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Time for a New Shoe? Making Sense of Specific Jurisdiction

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NOTE

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Ford Motor Co. v. Montana Eighth Judicial District Court, 141 S. Ct. 1017 (2021).

Jessica Hylton[*]

I. INTRODUCTION

Many of us can likely recall the uncomfortable feeling of a shoe that just does not fit. Whether too big or too small, it no longer offers the protection it was designed to provide and risks only pain and injury. Either way, it is time for a new shoe. Personal jurisdiction has its own shoe. In the groundbreaking case of *International Shoe Co. v. Washington*, the Supreme Court of the United States set out the necessary principles for a court to exercise personal jurisdiction over a defendant. These principles have endured for nearly 100 years.[1] However, recent expansions on personal jurisdiction doctrine have led some in the legal community to question if the *International Shoe* principles no longer fit the needs of plaintiffs injured by national and global corporations, or if the principles have been expanded to the point they are unrecognizable. *International Shoe* dealt specifically with specific jurisdiction, a type of personal jurisdiction pertaining to out-of-state corporate defendants.

Ford Motor Co. v. Montana Eighth Judicial District Court is the latest in a line of cases deciding when personal jurisdiction over a corporate defendant is proper.[2] *Ford* analyzed claims derived from two separate car crashes, in which neither of the cars at issue in either crash were designed, manufactured, or produced in the state where the plaintiffs brought their claims.[3] In deciding whether personal jurisdiction was

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[1] 326 U.S. 310 (1945).

[2] *See* 141 S. Ct. 1017 (2021).

[3] *Id.* at 1022.

proper in both forum states, the Court revised the test for specific jurisdiction, breaking in two the prior test created in *International Shoe* that required that a plaintiff's claim "arise out of or relate to" a defendant's activities within a forum state.[4] In creating this "new" test, the Court potentially opened the door for claims against out-of-state corporate defendants to meet the requirements of specific jurisdiction when the same activities may not have passed muster under prior holdings.[5] While previously it was thought that "arise out of and relate to" described one broad, overlapping category that required some level of causal link, under the new standard these are seen as two separate ways for a claim to fall under a court's jurisdiction, one of which requires no causal showing.[6]

Part II of this Note summarizes the facts and procedural background of Ford's claim that the state courts lacked personal jurisdiction. Part III explains the common-law evolution of specific jurisdiction and the emergence of the "arise out of or relate to test" and describes how lower courts have interpreted the rule prior to *Ford*. Part IV details the *Ford* Court's unanimous ruling, which ultimately held that Minnesota and Montana state courts properly exercised personal jurisdiction over Ford. Part V compares *Ford* to the Court's most recent prior case on specific jurisdiction, *Bristol Myers Squibb*, to question the necessity of a new test for specific jurisdiction, while raising concerns about the way lower courts will interpret the new test, how the new test will be applied to class actions, and if it is time for the Supreme Court to overrule the test for specific jurisdiction first articulated in *International Shoe*.[7]

II. FACTS AND HOLDING

Ford Motor Co. v. Montana Eighth Judicial District Court arises from two separate products liability cases: one in Montana and another in Minnesota.[8] In the Montana case, Markkaya Gullet was driving her 1996 Ford Explorer when the vehicle spun out, rolled, and landed upside down after the tread separated from a rear tire.[9] Gullett was found dead at the scene of the crash, and a representative of her estate sued Ford Motor Company in Montana state court, alleging state-law claims of design defect, failure to warn, and negligence.[10]

[4] *Id.* at 1033 (Alito, J., concurring).
[5] *Id.* (Alito, J., concurring).
[6] *Id.* (Alito, J., concurring).
[7] 137 S. Ct. 1773 (2017).
[8] *Ford Motor Co.*, 141 S. Ct. at 1022.
[9] *Id.* at 1023.
[10] *Id.*

In the Minnesota case, Adam Bandemer was riding as a passenger in his friend's 1994 Ford Crown Victoria.[11] The two were driving on a rural road when the driver rear-ended a snowplow, causing the car to land in a ditch.[12] Bandemer's airbag did not deploy during the crash, causing him to suffer serious brain damage.[13] Bandemer sued Ford Motor Company, as well as the driver of the car in Minnesota state court, alleging state-law claims for products-liability, negligence, and breach of warranty.[14]

Ford moved to dismiss both cases for lack of personal jurisdiction on essentially identical grounds – arguing only one of the two requirements for specific personal jurisdiction had been met.[15] While Ford admitted it had "purposefully availed" itself of each forum state by doing substantial business in them, Ford argued that the claims brought by the plaintiffs did not "arise out of or relate to" that substantial business.[16] Ford further insisted its activities in each state could only have given rise to the plaintiffs' claims if those activities actually caused the crashes in question.[17] Ford asserted that there could only be a causal link between its activities and crashes in the states where Ford designed, manufactured, and first sold the vehicles involved in the crashes.[18] Ultimately, Ford argued that although it did substantial business in both Montana and Minnesota, none of that business actually caused either of the crashes because the cars in question had been sold, designed, and manufactured outside the forum states.[19]

In Gullet's suit, the Montana Supreme Court affirmed the lower court decision denying Ford's motion to dismiss, finding that Ford not only "purposely availed itself" of the Montana market, but also that Ford placed its products into the "stream of commerce" in Montana and that a nexus existed between Gullet's use of her Ford Explorer and Ford's activities in Montana.[20] The court held that because Ford sold other vehicles in Montana, provided repair and maintenance services for Ford vehicles in Montana, and could foresee that its vehicles would cross state lines, Ford had encouraged Gullet to purchase and drive her Ford Explorer in Montana.[21]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*; *see also* Bandemer v. Ford Motor Co. et al., 2017 WL 10185684, *4 (Minn. Dist. Ct. 2017).

[15] *Ford Motor Co.*, 141 S. Ct. at 1023.

[16] *Id.* at 1035 (Alito, J., concurring).

[17] *Id.* at 2023.

[18] *Id.*

[19] *Id.*

[20] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 443 P.3d 407, 417 (2019), *cert. granted*, 140 S. Ct. 917 (2020), *aff'd*, 141 S. Ct. 1017 (2021).

[21] *Id.*

In Bandemer's suit, the Minnesota Supreme Court similarly affirmed the lower court decision denying Ford's motion to dismiss.[22] That court held that Ford's activities in Minnesota related to Bandemer's claims because Ford sold thousands of the same model of car that Bandemer was riding in, among thousands of other Ford vehicles in Minnesota; Ford collected data on car performance through its Minnesota dealers; and Ford marketed and advertised directly to Minnesota residents.[23]

Ford subsequently petitioned for a writ of certiorari to the Supreme Court of the United States.[24] The Supreme Court consolidated the two cases and granted certiorari [25] The Court held that the state courts had properly exercised personal jurisdiction over Ford in each of the suits.[26] In deciding this, the Court revisited its past holding in *Bristol-Myers Squibb Co. v Superior Court of California*,[27] to determine whether Ford was correct that the test for specific personal jurisdiction required a strictly causal showing between a defendant's activities within a forum state and the injury claimed by a plaintiff.[28] The Court held that specific jurisdiction only demands that the suit "arise out of or relate to the defendant's contacts with the forum," which encompasses both relationships supported by causation and some that are not.[29]

III. LEGAL BACKGROUND

Establishing personal jurisdiction is a crucial step for a case to move past the filing stage and avoid dismissal.[30] Personal jurisdiction refers to a court's decision-making power over the defendant in a case.[31] While personal jurisdiction is a necessary component of every case, courts throughout time have struggled to set a clear rule for when personal jurisdiction exists.[32] While personal jurisdiction standards have evolved over time, the core principles established in early cases remain a necessary

[22] Bandemer v. Ford Motor Co., 931 N.W.2d 744 (Minn. 2019), *cert. granted*, 140 S. Ct. 916 (2020), *aff'd sub nom.* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

[23] *Id.* at 753–54.

[24] *See Ford Motor Co.*, 141 S. Ct. at 1026 (2021).

[25] *See id.* at 1023–24.

[26] *Id.*

[27] *Id.* at 1030–31 (citing Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty., 137 S. Ct. 1773 (2017)).

[28] *Id.*

[29] *Id.* at 1026.

[30] STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, CIVIL PROCEDURE 67 (Wolter Kluwer eds., 10th ed. 2019).

[31] *Id.*

[32] *See, e.g.*, *id.*

foundation for current decisions.[33] Personal jurisdiction has its origins in the idea that there should be limits to when a court can exercise authority over nonresident defendants.[34] As for specific jurisdiction, the Supreme Court initially decided that the proper test centered around there being enough "minimum contacts" so as to not "offend standards of fair play and substantial justice" by subjecting a corporation to suit in a forum state.[35] The Court later added the idea that a corporation must "purposefully avail" itself of the forum state and that a suit must "arise out of or relate to" a defendant's contacts within that forum state for personal jurisdiction to be proper.[36] The Court has also debated adding a stream of commerce component to the test but has never been able to get a majority to agree on how precisely to define it.[37] In a 2017 case, the Supreme Court reviewed how specific jurisdiction applies to a mass-action suit, seemingly limiting when claims can arise out of or relate to a defendant's activities in a forum state; however the Court seemed to leave these limits, and how federal courts had applied the test, behind when deciding *Ford*.[38]

A. Personal Jurisdiction Generally

Starting in 1877, the Supreme Court recognized that the Due Process Clause prevents state courts from exercising personal jurisdiction over out-of-state residents when the nonresident has not taken steps to enter the state.[39] The Supreme Court found personal jurisdiction is necessary to protect state sovereignty, therefore, limiting states to exercise jurisdiction only over persons or property within their territory.[40] While the Court has since expanded beyond this idea, the notion that the Due Process Clause limits personal jurisdiction still remains.[41]

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[33] Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction Over Virtual Present Defendants*, 64 U. MIAMI L. REV. 133, 136 (2009).

[34] *See* Kyle Voils, *Making Sense of Sovereignty: A Historical Understanding of Personal Jurisdiction From Pennoyer to Nicastro*, 110 NW. U. L. REV. 679, 683 (2016).

[35] Int'l Shoe Co. v. Washington, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[36] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

[37] *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty., 480 U.S. 102 (1987); *Burger King Corp.*, 471 U.S. 462; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[38] *See* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773 (2017); Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

[39] Kyle Voils, *Making Sense of Sovereignty: A Historical Understanding of Personal Jurisdiction From Pennoyer to Nicastro*, 110 NW. U. L. REV. 679, 683 (2016).

[40] *Id.* at 684.

[41] *Id.*

There are two types of personal jurisdiction: general jurisdiction and specific jurisdiction.[42] A court with general jurisdiction can hear every kind of claim against a certain defendant.[43] General jurisdiction arises when the court in question is located either where the defendant is "at home" or physically present.[44] It does not require any additional showing that there is a connection between the plaintiff's claims and a defendant's activities in the forum state.[45] In cases where the defendant is a corporation, general jurisdiction is proper in the state where the corporation's principal place of business is located and the state where the company is incorporated.[46] A company's principal place of business is typically where its headquarters is located.[47] In contrast, the need for specific jurisdiction arises when a defendant is not "at home" in the forum state or was not served with process while "present" in the forum state.[48] Specific jurisdiction instead arises from an out-of-state defendant's specific contacts or activities in the forum state.[49]

Pennoyer v. Neff was the first modern case that shaped personal jurisdiction. It established the principle that due process of law is necessary to enable a court to exercise jurisdiction over a defendant.[50] However, it focused only on individuals.[51]

B. When the Shoe Fits: The Development of Corporate Personal Jurisdiction

Seventy years after *Pennoyer*, the Supreme Court explored personal jurisdiction again; this time deciding when personal jurisdiction could be proper over an out-of-state corporation.[52] In *International Shoe*, the Court decided whether a Washington state court could exercise personal jurisdiction over a corporation incorporated in Delaware and headquartered in St. Louis, Missouri.[53] In doing so, the Court gave the first articulable test for when personal jurisdiction can be granted over out-of-state corporate defendants.[54] The Court held that a state court's

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[42] YEAZELL & SCHWARTZ, *supra* note 30, at 85–86.

[43] *Id.* at 85.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See* Daimler AG v. Bauman, 571 U.S. 117, 157 (2014) (Sotomayor, J., concurring).

[48] YEAZELL & SCHWARTZ, *supra* note 30, at 85–86.

[49] *Id.*

[50] 95 U.S. 714 (1877).

[51] *See generally id.*

[52] Int'l Shoe Co. v. Washington, 326 U.S. 310, 311 (1945).

[53] *Id.* at 313.

[54] *Id.* at 319.

authority depends on the defendant corporation having such "minimum contacts" with the forum state that "the maintenance of the suit" is reasonable and "does not offend traditional notions of fair play and substantial justice."[55] The Court grounded its decision on due process, stating that the analysis depends on "the quality and nature of the activity" of the out-of-state defendant.[56]

The Court in *International Shoe* found that the defendant corporation's activities in Washington were enough to subject it to personal jurisdiction in the state because the defendant had availed itself of the benefits and protections of Washington's laws by engaging in a moderate amount of interstate business in Washington.[57] The suit in question arose out of this interstate business, and given the nature of the defendant corporation's contacts with the state, it could not be said that making it stand trial in Washington would be unreasonable under standards of "fair play and substantial justice."[58]

After *International Shoe*, courts struggled to draw the line between contacts that were moderate enough to subject an out-of-state corporation to personal jurisdiction and comport with due process and those contacts and activities that did not meet this standard.[59] In *McGee v. International Life Insurance Co.*, the Supreme Court noted that decisions were trending in favor of expanding the situations in which an out-of-state corporation could be brought under a court's personal jurisdiction.[60] At the time of *McGee*, technological, travel, and economic advancements made interstate and even intercontinental business transactions readily possible and common, making it significantly less inconvenient for corporations to defend themselves in out-of-state suits.[61]

In *McGee*, the Court held that a Texas insurance company had to defend suit in a California court.[62] The Court relied on the fact that the insurance company delivered the life insurance contract at issue in California, received premiums from California, and that the insured person was a resident of California at the time he died.[63] While the Court recognized that defending itself in California might cause the company some inconvenience, it would not violate due process to require the company to do so because the company was adequately notified of the suit

[55] *Id.* at 316.
[56] *Id.* at 319.
[57] *Id.* at 320.
[58] *Id.*
[59] McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957).
[60] *Id.*
[61] *Id.* at 222–23.
[62] *Id.* at 223–24.
[63] *Id.* at 223.

and had chosen to do business in California and subject itself to California laws.[64]

One year later, the Supreme Court again looked at when a court could exercise personal jurisdiction over an out-of-state defendant.[65] In *Hanson v. Denckla*, a Florida trustee sued a Delaware trustee in a Florida court over a trust created in Delaware even though the defendant trust company transacted no business in Florida, solicited no business in Florida, did not have an office in Florida, none of the trust assets were administered in Florida, and there was no act or transaction done in Florida that gave rise to the cause of action in the case.[66] The Court noted that the unilateral out-of-state activity of a plaintiff or a relationship between a plaintiff and defendant alone was not enough to create "minimum contacts" between the defendant and the forum state.[67] The Court instead determined that to find "minimum contacts," the defendant must "purposefully avail itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protection of its laws."[68] With this holding, the Court tacked on another requirement for specific jurisdiction to be proper: purposeful availment of the forum state.[69] The Court did not find purposeful availment in *Hanson* because the defendants had not acted to intentionally take advantage of doing business in Florida.[70]

C. The Stream of Commerce

As technology continued to progress, the Court faced scenarios in which a defendant corporation may never have been physically present in the forum state, but nevertheless may be subject to personal jurisdiction there because its products had reached and harmed consumers in the state.[71] This led to the development of the "stream of commerce" and the "stream of commerce plus" tests to determine when a product manufacturer has purposefully availed itself of a forum state.[72] The

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[64] *Id.* at 244.

[65] *See* Hanson v. Denckla, 357 U.S. 235 (1958).

[66] *Id.*

[67] *Id.* at 253.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 251.

[71] *An Overview of the Law of Personal (Adjudicatory) Jurisdiction: The United States Perspective*, CHICAGO-KENT COLL. L., http://www.kentlaw.edu/cyberlaw/docs/views/usview.html#N_9_ [https://perma.cc/TQB5-24N4] (last visited Mar. 30, 2022).

[72] Kathleen Ingram Carrington & Derek Rajavuori, *Navigating the Stream of Commerce: "Purposeful Availment" in the Wake of Ford*, JD SUPRA (Apr. 28, 2021), https://www.jdsupra.com/legalnews/navigating-the-stream-of-commerce-9958431/ [https://perma.cc/AGT4-CFQQ].

"stream of commerce" refers to the "movement of goods" from the time they leave the manufacturer to the time they reach the final consumer.[73] Stream of commerce cases highlight an attempt by the Court to amend *International Shoe*'s specific jurisdiction test to fit the changing economic, technological, and communications environment. Nevertheless, to date no Supreme Court majority has articulated a clear stream of commerce test.[74] The opinions below, however, detail two proposed tests, the stream of commerce and the stream of commerce plus.[75]

In *World-Wide Volkswagen Corp. v. Woodson*, the Court addressed whether an Oklahoma court could exercise personal jurisdiction over a corporation that was incorporated and headquartered in New York.[76] The plaintiffs were driving through Oklahoma in an Audi distributed by World-Wide Volkswagen Corporation, when a fire broke out after another automobile struck the car.[77] The Court first held that the minimum contacts test was not met because only a single, isolated incident involving the defendant corporation's vehicles had occurred in Oklahoma, and the corporation did not perform services, close sales, solicit business, or regularly sell cars in Oklahoma.[78] In finding that the defendant did not purposefully avail itself of the laws of Oklahoma, the Court stated that the defendant did not "indirectly, through others, serve or seek to serve the Oklahoma market."[79] In deciding the case, the Court referred back to *International Shoe*, noting that even if a defendant would not suffer inconvenience from defending suit in the forum state or the forum state court had a great interest in adjudicating the case, the Due Process Clause stops the forum state from deciding the case when there are not sufficient minimum contacts between the defendant and the forum state.[80]

Further, the Court addressed an argument from the plaintiffs that because an automobile is by its nature mobile, it was "foreseeable" that the Audi in question could cause injury in Oklahoma, and therefore the defendant should be subject to personal jurisdiction in the state.[81] While the Court concluded foreseeability alone was not enough for personal jurisdiction, it was not completely irrelevant in the determination.[82] The Court instead held that foreseeability for due process purposes does not

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[73] *Id.*

[74] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Meal Indus. Co. v. Super. Ct., 480 U.S. 102 (1987); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 783 (2011).

[75] *World-Wide Volkswagen*, 444 U.S. at 298; *Asahi*, 480 U.S. at 112–14.

[76] *World-Wide Volkswagen*, 444 U.S. at 288.

[77] *Id.* at 288.

[78] *Id.* at 295.

[79] *Id.*

[80] *Id.* at 294.

[81] *Id.* at 295–96.

[82] *Id.* at 297.

mean there is a "mere likelihood that a product will find its way into the forum State," but instead that the defendant's conduct and connection with the forum are enough that it could reasonably foresee it could be sued in the forum State.[83]

While the Court in this case found no personal jurisdiction, it gave an example of when a defendant corporation would purposefully avail itself of the forum state:

> If the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."[84]

Due process would therefore be satisfied when a corporation "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and that product later harms someone in that state.[85] This hypothetical scenario is arguably the same situation that happened in *Ford*, yet instead of solving *Ford* under the "stream of commerce" theory, the Court altered another test.[86]

The court addressed the "stream of commerce" test again in two other cases.[87] Neither case reached a majority decision on what the test should be.[88] In *Asahi Metal Industry*, the Court considered whether of an out-of-state defendant corporation, aware that parts "it manufactured, sold, and delivered outside the United States" would enter the forum state through the stream of commerce was enough to exercise personal jurisdiction over the corporation.[89] The plurality opinion introduced the stream of commerce plus test, which states that "the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[90] The plurality opinion ultimately concluded that personal jurisdiction was not proper because an additional action by the defendant was needed on top of placing the item

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[83] *Id.*

[84] *Id.*

[85] *Id.* at 297–98.

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

[87] Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102 (1987); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

[88] *See generally Asahi*, 480 U.S. 102; *J. McIntyre*, 564 U.S. 873.

[89] *Asahi*, 480 U.S. at 105.

[90] *Id.* at 112.

into the stream of commerce.[91] This additional action could include "advertising in the forum state" or "establishing channels for providing regular advice to customers in the forum State."[92] Unlike the plurality opinion, Justice Brennan argued in his concurrence that a defendant placing a product into the stream of commerce with knowledge that it will end up in the forum state, without more, *is* enough to meet the purposeful availment standard because the defendant is on notice that it could be sued in the state and has availed itself of the benefits of that state.[93] However, he agreed that personal jurisdiction was not proper in this case because it did not comport with fair play with substantial justice.[94]

In the second stream of commerce case, *J. McIntyre Mach., Ltd. v. Nicastro*, the Court held that personal jurisdiction was not proper when exercised over a British corporate defendant.[95] The corporation manufactured scrap metal machines, one of which was sold by an independent seller in the United States and later injured an individual there.[96] The Court determined personal jurisdiction ultimately was not proper because the corporation had not targeted the market in the forum state; however, the court again split on the question of when placing products into the stream of commerce is enough to grant personal jurisdiction over a defendant.[97] Justice Kennedy, writing for a plurality, stated that a defendant's prediction that its product might end up in the forum state through the stream of commerce is not enough, the defendant must have taken an act to target the forum state in some way.[98] In a dissenting opinion, Justice Ginsburg suggested that foreign manufacturers should not be able to escape personal jurisdiction by using an independent distributor instead of distributing products itself.[99] While the Court adopted no single stream of commerce test in the above cases, the relationship between a corporate defendant placing a product into the stream of commerce and specific jurisdiction lived on in later cases.[100]

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[91] *Id.*

[92] *Id.*

[93] *Id.* at 117 (Brennan, J., concurring).

[94] *Id.* at 116.

[95] J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011).

[96] *Id.* at 878.

[97] *Id.* at 877.

[98] *Id.* at 882–83.

[99] *Id.* at 873 (Ginsburg, J., dissenting).

[100] *See* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773 (2017); Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

D. Emergence of Arise Out of Or Relate To

The test at the heart of *Ford* was first distinctly articulated in the 1980s in a case involving a helicopter crash in Peru.[101] In *Helicopteros Nacionales de Colomibia, S.A. v. Hall*, a Colombian corporation provided helicopter transportation to several employees of a Peruvian consortium working on a pipeline in Peru.[102] After the helicopter crashed in Peru, killing four United States citizens who were working for the Peruvian consortium, a suit was filed in a Texas court against the helicopter company.[103] While the helicopter company had flown to Texas to negotiate its contract with the consortium, had purchased helicopters and helicopter parts from Texas, and sent pilots to train in Texas, the company had no other ties to the state.[104] The Court adopted the now infamous arise out or relate to test, holding that "when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant."[105] The Court found that the claims at issue did not arise out of or relate to the helicopter company's activities in Texas, but they did not elaborate because the parties did not dispute this point.[106] While the Court still found personal jurisdiction improper, it focused its analysis mostly on general jurisdiction grounds.[107]

Further, the court declined to answer whether "arise out of" and "relate to" referred to two separate kinds of connections that could satisfy specific jurisdiction or what kind of tie between the defendant's contacts and the forum state would show that either connection existed.[108] This test was not revisited again until *Bristol-Myers Squibb* in 2017, and these questions remained open for lower court interpretation.[109]

E. The Shoe Loosens: Specific Jurisdiction in the 21st Century

In 2017, the Supreme Court handed down a controversial decision that many thought might end the ability for plaintiffs from different states to band together and bring class action suits "because many saw BMS's holding—that plaintiffs from states around the country could not join

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[101] *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 410 (1984).

[102] *Id.* at 409–10.

[103] *Id.* at 410–12.

[104] *Id.*

[105] *Id.* at 414 n.8.

[106] *Id.* at 416.

[107] *Id.* at 416–19.

[108] *Id.* at 415 n.10.

[109] *See generally* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773 (2017).

together in California to sue the pharmaceutical company Bristol-Myers Squibb—as plausibly extending to multistate and nationwide class actions."[110] In *Bristol-Myers Squibb*, the Court addressed whether a California court could properly exercise jurisdiction over Bristol-Myers Squibb ("BMS"), an out of state corporate defendant, in an action brought by over 600 plaintiffs, most of whom resided outside of California.[111] The plaintiffs alleged an injury from ingesting a pharmaceutical, Plavix, which was manufactured and sold by BMS.[112] While BMS had five research and laboratory facilities in California and employed around 250 sales representatives there, BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory process for Plavix in California.[113]

In deciding this case, the Court revisited the "arise out of and relate to" standard for the first time since it was articulated in *Helicopteros*.[114] In doing so, the Court seemed to limit the nexus required between an out-of-state corporation's activities and a forum state to largely requiring a causation relationship.[115] The Court found jurisdiction improper over the claims brought by the out-of-state plaintiffs because they were not prescribed the drug in California, did not purchase the drug there, did not ingest the drug there, nor were they harmed there.[116] Under the but-for causation approach, these scenarios would be enough to satisfy the nexus requirement, which left speculation that a causal relationship is what was needed to create the nexus between the defendant's activities and the forum state.[117] The Court also concluded BMS's research in California was completely irrelevant to deciding the issue of personal jurisdiction because the research was conducted on matters not connected to Plavix.[118] In this case, there was no sufficient nexus between the forum state and the plaintiffs' claims because the claims would not have changed even absent the defendant's activities in the forum state.[119] The Court rejected the plaintiff's argument that the nexus was satisfied because *Bristol-Myers Squibb* had contracted to distribute Plavix nationally with a company

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[110] Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 YALE L.J. F. 205, 206 (2019).

[111] *Bristol-Myers Squibb*, 137 S. Ct. at 1777.

[112] *Id.* at 1778.

[113] *Id.*

[114] Levi M. Klinger-Christiansen, *The Nexus Requirement After Bristol-Myers: Does "Arise Out Of Or Relate To" Require Causation?*, 50 SETON HALL L. REV. 1145, 1145 (2020).

[115] *Id.* at 1177.

[116] *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

[117] Klinger-Christiansen, *supra* note 114, at 1170.

[118] *Id.* at 1781.

[119] *Id.* at 1782.

based out of California.[120] The Court even went as far as quoting another case that said, "even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."[121]

Justice Sotomayor dissented, arguing that the California court properly exercised personal jurisdiction.[122] She noted that BMS had a national advertising campaign for Plavix, distributed Plavix nationally, had several facilities in California, employed over 400 people in the state,[123] and received over $1 billion in sales from Plavix in California.[124] All of these facts led Justice Sotomayor to conclude that BMS had purposefully availed itself of California and the state's markets.[125] Because the out-of-state plaintiffs' claims were identical to the in-state plaintiffs' claims and the claims arose out of the same national marketing and distribution scheme, she asserted no further connection was required to prove that the claims "arose out of or related to" defendant's activities in California.[126]

While there was broad speculation that the holding in *Bristol-Myers Squibb* would change class actions because it appeared that out-of-state plaintiffs could no longer join with in-state plaintiffs over identical claims, to date there have not been significant ramifications from the decision.[127] While *Bristol-Myers Squibb* was a mass action and not a class action,[128] the potential ramifications were thought to apply equally to cases brought by individual plaintiffs.[129] A large majority of courts that have considered issues similar to those presented in *BMS* have held that the exercise of personal jurisdiction in nationwide class actions continues to be permissible in the same way as it was before the ruling in *BMS* was handed down.[130]

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[120] *Id.* at 1783.

[121] *Id.* at 1781 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 946 n.6 (2011).

[122] *Id.* at 1784 (Sotomayor, J., dissenting).

[123] *Id.* at 1786.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Wilf-Townsend, *supra* note 110, at 226.

[128] *Bristol-Myers Squibb*, 137 S. Ct. at 1784. Class actions require class certification that each plaintiff is bringing sufficiently similar suits. Wilf-Townsend, *supra* note 110, at 217. A mass action is similar but does not require class certification. *Id.* Therefore, plaintiffs in mass actions still bring similar suits but they do not have to be virtually identical. *Id.*

[129] Wilf-Townsend, *supra* note 110, at 226.

[130] *Id.*

F. Arise Out Of or Relate To Before Ford

Prior to *Ford*, the Supreme Court had never clarified what it meant for a plaintiff's claim to "arise out of or relate to" the defendant's contacts with the forum state.[131] This left lower courts to create their own varying interpretations of what this test required for personal jurisdiction to be proper.[132] The Court of Appeals for each of the federal circuits have all formulated the test as requiring some level of causation, typically using either but-for causation or proximate causation.[133] But-for causation requires that the plaintiff's claim would not have arisen in the absence of the defendant's contacts with the forum and is a more relaxed causal test.[134] Proximate causation is a more stringent causal test, requiring "the defendant's forum contacts to form an important or at least material elements of proof in the plaintiff's case."[135]

IV. INSTANT DECISION

This Part describes the Supreme Court's decision in *Ford*.[136] The Court, through Justice Kagan, issued a unanimous decision holding that the Minnesota and Montana state courts properly exercised personal jurisdiction over Ford. Subpart A discusses the majority's decision to affirm the lower courts' exercise of personal jurisdiction. Subparts B and C discuss the two concurring opinions.

A. Majority Opinion (Justice Kagan)

The Court rejected Ford's causation-only argument for specific jurisdiction and redefined the requirement that a claim must "arise out of or relate to" a defendant's contacts with the forum state for specific jurisdiction to be proper.[137] The majority focused on the disjunctive "or" in the test, reading it like a statute, breaking apart "arise out of" and "relate to," and holding that these represented two separate ways for a claim to satisfy specific jurisdiction.[138] "Arise out of" refers to cases in which the plaintiff's harm was *caused* by the defendant's contacts with the forum state.[139] Plaintiffs can also show that the defendant's contacts with the

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[131] Klinger-Christiansen, *supra* note 114, at 1151.
[132] *Id.*
[133] *Id.* at 1152.
[134] "The Ninth Circuit Court of Appeals is the primary adherent to this test." *Id.*
[135] *Id.* at 1154.
[136] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).
[137] *Id.* at 1026.
[138] *Id.* at 1022.
[139] *Id.* at 1026.

forum state were closely "related to" the plaintiff's injury, even without any showing that these contacts have any causal relationship to the alleged harm.[140] The Court ultimately found personal jurisdiction proper over Ford because the connection between the plaintiff's claim and Ford's activities in the state were close enough to support specific jurisdiction.[141]

While the Court did not expressly place Ford's conduct into either one of the categories, it suggested that the conduct could satisfy either.[142] The majority focused on Ford's "substantial" business in both states and found that Ford actively sought to serve the market for automobiles in both states.[143] The Court found that because the types of vehicles at issue in this case were widely promoted, sold, repaired, and maintained in each forum state, personal jurisdiction would be satisfied under the "relate-to" prong of the test even though no clear causal relationship was found between the plaintiff's injuries and defendant's in-state activities.[144] The Court even suggested that these activities might have been enough to cause the crashes in question, as the plaintiffs might never have bought the cars at issue without Ford's extensive marketing and servicing throughout both states.[145]

While the Court mentioned there would be limits on specific jurisdiction under the newly dissected "relates to" prong, the Court gave only a snapshot of what they would be.[146] The Court stated that even if one sells a product in a state and that product malfunctions, the company or entity still would not be subject to personal jurisdiction if the sale is only an isolated or sporadic transaction instead of a series of continuous transactions.[147] This would preclude an out-of-state court from exercising personal jurisdiction over a hypothetical duck decoy salesman in Maine who sells his decoys over the internet.[148] The Court did not consider, however, whether the two-part test applies to Internet transactions generally.[149]

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[140] *Id.*
[141] *Id.* at 1027.
[142] *Id.* at 1026.
[143] *Id.* at 1022.
[144] *Id.* at 1032.
[145] *Id.* at 1029.
[146] *Id.* at 1028 n.4.
[147] *Id.*
[148] *Id.*
[149] *Id.*

B. Justice Alito's Concurrence

Justice Alito argued that the *Ford* cases should have been decided without any change to the prior law on specific jurisdiction.[150] He argued that under *International Shoe*'s standards of fairness, it was clear that Ford's contacts with the forum states were sufficient to subject it to suit in those states.[151] He agreed with the Court in rejecting the "causation-only" approach offered by Ford but argued the Constitution required at least some causal link between a defendant's activities in a forum state and a plaintiff's claims for specific jurisdiction to be proper.[152] Nevertheless, Justice Alito found a causal link in *Ford* because the vehicles in question would never have ended up in the forum states if Ford had never advertised there, maintained vehicles there, or sent repair parts there.[153] He also warned that "arise out of" and "relate to" are actually overlapping categories, and by separating the two and not setting clear limits on the new "relate to" category, the Court created more confusion for lower courts.[154]

C. Justice Gorsuch's Concurrence

In concurrence, Justice Gorsuch also took issue with the Court's new test and argued it only creates confusion for lower courts.[155] He argued that the Court did not need to break apart the test, noting that lower courts have traditionally thought the prior "arise out of or relate to" standard for specific jurisdiction required at least a but-for causal link, but this this standard was not an incredibly demanding one and could have easily been met here.[156] Justice Gorsuch further argued that the majority's failure to set any real limits on the new test could pose problems in both directions; it could capture almost anything and broaden the scope of activities that would subject a corporation to specific jurisdiction or it could be a more stringent standard than before.[157] To illustrate, he explained that under the new test articulated by the Court, the states where the car was originally sold may not have been able to exercise jurisdiction over Ford because the only connection between the claims and these states is that the prior owner bought the car there; however, the plaintiff's injuries likely "arose from"

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[150] *Id.* at 1032 (Alito, J., concurring).
[151] *Id.* (Alito, J., concurring).
[152] *Id.* at 1033 (Alito, J., concurring).
[153] *Id.* (Alito, J., concurring).
[154] *Id.* at 1033–34 (Alito, J., concurring).
[155] *Id.* at 1039 (Gorsuch, J., concurring).
[156] *Id.* at 1034 (Gorsuch, J., concurring).
[157] *Id.* at 1035 (Gorsuch, J., concurring).

the sale of the cars in those states.[158] He pointed out that even though the new prong of the test might not be satisfied by the original sale, the Court seemed to ignore that the old part of the test that required some level of causation might be satisfied.[159] He then noted that there is a vast range of contact intensity between Ford's national marketing scheme and an "isolated incident."[160] Justice Gorsuch also pointed out that the court did not state if the new prong of the test replaces or just merely supplements the old causation inquiry.[161]

Justice Gorsuch then discussed the circumstances that led to the decision in *International Shoe* and argued that those circumstances were again present in *Ford*.[162] Prior to *International Shoe*, courts used due process to restrict where plaintiffs could sue out-of-state corporations that had harmed them, leaving many without a forum to have their claims redressed.[163] *International Shoe* addressed this issue, but Justice Gorsuch argued this same problem of removing a forum arose again.[164] However, even with these critiques, Justice Gorsuch conceded that nothing in the Constitution's original meaning or history would prevent Ford from being subject to the forum states' jurisdictions in this case.[165] Justice Gorsuch ended his opinion by stating that the question of when out-of-state corporations are subject to personal jurisdiction is no longer what the right outcome should be, but is instead what the right test should be given the Court's lack of explanation about the status of the old test and limits on its new test.[166]

V. COMMENT

While the *Ford* Court stated that they "have never framed the specific jurisdiction inquiry as always requiring causation,"[167] they also have never stated that it does not require a causal showing, have never broken the test apart, and also chose to take a different approach than every one of the federal circuit Court of Appeals.[168] Further, this outcome seems to be moving in the opposite direction of the Court's ruling in *Bristol-Myers Squibb* which held that plaintiffs across the nation could not gather in

[158] *Id.* (Gorsuch, J., concurring).
[159] *Id.* (Gorsuch, J., concurring).
[160] *Id.* (Gorsuch, J., concurring).
[161] *Id.* (Gorsuch, J., concurring).
[162] *Id.* at 1037–39 (Gorsuch, J., concurring).
[163] *Id.* at 1037 (Gorsuch, J., concurring).
[164] *Id.* at 1038 (Gorsuch, J., concurring).
[165] *Id.* at 1039 (Alito, J., concurring).
[166] *Id.* (Gorsuch, J., concurring).
[167] *Id.* at 1026.
[168] *See supra* Part III, Section F.

California to bring suit when the out-of-state plaintiffs could not show that they were prescribed or that they purchased the defendant's product in California.[169] As mentioned above, many thought the holding in *Bristol-Myers Squibb* meant that some kind of causal relationship was necessary to meet the arise out of and relate to standard. Further, the *Ford* decision seems to bring back the idea that a plaintiff's activities alone are enough to create specific jurisdiction, which it rejected in *Hanson v. Denckla*, as well as the idea that a nationwide marketing scheme could connect products that were bought out-of-state by plaintiffs to the defendant's activities forum state, which the Court rejected in *Bristol-Myers Squibb*.[170] While the outcome of *Ford* might have been the correct one, the new test is unnecessary, hard to apply, and has allowed the lower courts to make decisions that sway closer towards the hypothetical duck decoy salesman and farther from making a national, multimillion dollar company like *Ford* stand suit in a state it serves a large market in.

A. The Ford Court's Version of Arise Out Of or Relate To

The outcome in *Ford* is understandable because of Ford's expansive marketing, advertising, and maintenance and repair schemes both nationwide and in the forum states, yet the decision creates confusion for businesses trying to protect themselves against out-of-state suits .[171] While the Court mentioned that a retired duck decoy salesman would not be subject to specific jurisdiction for selling one of his products out of state over the internet, it did not articulate limits for businesses whose product market falls between the size of Ford and a single decoy salesman. As this middle-ground encompasses the vast majority of businesses today,[172] the decision leaves many wondering where specific jurisdiction law will go next. Justice Gorsuch said as much in his concurrence when he wondered whether this new test will be more stringent or loose than the old one.[173] It also leaves some asking the Court to create a new *International Shoe*, updating the requirements for personal jurisdiction to reflect economic advancements since the original case was decided.[174]

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[169] Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1781 (2017).

[170] *See supra* Part III, Section B.

[171] *Id.* at 1035.

[172] Approximately ninety-seven percent of businesses in the United States have between one and 500 employees. *Small businesses are an anchor of the US economy*, JP MORGAN CHASE & CO., https://www.jpmorganchase.com/institute/research/small-business/small-business-dashboard/economic-activity [https://perma.cc/E8FP-HEKF] (last visited Mar. 30, 2022).

[173] *Ford Motor Co.*, 141 S. Ct. at 1035 (Gorsuch, J., concurring).

[174] Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 236–37 (2021).

To begin piecing together the implications of *Ford*, it is important to note that the Court's decision directly overruled the test for specific jurisdiction in some circuits that applied a strict causation-only test like the one Ford suggested.[175] The United State Court of Appeals for the Ninth Circuit had historically relied on a but-for test of causation when applying the arise out of or relate to test, but a recent decision from the United States District Court for the District of Nevada noted that the decision in *Ford* did away with this approach.[176] The Eleventh Circuit also used to apply a but-for causation test, but a recent case in the United States District Court for the Southern District of Florida also held that the Supreme Court abrogated this view in *Ford*.[177] In the Third Circuit, there has already been variation among lower courts in deciding how *Ford* impacted its prior causation-only standard for specific jurisdiction.[178] These changes can make it more difficult for corporations currently being sued in these courts to predict what test will be used.[179]

The *Ford* decision is also seemingly in tension with the Court's precedent in *Bristol-Myers Squibb* and *Hanson*.[180] In both *Bristol-Myers Squibb* and *Ford*, the corporate defendants engaged in a national advertising and sales scheme for the product in question.[181] The only distinguishable differences between *Ford* and *Bristol-Myers Squibb* are that in *Ford*, all plaintiffs lived in the state in which they brought suit and the injuries alleged occurred in each respective forum state.[182] While this

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[175] Xan Ingram Flowers, *Navigating a Foggy Future Post-Ford Motor Co. v. Montana Eighth Judicial District Court*, BUTLER SNOW LLP (July 15, 2021), https://www.mondaq.com/unitedstates/patent/1092586/navigating-a-foggy-future-post-ford-motor-co-v-montana-eighth-judicial-district-court [https://perma.cc/D9WU-WRKF].

[176] Clarke v. Dutton Harris & Co., No. 2:20-cv-00160-JAD-BNW, 2021 WL 1225881, *4 (D. Nev. Mar. 31, 2021) (quoting Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995)).

[177] Lewis v. Mercedes-Benz USA, LLC, 530 F. Supp. 3d 1183, 1238 (S.D. Fla. 2021).

[178] *See* Rickman v. BMW of N. Am. LLC, 538 F. Supp. 3d 429, 441 (D.N.J. 2021) (finding that past Third Circuit causation requirement cannot be reconciled with Ford); *see also* Beemac, Inc. v. Republic Steel, No. 2:20-cv-1458, 2021 WL 2018681, *8 (W.D. Penn. May 20, 2021) (finding that Ford neither expressly or impliedly overrules causation focused test).

[179] Flowers, *supra* note 175.

[180] *See, e.g.*, Patrick J. Borchers et al., *Ford Motor Company v. Montana Eighth Judicial District Court: Lots of Questions, Some Answers*, 71 EMORY L.J. ONLINE 1, 3 (2021), https://scholarlycommons.law.emory.edu/elj-online/41 [https://perma.cc/8PVF-AVKN].

[181] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1030 (2021); Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773 (2017).

[182] Patrick Delaney, *Ford vs. Forum Shopping: The Attempt to Limit Personal Jurisdiction to A "Causation Only" Analysis*, JD SUPRA (May 24, 2021),

is a distinction between the cases, it does not resolve the tension between the two because it is well-established throughout the Court's personal jurisdiction jurisprudence that the plaintiff's location or conduct alone is not enough to subject an out-of-state defendant to suit in the forum state.[183] Yet, the *Ford* majority placed significant focus on the location and conduct of the plaintiff in changing how prior unrelated marketing activities, advertising activities, and location of facilities now relate to the plaintiff's injuries.[184]

The *Ford* Court emphasized the fact that the site of injury in both cases was within the forum state and that Ford sold other vehicles of the same model of the cars in the forum state.[185] According to the Court, even though the plaintiffs brought the cars into the forum states on their own accord, Ford still encouraged the plaintiffs to do so through their national marketing scheme.[186] In contrast, the *Bristol-Myers Squibb* Court looked to the fact that none of the defendants' contacts within California produced the product in question that harmed the plaintiffs, even though Bristol-Myers Squibb was advertising the product nationally and sold the product within the forum state as well.[187] Arguably, the factual scenarios in the cases are the same as far as the defendant's conduct, as the production, design, and purchase of the cars in question in *Ford* happened outside of the forum states.[188] The outcome only becomes different because of the site of the injuries and the plaintiffs' residences are in the forum states, even though in *Ford* the plaintiffs are the ones who brought the product into the forum state in the first place.[189] Applying this same reasoning to *Bristol-Myers Squibb*, the Court could easily find that because the same product was sold in the forum state and the out-of-state plaintiffs had been influenced by the same national advertising that was being shared in the forum state, the defendant's actions, not only in California but nationally, "caused" or "related to" the out-of-state plaintiffs' injuries.

Comparing the two cases reveals that *Ford*'s holding allowed contacts that did not meet the standard before, to now rise to meet the standard because there are in-state plaintiffs with an in-state injury.[190] Even under the argument that it was Ford that caused the plaintiffs to buy its vehicles through its national marketing and maintenance scheme, this

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https://www.Jdsupra.com/legalnews/ford-vs-forum-shopping-the-attempt-to-5008564/ [https://perma.cc/E98Q-N2AA].

[183] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[184] *Ford Motor Co.*, 141 S. Ct. at 1028–29.

[185] *Id.*

[186] *Ford Motor Co.*, 141 S. Ct. at 1028.

[187] Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773 (2017).

[188] *Ford Motor Co.*, 141 S. Ct. at 1022.

[189] *Id.*

[190] *Id.* at 1029.

argument could arguably have sufficed to subject Bristol-Myers Squibb to jurisdiction. This causes much confusion for large corporate defendants.[191] While *Bristol-Myers Squibb* seemed to suggest that a corporation will not be hauled into court in any state where it does substantial business unrelated to an injury claimed, the Court's decision in *Ford* seems to suggest otherwise. Now companies that advertise nationally, sell products nationally, and maintain or repair products nationally may be subject to suit in any state wherever its product may land, even by the unilateral activity of the plaintiff.[192] This too seems in conflict with past stream of commerce decisions as it was believed that once the product "exits" the stream of commerce, or is sold to the first consumer, the manufacturer is no longer subject to personal jurisdiction through the stream of commerce theory alone.[193]

Instead of addressing how *Ford* could have been decided under the holding of *Bristol-Myers Squibb* or explaining why *Bristol-Myers Squibb* demanded a different outcome, the Court focused on the disjunctive "or" and created a new prong of an old test to fit the outcome they desired, when precedent and federal court applications did not support this reading.[194] This opens up the possibility of the Court expanding the test for personal jurisdiction to fit its desired outcome in every case. While it is reasonable to assume the Court will sometimes change its tests, the Court should consider creating an entirely new test to apply to current corporate circumstances instead of just amending a test that no longer fits. While the ideas that purposeful availment and conduct that arises out of or relates to contacts within a state made sense to subject a company to personal jurisdiction in the 1920s, they prove much harder to apply when looking at the companies of today that can advertise through any medium and sell their products across the globe. The changing economic landscape that allows consumers to purchase products from anywhere in the United States at the click of a button, coupled with mass communication, makes it hard to argue that a large company that advertises nationally would not be subject to specific jurisdiction in any state under the *Ford* Court's test. Forcing national companies to defend suits in every state seems in direct contrast with the principles articulated in *International Shoe*, stating that there need to be clear limits on state sovereignty and that for personal jurisdiction to be proper, it must be reasonable and not offend notions of "fair play and substantial justice." Even the largest corporations would likely struggle if they were opened to suit by any consumer in any state that might have been influenced by the corporation's actions there.

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[191] Flowers, *supra* note 175.

[192] *Ford Motor Co.*, 141 S. Ct. at 1029.

[193] Carrington & Rajavuori, *supra* note 72.

[194] *See* Flowers, *supra* note 175; Borchers, *supra* note 180, at 20.

B. A Shoe Unfit: Moving Forward

As detailed above, *International Shoe*'s initial "minimum contacts" and "fair play and substantial justice" tests have been amended numerous times over the past 100 years.[195] What seems to have resulted is not a clear test for when specific jurisdiction is proper, but just a series of different facts to compare new cases to that the Court has either deemed unfair or not. Even with all the amendments to the original test, the question seemingly still comes down to what the Court thinks is fair, which can be nearly impossible to predict. The fact that there were some circuit courts that used a strict causation-only test for specific jurisdiction before *Ford*, while others did not shows that the expansions to the *International Shoe* test have only made the test more difficult to interpret.[196]

In the wake of *Ford*, courts have made extreme use of the new test as predicted by Justice Gorsuch's concurrence. In *Godfried v Ford Motor Company*, the United States District Court for the District of Maine found the defendant's activities in the forum state as being enough to meet the new "relate to" prong of specific jurisdiction.[197] The case also expanded the idea of specific jurisdiction further than *Ford*, encompassing situations in which there is not concrete evidence to conclude the specific product in question was ever sold, advertised, or repaired in the forum state.[198] In *Godfried*, the court held personal jurisdiction could properly be exercised over Ford after a protruding lawnmower blade struck the plaintiff.[199] Even though there was no evidence that the specific model of lawnmower in question was ever advertised, sold, or repaired in Maine, the court held that advertisements for Ford lawnmowers that were in a national magazine produced by plaintiffs were enough to conclude Ford had advertised in Maine.[200] The Court based this finding on the fact that two Maine businessmen were highlighted in the magazine and two Maine businesses were advertising in it.[201] The court also based its holding on the fact there was evidence that a Ford dealer in Maine had sold and repaired at least some lawnmowers, stating that there was no reason these dealers would not have sold or repaired the specific mower in question.[202] This is starting to look more like the duck decoy salesman listed as the Court's example

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[195] *See supra* Part I.

[196] Delaney, *supra* note 182.

[197] No. 1:19-CV-00372-NT, 2021 WL 1819696, at *7 (D. Me. May 6, 2021).

[198] *Id.* at *2, *7.

[199] *Id.* at *1, *7.

[200] *Id.* at *7.

[201] *Id.* at *6.

[202] *Id.* at *7.

of a company that would not be subject to specific jurisdiction.[203] Finding jurisdiction proper because a magazine issued nationally advertised the same product as the one at issue and because a repairmen in the state *may* have repaired the mowers in question seems more extreme than finding jurisdiction proper when a salesman markets his products online and someone in another state buys them.

Looking at a patent case decided soon after *Ford* illustrates a further potential extreme impact of Ford's holding on corporate defendants. In *Trimble Inc v. PerDiemCo LLC*, the Federal Circuit Court of Appeals found that twenty-two pre-suit communications over three months between a Texas corporate defendant and California resident plaintiff were enough to subject the Texas LLC to specific jurisdiction in California.[204] The communications were about alleged patent infringements and negotiations for a settlement containing nonexclusive licenses.[205] The court based its decision on the "relate to" prong of the test articulated in *Ford*, finding that the attempt to settle was similar to negotiations "in anticipation of a long-term continuing business relationship," over which the court would have jurisdiction.[206] While it is yet to be determined if this will only be applied in patent negotiation contexts, the idea that just continuously communicating about a future business relationship with someone out-of-state could subject a corporation to personal jurisdiction in that state is a stretch from what most corporations expected before *Ford*.[207] This again seems more like an online salesman whose products are purchased in another state than a company marketing and servicing products nationwide.

While *Bristol-Myers Squibb* opened the possibility for a restriction on when mass product liability class actions can be brought, *Ford* stands to foreclose that possibility.[208] Commentators suggested that the decision in *Bristol-Myers Squibb* would curb forum shopping because a plaintiff's status as being out-of-state alone would not be enough to haul in a corporate defendant for personal jurisdiction in a class action suit.[209] Plaintiffs seemingly could no longer pack together in a state with favorable laws or a state where a few plaintiffs resided or were injured, but others

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[203] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1028 n.4 (2021).

[204] 997 F.3d 1147, 1157–58 (Fed. Cir. 2021).

[205] *Id.* at 1156–57.

[206] *Id.* at 1157.

[207] Flowers, *supra* note 175.

[208] *See generally Key Takeaways From the Supreme Court's Personal Jurisdiction Decision in* Ford Motor Company v. Montana Eighth Judicial District Court, DECHERT LLP (Mar. 26, 2021), https://www.dechert.com/knowledge/onpoint/2021/3/key-takeaways-from-the-supreme-court-s-personal-jurisdiction-dec.html [https://perma.cc/6M4V-H6XM].

[209] Wilf-Townsend, *supra* note 110, at 205–06.

were not. The Court's holding in *Ford* might open back up the possibility for significant forum shopping among plaintiffs because nationwide marketing strategy and maintenance and repair service locations seemingly are now enough to "relate" to the injury without more. At the very least, corporate defendants may have to prepare themselves to defend suits in any state where they do substantial business, regardless of whether that business is directly related to injuries sustained by potential plaintiffs. As corporations face more risk about when they will be hauled into court, consumers could face increased prices to account for this risk.[210]

VI. CONCLUSION

The *Ford* decision changed the test for distinguishing what situations may subject a corporate defendant to suit in a state other than its state of incorporation or headquarters once its product injures someone. This decision creates much ambiguity about how much or little activity in a forum state or with a plaintiff in a forum state may subject a corporation to suit in that state. Whether *International Shoe* has been worn down to be unrecognizable or it just no longer fits the changing economic environment of corporations, one thing is clear: it is time for the Supreme Court to create a new shoe.

[210] Claire Andre & Manuel Velasquez, *Who Should Pay? The Product Liability Debate*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA UNIV. (Nov. 20, 2015), https://www.scu.edu/ethics/focus-areas/business-ethics/resources/who-should-pay-the-product-liability-debate/ [https://perma.cc/9WW9-QYXN].