace signed and delivered to Smith some paperwork through which he purchased Bankers Group life insurance policies; in turn, Grace, Smith, and White River completed a transaction leading to the issuance of White River stock to Smith and MacArthur, and to Smith and MacArthur's appointment on White River's Board of Directors.[322] Around that time, Automatic Washer took a financial nose-dive,[323] prompting Smith, in turn, to search for other securities that might satisfy Grace; on at least one occasion, he visited Grace in Batesville to share his findings.[324] In the end, that part of the deal fell through, prompting Grace to initiate his action against Smith and MacArthur.[325]

The Personal Jurisdictional Issues Presented

On the issue of personal jurisdiction, Smith contended that Arkansas had no power over him while he flew over the state en route from Memphis to Dallas, and that, lacking such power, an Arkansas forum could not validly compel him to respond.[326] Grace, critiquing this "antediluvian" argument, cited *International Shoe* in support of the proposition that "the function of today's summons is notice," including, in some cases, notice to parties amenable to jurisdiction but located beyond the forum.[327] He then proceeded to defend the validity of service based on temporary physical presence alone. [328] MacArthur, summoned through substitute service upon the Arkansas Secretary of State pursuant to that state's "doing business" statute,[329] opposed jurisdiction for several reasons, none of which the Court decided in its opinion.[330] Grace responded to these arguments by highlighting

320. *Id.* at 76–79; Complaint, *supra* note 312, Exhibit B at 1.

321. Transcript of Deposition of Ronnie Smith, *supra* note 311, at 84–88.

322. *Id.* at 36–38, 84–88; Complaint, *supra* note 312, at 7–9.

323. Transcript of Deposition of Ronnie Smith, *supra* note 311, at 37–39, 76.

324. *Id.* at 43.

325. Complaint, *supra* note 312, at 9–10.

326. Memorandum Brief of Ronnie Smith at 2, *Grace*, 170 F. Supp. 442 (Civ. No. B-306) (R.5).

327. Memorandum Brief of Plaintiffs at 2–3, *Grace*, 170 F. Supp. 442 (Civ. No. B-306) (R.12).

328. *Id.* at 3–4.

329. Affidavit of Robert V. Light at 1, *Grace*, 170 F. Supp. 442 (Civ. No. B-306) (R.2); Memorandum Brief of John D. MacArthur at 1, *Grace*, 170 F. Supp. 442 (Civ. No. B-306) (R.6); Memorandum Brief of Plaintiffs in Response to Defendant John D. MacArthur at 8, *Grace*, 170 F. Supp. 442 (Civ. No. B-306).

330. *Grace*, 170 F. Supp. at 447 (noting, without deciding, MacArthur's arguments that "1. . . . the contract in suit was completed in Illinois, and that Act 347 of 1947 is not applicable; 2. . . . the

the extent to which the disputed deal, and its partial performance, substantially connected MacArthur (through Smith, his alleged agent) to Arkansas.[331]

In light of the facts underlying Grace's dispute with Smith and MacArthur, it is evident that Arkansas jurisdiction—though predicated as to Smith upon a categorical rule permitting service upon physically present parties—had a valid basis apart from tag service, and would not likely have surprised either Smith or MacArthur. Although Smith may not have anticipated being served mid-air, Arkansas's then applicable "doing business" statute arguably would have permitted Grace to serve him in the same way that he served MacArthur.[332]

The District Court's Decision

One can, of course, be forgiven for assuming that the decision upholding tag jurisdiction was based entirely on the district court's conclusion that the plane was within Arkansas airspace at the time of service. As quoted in the court's opinion, the Marshal's return recited that on July 21, 1958, he served Smith "by personally delivering to him a copy of this writ, together with a copy of the Complaint, on the Braniff Airplane, Flight No. 337, non-stop flight from Memphis, Tenn. to Dallas, Texas, said copy being delivered to him at 5:16 P.M. at which time the said airplane was in the Eastern District of Arkansas and directly above Pine Bluff, Arkansas, in said District."[333] After reviewing the various statutes and treaties that bore on the question, the district court found that the airplane was within the territorial boundaries of

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cause of action alleged in the complaint did not accrue from the negotiation or the making of the alleged contract, and that the statute therefore is inapplicable; 3. . . . a single isolated transaction, such as is here involved, does not constitute 'doing business' or 'performing work or services' in Arkansas within the meaning of the statute; 4. . . . with respect to venue, Act 347, if applied to actions *ex contractu*, is unconstitutional as being discriminatory against non-residents").

331. *See, e.g.*, Memorandum Brief of Plaintiffs in Response to Defendant John D. MacArthur, *supra* note 329, at 2-4; 7-7(a); 1315.

332. Grace makes this argument. *See id.* at 7(a)-14. The gist of it is that (1) the "doing business" statute expressly provided for jurisdiction over nonresident individuals and corporations; (2) *International Shoe* permits such jurisdiction under certain circumstances, and (3) consistent with *International Shoe*, courts in Arkansas and elsewhere have exercised jurisdiction in cases factually similar to the one at bar, albeit cases involving corporations. *Id.* On the third point, noting *International Shoe*'s acknowledgment that a defendant's contacts with the forum are relevant to determining the reasonableness of jurisdiction in the forum, Grace notes that an earlier Arkansas case held that:

> If it was not too inconvenient for the defendant to create and maintain . . . contacts in the state, it would seem logical that it would not be extraordinarily inconvenient for it to be required to defend the plaintiff's alleged cause of action since the use of its product allegedly produced the injury.

Id. at 13 (quoting Green v. Equitable Powder Mfg. Co., 99 F. Supp. 237, 246 (W.D. Ark. 1951)); *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

333. *Grace*, 170 F. Supp. at 443.

Arkansas at the time of service. True, the court acknowledged that commercial planes might one day fly at altitudes too high to qualify as under state control. But not in this case. The court explained: "We have an ordinary commercial aircraft, flying on an ordinary commercial flight in the ordinary navigable and navigated airspace of 1958."[334]

334. *Id.* at 447.

Appendix B: Survey of Pre-*International Shoe* Transient Action Cases

Case	Forum	Plaintiff	Defendant	Action	Outcome
Bissell v.Briggs, 9 Mass. 462 (Mass. 1813).	Massachusetts	Resident. *Id.* at 463.	Non-resident. *Id.*	Enforcing New Hampshire judgment for trespass in Massachusetts court. *Id.* at 469–70.	Tag jurisdiction sustained. *Id.* at 470.
Hart v. Granger, 1 Conn. 154 (Conn. 1814).	Connecticut	Residence not evident from the opinion. *Id.* at 160.	Non-resident. *Id.*	Suit for breach of contract. Breach arose in connection with the sale of shares in the Connecticut Land Company, which purchased land in Ohio, that was originally in the possession of Connecticut, for development. Contract was executed in Connecticut. *Id.* at 154–56.	Tag jurisdiction sustained. *Id.* at 175.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Barrell v. Benjamin, 15 Mass. 354 (Mass. 1819).	Massachusetts	Non-resident. *Id.* at 354.	Non-resident. *Id.*	Suit brought for recovery of a debt arising from a business partnership in Demerara (located outside the United States). *Id.*	Tag jurisdiction sustained. The court conducts an interest analysis. *Id.* at 358.
Downer v. Shaw, 2 Fost. 277 (N.H. 1851).	New Hampshire	Non-resident	Resident. *Id.* at 280.	Plaintiff brought an action to enforce a Vermont judgment against the defendant in New Hampshire. *Id.*	The plaintiff failed to establish that the Vermont court exercised in personam jurisdiction over the defendant through tag, so this judgment can only be considered to bind the defendant' s Vermont property. *Id.* at 280–81. "If the defendant, though residing in this State, went into Vermont temporarily and accidentally, and while there was served with regular process, he would be subject to the jurisdiction of the Court [sic] that issued the process, and the judgment would, under the constitution [sic], have the same validity and effect here as in Vermont." *Id.* at 281.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Murphy v. John S. Winter & Co., 18 Ga. 690 (Ga. 1855).	Georgia	Resident. *Id.* at 692.	Non-resident. *Id.*	Unknown	Tag jurisdiction sustained. *Id.* at 691–92.
Mussina v. Belden, 6 Abb. Pr. 165 (N.Y. Sup. Ct. 1858).	New York	Non-resident. *See* Mussina v. Alling, 11 La. Ann. 568, 568 (1856).	Non-resident. *Mussina*, 6 Abb. Pr at 165.	Suit arose out of dispute over land located in Texas. *Id.*	Tag jurisdiction sustained. "Neither is it necessary that the parties defendants should be residents of this State to subject them to its jurisdiction. All the cases show that it is only essential to acquire jurisdiction of their persons, and this can be accomplished by the service of process on them, however brief may be their sojourn within the State, or however temporary it may have been intended to be." *Id.*

Case	Forum	Plaintiff	Defendant	Action	Outcome
Roberts v. Knights, 89 Mass. 449 (Mass. 1863).	Massachusetts	Non-resident (foreigner). *Id.* at 450.	Non-resident (foreigner). *Id.*	Plaintiff, a British seaman, sued former employer, master of British ship, for past wages. Defendant argued that plaintiff deserted their position. *Id.* at 449.	Tag jurisdiction sustained. The court employs an interest-balancing analysis. "It is extremely inconvenient to one who is temporarily in a foreign country to be sued by a fellow-countryman in its courts. But it is met by an argument of equal force on the other side. If the plaintiff had no such remedy, he would often be subjected to great hardships. On the whole, it is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits." *Id.* at 452.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Peabody v. Hamilton, 106 Mass. 217 (Mass. 1870).	Massachusetts	Non-resident (foreigner). *Id.* at 217.	Non-resident. *Id.*	Breach of contract. *Id.* at 219.	Tag jurisdiction is sustained. *Id.* at 222. The plaintiff served the defendant with service of process while he was on an English ship docked in Boston, traveling back to New York. *Id.*
De Poret v. Gusman, 30 La. Ann. 930 (La. 1878).	Louisiana	Unknown	Non-resident–owner of property located in the state. *Id.* at 930.	Suit brought to prevent the unlawful transfer of property into money in an estate dispute. The property is located in Louisiana. *Id.*	Tag jurisdiction affirmed. *Id.* at 934.
Savin v. Bond, 57 Md. 228 (Md. Ct. App. 1881).	Maryland	Resident. *Id.* at 231.	Resident. *Id.*	Original suit in District of Columbia was brought to recover a debt owed by plaintiff to defendant. *Id.*	Tag jurisdiction affirmed. "His debt to the appellant was payable wherever he was found . . . and process having been served upon him, the Supreme Court of the District had unquestionably jurisdiction to render the judgment . . . ." *Id.* at 233.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Vinal v. Core, 18 W. Va. 1 (W. Va. 1881).	West Virginia	Resident. *Id.* at 8.	Defendant 1: Resident. *Id.* at 1. Defendant 2: Non-resident. *Id.* at 1.	Action for malicious prosecution after the two defendants previously sued the plaintiff for stealing oil. *Id.* at 8.	Tag jurisdiction affirmed. *Id.* 20–21.
Smith v. Gibson, 3 So. 321 (Ala. 1888).	Alabama	Unknown	Non-resident. *Id.* at 321.	Dispute to recover amount due on promissory note. *Id.*	Tag jurisdiction affirmed. *Id.*
Alley v. Caspari, 14 A. 12 (Me. 1888).	Maine	Resident. *Id.* at 12.	Non-resident. Defendant was moving out of the state at the time he was served. *Id.*	Unknown	Tag jurisdiction affirmed. "The true interpretation of the principle is that when an alien or non–resident is personally present in any place in the state, however temporarily or transiently in such place, whether abiding, visiting, or traveling at the time, a process duly served upon him will confer complete jurisdiction over his person in our courts." *Id.* at 13.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Roberts v. Dunsmuir, 16 P. 782 (Cal. 1888).	California	Non-resident (foreigner) but residing in state at time of suit and declared intent to become a citizen. *Id.* at 782.	Non-resident (foreigner) but residing in state at time of suit. *Id.*	Plaintiff seeking to recover damages for injuries sustained while working in defendant's coal mine in Canada. *Id.*	Tag jurisdiction affirmed. " The action is transitory, and the defendant may be sued wherever found; otherwise, a person might in some cases escape such liability by simply going into another state." *Id.*
Reed v. Browning, 30 N.E. 704 (Ind. 1892).	Indiana	Resident. *See id.* at 704 (describing the plaintiff was one of those employed at the Indiana mill).	Non-resident. *Id.* at 705.	A tort action by an employee of a stone quarry against the employer. The employer was tagged while in Indiana supervising work at the stone quarry. *Id.* at 704.	Tag jurisdiction affirmed. The court justifies the assertion of jurisdiction on the defendant's voluntary presence in the state with the purpose of supervising business in the state. *Id.* at 705.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Baisley v. Baisley, 21 S.W. 29 (Mo. 1893).	Missouri	Non-resident. *Id.* at 29.	Non-resident. *Id.* at 29.	Suit for libel. Defendant was tagged in Missouri while in the state for another lawsuit, where the parties were reversed. Defendant, in this action, originally sued the plaintiff here because the plaintiff owns Missouri land. Libel concerned a letter written by the defendant and sent to a third party in Missouri. *Id.* at 29–30.	Tag jurisdiction affirmed. *Id.* at 31. " [I]t is difficult, on principle, to see why a nonresident may be validly served with summons in a civil action a few days before court convenes, and yet the service of similar process be invalid the day after court convenes." *Id.* at 30.
Fratt v. Wilson, 48 P. 356 (Or. 1897).	Oregon	Unknown	Non-resident. Tagged in a different county than the county where suit is pending. *Id.*	An action to recover a debt. *Id.*	Tag jurisdiction affirmed to support suit in a different county within the state when a defendant is tagged anywhere in the state. *Id.* at 357.

Appendix C: Survey of Pre-*International Shoe* Quasi in Rem Actions

Case	Forum	Plaintiff	Defendant	Action	Outcome
Chew & Relf v. Randolph, 1 Miss. 1 (Miss. 1818).	Mississippi	Non-resident. *Id.* at 4.	Resident. *Id.* at 4.	An action to enforce a Louisiana judgment for collection of a debt where jurisdiction was based on the attachment of the defendant's property. *Id.* at 3.	FFC denied to Louisiana judgment. "Independent of this inconvenience, notice of these proceedings by attachment very seldom reaches the party to be charged thereby, until judgment has been rendered against him, and it is too late to make defence [sic]." *Id.* at 5.
Suksdorff v. Bigham, 12 P. 818 (Or. 1886).	Oregon	Unknown	Unknown	A suit to contest the attachment procedures in an original action for conversion of money. *Id.* at 819.	The original judgment is invalid because the complaint was construed as one in tort, not contract. "No attachment against the property of another can legally issue in this state in any action except an action upon contract, expressed or implied, for the direct payment of money; and an attempt to procure the issuance of such process in any other kind of action is unauthorized, and the process, if issued, would be a nullity." *Id.* at 819.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Grizzard v. Brown, 22 S.W. 252 (Tex. Civ. App. 1893).	Texas	Non-resident. *Id.* at 252.	Non-resident. *Id.*	An action to recover a debt, with both parties being from Georgia. *Id.* Attached a tract of defendant's land located in Texas. *Id.*	Jurisdiction sustained, even though it was an action between two non-residents. " One nonresident, by an attachment proceeding, may subject the property of another nonresident, who is his debtor, to the payment of his debt, in any court of competent jurisdiction in this state." *Id.* at 253.
Cross v. Brown, 33 A. 147 (R.I. 1895).	Rhode Island	Resident. *Id.* at 147.	Non-resident. *Id.*	An action to recover a debt. Plaintiff attached non-resident defendants' debts located in the state. *Id.* at 150.	Jurisdiction through attachment of non-resident creditor's debt sustained. Id. at 150–51. "[I]t follows that, as the defendants Brown, Steese & Clarke could have maintained an action against the garnishees in this state for the recovery of the debts in question, then said debt was within this state and subject to attachment here." *Id.* at 150. "In a word, it is compelling the payment of the defendants' debt out of their property found in this state." *Id.* at 151.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Green v. Snyder, 84 S.W. 808 (Tenn. 1905).	Tennessee	Unknown	Non-resident. *Id.* at 808.	An action for damages resulting from personal injuries arising out of business in Tennessee. *Id.* Defendant conducted regular business within the state and had an office there. *Id.*	Jurisdiction granted if the defendant was personally served. *Id.*
Goodwin v. Claytor, 49 S.E. 173 (N.C. 1904).	North Carolina	Non-resident. *Id.* at 173.	Non-resident. *Id.*	An action to recover a debt, which neither party contests. *Id.* The plaintiff attached a debt owed to the defendant by his employer, which has its principal place of business in North Carolina. *Id.* at 173.	Jurisdiction sustained. "Our conclusion on this branch of the case is that the tobacco company was amenable to the process of our courts, both mesne and final; that the cause of action against it and in favor of Claytor arose in this state; and that the subject of the action is situated here; that is, the debt due from the tobacco company to the defendant—the res, as it is called—which has been brought within the jurisdiction of the court by service of the garnishment." *Id.* at 177 (internal citations omitted).

Case	Forum	Plaintiff	Defendant	Action	Outcome
Bryan v. Norfolk & W. Ry. Co., 104 S.W. 523 (Tenn. 1907).	Tennessee	Non-resident. *Id.*	Non-resident. *Id.*	An action for wrongful death of defendant's employee. *Id.*	Writ of attachment levied on four of defendant's passenger coaches impounded in Tennessee. *Id.* Jurisdiction denied because, under a statutory requirement, the non-resident plaintiff failed to aver that defendant's property was removed to Tennessee to avoid process of law in the state of their domicile (Virginia). *Id.* at 526.
H. L. Griffin Co. v. Howell, 113 P. 326 (Utah 1911).	Utah	Resident	Non-resident. *Id.* at 327.	Dispute over the negligent delivery of onions, resulting in a damage of $200 to a $487 order. *Id.* After the plaintiff won a default judgment, the defendant appealed on the basis that the attachment was improperly issued because the action was one in tort, not contract. *Id.* at 327–28.	Regardless of the district court's dissolvement of the attachment as improper, the court obtained jurisdiction thereafter through the defendant's general appearance in municipal court. *Id.* at 329. "The defendant, by thus taking the general appeal and invoking the jurisdiction of the court upon the merits, must be held to have made a general appearance in the case, and thereby conferred jurisdiction of his person on that court . . . ." *Id.* at 330.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Starkey v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co., 130 N.W. 540 (Minn. 1911).	Minnesota	Resident. *Id.* at 540.	Non-resident corporation. *Id.*	An action to recover for damages resulting from the negligent shipment of fruit from Michigan to Minnesota. *Id.* The plaintiff attached the non-resident defendant' s traffic balances arising from interstate shipments in the hands of an in-state railway company. *Id.*	Jurisdiction sustained. " The shipment out of which the plaintiff's claim arises terminated in this state, where the plaintiff resides. The shipment was made over the lines of three railway companies. These companies are joined as defendants. One of them is subject to service in this state, and has been served personally. Jurisdiction is sought to be acquired over the remaining two defendants, to the extent of their property in this state, by a garnishment of funds due them, and service by publication." *Id.* at 542.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Missouri *ex rel.* St. Louis, Brownsville & Mex. Ry. Co. v. Taylor, 266 U.S. 200 (1924).	Missouri	Resident corporation. *Id.* at 206.	Non-resident corporation. *Id.*	An action to recover damages from a shipment to Missouri. *Id.* at 207. The plaintiff attached traffic balances " due from a connecting interstate carrier having a place of business in Missouri." *Id.* at 206.	The Court upheld the assertion of jurisdiction, finding this case distinguishable from *Davis v. Farmers' Co-operative Equity Co.*, 262 U.S. 312 (1923), because the plaintiff is a resident of Missouri and the negligence that gave rise to the cause of action occurred in Missouri. *Id.* at 207.
Rosenblet v. Pere Marquette Ry. Co., 202 N.W. 56 (Minn. 1925).	Minnesota	Resident. *Id.* at 56.	Non-resident corporation. *Id.*	An action to recover for damages as a result of a delay in the transportation of a carload of apples to Minnesota. *Id.* The plaintiff attached the defendant's office furniture of its freight agent office located in the state. *Id.*	Jurisdiction is sustained. The court held, in accordance with the Supreme Court decision *Missouri v. Taylor*, 266 U.S. 200 (1924), that the attachment did not unreasonably burden interstate commerce. *Id.* at 57.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Int' l Milling Co. v. Columbia Transp. Co., 292 U.S. 511 (1934).	Minnesota	Resident corporation. *Id.* at 515.	Non-resident corporation. *Id.*	An action to recover for damage to an order of grain as a result of the defendant' s negligence. *Id.* The plaintiff attached the defendant' s vessel when it docked in Minnesota and made service of process on the agent on the ship. *Id.* at 516.	The Court affirmed the exercise of quasi in rem jurisdiction as not offensive to the Interstate Commerce Clause. *Id.* at 520. "Rather we find a situation where the defendant, chargeable with knowledge of the attachment laws of Minnesota, brought its property into that state, not fortuitously or by a rare accident, but in furtherance of a systematic course of business, and thereby subjected itself to suit *quasi in rem*, at the instance of a local creditor, who could not with equal convenience or facility have sued it anywhere else." *Id.* at 520–21.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Canadian Pac. Ry. Co. v. Sullivan, 126 F.2d 433 (1st Cir. 1942).	Massachusetts	Resident. *Id.* at 435.	Foreign corporation. *Id.* at 436.	An action to recover for injuries incurred as a result of a train accident in Canada. *Id.* at 435. Service of process was made upon the defendant's appointed agent in the state and the corporation's traffic balances in Massachusetts was attached. *Id.* at 435; *id.* at 435 n.1.	Jurisdiction sustained. "But, considering the reasoning in the Davis and International Milling Co. cases, the quotation from the former, and the statement in the latter that residence of the plaintiff in the forum ' even though not controlling, is a fact of high significance,' [sic] we conclude that no unreasonable, and therefore unconstitutional, burden was placed upon the defendant by subjecting it to suit in Massachusetts." *Id.* at 439–40 (internal citations omitted).
Root Grain Co. v. Livengood, 100 P.2d 714 (Kan. 1940).	Kansas	Non-resident. *Id.* at 715.	Non-resident. *Id.*	An action to recover a debt arising out of a commercial contract. *Id.*	Service by publication and attachment of defendant's in-state property sustained. *Id.* at 717.

Case	Forum	Plaintiff	Defendant	Action	Outcome
Roper v. Brooks, 9 So. 2d 485 (La. 1942).	Louisiana	Resident. *See* Roper v. Brooks, 9 So. 2d 497, 504 (La. Ct. App. 1941) (referring to plaintiff as "resident plaintiff").	Non-resident. Service of process made on Secretary of State. *Roper*, 9 So. 2d at 487.	An action for tort resulting from an in-state car accident. *Id.*	Tag jurisdiction through service of process on Secretary of State and attachment of defendant's in-state property affirmed. "The burden on a judgment creditor to locate seizable assets of his nonresident judgment debtor is certainly greater than upon the judgment creditor who has a personal judgment against a resident." *Id.* at 492.
Telkes v. Hungarian Nat'l Museum, 38 N.Y.S.2d 419 (N.Y. App. Div. 1942).	New York	Resident. *See id.* at 420 (describing the plaintiff's job as being in New York).	Non-resident, foreign corporation. *Id.*	Action to recover wages due under an employment contract, where the plaintiff conducted his work in New York. *Id.*	The court held that the assertion of jurisdiction turned on whether the defendant is an "autonomous, corporate body," in which case jurisdiction by attachment is appropriate, or a "department of the Hungarian Government," in which case it is not. Issue referred to official referee for determination. *Id.* at 424.