NOTE

LACING A NEW *SHOE*: BALANCING DUE PROCESS PROTECTIONS AGAINST THE RIGHT TO CONVENIENT REDRESS

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"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[1]
–Chief Justice John Marshall, *Marbury v. Madison*.

I. INTRODUCTION

Imagine this scenario: while traveling home from a family vacation, a product defect in the vehicle you own causes a deadly crash.[2] Upon returning home, you turn to the court system seeking justice for the injuries against you and your family. You file a product liability suit against the car manufacturer and the company that manufactured the vehicle's tires. You purchased the vehicle in your home state, have lived continuously in this state since purchasing the car, and the defendant companies do significant business in your state. Much to your surprise, the court denies your claim without considering the merits, and without considering what alternatives you may have to seek justice.[3]

This Note attempts to trace the history of the personal jurisdiction doctrine to understand how we arrived at this strange place, where

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[1] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[2] The hypothetical in this paragraph is based on the facts of *Aybar v. Aybar*, 177 N.E.3d 1257, 1258–59 (N.Y. 2021).

[3] *See Aybar*, 37 N.E.3d at 1266.

corporations have broad jurisdictional immunity and plaintiffs must search far and wide just to find a court that will accept their complaint. Part II discusses the history, including the origins of the major theories of personal jurisdiction. Part III proposes a relatively novel constitutional right, at least as applied to personal jurisdiction, with the goal of shaking loose the malaise that has prevented meaningful reform in personal jurisdiction. That Part introduces the Right to Convenient Redress and provides support for the concept in case law young and old. Part IV briefly considers the possibilities that the Right to Convenient Redress opens up and calls for others to think differently about the problems presented by narrow personal jurisdiction. In doing so, the Note adds a new perspective to the robust literature on the topic.

II. PERSONAL JURISDICTION THEN & NOW

Over the course of American history, there have been two prevailing justifications for requiring limits on personal jurisdiction, each of which has dominated legal reasoning at different points in our history.[4] First, in the era before *Pennoyer v. Neff*[5] was decided in 1878, personal jurisdiction was grounded in notions of state sovereignty.[6] In some ways, *Pennoyer* was consistent with this justification for jurisdiction, but *Pennoyer* also introduced the second justification for limits on personal jurisdiction: the Due Process Clause of the Fourteenth Amendment.[7] Due process grounds subsequently rose to the fore in *International Shoe Co. v. Washington*[8] and have guided much of the Court's jurisprudence in the more than seventy-five years since.[9]

State sovereignty and due process are often in tension with one another. While due process is a justification for limiting jurisdiction

[4] *See* Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 U. N.H. L. REV. 65, 69 (2015).

[5] Pennoyer v. Neff, 95 U.S. 714 (1878).

[6] *See, e.g.*, Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 320–21 (1870); *see also* Michael H. Hoffheimer, *The Case Against Neo-Territorialism*, 95 TUL. L. REV. 1305, 1314–18 (2021) (discussing the pre-*Pennoyer* territorial model and its basis in the state's power over property within its borders).

[7] *See* Pennoyer, 95 U.S. at 733–34 (1878) (holding that *in rem* attachment was not a valid basis for jurisdiction because it did not provide due process to a defendant but that personal service within the borders of a state was sufficient to exercise jurisdiction).

[8] Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

[9] *See* 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, 43, 56–57 (1990); *see also* Pfeffer, *supra* note 4, at 66–67.

over certain defendants and claims,[10] state sovereignty can create quite broad exercises of personal jurisdiction since a purely territorial model asks only whether the defendant is within the borders of the forum or consented to personal jurisdiction therein.[11] Invoking constitutional notions of due process is necessarily a challenge to a state's ability to render judgments. This tension is evident in Supreme Court jurisprudence throughout history as the Court seeks to respect our system of federalism and also protect defendants from judicial overreach.

This Part proceeds by expanding on the historical basis for each of these justifications and presents International Shoe as a decision that was acutely aware of the tension between these competing views and sought to strike a balance that respected both interests.

A. The Territorial Model & Interstate Federalism

In recent years, some scholars have found renewed utility in the territorial approach to personal jurisdiction.[12] These scholars point out that the *International Shoe* regime, as interpreted by the Roberts Court, fails to provide a forum in some cases where it obviously should.[13] Territorialism offers an appealing black-and-white rule that in theory puts plaintiffs, defendants, and courts on notice about jurisdictional limits, which, at this moment in history, would satisfy a growing scholarly itch to settle questions about what facts warrant personal jurisdiction and which do not.

Cooper v. Reynolds is emblematic of the territorial approach before *Pennoyer*.[14] In that case, the Supreme Court held that attachment of defendant's property within the forum state was sufficient to exercise jurisdiction even though the defendant did not have notice of the suit and statutory notice requirements were not followed.[15] This was so because territorialism holds *a priori* that the sovereign has power

[10] Borchers, *supra* note 9, at 56.
[11] *Id.* at 23; Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1595 (2018).
[12] *See* Jacobs, *supra* note 11, at 1592; Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1249 (2017). *But see* Hoffheimer, *supra* note 6, at 1308 (criticizing Jacobs and Sachs by pointing out that territorialism yields unfair results and ignores complex questions implicated by jurisdictional choices).
[13] *See, e.g.*, Jacobs, *supra* note 11, at 1590–91.
[14] *See* Cooper v. Reynolds, 77 U.S. (1 Wall.) 308, 320–21 (1870); *see also* Hoffheimer, *supra* note 6, at 1315 (discussing *Cooper*).
[15] Hoffheimer, *supra* note 6, at 1317.

over everything within its borders.[16] While failure to properly notice may be a reversible error under territorialism, it is not a question of jurisdiction.[17] Jurisdiction arises solely by virtue of the sovereign's power over its territory.[18] The Court in *Cooper* and other cases of the pre-*Pennoyer* period made no reference to constitutional limits on jurisdiction, suggesting that jurisdiction was thought to be a matter for states and federal common law to work out locally.[19]

Pennoyer did not abandon the territorial model, but it did make an important observation that fundamentally changed the future of personal jurisdiction: the true purpose of many *in rem* proceedings was not actually about the property, rather, the property was a hook to secure a judgment against a *person*.[20] Justice Field wrote that while a sovereign does have power over everything within its borders, it also lacks power over everything outside its borders.[21] This included persons outside the borders of a state.[22] The reason given by Justice Fields was one of federalism.[23] States, he argued, have an interest in protecting their citizens from the extra-territorial overreach of other sovereigns, and this means limiting the power of foreign states to render judgments against non-residents.[24]

In the nearly 150 years since, federalism has been invoked as a limit on personal jurisdiction by jurists across the political

[16] *See Cooper*, 77 U.S. at 319 ("It seems to us that the seizure of the property, or . . . the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff."); *see also* Pennoyer v. Neff, 95 U.S. 714, 722 (1878) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.").

[17] *See* Hoffheimer, *supra* note 6, at 1318 (discussing the reasoning in *Cooper*).

[18] *See id.* at 1317.

[19] *Cf. id.* (explaining that the Court in *Cooper* held lack of notice "did not provide sufficient grounds for nullifying judgment in collateral proceedings"). *Cooper* was decided more than two years after the Fourteenth Amendment was ratified on July 9, 1868, but the Court did not invoke the Amendment or the term *due process*. *See id.* at 1308 n.12.

[20] *See Pennoyer*, 95 U.S. at 734 ("It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them . . . . Such are cases commenced by attachment against the property of debtors . . . . So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned.").

[21] *See id.* at 722.

[22] *Id.*

[23] *See id.* ("The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.").

[24] *See id.* at 722–23.

spectrum.[25] *Hanson*'s "purposeful availment" requirement is rooted in territorialism.[26] The Court sought to ensure that the defendant had actually availed itself of the "benefits and protections" of the forum state, so that reciprocal obligations would also flow to the defendant.[27] Until the defendant assumes those obligations, the forum state's interest is outweighed by the interests of other states and the forum state cannot extend its jurisdiction beyond its borders.[28] As long as the minimum contacts test asks whether the defendant purposefully availed itself of the forum, state borders will continue to mean something in a tangible way.

World-Wide Volkswagen is often credited with reviving the federalism justification in modern doctrine.[29] In that case, the Court emphasized that "the Due Process Clause, *acting as an instrument of interstate federalism*, may sometimes act to divest the State of its power to render a valid judgment."[30] This casts due process as only the means to the true end: strong interstate federalism. In this formulation, due process is not merely guaranteeing fair notice and an opportunity to be heard,[31] it is guaranteeing that one state will not usurp the sovereign powers of another.[32]

World-Wide Volkswagen outlined several factors, later modified by *Burger King v. Rudzewicz*, that can be analyzed in addition to

[25] S*ee* Hanson v. Denckla, 357 U.S. 235, 251 (1958) (Warren, C.J.); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (White, J.) (citing *Hanson*, 357 U.S. at 251); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (Brennan, J) (quoting *World-Wide Volkswagen*, 444 U.S. at 292) (initially rejecting federalism but including some of its considerations in a factor test); Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780–81 (2017) (Alito , J.) (quoting *World-Wide Volkswagen*, 444 U.S. at 293–94) (holding that federalism concerns can "divest the State of its power to render a valid judgment"); *see also Burger King Corporation v. Rudzewicz*, OYEZ, https://www.oyez.org/cases/1984/83-2097 [https://perma.cc/7ZWN-SY3V] (showing diverse coalition of justices making up the majority); *see generally* Stephen Higdon, *If It Wasn't on Purpose, Can a Court Take It Personally?: Untangling* Asahi*'s Mess That* J. McIntyre *Did Not*, 45 TEX. TECH L. REV. 463 (2013) (describing the lasting influence of federalism in the Court's personal jurisdiction doctrine).

[26] *See* Higdon, *supra* note 25, at 470–71 (tracing the purposeful availment test to the Court's desire to embed territorial federalism into the analysis).

[27] *See Hanson*, 357 U.S. at 253.

[28] *See id.* at 253–55.

[29] *See, e.g.*, Higdon, *supra* note 25, at 472–73 (noting *World-Wide Volkswagen*'s reliance on federalism to ground its reasoning).

[30] *World-Wide Volkswagen*, 444 U.S. at 294 (emphasis added) (citing *Hanson*, 357 U.S. at 251, 254).

[31] *See* MICHAEL VITIELLO, ANIMATING CIVIL PROCEDURE 35–36 (2017) (arguing that the Court has not provided a good reason that the doctrine requires anything more than fair notice and hearing).

[32] *See World-Wide Volkswagen*, 444 U.S. at 294 (stressing "that the Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws,'" in which the Court included "territorial limitations on the power of the respective States" (first quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); then quoting *Hanson*, 357 U.S. at 251)).

minimum contacts: (1) "the burden on the defendant" (as judged by the minimum contacts test), (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (5) the "shared interest of the several States in furthering fundamental substantive social policies."[33] The plain language of *World-Wide Volkswagen* suggests that the factors could help or hurt either party, but *Burger King* holds that before the factors can be considered, the defendant's minimum contacts must be established.[34] That led Professors Borchers, Freer, and Arthur to conclude that the factors can only *hurt* the plaintiff since the factors will only be invoked to weigh against jurisdiction when minimum contacts exist.[35]

Three of the factors concern interstate federalism. First, the Court considers "the forum State's interest in adjudicating the dispute."[36] If the forum has a low level of interest, this may cut against jurisdiction. Second, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"[37] is weighed. This factor softens much of the Court's federalism-over-efficiency rhetoric[38] by permitting efficiency to defeat sovereign interests. Thus, even when the plaintiff chooses the forum with the strongest federalism interests, efficiency may be used against the plaintiff to deny jurisdiction. Third, the test considers the "shared interest of the several States in furthering fundamental substantive social policies."[39] An example of this comes from the case cited by the Court here, *Kulko v. Superior Court of California*.[40] There the Court held that personal jurisdiction doctrine must be careful not to create perverse incentives for families to enter into reasonable child

[33] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

[34] *See Burger King*, 471 U.S. at 476.

[35] *See* 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, 4 (2021) ("After *World-Wide Volkswagen* and *Burger King* . . . , the fairness assessment can *defeat* jurisdiction but cannot create jurisdiction in the absence of a relevant contact, although perhaps the factors can nudge a court toward finding jurisdiction in a close case.").

[36] *World-Wide Volkswagen*, 444 U.S. at 292 (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)).

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

[38] *See, e.g.*, *id.* at 294 (holding federalism may prevent jurisdiction "even if the forum State is the most convenient location for litigation").

[39] *Id.* at 292 (citing Kulko v. Superior Ct., 436 U.S. 84, 93, 98 (1978)).

[40] *Kulko*, 436 U.S. 84 (1978).

visitation agreements.[41] This example sheds light on what this factor is meant to account for. The factor could be used to deny plaintiff's choice of forum if the choice undermines social policy. The design of the factors shows that the Court continues to use interstate federalism to limit available forums at the expense of plaintiff's choice.

Recently, federalism played a large role in the reasoning behind the Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*.[42] In that case, plaintiffs from many different states sought to join together in a mass tort action in California state court.[43] The plaintiffs sought damages for injuries caused by the drug Plavix, which is made by Bristol-Myers Squibb ("BMS").[44] The non-California-resident plaintiffs had no connection to California and did not allege that BMS's contact with California gave rise to the injuries.[45] BMS moved to dismiss the non-resident plaintiffs, asserting lack of personal jurisdiction, and the issue was appealed to the Supreme Court.[46] The Court relied on *World-Wide Volkswagen*, saying

> [E]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[47]

The Court ultimately held that the defendant's contacts with California had nothing to do with the claim, and so the defendant did not subject itself to "the coercive power of [the] State."[48] California may have an interest in providing a forum for redress to its residents

[41] *See id.* at 93. *Kulko* also noted that "California has substantial interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised. These interests are unquestionably important." *Id.* at 98.
[42] *See* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780–81 (2017).
[43] *Id.* at 1778.
[44] *Id.*
[45] *See id.*
[46] *Id.* at 1778–79.
[47] *Id.* at 1780–81 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980)).
[48] *See Bristol-Myers*, 137 S. Ct. at 1780, 1783.

and regulating the acts of corporations within the state, but the Court held that California's power to render judgments does not extend to acts outside its boundaries against non-residents.[49] This means that even though BMS is not burdened by the litigation and litigation costs would go up under the Court's rule, and despite BMS's continuous and systematic contacts with California, federalism prevents valid jurisdiction.[50] This holding illustrates the continuing influence of territorial concerns on the Court's personal jurisdiction jurisprudence.

Federalism was not the only limitation on personal jurisdiction introduced by *Pennoyer*. Justice Fields also suggested that the Fourteenth Amendment's Due Process Clause limited jurisdiction to only those cases in which the defendant had adequate notice of suit.[51] As discussed below, this reasoning eventually overshadowed sovereignty and federalism as the primary consideration in the personal jurisdiction analysis.

B. Due Process as an Overriding Constraint

The extent to which *Pennoyer* sought to enshrine due process as a limit on personal jurisdiction, and the merits of such a holding, is debated by scholars.[52] All agree, however, that when Justice Fields cracked open the due process jar, he unleashed, for better or worse, a new jurisdictional paradigm, leaving plaintiffs' hopes clinging to the rim of that vessel.[53] *Pennoyer* led to a trickle of cases supporting due process as a limit on personal jurisdiction,[54] which culminated in the paradigmatic shift ushered in by *International Shoe*.[55] Since *Shoe*, due process has been a powerful tool of jurists who have sought to

[49] *See id.* at 1781.
[50] *See id.* at 1786–87 (Sotomayor, J., dissenting).
[51] Pennoyer v. Neff, 95 U.S. 714, 732–33 (1878).
[52] *Compare* Hoffheimer, *supra* note 6, at 1321 (contending that "*Pennoyer* constitutionalized personal jurisdiction"), *with* Sachs, *supra* note 12, at 1252 (arguing *Pennoyer* imposed no constitutional limits at all), *and* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) (arguing the constitutional basis for personal jurisdiction was wrongly imposed and should be undone).
[53] *See, e.g.*, Hoffheimer, *supra* note 6, at 1321; Sachs, *supra* note 12, at 1252; Jacobs, *supra* note 11, at 1594.
[54] *See, e.g.*, Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193–94 (1915); Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 579, 587 (1914); St. Louis Sw. Ry. Co. v. Alexander, 227 U.S. 218, 227 (1913).
[55] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 323–24 (1945).

restrict states' exercise of personal jurisdiction, particularly as applied to corporate defendants.[56]

Pennoyer asserted that persons physically not present in a state could not be bound by a judgment against them unless they were served within the state.[57] This was based on a relatively novel argument of the time: the Due Process Clause required personal service—the preferred means of actual notice—on a defendant.[58] Whether this was intended as dictum or a holding is of little consequence to us a century and a half later.[59] In either case, subsequent cases seized on this concept and furthered the sense that due process was an important limit on personal jurisdiction.[60]

In order for due process to be implicated at all, there must be a "depriv[ation]" of "life, liberty, or property" at risk.[61] This is not hard to find, since in nearly all civil cases the plaintiff is asking the court to enjoin behavior by the defendant (a clear liberty interest) or award damages against the defendant (a clear property interest).[62] This observation is important not because it is novel, but because the Court has never recognized the reciprocal due process right—that of the plaintiff to access a convenient forum for litigation.[63] This failure has spawned a one-sided analysis that yields unintuitive results because the current doctrine only protects the rights of one party. Parts III and IV elaborate on this concept in detail.

By the time *International Shoe*, discussed below in Part II-C, was decided, the Court had more fully come around to the idea that due

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[56] *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe*, 326 U.S. at 319) (requiring purposeful availment on the grounds that defendants would not otherwise be on notice of their exposure to liability); Daimler AG v. Bauman, 571 U.S. 117, 139 (2014) (holding that due process forbids general jurisdiction unless the defendant corporation is "at home" in the forum state).

[57] *Pennoyer*, 95 U.S. at 733–34. There was an exception for purely *in rem* proceedings in which the property itself was the subject of the litigation. *Id.* at 733.

[58] *Id.* ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to deter mine [sic] the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

[59] *But see* Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 570–75 (1995) (arguing that due process was not seriously introduced as a limit on personal jurisdiction until decades after *Pennoyer*, calling into question the gravity of the constitutional support for personal jurisdiction).

[60] *See, e.g.*, St. Louis Sw. Ry. Co. v. Alexander, 227 U.S. 218, 227 (1913); Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 579, 587 (1914); Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193–94 (1915).

[61] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

[62] *See* R.D. Rees, *Plaintiff Due Process Rights in Assertions of Personal Jurisdiction*, 78 N.Y.U. L. REV. 405, 406 (2003).

[63] *See* discussion *infra* Part III.

process was indispensable to the analysis. The *Shoe* test is largely—but not exclusively[64]—designed to evaluate due process in an era of a complex economy and evasive corporate defendants.

C. Blending the Models in International Shoe

The biggest watershed in the history of American personal jurisdiction occurred in 1945 when *International Shoe Co. v. Washington* was decided.[65] The decision jettisoned the rigid need for territorial "presence" and replaced it with a test, now known as "the due process analysis," that judged jurisdiction based on the defendant's contacts with the forum state and the relatedness of the claim to those contacts.[66] At the time, the territorial model was proving to be unworkable in an age of national commerce and corporate influence that made state economic borders less prominent than ever.

For a prime example of this, we need not look any further than the facts of *International Shoe* itself. The company was the "largest shoe company in the world,"[67] and it had gone to great lengths to avoid liability for unemployment taxes and personal jurisdiction.[68] Although the company employed about a dozen salesmen in Washington, it kept no inventory or real property in the state.[69] Instead, the salesmen individually rented showrooms where they displayed models of shoes.[70] Then, the salesmen sent customer order forms to company headquarters in St. Louis, Missouri, where the company construed the orders as "offers."[71] The offers were accepted in St. Louis and the product was shipped back to Washington, thus allowing the company to claim that it was completing no sales in Washington and was, therefore, "not doing such business in Washington as to manifest sufficient presence there to confer jurisdiction over it."[72]

Chief Justice Stone recognized the difficulties of applying a territorial model to corporations:

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[64] *See* Part II.C, *infra*, for a discussion of *International Shoe*'s territorial elements.
[65] *See* Borchers, *supra* note 9, at 56, 56 n.224.
[66] *See* Int'l Shoe Co v. Washington, 326 U.S. 316, 321 (1945); Rees, *supra* note 62, 406–07 (describing the analysis as the "due process inquiry").
[67] Hoffheimer, *supra* note 6, at 1333.
[68] *See id.* at 1334.
[69] *Id.* at 1334.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 1334–35 (quoting Appellant's Brief at 3, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (No. 107), 1945 WL 27431, at *3).

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far "present" there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.[73]

Having laid bare this fault in the territorial model, the true motivator of *International Shoe*'s rule becomes apparent. Corporations' omnipresent yet intangible existence made it impossible to say when a corporation had opened itself up to suit based on presence. Hence, a new paradigm that asked not *where* the defendant was relative to the forum, but *what* the defendant was doing there.

In the Chief Justice's formulation, the test plainly required "only that . . . [the defendant] have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[74] In explaining what that entails, the Court said that due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[75] The Court further called for an "estimate of the inconveniences" to determine reasonableness.[76]

The Court's test here is undeniably couched in the language of due process. But if one dwells on the Court's language for a moment, some familiar themes emerge from the barrage of buzz phrases. One such phrase requires that the suit be "reasonable, *in the context of our federal system of government*."[77] Here, the Court is clearly harkening to precedent that views other states' sovereignty as a limit

[73] *Int'l Shoe*, 326 U.S. at 316–17 (citations omitted).
[74] *Id.* at 316 (first quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940); then citing McDonald v. Mabee, 243 U.S. 90, 91 (1917)).
[75] *Int'l Shoe*, 326 U.S. at 317.
[76] *Id.* (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)).
[77] *Int'l Shoe*, 326 U.S. at 317 (emphasis added).

on the forum state's jurisdiction.[78] Subsequent cases have seized on this language to narrow the scope of personal jurisdiction.[79]

Most famously, the *International Shoe* test requires "minimum contacts"—emphasis on the "contacts."[80] The corporation cannot be a complete stranger to the forum; it must have some sort of "presence" as manifested by its agents.[81] Further, when the contacts are not "so substantial and of such a nature as to justify" general jurisdiction,[82] jurisdiction may nevertheless lie when the "nature and quality" of the contacts are related to the claim.[83]

The latter standard, now known as specific jurisdiction, is also presence-based: it has merely shifted the analysis from judging the presence of the *parties* to judging the presence of the *claim*.[84] The facts and result of *Aybar v. Aybar*,[85] discussed in the Introduction, make the presence requirement clear. Although the defendants in that case had minimum contacts and purposeful availment in the forum, the vehicle at issue was sold in the forum, and the plaintiffs were domiciled in the forum, specific jurisdiction did not lie because the car accident that precipitated the claim happened to occur on a fleeting visit to another state.[86]

Cases since *Shoe* have riffed on the idea of presence in their own ways.[87] But it is clear that the analysis has never completely shed the vestiges of territorialism. Nor should it, as many observers have argued.[88] Territorialism and federalism incorporate important state interests and often reach a coherent result with less rigmarole than a due process-based model will. The holy grail, for which American jurisprudence is still searching, is a system which retains the more palatable results of territorialism and due process, but avoids the harsh pitfalls inherent in each. I have endeavored to cast *International Shoe* as a valiant attempt at striking this balance, but

[78] The Court does not cite any cases for this proposition, but Pennoyer v. Neff, 95 U.S. 714, 722–23 (1878), is representative.
[79] *See supra* Part II.A.
[80] *See Int'l Shoe*, 326 U.S. at 316.
[81] *See id.* at 316–17.
[82] *See id.* at 318.
[83] *See id.*
[84] *See* Daimler AG v. Bauman, 571 U.S. 117, 125–27 (2014).
[85] Aybar v. Aybar, 177 N.E.3d 1257 (N.Y. 2021).
[86] *See id.* at 1258–60 (noting that plaintiffs did not even attempt to argue that specific jurisdiction existed).
[87] *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 253–54 (1958) (requiring purposeful availment for specific jurisdiction); *Daimler*, 571 U.S. at 127 (quoting Goodyear Dunlop Tire Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)) (requiring the defendant to be "at home" for general jurisdiction).
[88] *See* Jacobs, *supra* note 11, at 1592; Sachs, *supra* note 12, at 1252.

one that no longer achieves that balance after eighty years and wayward interpretations in modern cases.[89]

D. Modern Cases and the Problems They Present

The cases since *Shoe* have proceeded to vastly restrict the opportunities to secure jurisdiction over corporate defendants. For a dozen years after *Shoe*, the Court apparently did not view the new precedent as a significant barrier to jurisdiction.[90] But beginning with *Hanson v. Denckla* in 1958, the Court began a long line of cases gradually narrowing the bounds of both specific and general personal jurisdiction.[91] In this Section, I identify three doctrinal problems present in the current state of the law that I argue are in need of remedy.

1. Asymmetry Between Corporate Defendants and Natural Person Defendants

International Shoe was motivated in no small part by the recognition that the nature and pervasiveness of corporations in economic life had changed significantly in the decades preceding the decision.[92] At that time, many states secured jurisdiction over corporations through a legislative legal fiction of implied consent.[93] In *International Shoe* the Court encountered a defendant who structured itself in an attempt to avoid this scheme, thus prompting a new model based on "minimum contacts" rather than presence-by-service.[94] Unfortunately, subsequent decisions of the Court have recreated the problem *Shoe* sought to solve. By narrowing jurisdiction for corporations only, the Court has drastically limited

[89] *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038–39 (2021) (Gorsuch, J., concurring in the judgment).

[90] John T. Parry, Symposium, *Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on* J. McIntyre Machinery v. Nicastro, 16 LEWIS & CLARK L. REV. 827, 831 (2012). *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (upholding jurisdiction despite defendant corporation only having contact with the forum via mail).

[91] *Hanson*, 357 U.S. at 253; *see, e.g.*, Kulko v. Superior Ct., 436 U.S. 84 (1978); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); Daimler AG v. Bauman, 571 U.S. 117 (2014).

[92] *See supra* Part II.C.

[93] *See, e.g.*, Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075, 1077 (N.Y. 1916) (holding that when a corporation designates an agent for service of process, the corporation consents to be sued on any matter, regardless of whether the cause of action arises from the corporation's business within the state).

[94] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

the power of courts to render judgments against large corporations, while leaving the doctrine untouched with respect to individuals.[95]

For many reasons, this dichotomy makes little sense. Corporations are often much better positioned than individuals to defend a suit away from home due to superior financial resources and the limited financial liability that the corporate structure provides.96 Corporations commonly do business in multiple states, and it is not unreasonable for them to expect to be subject to suit where they regularly do business. Meanwhile, an individual defendant's temporary presence in a state is not at all indicative of his ability to defend a suit there, nor does temporary presence appeal to any notion of fairness or reasonableness.

The problems with the divergent standards become apparent when we consider an image often invoked by the Court to justify strong limits on jurisdiction: that of the humble "Appalachian potter"[97] or duck decoy carver.[98] Individuals selling homemade wares over the internet are typically not incorporated at all and thus are not shielded from tag jurisdiction, nor do they typically have the resources to defend in a distant forum. So, when the Court's duck decoy purveyor from Maine travels to Louisiana for a duck decoy convention, he is subject to tag jurisdiction in Louisiana. Contrast that with the out-of-luck plaintiffs in *Aybar v. Aybar*, who suffered injuries and the deaths of family members in a car accident while on vacation.[99] Plaintiffs tried to sue Ford Motor Company in New York, where the plaintiffs lived, where the car was sold to the plaintiffs (from a third party), and where it appears Ford engaged in "continuous and systematic" business.[100] Under the *Daimler* "at home" rule, Ford cannot be sued in New York unless specific jurisdiction exists.[101] But our decoy hobbyist is subject to suit in

[95] *Compare* Daimler AG v. Bauman, 571 U.S. 117, 193 (2014) (limiting general jurisdiction over corporations to only the defendant's states of domicile and disallowing the concept of corporate presence even when the corporation conducts significant business in the forum), *with* Burnham v. Superior Ct., 495 U.S. 604, 619 (1990) (upholding general jurisdiction via in-state personal service, or tag jurisdiction, for individuals).

[96] *See* Borchers, *supra* note 59, at 587–88.

[97] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 891 (2011) (Breyer, J., concurring).

[98] *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1028 n.4 (2021); *id.* at 1035 (Gorsuch, J., concurring in the judgment).

[99] Aybar v. Aybar, 177 N.E.3d 1257, 1258–59 (N.Y. 2021).

[100] *Id.* at 1265 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)) (rejecting the continuous and systematic standard).

[101] *See* Daimler AG v. Bauman, 571 U.S. 117, 122 (2014) (quoting *Goodyear*, 564 U.S. at 919). While the trial court in *Aybar* did not inquire into whether specific jurisdiction existed, *see Aybar*, 177 N.E.3d at 1259–60, an argument could be made for finding specific jurisdiction here.

Louisiana—despite no relationship with the forum at all—when the plaintiff serves him at the convention.[102]

While corporate defendants will always require separate rules because of the nature of the entity, those rules should be calibrated to reach outcomes that are equivalently the same for both natural persons and corporations.[103] The *Daimler* rule correctly calibrated the corporate equivalent of domicile, yet failed to account for tag jurisdiction. This oversight must be recognized and rectified through a new jurisdictional right like the one presented in this Note.

2. Asymmetry Between Defendant's Rights and Plaintiff's Rights

Our system of personal jurisdiction is currently focused entirely on ensuring that the defendant is not unduly burdened by having to defend a suit away from home.[104] This is ostensibly a check on the plaintiff's ability to initially choose the forum. When the defendant is away from its home state, concern is heightened that it will not receive a fair adjudication due to increased cost of litigating, bias against out-of-staters, and other potential issues.[105] These concerns are important and valid, but under current law, they apply only to one side of the suit.[106] We should be equally concerned that the plaintiff, litigating away from home, will suffer increased litigation costs, bias against out-of-staters, and the like.

As a practical matter, the plaintiff chooses what forum to initiate the suit in. But the Supreme Court has contoured that choice to the point where the plaintiff has little true choice at all. Consider again *Aybar v. Aybar*. The New York plaintiffs could have chosen to sue in Michigan, Ford's principal place of business, or Delaware, Ford's state of incorporation.[107] They could also have tried suing in Ohio, which was the home state of the other defendant, Goodyear Tire[108]

Ford certainly had contacts with the forum and it would have been reasonable to adjudicate in New York. But the case can be distinguished from *Ford v. Montana* by the fact that the accident did not occur in the forum state. *Compare Aybar*, 177 N.E.3d at 1258–59, *with Ford*, 141 S. Ct. at 1022.

[102] *See Ford*, 141 S. Ct. at 1038 (Gorsuch, J., concurring in the judgment) (pointing out that the Court continues to restrict jurisdiction over corporations while also leaving individuals vulnerable to suit via presence without explaining a good reason why).

[103] *Cf. Daimler*, 571 U.S. at 137 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place . . . ." Namely, it is "the place of incorporation and principal place of business.").

[104] *See* Rees, *supra* note 62, at 406–07.

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

[106] *See* Rees, *supra* note 62, at 420.

[107] *See Aybar*, 177 N.E.3d at 1258–59.

[108] *See id.* at 1259.

Had they sued in Michigan, Delaware, or Ohio, it is not likely that jurisdiction would lie against the not-at-home defendant. In that case, if jurisdiction could not be obtained, the plaintiff would be forced to commence two separate suits in separate forums in order to hold both defendants liable. This is an example of how narrow jurisdictional rules create inefficient litigation, drive up costs, and prevent full justice.[109] The plaintiffs could also attempt to sue in Virginia, the location of the accident,[110] but only if specific jurisdiction exists. However, there is no guarantee that specific jurisdiction exists in the location of the accident[111] because the Court has made clear that the plaintiff cannot create jurisdiction by crossing state lines.[112] If there is no specific jurisdiction, it is entirely possible that there is in fact *no forum* in which the plaintiffs could sue both Ford and Goodyear, since each defendant is "at home" in a different state.[113] This result is startling and unconscionable, and it is difficult to believe that such a result could exist. This demonstrates that the plaintiff has very little choice of forum and certainly has no convenient choice.

Common fact patterns like this illustrate the chasm between plaintiffs' rights and defendants' rights when it comes to accessing our courts. One of the central observations of this Note is that plaintiffs' rights, while barely recognized, are legitimate rights for which our system fails to account. Since current doctrine provides for no accounting of the plaintiffs' rights to access the court system,[114] the personal jurisdiction analysis should be revised to balance defendants' interests against plaintiffs' interests in a fair and equitable way.

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[109] *See* Borchers, *supra* note 59, at 585–86.

[110] *See Aybar*, 177 N.E.3d at 1258–59.

[111] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298–99 (1980) (holding that location of the accident is not a valid forum without further contacts by the defendant).

[112] *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958). Compare this situation to the European Union which has a rule providing for jurisdiction in tort cases in the nation where the injury occurred because of the natural proximity to witnesses and evidence. Borchers, *supra* note 59, at 587.

[113] *See Aybar*, 177 N.E.3d at 1259–60.

[114] *See* Rees, *supra* note 62, at 406–07.

3. Unpredictable Results, Difficult to Apply Rules, and High Transaction Costs

For many years, commentators have criticized the increasingly intricate due process test for specific jurisdiction.[115] The problems enumerated in the heading above have recently been exacerbated by the decision in *Daimler*, which took general jurisdiction off the table for many cases in which it previously would have been available, forcing litigants to rely on specific jurisdiction instead.[116] Too often, the Court has failed to reach a majority,[117] leaving lower courts to grapple with ambiguous precedents and few bright-line rules. The latest episode in the personal jurisdiction saga is *Ford v. Montana*, in which Justice Kagan cobbled together a seemingly fragile five-justice majority that upheld specific jurisdiction by unbraiding the oft-repeated requirement that the defendant's conduct "arise out of *or relate to*" its contacts with the forum.[118] The Court held that "relate to" implies a less strict causation requirement than "arise out of," which may result in somewhat broader exercises of specific personal jurisdiction.[119] But as Justice Alito points out in his concurrence, we know very little about the consequences of the majority's reading.[120]

This is a problem for litigants and lower courts who seek to apply these rules in a coherent manner. Professor Patrick Borchers has noted that the historical lack of clarity in personal jurisdiction doctrine has led to unnecessary litigation, high costs, and unpredictable results.[121] The Court should be seeking to simplify application of the test, not add to it as it did in *Ford*.

III. PLAINTIFF'S RIGHT TO CONVENIENT REDRESS

The primary contention of this Note is that the myriad problems with the current state of the doctrine can be solved by recognizing a heretofore unrecognized right: the right of the plaintiff to be heard in

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[115] *See, e.g.*, Borchers, *supra* note 59, at 563; Parry, *supra* note 90, at 830; Borchers et al., *supra* note 35, at 19–21.

[116] *See* Daimler A.G. v. Bauman, 571 U.S. 117, 138–39 (2014); *see also* Borchers et al., *supra* note 35, at 3.

[117] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 105 (1987); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011).

[118] *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021) (quoting Bristol-Myers Squibb Co. v. Superior. Ct., 137 S. Ct. 1773, 1780 (2017)) (emphasis in original).

[119] *See Ford*, 141 S. Ct. at 1026.

[120] *See id.* at 1033–34 (Alito, J., concurring in the judgment) (arguing that the majority's "gloss" regarding "relate to" "risks needless complications" and does not provide guidance to lower courts).

[121] *See* Borchers, *supra* note 59, at 582–87.

a convenient forum. This right should be balanced against the defendant's long-recognized due process right to be free of undue burdens outside its home state. Part IV discusses that balancing, and this Part explains the need for this Right to Convenient Redress and the support for this right in case law.

A. Defining the Right

The Right to Convenient Redress has long been hinted at in Supreme Court jurisprudence.[122] In access-to-court cases, the right has been endorsed explicitly,[123] while in personal jurisdiction cases it has mostly lurked beneath the surface, often cloaked in language of "the forum state's interest."[124] The plaintiff's right to convenient redress is derived from its status as "property" under the Due Process Clauses.[125]

Government violates the Due Process Clauses when (1) a state action (2) deprives a person of a life, liberty, or property interest (3) without sufficient notice or a fair hearing.[126] Denial of personal jurisdiction means that the claim can never be heard on the merits in that forum.[127] This implicates the Due Process Clauses because it deprives litigants of an essential property right: the Right to Convenient Redress.[128] The following shows that the right to access the court system is a state-created property interest entitled to the protections of the Due Process Clause.

The argument for finding a state-created right to convenient access to the courts is best stated in the quote from Chief Justice John

[122] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 484 (1985) ("[T]he Court has suggested that inconvenience may at some point become so substantial as to achieve *constitutional* magnitude . . . ." (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957))).

[123] *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982); Boddie v. Connecticut, 401 U.S. 371, 380–81 (1971); *see also* Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) (holding "[a] right of action is property" and is, therefore, subject to due process constraints).

[124] *See, e.g.*, Baskin-Robbins Franchising LLC v. Alpenrose Dairy, Inc., 825 F.3d 28, 38, 40 (1st Cir. 2016) ("[A] State generally has a 'manifest interest' in providing its resident with a convenient forum for redressing injuries inflicted by out-of-state actors." (quoting *Burger King*, 471 U.S. at 473)).

[125] *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *Loucks*, 120 N.E. at 201.

[126] *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

[127] *See* Stengel v. Black, 486 Fed. App'x 181, 183 (2d Cir. 2012).

[128] *See Logan*, 455 U.S. at 429 ("[T]he Court read the 'property' component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'" (quoting Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958))).

Marshall that began this Note: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[129] In response to this long-recognized duty, the United States and its component states have set up formal court systems responsible for adjudicating disputes between private citizens and have further discouraged resolution of disputes outside these court systems.

An injured plaintiff cannot be made whole without a forum to redress the injury. While a private party (allegedly, the defendant) initially caused the deprivation, the court's refusal to hear the merits can be a state action depriving plaintiff of what is rightfully theirs under our laws.[130] Further, the very fact that the plaintiff is denied a day in court is *itself* a deprivation, because individuals have a property interest in accessing the courts.[131] Thus, the lack of a convenient forum is itself a denial of due process. We have created a system by which injured parties can assert their rights in court. Use of that system is a government entitlement subject to the constraints of due process. When use of that system is denied—or extremely limited—because our jurisdictional decisions prevent redress, then there is no due process.[132]

The state-created entitlement doctrine is commonly traced to the seminal case of *Goldberg v. Kelly*,[133] which held that states cannot terminate welfare benefits without providing an opportunity for the recipient to present evidence.[134] The Court reached this conclusion by accepting the notion that "entitlements" offered by the state are property.[135] On this foundation, the Court reasoned that this property cannot be taken without procedural due process.[136] Since

[129] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[130] *See Logan*, 455 U.S. at 428 (citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950)); s*ee also* Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) ("The plaintiff owns something, and [the courts] help him to get it." (citing Howarth v. Lombard, 56 N.E. 570, 888 (Mass. 1900); Walsh v. Bos. & Me. R.R., 88 N.E. 12, 12–13 (Mass. 1909); Walsh v. N.Y. & N. Eng. R.R. Co., 36 N.E. 584, 584 (Mass. 1894))). Not every such refusal will be a deprivation, but one that leaves no other convenient relief will deprive the plaintiff of redress. *See Logan*, 455 U.S. at 429.

[131] *See Logan*, 455 U.S. at 428; Boddie v. Connecticut, 401 U.S. 371, 380–81 (1971); *Loucks*, 120 N.E. at 201.

[132] *See Logan*, 455 U.S. at 429 ("The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.").

[133] Goldberg v. Kelly, 397 U.S. 254 (1970).

[134] *Id.* at 264.

[135] *See id.* at 262 n.8.

[136] *See id.* at 264.

Goldberg, courts have applied this reasoning to an array of property interests.[137]

Among the many interests protected by state-created entitlement doctrine has been the right to access the courts.[138] In *Mullane v. Central Hanover Bank & Trust Co.*, Justice Jackson insisted that New York courts could not settle a trust without providing due process to all members of the trust, because such a settlement would terminate any claims that the beneficiaries had against the trustees.[139] Although this case preceded *Goldberg*, Justice Jackson recognized that the loss of the right to sue was a constitutionally protected property right subject to due process.[140]

In *Boddie v. Connecticut*, decided shortly after *Goldberg*, the Court was squarely faced with the question of whether litigants had a right to access courts.[141] In the case, a group of indigent women sought to get divorced through the state courts, but the state refused to waive their filing fees, leaving the women trapped in unwanted marriages.[142] They brought suit claiming they were denied due process protections.[143] The Court ruled that the state's action was a clear denial of the opportunity to be heard, and thus a due process violation.[144]

Logan v. Zimmerman Brush Co. combined the foundation of *Goldberg* with the holding of *Mullane* and the content of *Boddie*.[145] Logan filed an employment discrimination claim with the Illinois Fair Employment Practices Commission.[146] Under the governing statute, the Commission had 120 days to consider the claim.[147] The Commission failed to meet within the 120-day period, and plaintiff's

[137] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–33 (1976) (disability benefits); Bd. of Regents v. Roth, 408 U.S. 564, 578 (1972) (public employment); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11–12 (1978) (utility service); Barry v. Barchi, 443 U.S. 55, 62–64 (1979) (horse trainer's license).

[138] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 380–81 (1971); Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982).

[139] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 312–13 (1950).

[140] *See id.* at 313.

[141] *See Boddie*, 401 U.S. at 372.

[142] *See* Boddie v. Connecticut, 286 F. Supp. 968, 970 (D. Conn. 1968), *rev'd*, 401 U.S. 371 (1971).

[143] Boddie v. Connecticut, 401 U.S. at 376.

[144] *Id.* at 380–81.

[145] *Compare* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (observing that state-created entitlements are like "property" even though they "do not fall within traditional common-law concepts of property"), *and* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 312–13 (1950) (holding that beneficiaries must be given notice and an opportunity to contest proceedings that may deprive them of property rights), *with Boddie*, 401 U.S. at 373 (holding that denial of access to court proceedings is a due process violation).

[146] Logan v. Zimmerman Brush Co., 455 U.S. 422, 426 (1982).

[147] *Id.* at 424.

claim was never adjudicated. In a subsequent proceeding before the Supreme Court, Logan alleged he was denied due process by the Commission.[148] The Supreme Court agreed, holding first that plaintiff's access to the proceeding was a property right.[149] With that established, the Court emphasized that "an individual entitlement grounded in state law . . . cannot be removed except 'for cause,'" and simply failing to meet was not an acceptable cause for terminating a right.[150] Thus, the Commission violated the plaintiff's due process rights because it made no attempt to adjudicate the claim on the merits.[151]

As the above cases demonstrate, extinguishing a person's right to access the court without notice and a hearing has always been a violation of basic due process rights. Having established this right, the remainder of this Part seeks to show that personal jurisdiction doctrine fails the test from *Mathews v. Eldridge*.[152]

B. Applying the Mathews *Test*

The cases recognize that due process is an amorphous concept, and many Justices have lamented the "cryptic and abstract words of the Due Process Clause."[153] It is well settled that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[154] To help evaluate the demands of a given situation, the Court has identified factors, known as the *Mathews* test, to guide our understanding of what constitutes sufficient process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[155]

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[148] *Id.*
[149] *Id.* at 428–29 (citing *Mullane*, 339 U.S. at 313).
[150] *See Logan*, 455 U.S. at 430, 433–34 (quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11–12 (1978); and citing Goss v. Lopez, 419 U.S. 565, 573–74 (1975); Bd. of Regents v. Roth, 408 U.S. 564, 576–78 (1972)).
[151] *Logan*, 455 U.S. at 434.
[152] Mathews v. Eldridge, 424 U.S. 319 (1976).
[153] *See* Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (quoting *Mullane*, 339 U.S. at 313).
[154] *Mathews*, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
[155] *Mathews*, 424 U.S. at 335.

The following analysis of the factors demonstrates that today's personal jurisdiction doctrine does not provide the necessary level of process owed to plaintiffs in our justice system.

1. The Private Interests at Stake

When a court denies jurisdiction in the plaintiff's chosen forum, the plaintiff loses the opportunity to redress their injuries in that forum. That fact alone shows a deprivation is present. Here, access to a convenient forum *is* the right in question. We can assume that the plaintiff would always choose to bring suit in the forum most convenient for her. But in a system where corporate defendants can only be sued "at home" or where specific jurisdiction exists, plaintiffs are often denied their choice of forum before they even file the complaint.

Plaintiff's interest in accessing the courts carries great weight. Not only is it a constitutionally protected property interest, but it is also often the *only* means of redressing a problem.[156] The extremely limited options plaintiffs have under current doctrine present them with essentially three options: (1) choose an ostensibly reasonable forum and take their chances if defendant challenges jurisdiction;[157] (2) forge ahead in an inconvenient forum, bearing the additional costs of that choice;[158] or (3) refrain from bringing suit at all.[159] The reigning personal jurisdiction scheme no doubt deters many from ever bringing a claim due to the high transaction costs of litigating in an inconvenient forum. When this happens, a plaintiff is deprived of their private interest in access to the courts, and the redress itself can never be realized. Personal jurisdiction barriers necessarily keep

[156] *See Boddie*, 401 U.S. at 380–81.

[157] This was the route taken by the plaintiffs in *Aybar v. Aybar*, 177 N.E.3d 1257, 1258–59 (N.Y. 2021). Not only was the forum potentially reasonable as a forum for specific jurisdiction (Ford had minimum contacts and those contacts related to the claim) and New York would have been a general jurisdiction forum under and the pre-*Daimler* standard, but also New York had a statute expressly stating that foreign corporations (like Ford) consent to jurisdiction by virtue of registering to do business there. *Id.* at 1267–68 (Wilson, J., dissenting).

[158] After choosing option one and losing at the Supreme Court, plaintiffs in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), were left the option to bring separate suits in their own states. *Id.* at 1783. The effect is reduced judicial efficiency, as well as higher costs for plaintiffs.

[159] It is likely that the plaintiffs in *Aybar*, *Bristol-Myers*, and countless other cases large and small will end up at this option. *See Bristol-Myers*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting).

some people from being compensated for legitimate wrongs committed against them.[160]

No matter which option plaintiffs choose, they have been deprived of some access to the courts. Certainly, they may not have been deprived *complete* access, but that does not make it less of a deprivation. If the plaintiffs in *Goldberg* had been deprived of only half their benefits, the outcome would be the same.[161] None of this is to say that the government cannot place reasonable restrictions on access to certain entitlements. But those restrictions cannot go so far as to deny plaintiff "'an opportunity . . . granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case.'"[162] Encompassed by that quote is the idea of a meaningful *place* as well as time and manner.[163] Under current doctrine, often the only available forums are hundreds of miles from the plaintiffs' home or the location of an accident.[164] Such cases simply do not qualify as "meaningful" opportunities to receive a fair hearing.[165] The barriers of distance, unfamiliarity, and financial cost are no different than the filing fee found unconstitutional in *Boddie*.[166]

Thus, there are significant private interests at stake, and cases including *Boddie* and *Goldberg* show that lesser barriers to lesser interests have previously been invalidated by the Court, suggesting that the Court should take a similar interest in reforming personal jurisdiction doctrine.

2. The Risk of Erroneous Deprivation

This factor operates slightly differently in this context than it would in a classic entitlement analysis. An erroneous deprivation

[160] *See* Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2898 (2009) ("A forum is effectively unavailable if litigants can access it only through substantial cost or logistical complexity, and requiring litigation in such a forum could dramatically undermine their capacity to air and resolve their grievances satisfactorily.").

[161] *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970).

[162] *See* Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (first quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965), then quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950)); *see also* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong*, 380 U.S. at 552)).

[163] *See Mathews*, 424 U.S. at 334 ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961))).

[164] *See, e.g.*, Aybar v. Aybar, 177 N.E.3d 1257, 1258–59 (N.Y. 2021).

[165] *See* Sharpe, *supra* note 160, at 2898.

[166] *See Boddie*, 401 U.S. at 380–81.

typically occurs when a person is deprived of an entitlement, but then after further investigation, such as an administrative appeal or lawsuit, it is discovered that they were entitled to the benefit all along.[167] In the personal jurisdiction context, however, what counts as erroneous is a legal question and a matter of public policy. For the purpose of this analysis, an erroneous deprivation is a denial of jurisdiction issued when (1) permitting jurisdiction in that case would have added little to no burden on the defendant and/or (2) judicial efficiency is harmed. The previous Section demonstrated that under current doctrine, litigants are routinely forced into inconvenient forums or barred from accessing the courts at all.[168] These are erroneous because the Court has insisted on a set of rules that burdens plaintiffs and the courts but does little to protect defendants or enforce the bounds of federalism.

Current law tolerates erroneous deprivations of a convenient forum far too often. Other models, discussed in Part IV, below, can address the worst aspects of current doctrine while preserving federalism and due process concerns.

3. The Governmental Interest

Whether the federal government has an interest in regulating personal jurisdiction at all is the subject of debate among scholars.[169] The Supreme Court has often, although intermittently, said that federalism and state sovereignty are important interests that the Due Process Clause must enforce.[170] As recently as 2017, the Court has strongly endorsed federalism and state sovereignty as key reasons to narrow jurisdictional choices for plaintiffs.[171]

But in the context of the Mathews test, it is not clear that a monolithic "government interest" exists here. On one hand, states have an interest in providing a forum for their residents to redress

[167] *See* Goldberg v. Kelly, 397 U.S. 254, 260 (1970) ("If the recipient prevails at the 'fair hearing' he is paid all funds erroneously withheld.").

[168] *See supra* Part III.A.

[169] *See, e.g.*, Borchers *supra* note 9, at 20 (arguing the Constitution has almost no role to play and due process was never intended to be used in this way); Pfeffer, supra note 4, at 162–63 (2015) (arguing for a model making the states the primary arbiters of personal jurisdiction).

[170] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980); *see also* Borchers, *supra* note 9, at 87–93 (noting that the Court's federalism justification has been inconsistently invoked). *But see* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 & n.10 (1982) (pointing out that due process protects only individual rights, not state sovereignty).

[171] *See supra* notes 42–48 and accompanying text (discussing *Bristol-Myers*).

their injuries.[172] Relatedly, states have an interest in adjudicating claims arising within their borders.[173] But on the other hand, states also have an interest in protecting their residents from the overreach of foreign sovereigns.[174] In a given case, one of these interests may weigh more heavily, but on a macro scale it cannot be said that some government interest demands a jurisdictional system focused entirely on protecting defendants. As the case law recognizes, the government interest also extends to "'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.'"[175] These interests in efficiency and collaboration beg for a personal jurisdiction test that sheds the rigid rules of today's cases and instead focuses on convenience to both parties, efficiency in the courts, and common sense.

A review of the Mathews factors[176] reveals that the plaintiff has significant rights at stake, the risk of being needlessly deprived of those rights is significant, and the government has no countervailing interest that requires curtailing those rights without due process. Thus, it is clear that plaintiffs do have a Right to Convenient Redress, and that right is not being protected by current doctrine. The next Section addresses potential solutions to this problem.

IV. WHERE DO WE GO FROM HERE?

Recognizing the Right to Convenient Redress opens up many possibilities for reforming personal jurisdiction. Commentators have proposed a wide variety of new and old schemes to fix the issues of the current doctrine.[177] On the Supreme Court itself, reform is stifled

[172] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957))).

[173] *World-Wide Volkswagen*, 444 U.S. at 292 (citing McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)). In *World-Wide Volkswagen*, Oklahoma should have had an interest in the case because Oklahoma roads were used, Oklahoma first-responders were deployed, etc. *World-Wide Volkswagen*, 444 U.S. at 288. A major purpose of litigation is to deter future wrongs, and Oklahoma has a strong interest in establishing that deterrent effect in its courts.

[174] *See id.* at 291–92 (stating that due process protections are necessary "to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

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

[176] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[177] *See, e.g.*, Jacobs, *supra* note 11, at 1592–93 (advocating for a return to pre-*Shoe* territorialism); Sachs, *supra* note 12, at 1326–27 (supporting a reliance on "general law" and the *Pennoyer* model); B. Travis Brown, *Salvaging General Jurisdiction: Satisfying* Daimler *and*

because the Justices each have their own strong opinions.[178] Rather than insist that one solution is correct, this Note urges only that in future cases, the Court embrace the concept that the plaintiff has a due process right—that is just as meaningful as the defendant's right—to litigate in a convenient location.

While *Ford v. Montana* may hold the line for plaintiffs for now, the Court's work addressing personal jurisdiction is not complete. Jurisdiction over internet cases, for example, remains unsettled.[179] The concurrences in *Ford* hint toward an appetite to reform the law, if only a majority could agree on how. Embracing the plaintiff's Right to Convenient Redress may offer a way to break the doctrinal gridlock that has paralyzed the Court on this issue for decades. This right not only challenges long-held conceptions of the purpose behind the constitutional underpinning for personal jurisdiction, but also illuminates rather obvious basic tenants of the American judicial system: everyone gets their day in court. This challenge to the status quo, grounded in inescapable principles, may just be the secret ingredient that allows the Court to find a way forward.

V. CONCLUSION

It is not easy to find anyone who will defend the current state of the law. Most observers look at opinions like *Aybar v. Aybar* and find that the result defies common sense. *Ford v. Montana* will likely come to be regarded as an attempt to pull a commonsense result from a doctrine that is jumbled in every direction.

What is far more common is academic crossfire and judicial gridlock that fails to reach consensus. As the historical discussion in this Note shows, there is not even agreement on the meaning of seminal precedent, nor is it clear why due process, or state sovereignty, or federalism are important ideological groundings at all. The Right to Convenient Redress attempts to cut through the

Proposing a New Framework, 3 BELMONT L. REV. 187, 226 (2016) (proposing a new rule for general jurisdiction jurisprudence); Kendrick D. Nguyen, Note, *Redefining the Threshold for Personal Jurisdiction: Contact and the Presumption of Fairness*, 83 B.U. L. REV. 253, 274–75 (2003) (proposing a "presumption-of-reasonableness analysis" for personal jurisdiction be adapted for the internet age).

[178] *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (displaying three different opinions that urge different reforms and even different interpretations of current doctrine).

[179] *See, e.g.*, Johnson v. TheHuffingtonPost.com, 21 F.4th 314 (5th Cir. 2021) (holding, over dissenting opinion, that Texas did not have jurisdiction over an internet publisher accused of libel via the internet where the defendant had no connection to Texas), *reh'g denied*, 32 F.4th 488 (5th Cir. 2022) (denied on a split vote 10-7 against rehearing), *petition for cert. filed*, 91 U.S.L.W. 3014 (U.S. July 26, 2022) (No. 22-82).

noise and refocus the discussion on prioritizing fairness to both parties and ensuring jurisdiction is not a barrier to justice.