Case Western Reserve Law Review

Volume 67 | Issue 3

2017

The Business of Personal Jurisdiction

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INTRODUCTION

Perhaps the most notable aspect of the Roberts Court's approach to personal jurisdiction is that it has an approach at all. For nearly twenty-five years, the Supreme Court declined to hear any personal jurisdiction cases.[1] Nonetheless, personal jurisdiction issues continued to be litigated. As a result, personal jurisdiction doctrine developed in the circuit courts of appeals and in the state supreme courts, and these courts developed a relatively coherent body of law, albeit with circuit splits on some significant issues.[2] After decades of avoiding personal

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1. Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 43 (2012) ("Prior to the two personal jurisdiction cases that the Supreme Court promulgated in 2011, it had been nearly twenty-five years since the Supreme Court last considered whether a state court may exercise personal jurisdiction over a nonresident defendant who has no physical presence in the forum jurisdiction.").

2. *See, e.g.*, Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 317 (2012) (noting that "Justice David Souter

jurisdiction cases, the Supreme Court issued four opinions addressing the law of personal jurisdiction within three years.[3] These opinions significantly changed the shape of personal jurisdiction doctrine, leading to a rebalancing of the jurisdictional equilibrium—a balance whose center is still not fully known, as courts struggle to fit cases into the new framework set out by the Supreme Court.[4]

In this Article, we analyze how the Roberts Court's approach to personal jurisdiction affects business and commercial interests. First, we explain how the Roberts Court reshaped the doctrine of personal jurisdiction, narrowing jurisdictional bases in some areas while leaving other issues open for future litigation and ultimately crafting a new equilibrium in jurisdictional doctrine. Next, we examine the guiding principles underlying the Court's personal jurisdiction cases. We find little evidence that the Court was motivated by a desire to favor business interests—the Court failed to resolve the major question that

joined the Court in the fall of 1990 (five months after *Burnham*) and served for nineteen years, but he never decided a personal jurisdiction case, despite occasional explicit requests from lower-court judges for the Supreme Court to provide some definitive answers to lingering questions") (citing Luv N' Care, Ltd. v. Insta-Mix, Inc., 438 F.3d 465, 474–76 (5th Cir. 2006) (DeMoss, J., specially concurring) ("urg[ing] the Supreme Court to resolve" a split regarding stream-of-commerce jurisdiction)). For an analysis of the pre-Roberts Court doctrine, see Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 201–11 (2005) and Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 348–73 (2005).

3. Walden v. Fiore, 134 S. Ct. 1115 (2014) (holding that the defendant lacked the minimum contacts with the forum state needed to satisfy the prerequisites for jurisdiction); Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (holding that a corporate subsidiary's contacts within the forum state did not rise to the level of "continuous and systematic" needed to permit jurisdiction); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) (holding that an out-of-state defendant lacked the requisite "systematic and continuous general business contacts" to allow the forum state to entertain suit against them); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (plurality opinion) (holding that a foreign manufacturer did not engage in conduct purposefully directed at the forum state so as to subject them to personal jurisdiction in that state).

4. *See* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 269 (2014) ("[P]erhaps the initial chaos will stabilize into a new equilibrium, with courts re-calibrating specific jurisdictional doctrine to account for the demise of general contacts jurisdiction and the limitation on effects-test jurisdiction."); Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643 (2015) (examining how the jurisdictional changes affected transnational litigation).

the business lobby wanted answered, and it increased litigation costs by leaving open new avenues for jurisdictional challenges. Instead, it appears that the Court was driven more by a commitment to formalist evaluation of individual cases and a generalized resistance to allowing United States courts to serve as a magnet forum for transnational litigation.

We then evaluate the likely progression of the Court's further jurisdictional jurisprudence in light of these underlying commitments. We conclude that although it is difficult to predict exactly how the Court will rule in the currently pending issues involving the "relatedness" prong and in the "consent by registration" cases, it is clear that future cases will rely heavily on factual development to determine the scope, type, duration, and effect of the defendant's in-forum contacts. In Part III, we then turn to the challenges of jurisdictional discovery created by the increased need for factual development, analyzing how the Roberts Court's recent changes to the discovery rules are likely to play out in the jurisdictional context. Although the discovery rules were recently amended in an attempt to reduce costs and promote efficiency, courts and rulemakers alike will need to give additional attention to jurisdictional discovery; until they do so, businesses and other litigants are likely to continue to face jurisdictional uncertainty.

I. THE ROBERTS COURT'S APPROACH TO PERSONAL JURISDICTION

After decades of Supreme Court neglect, the Roberts Court issued four personal jurisdiction cases in a period spanning less than four years.[5] Each of these cases narrowed personal jurisdiction doctrine, holding that the defendant in each case could not constitutionally be subject to involuntary personal jurisdiction in the state where it was sued. The decisions were, in effect, defendant-friendly: in each of the cases, the defendant had objected to being haled into the plaintiff's choice of forum, and in each case the Court ultimately ruled that the defendant could not be sued there.[6] Thus, to the extent that business

5. *Walden*, 134 S. Ct. 1115; *Daimler AG*, 134 S. Ct. 746; *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. 915; *Nicastro*, 564 U.S. 873.

6. *Walden*, 134 S. Ct. 1115 (holding that the defendant lacked sufficient contacts with the forum state to establish jurisdiction, even though the defendant's conduct had effects in the desired forum state); *Daimler AG*, 134 S. Ct. 746 (holding that a foreign corporation could not be subject to general jurisdiction when it was not "at home" in the state); *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. 915 (holding that general jurisdiction was appropriate only when the defendant's contacts were so "'continuous and systematic' as to render them essentially at home in the forum State"); *J. McIntyre Mach., Ltd.*, 564 U.S. 873 (holding that a foreign manufacturer could not be subject to

interests are often viewed as largely synonymous with defendants' interests, the decisions may be considered to be protective of business interests as a whole.[7] As with the larger theme of Professor Jonathan Adler's conclusion in *Business and the Roberts Court*, however, the jurisprudential story is more complicated.[8]

A. The New Equilibrium of Personal Jurisdiction

The Supreme Court had long distinguished between two types of personal jurisdiction. General, or dispute-blind jurisdiction, allowed a court to exercise jurisdiction against a particular defendant for any claim, regardless of where it arose or whether it had any connection to the forum.[9] Specific jurisdiction, on the other hand, allowed a court to exercise jurisdiction over a defendant only for cases sufficiently related to the judicial forum.[10] The paradigm case for general jurisdiction was *Perkins v. Benguet Consolidated Mining Co.*[11] The paradigm case for specific jurisdiction was *International Shoe Co. v. Washington.*[12]

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jurisdiction merely because its product, sold through a U.S. distributor, caused injury within the forum).

7. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1107 n.175 (2015) ("This theory is consistent with the belief that the Supreme Court is generally business friendly, which often translates as defendant friendly.").

8. Jonathan H. Adler, *Introduction* to BUSINESS AND THE ROBERTS COURT 1, 12 (Jonathan H. Adler ed., 2016) ("So while there is little evidence the Court seeks to help business as such, there are aspects of the Court's dominant jurisprudence that work to the advantage of business interests.").

9. Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 138–39 (2015) (distinguishing the evolving definitions of general and specific jurisdictions).

10. *Id.*

11. 342 U.S. 437, 444 (1952) (holding that an Ohio court could exercise jurisdiction over a mining corporation based in the Philippines, on account of the company's overwhelming, not suit-related, ties to the state of Ohio that allowed the company president to direct the foreign corporation from Ohio, where he resided); *see also Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 927–28 ("Our 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains '[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.'") (quoting Donahue v. Far E. Air Transp. Corp., 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

12. 326 U.S. 310, 316 (1945) (holding that a court could constitutionally exercise jurisdiction over a nonresident defendant when the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

Between these poles, however, there was much room for debate. What kind of contacts, short of the corporation-directing activity present in *Perkins*, would suffice to allow dispute-blind jurisdiction?[13] How should the "minimum contacts" and "fairness" factors be weighed to determine whether specific jurisdiction would be appropriate?[14]

For decades, these questions were addressed by state supreme courts and federal circuit courts of appeals, which developed their own doctrinal formulations.[15] Before the Roberts Court decided the new personal jurisdiction cases, first-year law students across the nation learned the approach developed in these courts.[16] This approach held that general jurisdiction was appropriate when a defendant's in-state contacts were continuous, systematic, and substantial (thus allowing Wal-Mart, for example, to be subject to dispute-blind jurisdiction in all fifty states), but that specific jurisdiction under the *International Shoe* framework required a fairly tight nexus between the defendant's in-state contacts and the plaintiff's cause of action.[17] Although there were

13. *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 667–70 (1988) (arguing in favor of limiting general jurisdiction to a defendant's "home base"); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 735–48 (1988) (analyzing the quantity and quality of contacts needed to exercise general jurisdiction); Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 808–12 (2004) (proposing a theoretical foundation of general adjudicatory jurisdiction predicated on sovereign power over nonresidents engaging in forum activities analogous to the activities conducted by local domiciliaries).

14. *See, e.g.*, Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–63 (1966) (describing the various judicial analyses for specific jurisdiction and noting how the analyses comport with the due process clause); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 400–412 (2012) (explaining the Supreme Court's use of purposeful availment to correlate minimum contacts and fairness).

15. Tanya J. Monestier, *Where Is Home Depot "At Home"?:* Daimler v. Bauman *and the End of Doing Business Jurisdicti*on, 66 HASTINGS L.J. 233, 241 (2014) (noting that prior to *Daimler* "[t]here were few guideposts for courts deciding whether a corporation was doing business such that it would be subject to general jurisdiction" and that lower courts were therefore "largely left to their own devices in determining when a corporation would or would not be subject to general jurisdiction").

16. Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After* Daimler AG v. Bauman, 76 OHIO ST. L.J. 101, 114–15 (2015) (noting that "[t]reatises printed as black letter law that corporations were subject to general jurisdiction wherever they engaged in a sufficiently high level of business activity" and that a leading casebook presented it as settled law).

17. *Id.* at 110–13.

some areas of disagreement between the circuits, this equilibrium functioned fairly stably for decades.[18]

In 2011, the Court decided the first two cases: *J. McIntyre Machinery, Ltd. v. Nicastro*[19] and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[20] Both cases arose out of transnational commerce, were decided on the same day, and appeared to make relatively minor clarifications in personal jurisdiction doctrine. In *Nicastro*, the Court was asked to decide whether a New Jersey court could exercise specific jurisdiction over J. McIntyre Machinery, an English manufacturer; the record did not indicate that more than a handful of its machines had been sold through its U.S. distributor to New Jersey customers, but plaintiffs argued that McIntyre had sufficiently "targeted" the forum by marketing its products throughout the United States, including New Jersey.[21] A divided Court concluded that such generalized and indirect targeting was insufficient to support jurisdiction, at least in the absence of regular forum sales.[22] In *Goodyear*, the Court was asked to decide whether a North Carolina court could exercise general jurisdiction over a Turkish subsidiary of the Goodyear Corporation, when the tires manufactured by the Turkish subsidiary allegedly caused an accident involving children from North Carolina in France.[23] Again, the Court held that such jurisdiction was improper, writing that the subsidiary's "attenuated connections to the State . . . fall far short of . . . 'the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State."[24] Instead, the Court said, general jurisdiction was appropriate only when those contacts were so extensive that the defendant was "essentially at home" in the forum.[25]

18. *Id.* at 104–09.

19. 564 U.S. 873 (2011) (plurality opinion).

20. 564 U.S. 915 (2011).

21. *Nicastro*, 564 U.S. at 877–89.

22. *Id.* at 880–87. A plurality concluded that McIntyre did not appropriately "manifest an intention to submit to the power of a sovereign" because the company did not target New Jersey on its own for the transmission of goods. *Id.* at 882–87. Justice Breyer's concurring opinion reasoned that the Court's prior cases had never considered a similar singular sale through a distributor as sufficient for jurisdiction. *Id.* at 888–89 (Breyer, J., concurring).

23. *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 918–19.

24. *Id.* at 929 (citation omitted).

25. *Id.* at 919; *see* Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 535–36 (2012) (arguing that the Court provided little guidance for ascertaining when a corporation is "essentially at home").

In the 2013–14 term, the Court again returned to the subject of personal jurisdiction, deciding two additional cases. One of those was *Walden v. Fiore*,[26] which further refined the type of "targeting" necessary for specific jurisdiction; it held that the defendant's mere awareness that the plaintiff will feel the effects of the defendant's conduct in a particular forum is insufficient to amount to targeting that forum for jurisdictional purposes.[27] This might have been viewed as a relatively significant decision,[28] but it was overshadowed by the Court's other personal jurisdiction case of the term, *Daimler AG v. Bauman*.[29]

Daimler utterly upended the structure of personal jurisdiction.[30] It involved another transnational case, this time brought by Argentinian plaintiffs suing over the actions of Mercedes-Benz during the Argentinian "Dirty War."[31] The plaintiffs sought to proceed against the German parent company, DaimlerChrysler Aktiengesellschaft, relying on the extensive California contacts of its American subsidiary.[32] The Court held that the "continuous and systematic general business contacts" test applied by the circuit courts for general jurisdiction was the wrong test.[33] Instead, the Court maintained, the relevant analysis was the one alluded to—but not expanded upon—in *Goodyear*: was the defendant "at home" in the forum?[34] The Court explained that in all

26. 134 S. Ct. 1115 (2014).

27. *Id.* at 1124–26.

28. Although *Walden* was not as earth-shaking as *Daimler*, it will nevertheless have a significant impact on a large set of cases. *See* Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 390 (2015) ("Hard cases abound because the events underlying litigation frequently sprawl across borders."); Lee Goldman, *From* Calder *to* Walden *and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 SAN DIEGO L. REV. 357, 358 (2015) ("With the advent of the Internet and the explosion of new technology, individuals are accused of causing injury in distant states in which they have had no direct contacts on a daily basis.").

29. 134 S. Ct. 746 (2014).

30. Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 691–92 (2015) ("Daimler has apparently removed a heretofore well-entrenched concept of general jurisdiction over corporations on the basis of continuous and systematic activities even when substantial in nature. The case has transformed, perhaps even for the better, the law of general jurisdiction in the United States.").

31. *Daimler*, 134 S. Ct. at 751–52.

32. *Id.* at 751.

33. *Id.* at 760–61.

34. *Id.* at 760–62. The Court's new formulation of the test as being where the defendant was "at home" was even a change from the allusion in *Goodyear*, which had described general jurisdiction as appropriate where the defendant

except the most unusual circumstances, a defendant would be at home in no more than two jurisdictions: the state of incorporation and the state in which the corporation maintained its principal place of business.[35] Since Daimler was a German company with a principal place of business in Germany, it was not subject to the jurisdiction of the California courts for claims arising from its alleged actions in Argentina.[36] Even under the assumption that its American subsidiary's regional office in the state should be attributed to it for jurisdictional purposes, that was not enough to render it "at home" in California.[37]

This was a major change. It required re-writing every first-year Civil Procedure casebook, as the "continuous and systematic" test had been previously viewed as well-settled law.[38] It also took many courts and litigants by surprise. In cases all over the country, where defendants who engaged in nationwide activity had previously not even bothered to contest jurisdiction, defendants were suddenly raising personal jurisdiction defenses, even in long-running cases.[39]

The Court's personal jurisdiction jurisprudence—and particularly its decision in *Daimler*—thus ignited a domino reaction. In cases where the nonresident defendant had pervasive in-state contacts, jurisdiction would previously not have even been an issue under the "continuous and systematic" test. But now that general jurisdiction only applies

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was "essentially at home," "fairly regarded as at home," or "in [a] sense at home." Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 919, 924, 930 (2016).

35. *Daimler*, 134 S. Ct. at 761.

36. *Id.* at 748.

37. *Id.* at 752.

38. *See* Cornett & Hoffheimer, *supra* note 16, at 104 ("Despite the Court's assurance that its decisions are guided by tradition, *Daimler* departs from settled law.").

39. *See* Ariel G. Atlas, Note, *Who Says You Can't Go "Home"? Retroactivity in a Post-*Daimler *World*, 101 CORNELL L. REV. 1597, 1599 (2016) (examining retroactivity "through motions for reconsideration in pending civil cases"); Brooke A. Weedon, Note, *New Limits on General Personal Jurisdiction: Examining the Retroactive Application of* Daimler *in Long-Pending Cases*, 72 WASH. & LEE L. REV. 1549, 1552 (2015) ("The disagreement over *Daimler's* significance is especially problematic in long-pending cases in which defendants have moved for dismissals on the grounds that personal jurisdiction no longer exists because of the apparently stricter *Daimler* test."). Most courts have allowed the defendants to make new challenges in light of the existing law, see *id.* at 1587, even though forfeiture and waiver are typically employed by courts to lessen the impact of sudden legal changes. *See* Charles W. "Rocky" Rhodes, *Over the Threshold of Constitutional Adjudicative Retroactivity*, (manuscript at 41), https://ssrn.com/abstract=2783954 [https://perma.cc/UJ4F-AFZU] ("[C]ourts also appraise whether to forgive forfeitures related to unanticipated and sudden legal changes.").

when the defendant is "at home," the battleground has shifted to exploring other potential bases for jurisdiction. Courts are now confronting previously unresolved jurisdictional conundrums, such as the extent of the "relatedness" test for specific jurisdiction, whether jurisdiction may be premised on the presence of a separate state-related claim ("pendant" personal jurisdiction), and whether a state could require businesses to consent to general jurisdiction by registering to do business.[40] The resulting uncertainty regarding the new jurisdictional balance on these issues is troubling in light of the need for predictability in jurisdictional determinations.

B. The Business Impact of the New Equilibrium

On the whole, the Roberts Court's personal jurisdiction decisions were less favorable to business than they could have been. It is true that each of the four cases was decided favorably to the defendants in the case. It is also generally true, especially in the procedural arena, that policies good for defendants are thought to be good for business interests as well.[41] Thus, for example, both the National Federation of Independent Business (which represents small-business interests) as well as the United States Chamber of Commerce (which generally represents larger corporate interests) have advocated for more limited discovery rules, a change that typically favors defendants.[42]

In particular, the jurisdictional shift made one major change that aligned with business (and defendants') interests: it made it substantially more difficult for plaintiffs to bring nationwide class actions.[43]

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40. *See infra* Part III.

41. *See, e.g.*, Brian T. Fitzpatrick, *Civil Procedure in the Roberts Court*, *in* BUSINESS AND THE ROBERTS COURT 143, 150 (Jonathan H. Adler ed., 2016) (analyzing the Roberts Court's jurisprudence on pleading standards and suggesting "that the relative rights of plaintiffs and defendants . . . need a readjustment").

42. *See Anti-Biz E-Discovery Bill Defeated in Georgia House*, NFIB (Apr. 6, 2016), http://www.nfib.com/article/anti-biz-e-discovery-bill-defeated-in-georgia-house-73522/ [https://perma.cc/4X5E-MAFR] (arguing that a proportionality requirement is necessary to avoid "small businesses [being] forced to settle lawsuits—no matter the merit of the case—simply to avoid the costs of defending a lawsuit"); *see also* John H. Beisner, *The Centre Cannot Hold: The Need for Effective Reform of the U.S. Civil Discovery Process*, U.S. CHAMBER INST. FOR LEGAL REFORM 17 (May 2010), http://www.instituteforlegalreform.com/uploads/sites/1/ilr_discovery_2010_0.pdf [https://perma.cc/Q47B-UYUA] (arguing against assertions that "claims of discovery abuse rest on unfounded perceptions that have been exaggerated by certain 'pro-business' interests").

43. *See* Rich Samp, *With* Bauman v. DaimlerChrysler*, High Court May Have Put Brakes on Forum Shopping*, FORBES (Feb. 4, 2014, 9:00 AM), http://www.forbes.com/sites/wlf/2014/02/04/with-bauman-v-daimlerchrysler-high-court-may-have-put-brakes-on-forum-shopping [https://perma.cc/R6MX-

With plaintiffs suing defendants who are "at home" in different states (perhaps a retailer and manufacturer, or product manufacturer and component-part maker), it may be impossible to find a single forum in which all defendants can be sued. As a result, plaintiffs may find it more difficult to proceed in a single class action—a result which aligns with the litigation priorities of pro-business groups, which had long argued that meritless class actions took an unwarranted toll on business income.[44]

At the same time, however, it is quite clear that the Court's jurisdictional decisions were not motivated by a direct intent to resolve the cases favorably to business interests. Most importantly, the Court did not answer the main question raised in *Daimler* that the business groups were clamoring for an answer to: that is, whether the contacts of a subsidiary corporation could be imputed to the parent corporation.[45] That question was perfectly teed up in *Daimler*, could easily have been answered, and in fact was expected by many onlookers to be the main issue in the case.[46] Instead, the Court left that question open, ripe for continued litigation, although likely the question will arise less often with the Court's newfound limitations on general jurisdiction.

The decisions also create some difficulties for businesses. First, although business interests may often be aligned with defendant interests, this is certainly not always true—businesses also serve as plaintiffs in many cases, especially when seeking to protect intellectual-property rights. When they do serve as plaintiffs, they will also feel the difficulties raised by the Roberts Court's jurisdictional tightening. This has

EHQK] ("*Daimler* may even spell the end of nationwide class actions against multiple defendants filed anywhere other than the states (if any) in which all corporate defendants are 'at home.' . . . [S]uch claims cannot be heard . . . regardless of whether the defendant's contacts with the forum state are extensive or whether consolidating all claims would be efficient.").

44. *See* Joanna C. Schwartz, *The Cost of Suing Business*, 65 DEPAUL L. REV. 655, 655 (2016) ("[T]he Chamber of Commerce and other business amici tell the same story: Meritless class actions . . . are so devastatingly expensive to defend against . . . that corporate defendants cannot help but accept 'blackmail settlements' that harm both businesses' bottom lines and society at large."); Theodore Eisenberg et al., *Litigation as a Measure of Well-Being*, 62 DEPAUL L. REV. 247, 247 (2013) ("[P]ortraying much litigation as pathological is a key component of business lobbying groups' social construction of the legal system.").

45. Daimler AG v. Bauman, 134 S. Ct. 746, 759 (2014) ("[W]e need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained.").

46. Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1356 (2015) ("The Court sidestepped the thorny issue of when a subsidiary's contacts are imputable to a parent.").

created difficulties already for companies such as Gucci and Tiffany and Co., who sought to enforce their trademark rights by seeking to freeze assets derived from counterfeiting and held in the New York branch of the Bank of China.[47] Similarly, pharmaceutical companies have struggled to obtain jurisdiction over parties seeking to market generic drugs that potentially infringed plaintiffs' patent rights.[48]

Even more significantly, however, the decisions raise more questions about jurisdiction than they answer. Both the NFIB and the Chamber of Commerce have expressed the importance of predictability in personal jurisdiction.[49] But predictability is one thing that the Roberts Court jettisoned when it re-wrote the jurisdictional doctrine that the lower courts had long applied. The Court left for future litigation significant issues such as the necessary "relatedness" inquiry,[50] the availability of "pendant" personal jurisdiction, and the role of corporate registration statutes.[51] This uncertainty alone significantly raises litigation costs for businesses and other parties, who must now spend time and money litigating personal jurisdiction issues that would have earlier been viewed as so well settled not to require briefing or argument.[52]

47. Robertson & Rhodes, *A Shifting Equilibrium*, *supra* note 4, at 673 (noting that transnational trademark-infringement cases "require effective access to national courts").

48. Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 78 F. Supp. 3d 572, 598 (D. Del. 2015), *aff'd*, 817 F.3d 755 (Fed. Cir. 2016); *see* Megan La Belle, *Consent to General Personal Jurisdiction*, PRAWFSBLAWG (May 10, 2016), http://prawfsblawg.blogs.com/prawfsblawg/2016/05/consent-to-general-personal-jurisdiction.html [https://perma.cc/Y6ZX-EJFG] (discussing cases where companies had difficulties establishing jurisdiction).

49. Motion for Leave to File and Brief for *Amici Curiae* the Chamber of Commerce of the United States of America et al. in Support of Petitioner at 2, BNSF Railway Co. v. Tyrrell, No. 16-405 (U.S. Oct. 28, 2016), 2016 WL 6473001 at *2 ("Movants' members thus have a keen interest in the predictability that comes when courts follow fair rules for personal jurisdiction and abide by the decisions of this Court.").

50. The Court recently granted certiorari to consider this issue. Bristol-Myers Squibb Co. v. Superior Court of S.F. Cty., 377 P.3d 874 (Cal. 2016), *cert granted*, 137 S.Ct. 827 (2017).

51. Rhodes & Robertson, *Toward a New Equilibrium*, *supra* note 4, at 229 ("[J]urisdictional disputes won't go away but will simply move to a new playing field.").

52. Cassandra Burke Robertson, *Personal Jurisdiction in Legal Malpractice Litigation*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 15 (2016) (noting that under "[t]he prior pervasiveness of the 'continuous and systematic' standard" many defendants "did not even challenge jurisdiction").

II. THE ROBERTS COURT'S GUIDING PRINCIPLES

If the Roberts Court is not driven by an intent to favor business, then what principles undergird its approach to personal jurisdiction? And, perhaps more importantly, can those principles suggest how the Court might rule with regard to some of the open questions? Two guideposts stand out in this inquiry: a reluctance to draw foreign disputes into United States courts and an overall commitment to formalistic notions of sovereignty dependent upon territorial boundaries. Both these considerations suggest that jurisdictional determinations will necessitate factual determinations and be less susceptible to categorical—or easily predictable—results.

A. Limitations on Transnational Litigation

It is no coincidence that three of the cases in which the Court established new limitations on personal jurisdiction arose in transnational cases. The Court could have selected any number of personal jurisdiction cases on which to grant certiorari, but, after a nearly quarter-century of silence on personal jurisdiction, its personal jurisdiction resurgence focused largely on transnational cases. Other scholars have noted that the Roberts Court in general has been skeptical of doctrines that allow the United States to act as a magnet forum for cases arising abroad.[53] Justice Ginsburg's opinion in *Daimler* stated explicitly that "the risks to international comity" should be part of the jurisdictional analysis, and noted that the prior American acceptance of a broad jurisdictional standard has potentially "impeded negotiations of international agreements" on judgment recognition.[54]

The Supreme Court's attempt to restrict exorbitant jurisdiction may have both good and bad effects. On the positive side, the Court is undoubtedly correct that limiting general jurisdiction brings the United

53. *See, e.g.*, Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 998 (2015) ("Generally speaking, U.S. federal courts are increasingly reluctant to adjudicate transnational cases. . . . [T]he Supreme Court has made substantial refinements to doctrines such as personal jurisdiction, forum non conveniens, and the extraterritorial application of U.S. federal law that pose substantial obstacles for filing transnational suits in U.S. federal courts, especially under federal law.") (citation omitted); David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 43 (2014) ("In areas as diverse as securities fraud, personal jurisdiction, and human rights, the Supreme Court has restricted private regulatory enforcement in U.S. courts to prevent interference with foreign nations' efforts to regulate harm."); Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. PA. J. INT'L L. 663, 672 (2012) (evaluating "recent developments in three different doctrinal areas that make litigation harder to maintain in United States courts").

54. Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014).

States more in line with international practice.[55] In general, the Roberts Court's trend away from welcoming foreign litigants has been appreciated by international business interests who were previously wary of being sued within the United States.[56] This shift may even facilitate the adoption of a treaty on judgment recognition and enforcement.[57]

On the other hand, however, the Court's reduced willingness to uphold jurisdiction in transnational cases is not an unmitigated win for business interests. As one scholar as pointed out, "the jurisdictional reach of domestic courts may be shrinking at a time when access to justice may demand an expanded jurisdictional reach."[58] Thus, for example, U.S. businesses may have a more difficult time reaching assets housed in foreign banks doing business in the United States.[59] Similarly, in another "potentially unforeseen consequence," jurisdictional tightening has made it more difficult in some instances for parties to obtain recognition and enforcement of foreign judgments and arbitral awards.[60]

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55. Bookman, *supra* note 7, at 1140 (noting that "[t]he Court in *Goodyear* and *Daimler* has already brought general personal jurisdiction doctrine into line with internationally accepted ideas that domicile (as opposed to other kinds of contacts) reflects a valid basis for jurisdiction" and arguing that personal jurisdiction should be viewed in relation to the Court's other doctrines that affect when and whether cases can go forward in the United States).

56. Burbank, *supra* note 53, at 664 ("[T]he need of foreign companies for protection against litigation in U.S. courts is less today than it has been in decades, in both absolute and comparative dimensions.").

57. *See* Samuel P. Baumgartner, *The External Dimensions of the European Law of Civil Procedure—A Transatlantic Perspective*, *in* DER EUROPÄISCHE GERICHTSVERBUND—DIE INTERNATIONALEN DIMENSIONEN DES EUROPÄISCHEN VERFAHRENSRECHTS (Burkhard Hess ed.) (forthcoming) (manuscript at 34), https://ssrn.com/abstract=2742330 [https://perma.cc/A4WK-LDCE] ("[W]ith all the changes in U.S. litigation practice . . . the European interest in limiting the personal jurisdiction of U.S. courts in transnational cases should have diminished considerably.").

58. Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y 209, 277 (2015).

59. *See* Robertson & Rhodes, *A Shifting Equilibrium*, *supra* note 4, at 647–48 ("[T]ransnational judgment enforcement is difficult at best.").

60. Silberman, *supra* note 30, at 690; *see also* Sonera Holding B.V. v. Çukurova Holdings A.S., 750 F.3d 221, 224–25 (2d Cir. 2014) ("Whatever the purported scope of [New York law], *Daimler* confirmed that subjecting Çukurova to general jurisdiction in New York would be incompatible with due process."); Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath* Daimler *Wrought?*, 91 N.Y.U. L. REV. 344, 350 (2016) ("Although a jurisdictional nexus should be required to recognize and enforce foreign arbitral awards and foreign country judgments, the distinction between a plenary action and an action for recognition and enforcement justifies a more relaxed jurisdictional nexus in the recognition and enforcement context."); Tanya J. Monestier, *Whose Law of Personal*

B. A Commitment to Formalism and Territorial Boundaries

The personal jurisdiction cases speak more generally to the Roberts Court's commitment to formalism and respect for territorial boundaries.[61] This principle overlaps to some extent with the Court's reluctance to open U.S. courts to cases with a primarily foreign nexus. As one scholar has noted, in the Roberts Court's view, "[o]nly clean lines, clear rules, and cabined roles can bring foreign affairs back under control."[62]

The Court's commitment to formalism goes further than a concern for foreign affairs law, however.[63] It also carries over into the Court's approach to sovereignty, federalism, and even separation of powers.[64] In general, the formalist approach favors bright-line rules over more malleable cost-benefit analyses.[65] In the personal jurisdiction realm, the Court's formalist approach suggests a sharply limited role for the judiciary as well as a skepticism of plaintiffs' broad forum choices. Forum shopping, after all, is a nod to the legal realities that some jurisdictions are more favorable than others for certain claims; it is based on the

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Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments, 96 B.U. L. REV. 1729, 1731 (2016) ("The most heavily litigated issue in the recognition and enforcement of foreign judgments is that of personal jurisdiction.").

61. Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 390 (2014) ("After a century of being widely discredited, legal formalism has made a comeback into the heart of American legal practice.").

62. Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 448 (2015).

63. Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1204 (2007) ("Formalism may thus indeed be long lived on the Roberts Court, though it will not be the pre-New Deal Court's pervasive formalism predicated on natural law precepts. Instead, it appears that a more limited doctrinal formalism in certain contexts is emerging that formulates rules designed in part to further judicial deference to the political institution perceived to be in the best position to make the underlying judgment.").

64. Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1607 (2012) (noting that the Roberts Court's "decisions consistently reject balancing the costs and benefits of novel reallocations of power and instead favor articulating and enforcing bright-line rules"); Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 415–22 (2012) (highlighting the formalism and rigidity of the controlling opinions in *Goodyear*).

65. Krotoszynski, *supra* note 64, at 1607.

premise that justice may vary on the vagaries of geography unrelated to the merits of the claim at hand.[66]

The Court's formalist approach to shaping personal jurisdiction allowed the Court to jettison decades of lower-court doctrinal development. The "continuous and systematic general business contacts" test for general jurisdiction, after all, was not a doctrine developed by the Supreme Court; instead, it was developed over decades in the lower courts, as those courts struggled to apply dicta from *International Shoe*.[67] As a result, the Court did not need to find a way to work with or around that doctrine; instead, it could simply discard it.

Similarly, the Court's overarching respect for territorial boundaries meant that geographic distinctions would not be ignored—even when those distinctions prevented an individual litigant from obtaining a judicial remedy. Thus, for example, McIntyre, a British corporation that marketed its machinery throughout the United States, could not be subject to jurisdiction in New Jersey, where an individual plaintiff ended up suffering injury; the defendant had simply not directed any contacts at the state of New Jersey in particular.[68] The Court also gave deference to corporate formalities in *Daimler* by accepting that a defendant is "at home" in its state of incorporation—where it may do little or no business—in addition to the state where it maintains its principal place of business.[69]

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66. *See, e.g.*, Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 17 n.62 (2010) ("Forum shopping can also exploit different states' outcome-determinative procedural or institutional quirks (such as a faster docket or generous juries), which likewise may justify tweaking jurisdictional tests to protect the defendant's interests.").

67. Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014) ("[T]he words 'continuous and systematic' were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate.").

68. Justice Ginsburg, in dissent, characterized the facts in this hypothetical:

> A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?

J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 893 (2011) (Ginsburg, J., dissenting).

69. Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*, 53 HOUS. L. REV. 631, 690 (2016) (arguing that "the Supreme Court would better achieve its goal of limiting general jurisdiction through a clear and predictable due process doctrine, and

There is a real risk that the Court's formalist approach may prevent injured parties from seeking effective relief—possibly by requiring litigation in a foreign forum or one otherwise highly inconvenient to the plaintiff.[70] To the extent that the Court's formalist approach gives rise to such difficulties, it has been criticized as unduly emphasizing gatekeeping, "erecting procedural stop signs" and thereby contradicting "the aspirations of the American civil justice system."[71] Nonetheless, the formalist approach does not necessarily mandate an ultimately unjust result, at least as long as other aspects of the jurisdictional analysis may be modified to increase court access consistently with the Court's doctrinal commitments.[72]

C. Predicting the Court's Approach to Unresolved Issues

Although there are plenty of unresolved questions about the contours of personal jurisdiction, two major issues—which have arisen in numerous cases—are currently pending before the Supreme Court. The first is the scope of the "relatedness" requirement for specific jurisdiction, which the Supreme Court is poised to address in a case set on this term's docket.[73] The second is the validity of state policies that require

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at the same time, would be on firmer ground with respect to an underlying conceptual rationale, if it had designated the defendant's principal place of business as the only paradigm of where a corporation is 'essentially at home'"). *But see* Seungwon Chung, Note, *The Shoe Doesn't Fit: General Jurisdiction Should Follow Corporate Structure*, 100 MINN. L. REV. 1599, 1643 (2016) ("[C]ourts should expand the corporate general jurisdiction doctrine, ever so slightly, by recognizing that a corporation's exercise of corporate functions (i.e., direction of corporate activities and management of day-to-day operations) subjects a corporation to general jurisdiction.").

70. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 348 (2013) ("[I]n many circumstances consumers and employees would not be able to seek redress in the state where they purchase or receive defective products or services, or live, or were injured. Rather, plaintiffs potentially would have to litigate in distant fora—possibly in foreign countries—or abandon their claims altogether.").

71. *Id.* at 369.

72. *See* Rhodes & Robertson, *Toward a New Equilibrium*, *supra* note 4, at 269 (recommending such a judicial balancing act).

73. Bristol-Myers Squibb Co. v. Superior Court of S.F. Cty., 377 P.3d 874, 884 (Cal. 2016), *cert. granted*, 2017 WL 215687 (Cal. Jan. 19, 2017) (No. 16-466) (applying the "substantial connection" test for relatedness, which "requires courts to evaluate the nature of the defendant's activities in the forum and the relationship of the claim to those activities in order to answer the ultimate question under the due process clause: whether the exercise of jurisdiction in the forum is fair"). Other pending cases before the Court present similar issues. *See* TV Azteca v. Ruiz, 490 S.W.3d 29, 52–53 (Tex. 2016), *petition for cert. filed*, (U.S. Oct. 12, 2016) (No. 16-481) ("This 'substantial connection' standard does not require proof that the plaintiff

a business to submit to general jurisdiction as a condition of doing business.[74] Other issues, such as the unanswered question of imputed contacts, have taken a backseat—perhaps because the Roberts Court's formalist approach and general jurisdiction narrowing have made them viewed as less likely to be successful.[75]

We have argued elsewhere that a broader "relatedness" standard may be necessary to ensure that injured litigants have access to the courthouse after the Court narrowed other aspects of jurisdictional doctrine.[76] Ideally, jurisdictional doctrine would take into account both the pervasiveness of the defendant's contacts and the regulatory interests of the forum—a stronger regulatory interest and more pervasive contacts could allow a looser connection between those contacts and the plaintiff's cause of action.[77]

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would have no claim 'but for' the contacts, or that the contacts were a 'proximate cause' of the liability.").

74. Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 78 F. Supp. 3d 572, 587 (D. Del. 2015), *aff'd*, 817 F.3d 755 (Fed. Cir. 2016), *cert. denied*, 2017 WL 69716 (U.S. Jan. 9, 2017) (No. 16-360) (concluding "that this Court may exercise general jurisdiction over Mylan Pharma based on Mylan Pharma's consent, consent which Mylan Pharma gave when it complied with the Delaware business registration statute by appointing a registered agent in Delaware to accept service of process"). *But see In re* Syngenta AG MIR 162 Corn Litig., MDL No. 2591, 2016 WL 2866166, at *6 (D. Kan. May 17, 2016) ("[E]ven if the Kansas statute requiring consent to general jurisdiction were not deemed improperly discriminatory, it would nonetheless fail to pass muster under the applicable balancing test."); Brown v. Lockheed Martin Corp., 814 F.3d 619, 641 (2d Cir. 2016) ("The reach of that coercive power, even when exercised pursuant to a corporation's purported 'consent,' may be limited by the Due Process clause. We need not reach that question here, however, because we conclude that the Connecticut business registration statute did not require Lockheed to consent to general jurisdiction in exchange for the right to do business in the state.").

75. William V. Dorsaneo, III, Pennoyer *Strikes Back: Personal Jurisdiction in a Global Age*, 3 TEX. A&M L. REV. 1, 25 (2015) ("Based on prior Supreme Court decisions, however, it is not anticipated that the Supreme Court will look favorably on the concept of judicial veil-piercing."); *see also* Suzanna Sherry, *Don't Answer That! Why (and How) the Supreme Court Should Duck the Issue in* DaimlerChrysler v. Bauman, 66 VAND. L. REV. EN BANC 111, 116 (2013) ("[S]etting a high bar for piercing the corporate veil across the board—including in all jurisdictional contexts—continues and entrenches a formalist approach to corporate separateness that does not reflect either the reality or the diversity of corporate forms and that allows corporations to externalize costs.").

76. *See* Rhodes & Robertson, *Toward a New Equilibrium*, *supra* note 4, at 267–68 ("[T]he Supreme Court must expand its defendant-centric focus to incorporate a more thorough analysis of the countervailing . . . interests at issue.").

77. *Id.* at 212; *see also* Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RES. L. REV. 769, 772 (2016)

It is difficult to predict whether the Court would adopt this analysis. On the one hand, like the "continuous and systematic" standard for general jurisdiction, a tight nexus to jurisdictional contacts was never required by the Supreme Court, but was instead developed by the lower courts.[78] While some circuits applied a strict causal relationship test requiring that the defendant's in-forum contacts gave rise to the plaintiff's cause of action, the Supreme Court has always articulated the standard as one in which the case may "arise from *or relate to*" the forum.[79] On the other hand, however, a broad "relatedness" standard would again make it easier to plaintiffs to establish jurisdiction in forums beyond the defendant's home state—a result that the business groups have warned against in pending litigation.[80] And perhaps most importantly for a Court that appears driven more by formalist concerns than an outright desire to protect business interests, a causal test is a bright-line rule that may appear easier to apply.[81]

Nor is it easy to predict the Court's approach to the "consent by registration" arguments. Such an approach would again widen the jurisdictional reach of the states, a result that the pro-business groups view as problematic.[82] Of course, not every state would adopt a jurisdictional-consent requirement for corporate registration. The Delaware Supreme Court, for example, recently held that such an approach was both counterproductive to state policies and "constitutionally problematic."[83] Nonetheless, the Delaware Court noted that the issue had

(arguing "that state sovereignty should be seen as a basic theoretical justification for the constitutional restrictions on personal jurisdiction").

78. Rhodes & Robertson, *Toward a New Equilibrium*, *supra* note 4, at 230–32.

79. *Id.* at 231.

80. Brief of the Chamber of Commerce et al. as *Amici Curiae* in Support of Petitioners at 12–13, TV Azteca v. Ruiz, (U.S. Nov. 14, 2016) (No. 16-481) (arguing that the "substantial connection" approach applied by the California Supreme Court "expands plaintiffs' ability to engage in forum-shopping").

81. It may prove more difficult in application, especially if significant jurisdictional discovery and fact-finding is necessary to establish the but-for relationship. *See infra* Part III.

82. *See* Brief of the Chamber of Commerce et al., *supra* note 80, at 11–12 (discussing the risks of forum shopping when jurisdiction is widened).

83. Genuine Parts Co. v. Cepec, 137 A.3d 123, 142 (Del. 2016) ("Our citizens benefit from having foreign corporations offer their goods and services here. If the cost of doing so is that those foreign corporations will be subject to general jurisdiction in Delaware, they rightly may choose not to do so. Moreover, in our federal republic, exacting such a disproportionate toll on commerce is itself constitutionally problematic.").

been raised in many courts since the Supreme Court's decision in *Daimler*.[84]

The Court's penchant for private ordering and formalistic sovereignty may nonetheless suggest that it would uphold state legislative action that affirmatively predicated corporate registration on consent to jurisdiction. Certainly, the Court would be highly unlikely to infer such consent to jurisdiction based on corporate registration alone without such an explicit requirement.[85] And it may conclude that a state exceeds its power in requiring consent to jurisdiction in cases wholly unrelated to matters where the state possesses a regulatory interest—for example, an interest in protecting state residents.[86] But it is not clear that the Court would necessarily strike down state legislation that explicitly required consent to jurisdiction as a condition for business registration in those cases where the state has a valid regulatory interest and the plaintiff is a state resident seeking redress against an out-of-forum defendant.[87]

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84. *Id.* at 144 ("*Daimler* only speaks to whether general jurisdiction can be appropriately exercised over a foreign corporation that *has not consented to suit* in the forum. It does nothing to affect the long-standing principle that a defendant may consent to personal jurisdiction.") (citing Perrigo Co. v. Merial Ltd., No. 8:14–CV–403, 2015 WL 1538088, at *7) (internal citations omitted) (emphasis in original); Otsuka Pharm. Co. v. Mylan Inc., 106 F. Supp. 3d 456, 469 (D.N.J. 2015) ("[D]esignation of an in-state agent for service of process in accordance with a state registration statute may constitute consent to personal jurisdiction, if supported by the breadth of the statute's text or interpretation."); Senju Pharm. Co. v. Metrics, Inc., 96 F. Supp. 3d 428, 437 (D.N.J. 2015) ("[*Daimler*] did not disturb the consent-by-in-state service rule . . . ."); Beach v. Citigroup Alt. Invs. LLC, No. 12 Civ. 7717(PKC), 2014 WL 904650, at *6 (S.D.N.Y. Mar. 7, 2014) ("Notwithstanding these limitations, a corporation may consent to jurisdiction in New York under [New York's general jurisdiction statute] by registering as a foreign corporation and designating a local agent."); Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 136 n.15 (2d Cir. 2014) (noting in dicta that "[t]he district court may also consider [on remand] whether [the defendant bank] has consented to personal jurisdiction in New York by applying for authorization to conduct business in New York and designating the New York Secretary of State as its agent for service of process").

85. Rhodes & Robertson, *Toward a New Equilibrium*, *supra* note 4, at 261 ("[M]ost commentators agree that implied consent, such as statutes that designate a state official as the agent for service of process, cannot give rise to jurisdiction for conduct unrelated to forum activity.").

86. *Id.* at 261–62; *see also* John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 143 (2016) (suggesting that consent-by-registration jurisdiction comports with the Dormant Commerce Clause only "when the plaintiff is a state resident (whether injured in or out of state) or a non-state resident" who was injured within the state).

87. *See* Jack B. Harrison, *Registration, Fairness and General Jurisdiction*, 95 NEB. L. REV. 477, 540 (arguing that such an approach could allow the Court

What is clear, however, is that regardless of how the Court rules in these particular cases, courts conducting jurisdictional analyses will be increasingly asked to make important factual determinations. Without the backstop of the "continuous and systematic" rule for general jurisdiction, courts will now have to inquire into the type, duration, and scope of the defendant's contacts with the forum—no matter how extensive those contacts are—and ascertain whether those contacts are sufficiently related to the plaintiff's cause of action. This will necessitate an earlier understanding of the claims asserted and the types of activities that are sufficiently related to those claims to be a factor in the jurisdictional analysis. And the potential difficulties will not be alleviated even if the Court allows states to extract consent to jurisdiction as a condition of corporate registration, as some states have rejected consent through registration entirely, and even those who do allow it may have to undertake a case-by-case analysis of the state's regulatory interest. The contours of any new equilibrium for personal jurisdiction are thus likely to be fact-driven.

III. THE UPCOMING CHALLENGE: JURISDICTIONAL DISCOVERY

Even before *Daimler* cast newfound uncertainties on the permissible scope of personal jurisdiction, the facts in a jurisdictional challenge mattered. For example, Nicastro likely would have established jurisdiction for his personal injury product-liability claim over the British manufacturer McIntyre in New Jersey state court (with the concurring justices joining the dissenting justices) if he had been able to demonstrate that McIntyre's machines were regularly sold through its U.S. distributor to New Jersey customers. But Nicastro failed, as Justice Breyer noted, to establish such facts through the discovery process.[88] Justice Ginsburg's objection that this omission might have arisen from McIntyre's obstruction went unanswered.[89]

Such examples of judicial reliance on "missing" record facts to the detriment of plaintiffs attempting to establish a nonresident defendant's amenability to suit have not been uncommon. The Supreme Court is

to "create a clear process whereby proper personal jurisdiction involving potential corporate defendants with a national market is easily and predictably analyzed for both specific and general jurisdiction").

88. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 889–90 (2011) (Breyer, J., concurring) ("There may well have been other facts that Mr. Nicastro could have demonstrated in support of jurisdiction. . . . But the plaintiff bears the burden of establishing jurisdiction . . . .").

89. *Id.* at 898 n.3 (Ginsburg, J., dissenting) ("[However,] McIntyre UK resisted Nicastro's efforts to determine whether other McIntyre machines had been sold to New Jersey customers.").

no stranger to the practice,[90] and lower federal and state courts have employed it as well.[91] In some of these cases, the presumption against the plaintiff arising from the missing record fact defies the probabilities associated with typical business practices. The *Nicastro* plurality, for example, accepted McIntyre's assertion that "no more than four machines (the record suggests only one . . .), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey."[92] But is it reasonable to believe that only four or fewer of McIntyre's scrap-metal shearing machines were sold to New Jersey, even though McIntyre's high-ranking corporate officers attended annual conventions every year in the U.S. to market their shearing machines and New Jersey is the largest processor of scrap metal in the U.S.?[93] Or, to take another example, is it likely that no previous automobile sold by a regional distributor of automobiles and a New York dealership journeyed to Oklahoma before one such vehicle purchased by the Robinsons was tragically slammed from behind?[94] Nonetheless, because courts might uncritically accept such improbable inferences from a silent record, the plaintiff must be prepared to augment probabilities with evidence.

This challenge confronting plaintiffs will only intensify now, as the ultimate jurisdictional touchstone after *Daimler* is uncertain. In many cases, then, plaintiffs will not be certain of the legal standard that will be dispositive in their cases, much less what evidence will be needed to satisfy that standard. And the plaintiffs' ability to conduct the needed discovery may be sharply curtailed in federal courts (and those state courts adopting the federal standards) under the recent amendments to the federal discovery rules promulgated under the supervision of the Roberts Court.

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90. *E.g.*, *id.* (detailing McIntyre's difficulty locating records concerning the "ultimate destination of machines it shipped"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289 (1980) ("[T]here was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case.").

91. *E.g.*, CSR Ltd. v. Link, 925 S.W.2d 591, 594–96 (Tex. 1996) (concluding there was "no direct evidence" that an Australian sales agent for raw asbestos fiber knew that its asbestos fiber would be distributed in Texas, even though more than 350 tons of fiber in one of its many transactions with the purchaser was shipped by the purchaser directly to Houston, Texas).

92. *Nicastro*, 564 U.S. at 878 (plurality opinion).

93. *Cf. id.* at 897–98, 898 n.3 (Ginsburg, J., dissenting) (describing McIntyre UK's business involvement throughout the United States).

94. *Cf. World-Wide Volkswagen*, 444 U.S. at 289, 295 (presuming, based on the lack of contrary evidence, that no automobile sold by the distributor and dealer had previously entered Oklahoma).

A. The New Scope of Discovery

The prior version of Federal Rule of Civil Procedure 26(b)(1) authorized discovery of "any non-privileged matter that is relevant to any party's claim or defense," creating a broad presumption of discoverability subject to the potential court-ordered limitations under Rule 26(b)(2)(C) for unduly burdensome discovery outweighing its anticipated benefits, when considering the needs of the case, the amount in controversy, the parties' resources, and the importance of the issues and the sought discovery in resolving those issues.[95] After its December 2015 amendment, Rule 26(b)(1) now authorizes "discovery of any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[96] The prior broad presumptive discovery access subject to court-ordered limitations has morphed into a more limited initial discovery scope incorporating a proportionality principle. Although this alteration could be read as minimal, the rule's proponents apparently intended a more substantial change.[97]

And the early returns so far indicate that the change is indeed meaningful. Several district courts have highlighted this new amendment in denying or curtailing discovery requests.[98] But how this new rule impacts jurisdictional discovery specifically has not yet been addressed by the courts.

B. The Existing Approaches to Jurisdictional Discovery

Even before the new discovery rule change and the Roberts Court's upheaval of the governing jurisdictional standards, the availability and scope of jurisdictional discovery varied from circuit to circuit and sometimes from case to case. Although the Supreme Court acknowledged a role for jurisdictional discovery in *Oppenheimer Fund, Inc. v. Sanders*,[99]

95. *See* FED R. CIV. P. 26 advisory committee's note to 2015 amendment (describing the change made through the amendment).

96. Fed R. Civ. P. 26.

97. *E.g.*, CHIEF JUSTICE JOHN G. ROBERTS JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–6, https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/TUN7-7Z3H] ("The amendments may not look like a big deal at first glance, but they are.").

98. *E.g.*, Roberts v. Clark Cty. Sch. Dist., 312 F.R.D. 594, 603 (D. Nev. 2016) (discussing the 2015 amendment's effect on limiting the scope of discovery).

99. 437 U.S. 340, 351 n.13 (1978) (noting "where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues").

and authorized the assumption of jurisdiction as a sanction for failing to comply with jurisdictional discovery in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*,[100] this is the sum of the Court's guidance. Left to their own devices, federal district courts and circuit courts of appeals adopted different approaches to the availability and scope of jurisdictional discovery.

These different approaches emerged in part because discovery issues typically are subordinate to the ultimate jurisdictional issue. Appellate court decisions on jurisdictional discovery almost always arise in the context of reviewing the lower court's ruling on personal jurisdiction, with the plaintiff asserting as another point or cross-point that the district court erred in failing to allow the discovery of some matter that the plaintiff alleged would assist in ascertaining amenability. The appellate court's jurisdictional discovery holding often reads as an afterthought, corresponding with the decision to affirm or reverse on the primary jurisdictional issue.[101] In other appellate decisions, the jurisdictional discovery holding appears to be a vehicle to achieve interim justice while avoiding a final personal jurisdiction determination; the court, after reviewing the existing record, reasons that additional discovery must be obtained before resolving the jurisdictional query.[102] Even in the initial battlefield of the district courts, the jurisdictional

100. 456 U.S. 694, 709 (1982) (holding that the "legal presumption to the issue of personal jurisdiction does not itself violate the Due Process Clause").

101. *E.g.*, Patent Rights Prot. Grp., LLC v. Video Gaming Techs., Inc., 603 F.3d 1364, 1372 (Fed. Cir. 2010) (holding district court erred in jurisdictional dismissal and in denying additional jurisdictional discovery); GCIU-Emp'r Ret. Fund v. Goldfarb Corp., 565 F.3d 1018, 1026–27 (7th Cir. 2009) (affirming district court's jurisdictional dismissal and denial of jurisdictional discovery); Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 428–29 (5th Cir. 2005) (affirming district court's jurisdictional dismissal and denial of jurisdictional discovery); Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 93–95 (2d Cir. 1975) (affirming district court's jurisdictional dismissal and denial of jurisdictional discovery).

102. *E.g.*, *In re* Terrorist Attacks on September 11 , 2001, 714 F.3d 659, 678–79 (2d Cir. 2013) (reversing district court's dismissal for lack of personal jurisdiction and remanding to district court for judicially supervised jurisdictional discovery with respect to certain defendants when plaintiffs' allegations suggested jurisdiction but factual disputes persisted); Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 448 (3d Cir. 2003) (reversing district court's jurisdictional dismissal and discovery denial and remanding for limited jurisdictional discovery to be used when reconsidering the jurisdictional issue); GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1351–52 (D.C. Cir. 2000) (reversing district court's certified interlocutory order upholding jurisdiction but remanding for jurisdictional discovery that might supplement the plaintiff's jurisdictional allegations).

discovery issue often intermixes with the perceived merits of the ultimate jurisdictional ruling.[103] Yet, in sharp contrast to the *de novo* appellate review applicable to a district court's legal jurisdictional determinations, the district judge enjoys broad discretion with respect to jurisdictional discovery.[104] Hence, the development of jurisdictional discovery principles has been haphazard, illustrated by the three separate approaches employed by the circuit courts in determining whether jurisdictional discovery is warranted.[105]

First, in some circuits, plaintiffs are presumptively entitled to at least some jurisdictional discovery, assuming the jurisdictional allegations are neither frivolous nor futile. The Third, Ninth, Eleventh, and D.C. Circuits appear to follow such a permissive approach, although the terminology employed differs from circuit to circuit. In the Third Circuit, unless the jurisdictional basis is clearly frivolous, the district court should allow jurisdictional discovery, especially over a corporate defendant.[106] In the Ninth Circuit, discovery should ordinarily be granted if relevant jurisdictional facts are controverted or additional jurisdictional facts are necessary, although the district court does not err in denying jurisdictional discovery if it is clear that it would not uncover sufficient facts or that it is based on a mere hunch.[107] The rule in the Eleventh Circuit appears to be that the plaintiff should be given the opportunity to discover facts that

103. *E.g.*, Jenkins v. Miller, 983 F. Supp. 2d 423, 446 (D. Vt. 2013) (granting jurisdictional discovery when plaintiffs made a "sufficient start" to establishing jurisdiction on a then-sparse record). *Cf.* Bell Helicopter Textron, Inc. v. Heliqwest Int'l, Ltd., 385 F.3d 1291, 1299 (10th Cir. 2004) (affirming district court's jurisdictional discovery denial because the discovery requests were unlikely to impact the jurisdictional holding).

104. *E.g.*, GCIU-Emp'r Ret. Fund, 565 F.3d at 1026–27 (holding district court did not abuse its discretion in denying request for discovery); United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 626 (1st Cir. 2001) ("The standard for reversing a district court's decision to disallow jurisdictional discovery is high."); Patterson v. Dietze, Inc., 764 F.2d 1145, 1148 (5th Cir. 1985) ("[J]urisdictional discovery is within the trial court's discretion and 'will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse'") (quoting Wyatt v. Kaplan, 686 F.2d 276, 283 (5th Cir. 1982)).

105. *E.g.*, Mother Doe I v. Al Maktoum, 632 F. Supp. 2d 1130, 1144 (S.D. Fla. 2007) ("The standards for permitting jurisdictional discovery vary by circuit."); Ellis v. Fortune Seas, Ltd., 175 F.R.D. 308, 311–12 (S.D. Ind. 1997) (detailing the then-existing approaches employed by various federal courts to resolve jurisdictional discovery issues).

106. Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 336 (3d Cir. 2009) (reversing dismissal and remanding for jurisdictional discovery over corporate defendant).

107. Boschetto v. Hansing, 539 F.3d 1011, 1020 (9th Cir. 2008) (holding district court did not abuse its discretion when request for discovery was based on little more than a hunch).

would support jurisdictional allegations, especially when the jurisdictional issue is genuinely in dispute.[108] In the D.C. Circuit, jurisdictional discovery "should be freely permitted" unless there are no factual circumstances under which personal jurisdiction would be appropriate.[109]

But a second approach in other circuits requires the plaintiff to satisfy a defined jurisdictional burden before being entitled to conduct jurisdictional discovery. As some examples, the Seventh Circuit demands that the plaintiff must make a prima facie case for personal jurisdiction before obtaining jurisdictional discovery,[110] and the Second Circuit employs an analogous requirement of specific jurisdictional factual allegations before jurisdictional discovery is warranted.[111] In the Eighth Circuit, district judges abuse their discretion in disallowing

108. District courts in the Eleventh Circuit developed this approach by interpreting circuit decisions on the availability of subject-matter jurisdictional discovery to also apply to in-personam jurisdictional discovery. *See* RMS Titanic, Inc. v. Zaller, 978 F. Supp. 2d 1275, 1302–03 (N.D. Ga. 2013) (granting plaintiff's request for leave to conduct jurisdictional discovery, relying on Eaton v. Dorchester Dev., Inc., 692 F.2d 727, 729 n.7 (11th Cir. 1982) and Majd-Pour v. Georgiana Cmty. Hosp., Inc., 724 F.2d 901, 903 (11th Cir. 1984)).

109. GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1351–52 (D.C. Cir. 2000) (reversing district court's certified interlocutory order upholding jurisdiction but remanding for jurisdictional discovery that might supplement the plaintiff's jurisdictional allegations).

110. *E.g.*, Central States, Se. & Sw. Areas Pension Fund v. Phencorp Reinsurance Co., 440 F.3d 870, 877–78 (7th Cir. 2006) (remanding for jurisdictional discovery because the plaintiff made a prima facie case of personal jurisdiction). A prima facie requirement as a prerequisite for jurisdictional discovery appears odd, however, as a prima facie jurisdictional proof, at least with respect to those jurisdictional facts overlapping the merits, is sufficient for the court's exercise of personal jurisdiction. *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 978 (2006) ("Courts apply the prima facie standard either to deny jurisdiction or to uphold it."). Moreover, despite its ubiquity, the "prima facie showing" requirement is notoriously vague and ill-defined. *See id.* at 978–80 ("[I]t is clear that prima facie requires less of a showing than that required by the normally prevailing standard of proof, but it is unclear how much less.").

111. *E.g.*, *In re* Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 208 (2d Cir. 2003) (holding that the district court abused its discretion in denying an opportunity for limited jurisdictional discovery when the plaintiffs pointed to a specific meeting attended by representatives of the nonresident defendant relevant to the jurisdictional query); Jazini v. Nissan Motor Co., 148 F.3d 181, 185–86 (2d Cir. 1998) (affirming the district court's denial of jurisdictional discovery when the plaintiffs did not establish a prima facie case regarding the foreign corporate defendant's amenability); Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 93–94 (2d Cir. 1975) (concluding that the district court did not abuse its "broad discretion" in denying jurisdictional discovery when the plaintiff failed to allege any specific facts regarding the nonresident defendant's forum activity).

jurisdictional discovery only when written evidence, rather than speculation or conclusory allegations, support the nonresident defendant's contacts with the forum state; in the absence of supporting documentary evidence, jurisdictional discovery may be freely denied.[112]

The third and final approach in the remaining circuits leaves the availability of jurisdictional discovery almost entirely to the district court's discretion. This approach is exemplified by the First Circuit, which has held that a district court does not abuse its discretion unless the plaintiff establishes a colorable jurisdictional claim, the plaintiff presents facts showing the materiality of the discovery request, and the district court plainly errs to the plaintiff's substantial prejudice.[113] Other circuits likewise view the availability of jurisdictional discovery as committed to the district court's discretion.[114]

Once the district court determines that jurisdictional discovery is appropriate, the next difficulty is ascertaining the scope of permissible discovery. Here, again, district courts enjoy broad discretion, subject only to a few overarching guidelines. In general, the discovery request must be specific rather than vague, as with any other discovery request.[115] Additionally, jurisdictional discovery should be narrowed or limited to the jurisdictional issues and any merits issues inextricably intertwined with jurisdictional issues[116]—rather than extending to the

112. *E.g.*, Steinbuch v. Cutler, 518 F.3d 580, 589–90 (8th Cir. 2008) (remanding for jurisdictional discovery against one defendant on the basis of the plaintiff's production of documentary evidence, while refusing remand against another defendant based on the plaintiff's speculative and conclusory allegations).

113. *E.g.*, Negrón-Torres v. Verizon Commc'ns, Inc., 478 F.3d 19, 27 (1st Cir. 2007) (affirming the district court's denial of jurisdictional discovery).

114. *E.g.*, Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 428–29 (5th Cir. 2005) (affirming the district court's refusal to authorize jurisdictional discovery when the plaintiffs could not establish prejudice from the denial); Bell Helicopter Textron, Inc. v. Heliqwest Int'l, Ltd., 385 F.3d 1291, 1299 (10th Cir. 2004) (holding that the district court's jurisdictional discovery denial was not an abuse of discretion when the discovery requests were unlikely to impact the jurisdictional holding); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 715–16 (4th Cir. 2002) (holding that the district court did not abuse its discretion in concluding that further discovery would not aid the personal jurisdiction determination).

115. *Cf.* Freeman v. United States, 556 F.3d 326, 342–43 (5th Cir. 2009) (holding that the district court did not abuse its discretion in denying a broad and amorphous request for subject-matter jurisdictional discovery).

116. *See* Rhodes & Robertson, *Toward a New Equilibrium*, *supra* note 4, at 255–58 (explaining that, despite the difficulties with using the merits of a case to decide jurisdictional issues, the reality is that "context matters"); Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdictio*n, 45 U.C. DAVIS L. REV. 1301, 1329–32 (2012) ("[T]he court cannot merely assume that the plaintiff's jurisdictional allegations are correct.").

substantive merits of the parties' claims.[117] And of course, the discovery requests must be relevant to the jurisdictional issue, with the burden on the requesting party to establish that the sought discovery is tailored to producing the facts necessary to defeat a jurisdictional dismissal motion.[118] But when the necessary facts are uncertain, the relevancy limitation loses much of its meaning.

C. The New Jurisdictional Discovery Equilibrium

Even before *Daimler*, the broad and amorphous nature of the governing factors in the jurisdictional calculus rendered the relevancy limitation of minimal assistance. Outside of a handful of clear jurisdictional rules that limit the potential scope of accompanying discovery,[119] the jurisdictional query is governed by a mélange of considerations.[120] This led district courts on quite a few occasions, as Professor S.I. Strong highlighted, to bless sweeping jurisdictional requests.[121]

With the uncertainty after *Daimler*, the need for broad discovery requests has intensified, at a time when the discovery rules are indicating that, in general, the scope of discovery should be curtailed. But the procedural rules do not specifically mention jurisdictional discovery, and jurisdictional discovery is somewhat sui generis. Many of the specified factors for the proportionality principle in amended Rule 26(b)(1) do not fit well with jurisdictional discovery.[122] Some of these factors are tailored to the ultimate issues in the case, matters that are generally

117. *E.g.*, Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 457 (3d Cir. 2003) (ordering limited discovery on the issue of a foreign corporate defendant's business activities in the U.S. when the plaintiff's jurisdictional discovery request was specific and non-frivolous).

118. *Cf. Freeman*, 556 F.3d 326, 342–43 (holding that the plaintiffs "failed to articulate a discrete discovery request" or to specify the needed likely discoverable facts to cure the subject-matter jurisdictional deficiency).

119. *See* Martinez v. Aero Caribbean, 764 F.3d 1062, 1070–71 (9th Cir. 2014) (affirming the district court's denial of discovery regarding a corporate subsidiary's contacts with the forum because those contacts could not make the corporation "at home" in the forum for general jurisdiction purposes).

120. *See* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 626–43 (2007) (discussing the various pronounced factors in detail). Professor Richard Freer first used the "mélange" description. Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 552 (2012).

121. *See* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 541–53 (2010) (examining the different facts that courts find relevant to questions concerning personal jurisdiction and the broad discovery requests that have been employed to unearth those facts).

122. FED. R. CIV. P. 26(b)(1).

inappropriate to consider at the jurisdictional stage, such as "the importance of the issues at stake in the action" and "the amount in controversy."[123] Even the weighing of the benefits and burdens of the proposed discovery is somewhat problematic in the jurisdictional context: should these benefits and burdens be weighed only with respect to the jurisdictional issue, or would it be appropriate to consider the benefits to the suit writ large in a context where the jurisdictional issue might (as it often does) ultimately decide the case? And, of course, the benefits of any proposed jurisdictional discovery are hard to ascertain when the governing jurisdictional standards are in doubt.

Jurisdictional discovery also does not fit well within the discovery envisioned by the rules because it often must be conducted outside the normal discovery time frame. While the 2015 amendments expedite the parties' duty to confer and develop a proposed discovery plan, rendering it somewhat more likely that jurisdictional discovery might be addressed by the parties and court in the ordinary course, the motion to dismiss for lack of jurisdiction still might be ruled upon before the discovery plan trigger. Under the new rules, the discovery conference has been advanced thirty (30) days: the parties must now confer no later than sixty-nine (69) days after any defendant has been served or thirty-nine (39) days after any defendant has appeared.[124] While the parties may confer before the deadline, which would be beneficial if a motion to dismiss for lack of personal jurisdiction has been filed, this opportunity requires the cooperation of opposing counsel.[125] Thus, it will largely be up to the courts and the parties to fashion jurisdictional discovery.

In doing so, the courts must be cognizant of the uncertainties that plaintiffs face in establishing jurisdiction over nonresident defendants. Although a balance is needed between the rights of plaintiffs and defendants with respect to jurisdictional discovery, broad discovery may be necessary now to give plaintiffs some opportunity to present evidence on new jurisdictional theories in an attempt to satisfy an uncertain governing standard. District courts are in the best place to make this determination on a case-by-case basis. Although this does not provide the certainty and predictability craved by business, the upheaval of

123. *Id.*

124. The 2015 Amendments to Federal Rule of Civil Procedure 16(b)(2) moved the deadline for issuing the scheduling order up thirty (30) days, to no later than ninety (90) days after any defendant has been served with the complaint or sixty (60) days after any defendant has appeared. Federal Rule of Civil Procedure 26(f), which requires that the parties must confer at least twenty-one (21) days before the scheduling order is due, was not amended.

125. *See* Amii N. Castle, *A Comprehensive Overview: 2015 Amendments to the Federal Rules of Civil Procedure*, 64 U. Kan. L. Rev. 837, 858 (2016) (stating that a primary goal of the 2015 amendments was to achieve "a heightened level of cooperation between the parties and opposing counsel").

jurisdictional doctrine wrought by *Daimler* will have both positive and negative impacts on their interests.

Conclusion

Through four cases in less than four years, the Roberts Court has significantly reshaped the contours of personal jurisdiction. Although the changes limit the scope of jurisdiction in ways that may favor defendants overall, the Court did not appear directly motivated by a desire to favor business—and, in fact, the Court erected significant obstacles to business interests. Instead, the results in the cases may be better explained by the Court's commitment to a formalist approach with respect for territorial boundaries and by a skepticism of transnational litigation not clearly related to a U.S. forum.

The Court's recent changes to the discovery rules suggest that its rulemaking approach, in contrast, may align more directly with business interests. Chief Justice Roberts' report summarizing the new rules parallels the language used by business advocates who focus on the expense of lawsuits and the toll that litigation takes on business.[126] In the report, he writes that the discovery changes are important "to help ensure that federal court litigation does not degenerate into wasteful clashes over matters that have little to do with achieving a just result."[127] The Court's more business-protective approach to discovery does not undercut the Court's formalist commitment, but rather likely reflects a continued regard for the separation of powers even in the Court itself, where the rulemaking function can more directly encompass policy interests than the Court's adjudication function.[128]

While the revised discovery rules may lessen litigation costs overall, however, they do not take account of the need for jurisdictional discovery and do not help resolve the jurisdictional analysis. This oversight is unfortunate, as the Court's new equilibrium in personal jurisdiction means that factual development will become increasingly important. It is no longer enough to say that a defendant has continuous, systematic, and substantial contacts within the forum; instead, parties will have to develop a factual foundation that explores the nature, scope, extent, and duration of those contacts and explains how those contacts relate to the substance of the claim asserted. Without further refinement of

126. *See generally* Beisner, *supra* note 42 (expressing concern about discovery costs).

127. Chief Justice John G. Roberts Jr., *supra* note 97, at 12.

128. *See* Wasserman, *supra* note 2, at 333 ("The early years of the Roberts Court have been marked by a great deal of procedural rulemaking outside of Supreme Court adjudication—by Congress, by all the actors in the REA process, and by lower courts, all often coming in response to the Court's adjudicative activity.").

the rules of jurisdictional discovery, courts and parties alike will struggle to reconcile the jurisdictional question with the available tools of discovery.