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Patrick Woolley*

INTRODUCTION

I am honored to participate in this Festschrift celebrating Rhonda Wasserman. Professor Wasserman became a full professor the year I started teaching. And so, from the start of my academic career, I have been reading, learning from, and admiring her scholarship.

While Professor Wasserman has written many fine articles, I have especially admired two of her class action pieces, *Dueling Class Actions* and *The Curious Complications with Back-End Opt-Out Rights*.[1] The articles thoughtfully delve into some of the many complications that arise from class litigation in our federal system. The pieces are a marvel of thoroughness, analytical precision, and evenhandedness. And they are but a part of an impressive body of work that includes important articles at the intersection of family law and conflict of laws.

In this brief Article written in Professor Wasserman's honor, I seek to replicate at least some of the admirable qualities of her scholarship and to make a contribution in two subjects of enduring scholarly interest to us both—class actions and personal jurisdiction. Specifically, I discuss an issue that has grown in importance since the United States Supreme Court decided *Bristol-Myers Squibb Co. v. Superior Court*:[2] whether, and if so to what extent, the Court's recent personal jurisdiction decisions

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* A.W. Walker Centennial Chair in Law, The University of Texas School of Law. I thank Teddy Rave for helpful comments on an earlier draft and Sean McKenzie for research assistance.

[1] Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000); Rhonda Wasserman, *The Curious Complications with Back-End Opt-Out Rights*, 49 WM. & MARY L. REV. 373 (2007) [hereinafter Wasserman, *Curious Complications*].

[2] Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255 (2017).

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should be understood to negatively affect the ability of courts to exercise personal jurisdiction over defendants in class litigation.

Bristol-Myers held that the mere fact that the claims of some plaintiffs in a mass action have a territorial connection to the forum state does not create the connection required for specific jurisdiction over the defendant vis-à-vis similar claims by other plaintiffs in the action.[3] Because no forum state may have the required connection with the claims of *all* of the plaintiffs in a nationwide mass action, *Bristol-Myers* may often require that a mass action be brought only in states that have general jurisdiction over the defendant.[4] And as an article co-authored by one of my faculty colleagues has thoroughly explained, reliance on general jurisdiction to provide an appropriate forum for aggregate litigation can be a problematic proposition.[5]

Two arguments have emerged that seek to render *Bristol-Myers* essentially irrelevant in class suits. The first—applicable only in federal district court—rests on the contention that jurisdiction over defendants with respect to claims asserted by absent class members is governed by the Fifth, rather than the Fourteenth, Amendment Due Process Clause. And because *Bristol-Myers* was a Fourteenth Amendment decision, the argument goes, it has no relevance to the claims of absent class members. As explained briefly in Part I, this approach to personal jurisdiction in federal district court fails to recognize that in the absence of congressional legislation authorizing worldwide or nationwide service of process, there is no sound basis for departing in federal district court from the limits on jurisdiction applied in state court, including the limits imposed by the Fourteenth Amendment Due Process Clause.

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[3] *Id.* at 265 ("The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims.").

[4] There was a state in *Bristol-Myers*—New Jersey—that likely had specific jurisdiction over *all* of the claims. Plavix was developed in New Jersey, as were "the labeling, warnings, packaging, and other promotional materials for the drug . . . ." *In re* Plavix, Mktg., Sales Prac. and Prod. Liab. Litig. (No. II), 923 F. Supp. 2d 1376, 1379 (J.P.M.L. 2013); *see also Bristol-Myers*, 582 U.S. at 259 (stating that Bristol-Myers manufactured, labelled, packaged, and worked on regulatory approval of the drug in either New York or New Jersey); *cf. id.* at 258 (noting that Bristol-Myers "is incorporated in Delaware and headquartered in New York"). That said, there is no question that the standard articulated in *Bristol-Myers*—in combination with the Court's analysis in *Daimler*—radically restricts the number of available fora in at least some aggregate litigation. *See* Daimler A.G. v. Bauman, 571 U.S. 117 (2014).

[5] *See* Maggie Gardner et al., *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455 (2022).

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The second argument—addressed in Part II—insists that only the claims of named plaintiffs need have the connection with the forum state mandated by the Fourteenth Amendment Due Process Clause. I conclude that there is no sound basis for drawing a distinction between named plaintiffs and absent class members for purposes of specific jurisdiction. But the focus on drawing such a distinction has obscured a crucial point: the underlying *nature* of claims typically asserted in class litigation may bear on the availability of specific jurisdiction. Negative-value claims, for example, can provide a mechanism for enforcement of the substantive law only when aggregated.[6] And states that share the same substantive policy will usually have a strong interest in cooperating to effectuate their shared policy. That interest justifies treating negative-value claims that legitimately are governed by a common policy and that arise out of roughly the same set of facts as part of the *same claim* for purposes of specific jurisdiction. A similar analysis applies to negative-value claims based on federal law.

I. THE FIFTH AMENDMENT ARGUMENT

One response to *Bristol-Myers* has been to argue that jurisdiction over defendants with respect to the claims of absent class members is governed in federal court by the Fifth Amendment Due Process Clause. And because the Fifth Amendment Due Process Clause arguably requires contacts only with the nation as a whole,[7] those claims need have a connection only with the United States. That connection will usually exist with respect to claims of absent class members who reside in the United States.

At its most persuasive, the argument rests on the principle that the Rules Enabling Act authorizes the Supreme Court to prescribe only rules of "practice and

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[6] *See* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Litigation*, 77 NOTRE DAME L. REV. 1057, 1059–60 (2002) ("The concept of the negative value claim is most often applied when the value of the claim is itself . . . too small to justify the cost of prosecution."); *see also* Benjamin J. Siegel, Note, *Applying a "Maturity Factor" Without Compromising the Goals of the Class Action*, 85 TEX. L. REV. 741, 749–52 (2007) (discussing the concept).

[7] Whether the Fifth Amendment imposes a national contacts test has never been definitively decided by the U.S. Supreme Court, but that understanding has been widely adopted by lower courts addressing the issue. *See, e.g.*, Waters v. Day & Zimmerman NPS Inc., 23 F.4th 84, 92 (1st Cir. 2022) ("The Fifth Amendment does not bar an out-of-state plaintiff from suing to enforce their rights under a federal statute in federal court if the defendant maintained the 'requisite minimum contacts' with the United States.'"); *see* Wasserman, *Curious Complications*, *supra* note 1, at 421 (explaining that "many of the federal courts of appeals have upheld jurisdiction based upon the defendant's aggregate contacts with the country as a whole, rather than upon her contacts with the state in which the court sits" and citing authority to that effect).

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procedure."[8] For that reason, the argument goes, Federal Rule of Civil Procedure 4(k)(1)(A)—which incorporates the limits imposed on state courts by the Fourteenth Amendment Due Process Clause—governs only territorial limits on the service of a summons.[9] And because only the plaintiffs named in the original complaint must serve a summons on the defendant, jurisdiction over the defendant with respect to the claims of later-added plaintiffs—including absent class members once a class is certified—is subject to the Fifth Amendment Due Process Clause.[10]

All but the first part of the argument is wrong for reasons I laid out in a 2019 article.[11] The United States Supreme Court has no power under the Rules Enabling Act to prescribe Federal Rules governing amenability to jurisdiction.[12] And in the absence of congressional legislation authorizing worldwide or nationwide service of process, whether a person is amenable to the personal jurisdiction of a federal district court is determined by state law under the Rules of Decision Act ("RDA").[13] While the RDA is sometimes misconstrued as applicable only in diversity cases, it mandates application of state law in federal court—whatever the basis of federal subject matter jurisdiction—unless the Constitution, treaties, or federal statutes otherwise require or provide.[14] The RDA leaves some limited room for federal common-law making

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[8] 28 U.S.C. § 2072(a).

[9] FED. R. CIV. P. 4(k)(1) ("*In General*. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . .") (formatting modified).

[10] *See Waters*, 23 F.4th at 92–96 (collective action); *see also* Mussat v. IQVIA, Inc., 953 F.3d 441, 447–48 (7th Cir. 2020) (claiming that the defendant's jurisdictional argument based on Federal Rule 4(k)(1)(A) was "mixing up the concepts of jurisdiction and service"). Those making this argument usually limit it to claims based on federal law. *See, e.g.*, *Waters*, 23 F.4th at 94. But it is a mistake to conclude that the Rules of Decision Act treats personal jurisdiction over defendants with respect to claims based on federal law any differently than it does with respect to claims based on state law. *See infra* note 14 and accompanying text.

[11] *See* Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565 (2019). Benjamin Spencer, for his part, has rejected the argument as a matter of rule construction. *See* A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 42–44 (2019).

[12] Woolley, *supra* note 11, at 588–607.

[13] *Id.* at 607–18.

[14] *Id.* at 617–18. "Because state law is invalid to the extent it is inconsistent with federal constitutional limitations, the RDA generally requires a federal court to apply the relevant source of state law as limited by the Fourteenth Amendment Due Process Clause." *Id.* at 623 n.255. From this perspective, Rule 4(k)(1)(A) is valid because it simply restates the law prescribed by the RDA. *Id.* at 626–27.

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with respect to personal jurisdiction.[15] "But because Congress has expressly authorized nationwide or worldwide service of process to vindicate specific rights when it believed it was appropriate to do so, federal courts should refrain from elaborating federal common law rules of amenability" except in exceptional circumstances.[16] The desire to make a class suit easier to bring does not qualify as an exceptional circumstance.

II. THE FOURTEENTH AMENDMENT LIMITS ON PERSONAL JURISDICTION

Courts and commentators seeking to circumvent *Bristol-Myers* in class litigation have also argued that the Fourteenth Amendment Due Process Clause requires only that the claims of named plaintiffs have the required connection with the forum state.[17] I reject that argument below while concluding that the *nature of the claims* asserted in a particular class suit may justify a limited expansion of the typical boundaries of specific jurisdiction.

Specifically, I contend that a group of negative-value claims may be deemed part of the *same claim* for purposes of specific jurisdiction under two conditions. First, the negative-value claims must be subject to a substantive policy shared by two or more states that have an interest in cooperating to enforce that policy. Second, the negative-value claims must be based on roughly the same set of facts. Then, so long as *part* of the claim comprised of the negative-value claims has the required connection with the forum state, the Fourteenth Amendment permits the forum state to exercise specific jurisdiction over the claim as a whole.

This approach should make it easier for states that share a substantive policy to have that policy enforced. Assume, for example, a group of negative-value claims against a Michigan defendant, all of which are based on roughly the same set of facts. And assume further that Wyoming, South Dakota, and North Dakota would apply the same substantive policy to the claims within their jurisdiction, even though

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[15] *Id.* at 619–26. The argument that federal district courts have authority to exercise jurisdiction to the limits of the Constitution over defendants with respect to the claims of absent class members fails to grapple with the fact that the law of personal jurisdiction involves policy determinations that generally must be left to state legislatures or to Congress post-*Erie*. *Id.* at 594–95. The argument is also flatly inconsistent with the pre-*Erie* understanding which, in conformity with the general common law, limited the personal jurisdiction of federal trial courts to the district in which they sat in the absence of congressional legislation to the contrary. *Id.* at 570–75. Put simply, federal trial courts have *never* had unfettered authority to exercise personal jurisdiction to the limits of the U.S. Constitution.

[16] *Id.* at 624.

[17] *See* Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 Y.L.J. FORUM 205, 215–19 (2019) (collecting caselaw); *see infra* notes 39, 49–50.

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Michigan—the defendant's home state—would apply a different policy. Assuming the three states have a joint interest in enforcing their shared policy, negative-value claims that have the required territorial connection with *any* of the three states should be deemed part of the *same claim* for purposes of specific jurisdiction *in all three states*.

I lay out the argument in three subparts. Subpart A—which discusses the Court's minimum contacts jurisprudence in general terms—provides a foundation for the analysis that follows. Subpart B explains why limits on specific jurisdiction protect defendants against claims by named plaintiffs and absent class plaintiffs alike. And finally, Subpart C argues, for the reasons set forth above, that negative-value claims asserted in a class suit may, in limited circumstances, be deemed part of the same claim for purposes of specific jurisdiction.

Although the principal focus of Subpart C is on how the shared substantive policies of *states* may modify otherwise applicable limits on specific jurisdiction, the implications of the analysis are not so limited. Because federal substantive policies apply nationwide, the approach urged here would broadly authorize the exercise of personal jurisdiction in negative-value suits based on federal substantive law in any state or federal court in which at least some of the negative-value claims have the required territorial connection with the forum state.

A. An Overview of the Court's Minimum Contacts Analysis

Since 2014, the United States Supreme Court has dramatically restricted the extent to which courts may exercise contacts-based general and specific personal jurisdiction over defendants consistently with the Fourteenth Amendment Due Process Clause. In *Daimler AG v. Bauman*, the Court insisted that a forum state may exercise general jurisdiction over a corporate defendant on the basis of contacts only in a state in which the corporation is "essentially at home," typically the states in which the company is incorporated and has its principal place of business.[18] The Court reasoned that the fact that a company is "doing business" in a state is an

[18] Daimler A.G. v. Bauman, 571 U.S. 117, 137–39 (2014); *see also* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) (authorizing general jurisdiction over a corporation on the basis of contacts only in a state in which the corporation is essentially at home, but failing to state clearly that general jurisdiction is rarely available outside a corporation's place of incorporation and principal place of business). This understanding of general jurisdiction contrasts dramatically with the widespread understanding *before* the Court's 2011 decision in *Goodyear*—that "doing business" in a state was a sufficient basis for general jurisdiction.

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inadequate basis for general jurisdiction.[19] The limited availability of general jurisdiction has highlighted the importance of specific jurisdiction. And in *Bristol-Myers*, the Court reaffirmed that specific jurisdiction requires an appropriate connection among the defendant, the claim, and the forum state. The Court specifically held that the mere fact that the claims of *some* plaintiffs in a mass action have a territorial connection with the forum state does not create the connection required for specific jurisdiction with respect to the similar claims of other plaintiffs.[20]

The argument that personal jurisdiction should be about whether a defendant would be unduly inconvenienced by an assertion of jurisdiction has long been popular among academics.[21] But the law is now clear that personal jurisdiction cannot be reduced to a question of convenience. As the Court explained in *Bristol-*

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[19] *Daimler*, 571 U.S. at 139 n.20.

[20] Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 265 (2017). As this Article was nearing publication, the Court held that the Due Process Clause permits a state to exercise general jurisdiction over a corporation that has appointed an agent for service of process in the state pursuant to a registration statute, provided the agent is served within the state. *See* Mallory v. Norfolk S. Ry. Co., 600 U.S. ___, 2023 WL 4187749 (June 27, 2023). In states that authorize general jurisdiction on this basis, the due process limits *Daimler* and *Bristol-Myers* impose on personal jurisdiction now appear to be irrelevant when the corporate agent is served. But the Court in *Mallory* did not consider whether the exercise of jurisdiction would be consistent with the Commerce Clause. *Id.* at *3 n.3. Justice Alito, who provided the fifth vote for the Court's holding, expressed skepticism in a concurring opinion: "In my view, there is a good prospect that Pennsylvania's assertion of jurisdiction here—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause." *Id.* at *18 (Alito, J., concurring). Justice Alito went on to suggest that jurisdiction based on the statutorily required appointment of an agent for service of process may survive scrutiny under the Commerce Clause only if, *among other things*, "the law advances a legitimate local public interest." *Id.* at *19. He concluded that a "State generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors through conduct outside the State." *Id.* Even if that conclusion is correct, suits aggregating negative-value claims may be an exception to the general rule. *Cf. infra* II.C. (arguing that an exception to that general rule exists with respect to due process limits on personal jurisdiction).

[21] *See, e.g.*, Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 850 ("[T]he Constitution imposes jurisdictional limits . . . to protect the defendant from the inconvenience and expense of litigation in a forum with which she has no meaningful connection."); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1137 (1981) ("Due process should be held to bar a state's exercise of jurisdiction only if meaningful inconvenience can be demonstrated."); Ralph U. Whitten, *Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 846 (1981) (arguing that a court should have "jurisdiction to adjudicate an action against any defendant, unless the defendant demonstrates that the relative burdens imposed by suit in the particular court are so great that the defendant is, as a practical matter, unable to defend there adequately").

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Myers, assessing the "burden on the defendant"[22]—the cornerstone of a jurisdictional analysis—includes not only "the practical problems resulting from litigating in the forum"—i.e. considerations of convenience—"but . . . also . . . the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[23] Moreover, although considerations of convenience continue to play a role in determining whether a court may exercise personal jurisdiction over a defendant, the Court's cases since at least *World-Wide Volkswagen v. Woodson* have made clear that the Due Process Clause primarily protects the liberty interest of defendants from being subjected to inappropriate exercises of state sovereign power.[24] Thus, even if litigating in the forum would cause no inconvenience, subjecting a defendant to the coercive power of the forum state may be inconsistent with the requirements of Due Process. It is for that reason that personal jurisdiction requires an appropriate connection between the defendant and the forum state, and in the case of specific jurisdiction, between the claim and forum state as well. The Court in recent years has also reaffirmed that this appropriate connection requirement permits a court to consider "alongside defendants' interests those of the States in relation to each other."[25] As the Court explained in *Ford v. Montana Eighth Judicial District Court*: "One State's 'sovereign power to try' a suit . . . may prevent 'sister States' from exercising their like authority."[26]

The appropriate connection requirement serves a critical function because states have enormous latitude in structuring the rules that govern adjudication of disputes in their courts.[27] A forum state, for example, develops its own choice-of-

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[22] *Bristol-Myers*, 582 U.S. at 263.

[23] *Id.*

[24] *Cf.* Allen R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 711 (1987) ("Due process protects the sovereign interests of other states . . . through its protection of the individual from illegitimate assertions of state authority. Legitimacy . . . is defined by reference to the state's allocated authority within the federal system.").

[25] Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1045 (2021).

[26] *Id.* at 1025.

[27] *See* Edward H. Cooper, *Rewriting* Shutts *for Fun, Not to Profit*, 74 UMKC L. REV. 569, 575 (2006) (recognizing that the forum-sovereign "will supply its own judge, draw the jury if the case progresses to trial in that mode, apply its own procedure, make the choice of governing 'substantive' law, and determine the content of the chosen law," and noting that "one sovereign may behave quite differently from others"); Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 255 (1991) ("Choice of judicial jurisdiction is choice of law because choosing a jurisdiction chooses the legal regime that will select, interpret and apply the policies that will determine the result in the particular case.").

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law rules,[28] subject only to minimal constraints imposed by the Due Process and Full Faith and Credit Clauses.[29] A forum state similarly has plenary authority over its own procedure, subject again only to minimal constraints imposed by the United States Constitution.[30] The Due Process Clause, of course, imposes a floor in terms of procedural choices a state may make, but most procedural choices—including the circumstances in which a jury trial is available and whether judges are elected or appointed—raise no federal constitutional concerns.

One way in which specific jurisdiction protects defendants against inappropriate assertions of state regulatory authority is through the purposeful availment requirement. As *World-Wide Volkswagen* explained, the purposeful availment requirement "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[31] That is accomplished by focusing exclusively on the nature and quality of the defendant's purposeful contacts with the forum state and ignoring "the mere 'unilateral activity of those who claim some relationship with a nonresident defendant.'"[32]

Specific jurisdiction also requires an appropriate connection between the claim and the forum state. The Court in *Bristol-Myers* held that the mere fact that the claims of *some* plaintiffs in mass litigation may have an appropriate connection with the forum state does not grant courts in the forum state jurisdiction over the defendant with respect to similar claims by other plaintiffs.[33] But the Court has also recognized

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[28] *See* Allen R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 385 ("[A] forum is always entitled to apply its own choice-of-law rules even when it would not be permitted to apply its own substantive law, and that choice can confer substantial benefits on a party.").

[29] *See* RICHARD A. NAGAREDA ET AL., THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 171 (3d ed. 2020) (noting that "[w]ithin the capacious limits of the Constitution, states have followed and continue to follow a variety of approaches to choice of law"). For general discussion of state choice-of-law approaches and constitutional limits on state choice of law in aggregate litigation, see *id.* at 168–200.

[30] Stein, *supra* note 28, at 385 (noting that "the availability and sympathy of juries, discovery, and contingent fees all vary significantly from state to state"); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1175–76 (2013) (explaining that "restrictions on personal jurisdiction ensure that disputes will be resolved in accordance with the entire legal environment of the regulating state").

[31] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[32] *Id.* at 298 (quoting Hanson v. Denckla, 357 U.S. 235, 254 (1958)). The statements in the text provide only a starting point for analysis. The Court has not resolved many important questions about the meaning of purposeful availment.

[33] Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 265 (2017).

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that there need not always be a causal relationship between the defendant's purposeful contacts with the forum state and the claim. In at least some circumstances, for example, it is enough that there be an *injury* to the plaintiff in the forum state, even if that injury was not caused by the defendant's purposeful contacts with the state.[34] The Court has been less than clear about what those circumstances are, beyond holding in *Ford* that the pervasiveness of Ford's purposeful contacts with the forum states in question justified specific jurisdiction even in the absence of a causal relationship.[35] But the *Ford* Court's heavy reliance on *World-Wide Volkswagen* suggests that injury in the forum state may be sufficient whenever a company regularly and purposefully "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[36] And one set of commentators has argued that when "one reaches the volume of contacts that once supported general jurisdiction, a non-causal relationship suffices."[37] It is clear, in any event, that if the defendant has purposeful contacts with the forum state that are substantial enough, the defendant is not entitled to defend against jurisdiction on the ground that the specific claim in question is not causally related to the defendant's purposeful contacts with the forum state.

B. Use of the Class Device Does Not Change the Jurisdictional Analysis

Seeking to limit the extent of the perceived damage to aggregate litigation inflicted by *Bristol-Myers*, Justice Sotomayor argued in her dissent that the Court's

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[34] Ford Motor Co. v. Montana Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1023 (2021).

[35] *Id.* at 1022 (stating that "Ford did substantial business in the State—among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective" and holding that "[w]hen a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit"). At the opposite end of the spectrum, the Court suggested that a noncausal relationship between the forum state and the plaintiff's claim would not be sufficient for "sporadic or isolated transactions." *Id.* at 1028 n.4 (stating that the Court has "long treated isolated or sporadic transactions differently from continuous ones" and that its opinion should not be read "to say that any person using any means to sell any good in a State is subject to jurisdiction there if the product malfunctions after arrival").

[36] *Id.* at 1027–28. The Court in *World-Wide Volkswagen* had stated in dicta that jurisdiction is appropriate "if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen . . . arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in" the forum state and "its allegedly defective merchandise has there been the source of injury to its owner or to others." *World-Wide Volkswagen*, 444 U.S. at 298. The injury suffered by the plaintiffs in *World-Wide Volkswagen* was not causally related to the manufacturer's or distributor's purposeful contacts with the forum state.

[37] Patrick J. Borchers et al., Ford Motor Co. v. Montana Eighth Judicial District*: Lots of Questions, Some Answers*, 71 EMORY L.J. ONLINE 1, 10 (2021).

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decision should be confined to aggregate litigation achieved through mass joinder of plaintiffs and not be applied to class litigation in which one or more named plaintiffs *represent* a class of absentees.[38] Some lower courts, including most prominently the Third, Sixth and Seventh Circuits, have followed suit.[39] And some commentators have agreed.[40]

Those who believe that *Bristol-Myers* should not apply to class litigation often argue that absent class members are not "parties" for purposes of personal jurisdiction.[41] Unlike parties to litigation, absent class plaintiffs need not have minimum contacts with the forum state or even affirmatively act in some way to manifest consent to personal jurisdiction. As the Court in *Phillips Petroleum Co. v. Shutts* explained, a court may exercise jurisdiction over absent class plaintiffs in a suit predominantly for money damages if the absentees do not avail themselves of an opportunity to opt out *and* they have been adequately represented.[42] By contrast,

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[38] *Bristol-Myers*, 582 U.S. at 278 n.4 (Sotomayor, J., dissenting). *Bristol-Myers* involved "eight separate complaints, each including California residents and non-residents as plaintiffs, [that] were filed in the San Francisco Superior Court by or on behalf of 659 individuals, consisting of 84 California residents and 575 non-residents." Bristol-Myers Squibb Co. v. Superior Ct., 175 Cal. Rptr. 3d 412, 415 (Cal. Ct. App. 2014). The plaintiffs' attorneys presumably structured the litigation as eight separate mass actions instead of a single class action to avoid removal to federal district court. The Class Action Fairness Act treats this strategic choice as decisive for purposes of diversity jurisdiction under Section 1332(d), see 28 U.S.C. § 1332(d)(11), and the choice may have other important consequences. But Justice Sotomayor was the only Justice to suggest that the choice of plaintiffs to sue as a class might affect personal jurisdiction over individual *defendants*.

[39] Fischer v. Federal Express Corp., 42 F.4th 366, 374–75 (3d Cir. 2022); Lyngaas v. Curaden AG, 992 F.3d 412, 432–38 (6th Cir. 2021); Mussat v. IQVIA, Inc., 953 F.3d 441, 446–47 (7th Cir. 2020). Judge Wood, who wrote the Seventh Circuit's decision in *Mussat*, took a similar approach in an article written when she was an academic. *See* Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 616 (1987) ("If a small-stakes money damage class action is properly treated as a pure representational action . . . then the contacts supporting the [named plaintiff's] claim against the defendants should support the entire class's claims.").

[40] *See infra* notes 49–50.

[41] *See supra* note 17.

[42] Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 812 (stating that "[t]he plaintiff must receive notice plus an opportunity to be heard and participate . . . [and] an opportunity to remove himself from the class" and that "the named plaintiff [must] at all times adequately represent the interests of the absent class members"); *see* Wasserman, *Curious Complications*, *supra* note 1, at 404–08 (explaining the fundamental fairness and consent rationales that support the Court's decision in *Shutts*). Daniel Wilf-Townsend has stated that there is support in the Court's jurisprudence for the view that adequate representation may be sufficient to authorize a forum state to exercise jurisdiction over a class of absent defendants. *See* Daniel Wilf-Townsend, *Class Action Boundaries*, 90 FORDHAM L. REV. 1611, 1640–43 (2022). The Court in

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in the absence of minimum contacts, service of process on an individual in the forum state, or express consent, a court may exercise personal jurisdiction only over a party that *appears* and waives its jurisdictional objection.

But the significance of these distinctions is often overstated. As I have argued elsewhere, the adequate representation requirement, properly understood, seeks to safeguard the liberty interests of absent class plaintiffs to the same extent as more conventional limits on personal jurisdiction. "[A]s a practical matter, the minimum contacts requirement serves to protect an individual in ordinary litigation from the exercise of power by a sovereign that lacks an appropriate connection with the person, unless litigation in the courts of that sovereign would be in his or her interest."[43] If the exercise of jurisdiction by the sovereign would be in the person's interest, that person will consent. Similarly, "[a]n adequate class representative—properly defined—will pursue the claims of an absentee in the forum that, all things considered, would best serve the interests of the absent class member."[44] Thus, "adequate representation, properly understood, protects the liberty interest of absent class members in being free from the regulatory authority of the courts of a sovereign that lacks an appropriate connection with the class member when litigating in that sovereign's courts would not be in the interest of the class member."[45] Of course, class counsel may err in choosing a forum without being labeled inadequate.[46] The

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Shutts noted that its "discussion of personal jurisdiction" did not "address class actions where the jurisdiction is asserted against a *defendant* class." *Shutts*, 472 U.S. at 811 n.3.

[43] Patrick Woolley, *The Jurisdictional Nature of Adequate Representation in Class Litigation*, 79 GEO. WASH. L. REV. 410, 423 (2011) [hereinafter Woolley, *Jurisdictional Nature*].

[44] *Id. See also* Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799, 833–34 [hereinafter Woolley, *Choice of Law*] (noting that "a choice of forum . . . involves not just the selection of choice-of-law rules but other matters which may be of importance to class members" and insisting that "putative class counsel cannot properly request certification of a class in a forum that would not at least arguably maximize the interest of each 'easily identifiable categor[y] of claimants' in the class").

[45] Woolley, *Jurisdictional Nature*, *supra* note 43, at 423; *see also id.* at 419–23; Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 959–71 (2010) [hereinafter Woolley, *Collateral Attack*] (explaining the argument in greater detail). The failure to opt-out—though it may provide some evidence of consent is—without more—an inadequate basis for concluding that an absent class member has consented to personal jurisdiction. *See* Wasserman, *Curious Complications*, *supra* note 1, at 407–08 (noting the problems with treating a failure to opt out as consent to jurisdiction).

[46] Woolley, *Choice of Law*, *supra* note 44, at 834 ("Class counsel must be afforded latitude to exercise professional judgment in deciding where to request certification.").

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Due Process Clause guarantees adequate—not perfect—representation.[47] At a minimum, however, adequate representation requires that competent class counsel make a good faith effort to choose a forum that, all things considered, is best for an absent class member.[48]

In any event, the fact that absent class plaintiffs are not parties for purposes of personal jurisdiction has no bearing on the due process rights of individual *defendants*. And *Bristol-Myers* is about personal jurisdiction over individual defendants with respect to particular claims. The insistence that class suits are representative litigation does not change that fact.

It has sometimes been argued that class certification requirements ensure that a defendant suffers no prejudice—and therefore no potential due process violation—from not separately analyzing the relationship between the claims of absent class members and the forum state. As one student commentator explained: "Certification means that 'key elements of the claim, and the key defenses, are common to the class,' and as a result the defendant is presented with a 'unitary, coherent claim to which it need respond only with a unitary, coherent defense.'"[49]

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[47] It is for this reason that absent class plaintiffs in an action in which unitary adjudication is not essential are entitled not only to adequate representation but to an opportunity to opt out. *See* Woolley, *Collateral Attack*, *supra* note 45, at 970 (arguing that a class member "motivated and sophisticated enough to determine for herself the desirability of the forum . . . is entitled to an opportunity to grant or withhold consent to personal jurisdiction" because "class members should not be required to accept the compromises inherent in adequate representation if they wish to participate in the litigation").

[48] *Cf.* Woolley, *Choice of Law*, *supra* note 44, at 834 n.119 (noting authority for the proposition that an attorney may be liable for malpractice if she chooses a disadvantageous forum).

[49] Bryce Saunders, Note, *23 and Me:* Bristol-Myers Squibb*, Federal Class Actions, & the Nonparty Approach*, 71 CASE W. RSRV. L. REV. 1121, 1138–39 (2020); *see also* John Mikuta, Comment, *The Class Action Struggle: Should* Bristol-Myers*'s Limit on Personal Jurisdiction Apply to Class Actions?*, 71 EMORY L.J. 325, 361 (2021) (arguing that Rule 23's certification requirements ensure that "the class claim is in fact unitary and coherent, thus erecting a safeguard to protect the rights of class action defendants"). This argument fails to take into account that the unity and coherence of class claims may depend on the application of choice-of-law rules. When personal jurisdiction is not at issue, the courts of a forum state may rely on choice-of-law techniques designed to facilitate the certification of a class suit. *See* Patrick Woolley, Erie *and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1728–32 (2006) (identifying two choice-of-law techniques a state may use in a class action in order to ensure the application of one substantive law). But a forum state that lacks specific jurisdiction over the defendant with respect to all of the putative class claims lacks the authority to apply its choice-of-law rules to ensure the application of one substantive law to all of the claims. *See supra* notes 21–30 and accompanying text; *infra* notes 58–61 and accompanying text.

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That approach treats the burden against which jurisdictional requirements protect as primarily about convenience.[50] But the Court over the last forty years has markedly deemphasized the role of personal jurisdiction as a safeguard against inconvenience. As the Court explained in *World-Wide Volkswagen*: "The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years"[51] because "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."[52] A defendant may defeat jurisdiction on grounds of convenience—which as *World-Wide Volkswagen* notes "is typically described in terms of 'reasonableness' or 'fairness'"[53]—only in limited circumstances. To do so, as the Court explained in *Burger King v. Rudzewicz*, a defendant must "present a compelling case"[54] that the inconvenience to the defendant is so substantial and disproportionate in the light of other interests at stake that the exercise of jurisdiction

[50] *See* Wilf-Townsend, *supra* note 42, at 1616–17 (arguing that the "structure of class actions, in which the claims of absent class members are highly similar to the claims of the named representative" means "the marginal burdens on the defendant of the exercise of litigation will be low" because "the defendant will already have to hire lawyers, arrange for the travel of witnesses and staff, and handle all of the other usual burdens that attend litigation"); Mikuta, *supra* note 49, at 357–58 (claiming that "unlike in mass actions and ordinary lawsuits, the fact that additional class members are a part of the litigation does not significantly increase the litigation burden faced by the defendant[,]" in part because the defendant "does not have to hire additional counsel or travel to another forum to litigate the class members' claims, and does not have to participate in additional discovery with respect to the class members"). There is reason to be skeptical that use of the class device does not significantly increase the inconvenience to the defendant in the forum state. *See* David Marcus & Will Ostrander, *Class Actions, Jurisdiction, and Principle in Doctrinal Design*, 2019 BYU L. REV. 1511, 1530–31 (2019) (raising doubts about the argument that a class defendant does not suffer significantly greater inconvenience but nonetheless concluding that "[c]lass certification means that, in real-world terms, the difference to the defendant between litigating a single-state class action . . . and a multi-state class action is not so significant as to require a wholesale change in decades of personal jurisdiction practice").

[51] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

[52] *Id.* at 293 (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957)). *See generally* Sterk, *supra* note 30, at 1166–68 (discussing the "decline of inconvenience" as a relevant consideration in jurisdictional analysis).

[53] *World-Wide Volkswagen*, 444 U.S. at 292.

[54] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.").

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would be fundamentally unfair.[55] Because the burden of demonstrating the existence of personal jurisdiction is typically on the plaintiff, it is telling that the Court placed the evidentiary burden of making this showing on the defendant and stated that the burden could be satisfied only if the defendant makes a *compelling* case.[56] More recently, six Justices (in plurality and concurring opinions) incorporated certain hypotheticals into their discussion of purposeful availment that failed to acknowledge that inconvenience could be addressed through the *Burger King* framework.[57] But those opinions do not challenge the established proposition that the regulatory burden imposed on a defendant is the more important consideration.

That regulatory burden is not diminished because a claim is asserted in a class suit. A forum state has no less regulatory authority over a defendant in a class suit than in any other kind of litigation. A forum state, for example, imposes its choice-

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[55] After noting that "the protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness,'" *World-Wide Volkswagen*, 444 U.S. at 292, the Court described the relevant considerations as follows:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

Id.; *see also Burger King*, 471 U.S. at 477 (identifying the same factors). The Court employed this general framework in *Asahi Metal Indus. Co., Ltd. v. Superior Ct.*, 480 U.S. 102, 114–16 (1987), without expressly insisting that a defendant make a compelling case that the exercise of jurisdiction would be unreasonable.

[56] *See, e.g.*, 5B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1351 (3d ed. 2022) (noting that "the plaintiff bears the burden to establish the court's jurisdiction" on a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction except on the question of reasonableness once minimum contacts have been shown).

[57] *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885 (2011) (plurality opinion) (arguing for a strict interpretation of the purposeful availment requirement in part because "[t]he owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country" and because it would be undesirable to allow the farmer to be sued in "Alaska or any number of other States' courts without ever leaving town"); *id.* at 891–92 (Breyer, J., concurring) (rejecting the New Jersey Supreme Court's approach to purposeful availment in part because it might be unfair "in the case of . . . an Appalachian potter[] who sells his . . . []cups and saucers[] exclusively to a large distributor, who resells a single item . . . to a buyer from a distant State . . . .").

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of-law rules even in class litigation.[58] And one function of constitutional limits on specific jurisdiction is to protect a defendant from the regulatory burden imposed by the forum state's choice-of-law rules when the state would lack an appropriate connection with the defendant, the claim, or both.[59]

Consider the following illustration: Michigan, the defendant's home state, would apply its substantive law only to class claims held by Michigan residents.[60] But Oklahoma—a state with which the defendant has the required purposeful contacts—would apply Michigan law to all the class claims.[61] To the extent Oklahoma lacks the required connection with one of those claims, it would be an impermissible deprivation of liberty to subject the defendant to the regulatory authority of Oklahoma with respect to that claim.

For all these reasons, the argument that only the claims of the named plaintiffs matter for purposes of specific jurisdiction is an analytical dead end. That said, many who have made the argument seem less concerned about class suits *per se* than about claims that are often best handled through a class suit—negative-value claims, for example.[62] And viewed in that way—as an argument about jurisdictional requirements with respect to particular kinds of claims—the argument has greater force. But focusing on the representative nature of the class device—rather than on the underlying nature of claims often asserted in class suits—obscures the relevant considerations. The question is not whether the claims of absent class members may be treated differently from the claims of named plaintiffs. Rather, the key question is whether particular *kinds* of claims may be treated differently in a specific

[58] *See supra* notes 27–30 and accompanying text (noting the power of a forum state to apply its own choice-of-law rules); *see also* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (holding that a federal court district court must apply the choice-of-law rules of the state in which it sits). For further discussion of *Klaxon*, see Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 23 U. PA. J. CONST. L. 2127 (2021).

[59] *See supra* notes 21–30 and accompanying text.

[60] *Cf.* Radeljak v. DaimlerChrysler, 719 N.W.2d 40, 46 (Mich. 2006) (opining that Croatian law was likely to apply even though DaimlerChrysler was a home-state defendant because "Croatia appears to have a greater interest in this case than does Michigan because it involves residents and citizens of Croatia who were injured in an accident in Croatia").

[61] *Cf.* Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618 (Okla. 2003) (holding that Michigan law, the law of the defendant's home state, applied to all the breach of warranty claims in a nationwide class suit).

[62] *See, e.g.*, Wilf-Townsend, *supra* note 42, at 1634 (stating that representative litigation "allows for the resolution of claims too numerous to be joined together or of claims whose low value would prevent them from being pursued on their own").

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jurisdiction analysis. The next subpart tackles that question with respect to negative-value claims.

C. Specific Jurisdiction over Negative-Value Claims

It might be argued that the underlying nature of a claim should make no difference to the availability of jurisdiction. After all, the Court in *Bristol-Myers* emphasized that the "primary concern"[63] in a jurisdictional analysis should be the "burden on the defendant."[64] But the Court did not suggest that it was the only concern.[65] And as Daniel Wilf-Townsend has perceptively noted, "benefits that may flow to 'the interstate judicial system'" from the exercise of personal jurisdiction must also be included in the jurisdictional calculus.[66] Two of the interests the Court has expressly identified in this vein—"the interstate judicial system's interest in obtaining the most efficient resolution of controversies"[67] and "the interests of the 'several States' . . . in the advancement of substantive policies"[68]—are factors that

[63] Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263 (2017).

[64] *Id.*

[65] *Id.* (explaining that "[i]n determining whether personal jurisdiction is present, a court must consider a variety of interests," including "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice"). In deciding whether a court may exercise jurisdiction over a defendant, the interests of absentees on whose behalf negative-value claims are asserted likely are not entitled to great weight. As David Marcus and Will Ostrander have noted: "Affected consumers often have no idea that they are injured or do not care if they are." Marcus & Ostrander, *supra* note 50, at 1532.

[66] Wilf-Townsend, *supra* note 42, at 1654. Professor Wilf-Townsend notes, among other things, that "states share an interest in deterring unlawful conduct—and nationwide class actions may be the most effective deterrent for a defendant's nationwide conduct." *Id.* But relying on this generalized interest to justify jurisdiction over all class members in a nationwide class suit may frustrate the more specific interest of particular states in having their law applied to substantive claims with which they have a territorial connection.

[67] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); *see also* Asahi Metal Indus. Co., Ltd. v. Superior Ct., 480 U.S. 102, 115 (1987) (referring to "the interests of the 'several States' . . . in the efficient judicial resolution of the dispute").

[68] *Asahi*, 480 U.S. at 115. *World-Wide Volkswagen* and *Burger King* referred more narrowly to "the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen*, 444 U.S. at 292; *Burger King*, 471 U.S. at 477. But *Asahi* uses a broader formulation, and *World-Wide Volkswagen* did not purport to provide a comprehensive list of factors that would affect the jurisdictional calculus. *See World-Wide Volkswagen*, 444 U.S. at 292 (noting "that the burden on the defendant . . . will in an appropriate case be considered in light of other relevant factors, *including* . . . the shared interest of the several States in furthering fundamental substantive social policies") (emphasis added); *see also Asahi*, 480 U.S. at 115 (identifying as additional factors to be considered in a case involving foreign-country: "the procedural and substantive policies of other *nations* whose interests are

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may sometimes justify the assertion of jurisdiction on "a lesser showing of minimum contacts than would otherwise be required."[69] There similarly is no doubt that a state or federal court engaged in a Fourteenth Amendment due process analysis must consider federal substantive policies in the jurisdictional calculus.[70]

Richard Freer has expressed skepticism about such arguments, contending that "[t]he Court has spent years relegating [the interest] factors—which once occupied a place of primacy—to distant importance."[71] He makes an important point. The Court has come far from a jurisdictional analysis in which "[n]o single factor"—not even the burden on the defendant—"held primacy."[72] As the Court insisted in *Bristol-Myers*—the "burden on the defendant"—which is largely assessed on the basis of minimum contacts—now "is the primary concern."[73] And in considering the burden on the defendant, the Court has imposed important threshold requirements for which consideration of other factors is irrelevant. Among the most prominent of these is the principle that specific jurisdiction is unavailable in the absence of *purposeful* contacts established by the defendant.[74]

But putting threshold requirements aside, factors other than the burden on the defendant cannot cleanly be separated from a sound minimum contacts analysis. Whether the defendant's purposeful contacts with the forum state are of the quantum and quality to justify jurisdiction often cannot be answered sensibly without at least

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affected by the assertion" of jurisdiction, and "the Federal Government's interest in its foreign relations policies").

[69] *Burger King*, 471 U.S. at 477.

[70] *See supra* note 68.

[71] *See* Richard D. Freer, *Personal Jurisdiction: The Walls Blocking an Appeal to Rationality*, 72 VAND. L. REV. EN BANC 99, 116 (2019) (expressing skepticism about such arguments) [hereinafter Freer, *Personal Jurisdiction*]. *But see* 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, 605 (2022) (suggesting that, after the *Ford* decision, "[p]erhaps the Court will be receptive to another Brennan innovation: tying the assessment of contact to the assessment of fairness in cases in which contact is minimal").

[72] Freer, *Personal Jurisdiction*, *supra* note 71, at 103.

[73] Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255, 263 (2017).

[74] *See, e.g.*, *Burger King*, 471 U.S. at 474 ("[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State."); Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

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implicitly considering "the forum state's interest in adjudicating the dispute" and "the plaintiff's interest in convenient and effective relief."[75] And in deciding the minimum contacts question, the Court has also considered—when appropriate—"the interstate judicial system's interest in obtaining the most efficient resolution of controversies" and the "interests of the 'several States' in the advancement of substantive policies."[76] Thus, it makes sense to consider these factors in assessing the circumstances in which jurisdiction should be available over a defendant with respect to negative-value claims.

That assessment suggests that the "interstate judicial system's interest in obtaining the most efficient resolution of controversies" should not weigh in favor of jurisdiction in connection with negative-value claims.[77] That interest has played a role in the Supreme Court's decisions only when a state-created mechanism for coordination among states exists. *Kulko v. Superior Court*, for example, referred to the Revised Uniform Reciprocal Enforcement of Support Act of 1968 in part to explain why the fact that California and New York had agreed on a mechanism to determine and enforce child support obligations meant that there was no need to subject the New York defendant to jurisdiction in California.[78] *Keeton v. Hustler Magazine*, by contrast, appeared to rely on that factor to support an exercise of jurisdiction.[79]

The plaintiff in *Keeton* brought a suit for libel against *Hustler Magazine* in New Hampshire, seeking recovery for injury to reputation that she suffered from publication of the magazine, not just in New Hampshire, but across the country. Under the "single publication rule" that New Hampshire and many other states apply,

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[75] *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

[76] *Id.*

[77] *Id.*

[78] Kulko v. Superior Ct., 436 U.S. 84, 98–100 (1978) (explaining that the Act provided "a mechanism for communication between court systems in different States . . . to facilitate the procurement and enforcement of child-support decrees where the dependent children reside in a State that cannot obtain personal jurisdiction over the defendant" and citing the Act as a reason why allowing California to exercise jurisdiction over the defendant was unnecessary). *Kulko* also relied on the Act to conclude that "California's legitimate interest in ensuring the support of children resident in California without unduly disrupting the children's lives" could be served without exercising jurisdiction over the defendant. *Id.* at 98. The Court in *World-Wide Volkswagen* cited *Kulko*'s discussion of the Act in identifying "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" and "the shared interest of the several States in furthering fundamental substantive social policies" as factors for consideration in the jurisdictional inquiry. *See World-Wide Volkswagen*, 444 U.S. at 292.

[79] Keeton v. Hustler Mag., Inc., 465 U.S. 770 (1984).

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"[a]ny one edition of a book or newspaper . . . or similar aggregate communication" is treated as a "single publication" for which only *one* action is permitted to recover damages for injury to reputation suffered in all jurisdictions.[80] Thus, the question in *Keeton* was whether limits on specific jurisdiction should be construed in a way that would undermine widely-accepted state claim-preclusion rules that furthered the interstate judicial system's interest in obtaining the most efficient resolution of controversies.[81] The Court held that New Hampshire could exercise specific jurisdiction over the defendant, even with respect to injuries that had not been suffered in the State. As the Court explained:

> [T]he combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States in the application of the "single publication rule" demonstrate the propriety of requiring respondent to answer to a multistate libel action in New Hampshire.[82]

Because the single publication rule permits a libel plaintiff to recover only once for a multistate libel, a plaintiff in *Keeton*'s position is likely to choose the *single* most advantageous forum in which to pursue her case. In thus providing an exceptionally strong incentive to file only one suit, the single publication rule furthers the interstate judicial system's interest in obtaining the *most efficient* resolution of controversies. But no such incentive exists for a single, unitary adjudication of related, negative-value claims. Indeed, loosening limits on jurisdiction in this context would likely exacerbate the problem of inefficient parallel litigation, in which individual class members may be a part of multiple class suits filed by different class counsel in multiple forum states.

By contrast, the interests of the several States in the advancement of substantive policies may provide a basis for loosening jurisdictional requirements in connection with negative-value claims. The key generally should be whether the forum state

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[80] RESTATEMENT (SECOND) OF TORTS § 577A (AM. L. INST. 1965). The Restatement explains that the "rule is justified by the necessity of protecting defendants and the courts from the numerous suits that might be brought for the same words if each person reached by such a large-scale communication could serve as the foundation for a new action." *Id.* at § 577A cmt. c.

[81] The Court did not identify the interest using this precise language. Rather, the Court concluded that "New Hampshire also has a substantial interest in cooperating with other States, through the 'single publication rule,' to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding." *Keeton*, 465 U.S. at 777.

[82] *See id.* at 777–78.

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would apply the *same* substantive law to a negative-value claim as would a state that could exercise jurisdiction over the defendant with respect to that claim *viewed in isolation*.[83] Because different choice-of-law rules may lead to the application of different rules of substantive law to the same claim, looking to the *whole law* of the states in question—including their choice-of-law rules[84]—is essential to that determination.[85]

The relevant states must also have an interest in cooperating to ensure the private enforcement of the shared policy. The two normally go hand in hand. But if the procedural law of one of the states is hostile to enforcement of the shared policy, there may be no basis for finding a joint interest in cooperating to enforce the shared policy. If, for example, one of the states in question proscribes negative-value class

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[83] When the substantive law of two states is the same on a point, the states clearly share a common substantive policy. But states may share a common substantive policy even when the relevant rules of law are not identical. States, for example, may share a common substantive policy when their laws are different in detail. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 cmt. h (AM. L. INST. 1988) (stating that "in situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local law rules," a court "may apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved"); Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 180 (discussing Nebraska's decision to enforce out-of-state contracts that imposed a "somewhat higher interest rate" than permitted by Nebraska law when the out-of-state law was "'similar in principle' to the Nebraska small-loan act"). And the Supreme Court in *World-Wide Volkswagen* viewed the enactment of the Revised Uniform Reciprocal Enforcement of Support Act of 1968 as indicating that California and New York in *Kulko* shared an interest "in furthering fundamental substantive social policies," *World-Wide Volkswagen*, 444 U.S. at 292, even if the scope of the duty to provide child support might vary. *See* Revised Uniform Reciprocal Enforcement Support Act § 7 (1968) ("Duties of support applicable under this Act are those imposed under the laws of any state where the obligor was present for the period during which support is sought."). For further discussion, see *infra* notes 84–85 and accompanying text.

[84] LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 121 (8th ed. 2020) ("Terminology: *whole law* = conflicts rules + internal law.").

[85] Two states share a common substantive policy when the relevant choice-of-law rules of each state point to a rule of internal substantive law that both states share or to a common substantive policy reflected in the internal substantive law of each state. *See supra* notes 83–84 and accompanying text (generally discussing the concept of a common substantive policy and arguing that identification of a common substantive policy requires reference to the whole law of the relevant states). It is less clear that a state shares a common substantive policy with another state when its choice-of-law rules would lead to the application of the other state's substantive policy but not its own. When a state's choice-of-law rules would further a substantive policy that is not reflected in its own internal law, the question posed is whether a state may have an interest in furthering a foreign substantive policy that is strong enough to justify expanding the state's specific jurisdiction. And if so, in what circumstances? The answer to these questions is beyond the scope of this Article.

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suits on the ground that they benefit only class counsel, that state would lack an interest in cooperating with other states to enforce the shared substantive policy.

To the extent two or more states share the same substantive policy with respect to a group of negative-value claims and have a joint interest in cooperating to ensure the private enforcement of that policy, that interest would justify an expansion in the typical scope of a claim for purposes of specific jurisdiction. "Claim," of course, is one of those chameleon-like terms whose meaning changes depending on the circumstances. The term is often used simply to refer to a theory of liability on which a plaintiff relies to seek relief. But the term "claim" is also commonly used to refer to a grouping of facts that qualify as a "transaction or series of connected transactions"[86] the so-called transactional approach to defining a claim.[87] And it is in this latter way that the term should be understood for purposes of specific jurisdiction.[88]

Consider *Keeton* once again. The suit included events occurring wholly outside of New Hampshire that led to injury entirely outside of the state.[89] Such events were parallel to the series of events in New Hampshire that caused injury there.[90] The single publication rule meant that, as a matter of New Hampshire law, relief could be sought in a single suit for the complete series of occurrences leading to defamation injury in New Hampshire and elsewhere.[91] Indeed, *assuming personal jurisdiction existed*, the failure to seek relief even with respect to events that occurred solely outside of New Hampshire would have been claim-preclusive once a final judgment on the merits had been rendered.[92] But imposing liability on the basis of events that

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[86] RESTATEMENT (SECOND) JUDGMENTS § 24 (defining a claim for purposes of claim preclusion); *see also* FED. R. CIV. P. 20(a)(1)(A) (authorizing the joinder of multiple plaintiffs in a civil action when "they assert any right to relief . . . with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences").

[87] *See* Alan M. Trammell, *Transactionalism Costs*, 100 VA. L. REV. 1211, 1212–13 (2014) (describing the transactional approach).

[88] Christine Bartholomew and Anya Bernstein argue that it is in this way that the Court in *Ford* understood the term. Christine P. Bartholomew & Anya Bernstein, Ford*'s Underlying Controversy*, 99 WASH. U. L. REV. 1175, 1207 (2022) ("*Ford*'s text and its application of the law to the facts defines a claim as the underlying transaction, occurrence, or event on which litigation is based.").

[89] Keeton v. Hustler Mag., Inc., 465 U.S. 770, 772–74 (1984).

[90] *Id.*

[91] *Id.*

[92] *See supra* notes 80–81 and accompanying text. Matters outside a court's jurisdiction are not barred by claim preclusion. *See* RESTATEMENT (SECOND) OF JUDGMENTS 26(1)(c) & cmt. c(1) (AM. L. INST. 1982).

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occur wholly out of state and lead to no injury within it typically is not within the regulatory authority of courts in a forum state that lacks general jurisdiction over the defendant. Thus, it was open to debate whether, for purposes of specific jurisdiction, defamation occurring wholly outside of New Hampshire could be characterized as part of the same claim as defamation occurring within the state.

As bodies of law as diverse as joinder, claim preclusion, and supplemental subject matter jurisdiction illustrate, the scope of a "claim" or "transaction or occurrence" must be responsive to the policies in the area of law in which the concept is used.[93] Thus, under the *Restatement (Second) of Judgments*, each plaintiff generally has a separate claim—transactionally defined—against each defendant for purposes of claim preclusion,[94] but multiple plaintiffs may join together in one civil action under the Federal Rules of Civil Procedure if, among other things, they assert a right "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences."[95] It should not be surprising that the precise contours of a claim for purposes of specific jurisdiction similarly cannot be divorced from the underlying policies that guide decision making with respect to personal jurisdiction. *Keeton* suggests that a key factor in concluding that the single publication rule was consistent with due process limits on specific jurisdiction was "the interstate judicial system's interest in obtaining the *most efficient* resolution of controversies."[96]

This mode of analysis similarly suggests that the "interests of the 'several States' in the advancement of . . . substantive policies" may shape the scope of a claim for purposes of specific jurisdiction.[97] Assume, for example, that two states would apply the *same* substantive law to negative-value claims that are based on roughly the same set of facts. The states' joint interest in cooperating in the private

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[93] Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1724 (1998) (remarking that Charles Alan Wright, the towering federal courts scholar, "never would have fallen into the trap of treating the transaction standard as anything but a nuanced term designed to provide courts flexibility and some discretion in developing the policies underlying each of the areas in which it is utilized").

[94] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (AM. L. INST. 1982) ("When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar[,] . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.").

[95] *See* FED. R. CIV. P. 20(a)(1)(A).

[96] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (emphasis added). *Keeton* used different language. *See supra* note 81.

[97] *World-Wide Volkswagen*, 444 U.S. at 292.

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enforcement of that shared policy should permit the courts of either state to treat those negative-value claims as part of the same claim for purposes of specific jurisdiction. I assume that in most contexts each plaintiff will have a separate claim for purposes of specific jurisdiction. But the fact that negative value-claims cannot be adjudicated without aggregation strongly suggests that a departure from the baseline scope of a claim is appropriate in the limited circumstances described here.[98]

And so long as part of that claim has the required territorial connection with the forum state, courts within that state may hear the claim in its entirety. In other words, so long as the forum state has the required territorial connection with the negative-value claims of *some* plaintiffs, the court may exercise jurisdiction over the defendant with respect to *all* the negative-value claims that may be deemed part of the same claim for purposes of specific jurisdiction. After all, as *Keeton* recognized, a claim for purposes of specific jurisdiction may include events occurring wholly out of state that caused no injury within the state.[99] The New Hampshire courts could exercise specific jurisdiction over the defendant with respect to those out-of-state events because the in-state occurrences created the necessary link between the multistate claim and New Hampshire.[100] That the negative-value claims of some plaintiffs—viewed in isolation from others—might lack the required affiliation with the forum state similarly should not matter.[101]

It should also be irrelevant to the scope of the claim that some forum state could exercise jurisdiction over the defendant with respect to *all* of the negative-value claims viewed in isolation. The interest of such a state will not be "more affected"[102]

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[98] *Cf.* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1454 (2018) ("At a minimum, asserting personal jurisdiction over an aggregated proceeding would be rational when the costs of litigation make such aggregation necessary to feasibly enforce the governing law and obtain judicial remedies.").

[99] Keeton v. Hustler Mag., Inc., 465 U.S. 770, 777–78 (1984).

[100] *Id.*

[101] It has never been the case that *every* aspect of a claim must have a territorial connection with the forum state. But when part of a claim could alternatively be conceptualized as a wholly separate "claim," reliance on that truism is insufficient to justify jurisdiction. The key should be whether the defendant's purposeful contacts with the forum state are substantial enough to justify extending jurisdiction on the basis of a noncausal relationship between the defendant's purposeful contacts with the forum state and the negative-value claims in question. *See supra* notes 35–38 and accompanying text. I assume for purposes of discussion that a defendant in a negative-value class suit will have such contacts with the forum state.

[102] Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1025 (2021).

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than those of other states with a different substantive policy.[103] To understand why, assume that the defendant's home state would apply its own law to all of the negative-value claims.[104] And because its law strongly favors the defendant, that choice would frustrate the shared substantive policy of two or more *other* states, each of which separately would have authority to exercise jurisdiction over the defendant with respect to some of the negative-value claims considered in isolation. The states that share the substantive policy have no less a legitimate interest than any other state in negative-value claims with which they have a territorial connection. Permitting jurisdiction on the basis of a shared substantive policy simply recognizes that states have a legitimate interest in cooperating to enforce their substantive policies.[105]

In short, negative-value claims that are legitimately governed by the same substantive policy and are based on roughly the same set of facts may be treated as part of the same claim for purposes of specific jurisdiction. And so long as part of that claim has the required territorial connection with the forum state, courts within that state should be able to exercise specific jurisdiction over the defendant with respect to the claim as a whole.[106]

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[103] *Cf. id.* ("The law of specific jurisdiction . . . seeks to ensure that States with 'little legitimate interest' in a suit do not encroach on States more affected by the controversy.").

[104] *Cf. In re* Accutane Litig., 194 A.3d 503 (N.J. 2018) (applying the law of the defendant's home state of New Jersey in aggregate litigation).

[105] Because the broad definition of "claim" suggested here is intended to ensure that a jurisdictional avenue exists for the enforcement of a common substantive policy shared by two or more states, it might be argued that the scope of a claim should not be expanded when a class suit has been certified in which the common substantive policy may be vindicated. But whether some other court exists that could vindicate a shared substantive policy has no bearing on the legitimate scope of a claim. That kind of consideration would more appropriately be a part of a "jurisdiction by necessity" analysis. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 212, 211–12 (1977) (insisting that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," but nonetheless noting that "[t]he case d[id] not raise, and [the Court] therefore d[id] not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff").

[106] One group of commentators has taken a somewhat different approach to the problem of specific jurisdiction in aggregate litigation, arguing that "[s]queezing all federalism interests into the relatedness requirement . . . invites broad generalizations about state interests that may not be true" Gardner et al., *supra* note 5, at 478. They suggest that questions of interstate federalism may be better addressed through the "reasonableness inquiry" which they contend "explicitly invites consideration of competing sets of interests assessed from multiple angles of interstate federalism—the possible interest, disinterest, and incentives behind multiple states' 'desires' to provide a potential forum for a dispute." *Id.* For a different understanding of the reasonableness inquiry, see *supra* notes 53–56 and accompanying text.

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Bristol-Myers is consistent with this approach. The Court in *Bristol-Myers* simply did not address whether the claims of multiple plaintiffs may be deemed a part of the same claim for purposes of specific jurisdiction.[107] It is true that *Bristol-Myers* distinguished *Keeton* as involving "*the scope of a claim*," without recognizing that the scope of the claim in *Keeton* was exceptionally broad in terms of specific jurisdiction and that *Bristol-Myers* could be understood to raise a similar question of scope, albeit in a sharply different context.[108] But the Court in *Bristol-Myers* made no effort to articulate the proper scope of a claim for purposes of specific jurisdiction, focusing instead on rejecting the "sliding scale approach" to specific jurisdiction.[109]

Because federal substantive law applies nationwide, the approach urged here would broadly authorize specific jurisdiction over defendants in connection with negative-value claims based on federal substantive policy. But the approach may have only a modest effect on specific jurisdiction when negative-value claims based on state law are at stake. That is because the substantive law of the states is rarely uniform.[110] Indeed, in the absence of techniques such as applying the law of the defendant's principal place of business, variations in the law applicable to categories of state-law claims have often foiled the certification of nationwide class actions and all but modestly defined multistate class suits.[111] And the requirement that a common substantive policy shared by states be identified by applying the *whole law* of relevant states is even less likely to authorize nationwide class suits or expansive

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[107] *See* Bristol-Myers Squibb Co. v. Superior Ct., 582 U.S. 255 (2017).

[108] *Id.* at 266.

[109] The sliding-scale approach appears to evade the strict dichotomy between general and specific jurisdiction on which the U.S. Supreme Court insisted in *Goodyear* and *Daimler*. *See, e.g.*, Triple Up Ltd. v. Youku Tudou Inc., 235 F. Supp. 3d 15, 27 (D.D.C. 2017) (arguing that even before *Daimler* and *Goodyear*, the Court had made clear that "general and specific jurisdiction are 'analytically distinct categories, not two points on a sliding scale,'" and concluding that the gap between general and specific jurisdiction has "only widened" after *Daimler* and *Goodyear*, "as general jurisdiction has assumed an increasingly 'reduced role'"). Thus, it is not surprising that the Court rejected California's approach, claiming that it "resemble[d] a loose and spurious form of general jurisdiction." *Bristol-Myers*, 582 U.S. at 264.

[110] *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 583 (1996) (recognizing that "[a]s a practical matter variations between state laws may range from nuances to fairly important differences") (quoting COMPLEX LITIGATION PROJECT § 6.01 Reporter's Note 31 to cmt. e, at 439 (AM. L. INST. 1993)).

[111] *See* NAGAREDA ET AL., *supra* note 29, at 168 ("If a court must apply materially different state laws to the claims of different class members, the result is likely to be a multitude of individual questions, which can make it difficult to satisfy the predominance requirement of Rule 23(b)(3) in a multistate or nationwide class suit."); *e.g.*, *In re* Bridgestone/Firestone Tire Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002) (concluding that the law of the place of injury would govern the claims that plaintiffs sought to certify in a nationwide class action and ordering decertification of the class).

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multistate class actions. But even with respect to state-law claims, the approach suggested here would mean that negative-value claims would less likely be subject *solely* to the regulatory authority of a forum state that would frustrate the shared substantive policy of other states.

CONCLUSION

The Court's decisions in *Daimler* and *Bristol-Myers* together have led to a sea change in the law governing jurisdiction over defendants in aggregate litigation. And class suits—which have no less of an effect on the rights of defendants than other aggregate litigation—should not be exempt from the greater solicitude for defendants that these decisions exemplify. That said, the burden on the defendant has never been the sole factor in jurisdictional determinations. The interests of states—including the interests of states in cooperating to further shared substantive policies—must also be considered.

That recognition justifies a loosening of jurisdictional requirements in some circumstances, including suits asserting negative-value claims. Because such claims cannot be resolved without aggregation, the interest of states in cooperating to further shared substantive policies is particularly salient in this context. For that reason, the scope of a claim—as that term is defined for purposes of specific jurisdiction—should be understood more broadly in connection with negative-value claims than might otherwise be justified.

In sum, claims asserted by absent class members are not exempt from limits on personal jurisdiction over individual defendants. But the nature of the claims asserted in a class suit may in appropriate circumstances modify those limits in accordance with the longstanding principle that the burden on the defendant is not the sole consideration in the jurisdictional calculus.

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